O.A. 11-4-91 O&7 w/app

FILED
SID J. WHITE
AUG 2 1991
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

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

INITIAL BRIEF OF PETITIONER, COX CABLE CORPORATION

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INTRODUCTION

Petitioner, Cox Cable Corporation, third-party defendant/fourth-party plaintiff in the trial court and appellee in the court below, is referred to as "Cox Cable." Respondent, Gulf Power Company, defendant/third-party plaintiff in the trial court and appellant in the court below, is referred to as "Gulf Power." Burnup & Sims Cable Com, Inc., fourth-party defendant in the trial court, is referred to as "Burnup & Sims." Plaintiff, Michael D. Lewis, is referred to as "Lewis." Burnup & Sims and Lewis are not parties in this appeal.

References to the Record on Appeal appear as "[R.]," with citation to the appropriate page in the record. References to the Supplemental Record on Appeal appear as "[SR.]." References to the transcript of the hearing on Cox Cable's Second Amended Motion for Summary Judgment (part of the stipulated Supplemental Record on Appeal) appear as "[T.]." References to the Appendix attached hereto appear as "[A.]."

STATEMENT OF THE FACTS AND CASE

This case is before the Court on issues raised in Gulf Power's third-party complaint against Cox Cable. The action arises out of personal injuries suffered by Lewis while installing television cable on Gulf Power's poles.

Cox Cable and Gulf Power entered into a written agreement on January 1, 1978, which authorized Cox Cable to attach its cables, wires and appliances to Gulf Power's utility poles. [R. 172; A. 1] Cox Cable pays Gulf Power an annual fee for that right, based upon the cost of the poles and Gulf Power's construction, operating and maintenance costs. [R. 176] Cox Cable hired Burnup & Sims, a cable installation contractor, to perform the installation. [R. 170] Burnup & Sims was known to Cox Cable to be well-qualified in the installation of cable television systems on electrical poles and one of the largest and most established cable installation companies in the nation. [R. 171]

Prior to the incident giving rise to this action, Gulf Power contacted Cox Cable regarding certain problems with Burnup & Sims' work, including incidents where guy wires on Gulf Power's poles were reportedly overtightened to the point of causing problems with power distribution. [R. 101] On each occasion, Cox Cable contacted managing agents for Burnup & Sims and informed them of the reported problems and conditions they were creating on Gulf Power's facilities. [R. 101] Burnup & Sims responded on each occasion that they were aware of the particular incidents, explained their version of what happened, and assured Cox Cable that any problems with their practices would be corrected. [R. 102]

Lewis was an employee of Burnup & Sims, hired to install the cable on Gulf Power's poles. [R. 1] Lewis' supervisor instructed him not to overtighten the utility pole guy wire that he was installing, as that would tend to slacken Gulf Power's down guys on

the poles. [R. 100] Lewis was also instructed not to touch Gulf Power's down guys and warned of the danger of putting slack in Gulf Power's guy wires. [R. 100] During the installation, on July 16, 1981, Lewis suffered electrical burns when a guy wire he was tightening became charged with electrical current. [R. 1] Lewis sued Gulf Power in August 1984 for damages as a result of his injuries. [R. 1]

Gulf Power promptly filed a third-party complaint against Cox Cable and Burnup & Sims. [R. 5; A. 23] Gulf Power made three substantive allegations against Cox Cable[1]: first, Gulf Power alleged that, by the terms of their agreement, Cox Cable was required to completely indemnify Gulf Power for any damages adjudged against it as a result of Cox Cable's actions pursuant to the contract. [R. 5] The indemnity provision of the agreement states, in pertinent part, as follows:

> Licensee [Cox Cable] shall indemnify, protect and save the Licensor [Gulf Power] 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 Licensee and employees of any contractor or sub-contractor performing work for Licensee ... which may arise out of or be caused by the erection, maintenance, presence, use or removal of said attachments or by the proximity of the respective cables, wires, apparatus and appliances of the Licensee, or by any act of Licensee on or in the vicinity of Licensor's poles, or on, or in the vicinity of any other poles occupied jointly by Licensor and Licensee regardless of ownership of said poles.

[R. 177-78][2] Second, Gulf Power alleged that Cox Cable breached paragraph 9 of the agreement by "failing to utilize employees and contractors who were experienced in

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[1] Gulf Power's claim against Burnup & Sims was subsequently dismissed by the trial court. [R. 91]

[2] In the courts below, Gulf Power has also relied upon language in the agreement that "complete indemnification" was contemplated [R. 172], that "full indemnification" was a prime condition of the agreement [R. 173], and that Cox Cable assumed all risks of entry to the property [R. 178].

working with and around energized electrical conductors." [R. 5] This allegation tracked paragraph 9 of the agreement which states, in pertinent part:

> In the installation and maintenance of its facilities Licensee shall utilize employees and contractors who are experienced in working with and around energized electrical conductors.

[R. 177] Third, Gulf Power alleged that Cox Cable was negligent and that Cox Cable's negligence was "the sole and proximate cause of the Plaintiff's alleged injuries." [R. 5-6] Gulf Power sought judgment against Cox Cable for "all damages that are adjudged against the Defendant, Gulf Power Company in favor of the Plaintiff." [R. 6]

Gulf Power subsequently obtained summary judgment against Lewis. [R. 51] The appellate court reversed, Lewis v. Gulf Power Co., 501 So.2d 5 (Fla. 1st DCA), rev. denied, 508 So.2d 14 (Fla. 1987), holding that a jury question was presented on the sufficiency of any notice given by Gulf Power of the dangers of electricity. Id. at 8. The trial court thereafter limited Lewis' claim against Gulf Power to the sufficiency of the warning, if any, given by Gulf Power of dangerous conditions arising from unsafe work practices of cable workers on its utility poles. [R. 103]

Gulf Power settled Lewis' claim in July 1989. [R. 203] In October 1989, Gulf Power filed a notice for trial pursuant to Fla. R. Civ. P. 1.440 and the trial court set Gulf Power's claims for trial. [SR.] Cox Cable had filed a second motion for summary judgment in June 1989 [R. 167] and amended the motion after the case was set for trial [R. 205]. Cox Cable sought summary judgment on all of Gulf Power's claims and relied, in part, upon the affidavits of Larry F. Lewis, Cox Cable's General Manager in Pensacola [R. 170] and Richard A. Mueller, Cox Cable's Director of Operations Engineering [R. 201]. These affidavits established that Cox Cable did not breach paragraph 9 of the agreement, as alleged in Gulf Power's third-party complaint, because Cox Cable had no employees on the job site and hired an experienced contractor (Burnup & Sims) to perform the work.

[R. 171; 202] The summary judgment hearing was held on January 3, 1990, three weeks before the date Gulf Power's claims were then scheduled to be tried. [T. 1][3]

The trial court, per the Honorable Lacey A. Collier, granted summary judgment in favor of Cox Cable on all of Gulf Power's claims. [R. 216; A. 30] Judge Collier found that the contractual indemnity provision was unenforceable under Florida law because it did not expressly state in clear and unequivocal terms an intent that Cox Cable would indemnify Gulf Power against the consequences of Gulf Power's own wrongful acts. [R. 218-19] The trial court also determined that section 725.06, Florida Statutes [A. 43], broadly applies to agreements incidental to construction and operated to bar Gulf Power's indemnity claim. [R. 219] On the breach of contact claim, Judge Collier found paragraph 9 clear and unambiguous, and that the unrefuted evidence of record demonstrated Cox Cable's full compliance with that provision. [R. 217] Finally, it must be concluded that Judge Collier found Gulf Power did not assert a contribution claim against Cox Cable; after hearing argument of counsel on that point [T. 12; 15-16; 29], the trial court ruled that Gulf Power take nothing by its third-party complaint. [R. 219]

Gulf Power did not seek rehearing or clarification of the final summary judgment, nor did Gulf Power request leave to amend its third-party complaint. Gulf Power appealed the judgment to the First District Court of Appeal. [R. 220]

The appellate court reversed in Gulf Power Co. v. Cox Cable Corp., 570 So.2d 379 (Fla. 1st DCA 1990) [A. 34]. On the contractual indemnity claim, the court held that a less stringent standard of specificity applies in cases of joint negligence between the indemnitor and indemnitee, id. at 382, and that factual issues remained concerning whether the parties were joint tortfeasors. On the breach of contract claim, the court held

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[3] The trial was subsequently continued by the trial court upon stipulation of the parties. See [T. 39]

that paragraph 9 must be construed in light of the entire agreement in determining the parties' intent, and that a fact finder could reasonably infer that Cox Cable had a duty to correct or warn of a potentially dangerous situation. Id. at 381-82 and n.3. Section 725.06 was held not to apply in this case because the court felt Gulf Power was not seeking to have improvements made; rather, Cox Cable sought a license to use Gulf Power's property. Id. at 383. Finally, on the negligence allegation, the court held that, although the third-party complaint appeared "somewhat deficient", it was not so deficient as to require granting summary judgment, and that Gulf Power was entitled to amend. Id. at 382 n.2.

Cox Cable petitioned this Court to accept jurisdiction based upon express and direct conflict between the decision of the court below and prior decisions of this Court and other district courts of appeal; that conflict exists on the standard which contractual indemnity language must meet in order to require indemnification of an indemnitee for the consequences of its own wrongful conduct where both the indemnitor and indemnitee may be at fault. On July 8, 1991, the Court issued its Order accepting jurisdiction.

SUMMARY OF ARGUMENT

The appellate court erred in its determination of the sufficiency of the contractual indemnity language relied upon by Gulf Power. Under the standard adopted by this Court in Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Co., 374 So.2d 487 (Fla. 1979) [A. 39] and followed by other Florida appellate courts, an agreement will not be construed to provide indemnity for the consequences of a party's own wrongful conduct unless that intent is clearly and unequivocally expressed in the agreement. That standard applies both in cases where the indemnitee is solely at fault and where the indemnitor and indemnitee are jointly liable. The indemnity provision in this case does not clearly and unequivocally require Cox Cable to indemnify Gulf Power for the consequences of Gulf Power's acts and cannot be enforced to require Cox Cable to indemnify Gulf Power under any possible set of facts which Gulf Power could prove at trial. As a matter of law, Gulf Power's liability to Lewis was based upon its direct act or omission, not vicarious liability due to any conduct of Cox Cable, and the indemnity provision is not enforceable even if the parties were found to be joint tortfeasors. The trial court correctly made that determination in finding Gulf Power's indemnity claim unenforceable under Florida law.

The appellate court erred in construing the parties' agreement beyond the issue pled by Gulf Power and, in doing so, fundamentally altered the parties' undertaking. Gulf Power, through its specifically worded third-party complaint, limited the breach of contract claim to paragraph 9 of the agreement. The trial court found the meaning of paragraph 9 to be clear and unambiguous, and its application was a question of law for the court. The appellate court substituted its own interpretation of the entire contract, effectively changing the plain language of paragraph 9, and reversed upon a newly found duty imposed on Cox Cable by other provisions of the agreement. The unrefuted evidence

stands in the record, as found by the trial court, that Cox Cable did not breach the plain terms of paragraph 9.

Gulf Power's third-party complaint does not assert a contribution claim against Cox Cable, nor does it manifest any intent to do so. The third-party complaint attempts to shift the entire liability for Lewis' injury to Cox Cable, not to share that liability. Gulf Power's pleading asserts that Cox Cable was "the sole and proximate cause" (emphasis supplied) of Lewis' injuries and sought judgment against Cox Cable for "all damages" awarded against Gulf Power in favor of Lewis. Gulf Power's position was plainly stated and Cox Cable was not required to seek dismissal or more definite statement of these allegations. Moreover, Gulf Power never sought to amend its pleading nor asked for rehearing of the trial court's order; at this advanced stage of the proceeding, Gulf Power should not be allowed to now seek contribution.

Finally, even if the agreement were sufficient under Charles Poe Masonry, the agreement does not comply with section 725.06, Florida Statutes, and cannot be enforced to require Cox Cable to indemnify Gulf Power in this case. The statute should be afforded liberal application, consistent with its remedial purpose. Section 725.06 is broadly worded to control the use of indemnity agreements in construction-related contracts. The statute has been applied by other courts outside of the narrow scope imposed by the appellate court in this case. The nature and object of the parties' agreement, containing provisions for construction of Cox Cable's plant on Gulf Power's poles, warrant application of the statute. Because the agreement fails to contain either a monetary limitation on indemnity or specific consideration for the indemnity provision, as required by the statute, it cannot be enforced to require Cox Cable to indemnify Gulf Power under the circumstances of this case.

ARGUMENT

I. THE APPELLATE COURT APPLIED AN INCORRECT STANDARD IN DETERMINING THE SUFFICIENCY OF THE INDEMNITY PROVISION.

The district court of appeal applied an erroneous legal standard in determining the sufficiency of the indemnity provision in the parties' agreement. This Court has applied the same standard in cases where the indemnitee is solely negligent as where the parties are jointly liable: an intent to indemnify the indemnitee from the consequences of its own wrongful conduct must be clearly and unequivocally expressed in the agreement. In this case, the appellate court ruled that a less stringent standard applies in cases of joint negligence. Under the correct legal standard, the indemnity provision here is unenforceable regardless of whether Gulf Power was solely negligent or the parties were jointly responsible for causing Lewis' injuries. Therefore, the decision of the court below should be reversed.

Florida courts have taken a narrow view of indemnity agreements which purport to indemnify a party against its own wrongful acts. Such contracts are viewed with disfavor, Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Co., 374 So.2d 487, 489 (Fla. 1979), and should be strictly construed against the party seeking indemnification. United Parcel Service of America, Inc. v. Enforcement Security Corp., 525 So.2d 424, 425 (Fla. 1st DCA 1987), rev. denied, 525 So.2d 878 (Fla. 1988).

In University Plaza Shopping Center, Inc. v. Stewart, 272 So.2d 507 (Fla. 1973), this Court adopted a strict standard for determining whether an agreement requires indemnification for a party's wrongful conduct:

> [W]e choose to follow the rationale in the two Florida Power & Light cases and Gulf requiring a specific provision protecting the indemnitee from liability caused by his own negligence.

Id. at 511 (emphasis supplied). In settling on this 'bright-line' rule, the Court stated that general language providing indemnity for "any and all claims" is not sufficient to include losses caused by the indemnitee's negligence. See id. at 509-10. The Gulf case relied on by the Court held that:

> [I]n order for an indemnity clause or contract to indemnify against an indemnitee's own negligence, the clause or contract must expressly state that such liability is undertaken by the indemnitor.

Gulf Oil Corp. v. Atlantic Coast Line Railroad Co., 196 So.2d 456, 459 (Fla. 2d DCA), cert. denied, 201 So.2d 893 (Fla. 1967) (emphasis supplied).

Although University Plaza involved an indemnitee's sole negligence, this Court has expressly held that standard to apply in cases of joint negligence between the indemnitor and indemnitee. Charles Poe Masonry, Inc., 374 So.2d at 490. In Charles Poe Masonry, the Court stated:

> We are not unmindful of the fact that the majority in University Plaza limited its holding to instances where liability is based solely on the fault of the indemnitee. However, the public policy underlying that decision applies with equal force here, that is, to instances where the indemnitor and indemnitee are jointly liable. Under classical principles of indemnity, courts of law rightfully frown upon the underwriting of wrongful conduct, whether it stands alone or is accompanied by other wrongful acts. Stuart v. Hertz Corp. Hence we extend the holding in University Plaza to cases where the indemnitor and indemnitee are jointly liable.

Id. at 489-90. These decisions of the Court plainly require the same degree of specificity for indemnification in cases of joint negligence that is required where the indemnitee is solely at fault.

Charles Poe Masonry and its progeny have established the parameters of the 'clear and unequivocal' requirement in the context of joint negligence. The language in that case required the indemnitor to assume "all responsibility for claims asserted by any

person whatever" and hold the indemnitee "harmless from all such claims." 374 So.2d at 489. The Court said that language,

> employs exactly the sort of "general terms" which we held in University Plaza to not disclose an intention to indemnify for consequences arising from the wrongful acts of the indemnitee. The language of the lease agreement demonstrates nothing more than an undertaking by Poe to hold Spring Lock harmless from any vicarious liability ...

Id. The Court distinguished Leonard L. Farber Co. v. Jaksch, 335 So.2d 847 (Fla. 4th DCA 1976) as a case involving language that was sufficiently clear and unequivocal in the context of joint negligence. The agreement in Farber purported to indemnify for losses "occasioned wholly or in part" by any act or omission of the indemnitee. 374 So.2d at 489. This Court approved the holding that the "in part" language:

> ... manifested lessee's clear and unequivocal intent to indemnify lessor in cases where the lessee and lessor are found to be jointly at fault.

Id.; see also, Marino v. Weiner, 415 So.2d 149, 151 (Fla. 4th DCA 1982). The only other language held to meet the clear and unequivocal standard in cases of joint negligence is language which indemnifies for all losses except those caused by the indemnitee's sole negligence. See, e.g., Mitchell Maintenance Systems v. State, Department of Transportation, 442 So.2d 276, 278 (Fla. 4th DCA 1983); compare Leadership Housing Systems of Florida, Inc. v. T & S Electric, Inc., 384 So.2d 733, 734 (Fla. 4th DCA 1980) (language purporting to "forever indemnify and save harmless [indemnitee] from any obligation, liability, lien, claim, demand, cause or causes of action whatsoever" did not meet the standard of Charles Poe Masonry).

The decision in United Parcel Service of America, Inc. v. Enforcement Security Corp., 525 So.2d 424 (Fla. 1st DCA 1987), rev. denied, 525 So.2d 878 (Fla. 1988), does not support the appellate court's conclusion that the degree of specificity required for

indemnification in cases of joint negligence is less stringent. The agreement in that case provided broad indemnification, but expressly excluded losses arising out of the sole negligence of the indemnitee. Id. at 425. The court correctly referred to similar language held sufficient in Mitchell, supra, and the "wholly or in part" cases (approved in Charles Poe Masonry), in determining that this language was "clear and unequivocal." Id. at 426.

Neither the analysis nor the conclusion in United Parcel Service suggests that less specific language is required in joint negligence cases. Where indemnity is provided for losses caused "in whole or in part" by the indemnitee, coverage in cases of joint negligence is necessarily included. Likewise, where an agreement provides indemnification for all losses expressly excluding those caused by the sole negligence of the indemnitee, the language applies to all claims not caused by the indemnitee's sole negligence, including those caused by joint liability. No case has extended these decisions, as the court did below, to approve of less-than-clearly-stated language to indemnify an indemnitee in joint negligence cases.

The indemnity provision in this case is not sufficient to indemnify Gulf Power for the settlement which it paid Lewis, regardless of whether Gulf Power was solely at fault or the parties jointly caused Lewis' injuries. The language here does not clearly and unequivocally manifest an intent to indemnify Gulf Power for the consequences of its own wrongful conduct, and thus does not satisfy the standard adopted by this Court. Therefore, even if a factual dispute could conceivably exist over whether Cox Cable committed negligence which jointly caused Lewis' injuries, and joint negligence by Gulf Power and Cox Cable were assumed for purposes of the Court's analysis, the indemnity language does not require Cox Cable to indemnify Gulf Power.

Paragraph 10 of the agreement limits Cox Cable's indemnity obligation to claims arising out of or caused by the following circumstances:

(1) the erection, maintenance, presence, use or removal of Cox Cable's attachments;

(2) the proximity of the respective cables, wires, apparatus and appliances of Cox Cable; and

(3) any act of Cox Cable on or in the vicinity of Gulf Power's poles, or on, or in the vicinity of any other pole occupied jointly by Gulf Power and Cox Cable regardless of ownership of said poles.

[R. 177-78] Nowhere does the agreement state that indemnification will extend to losses caused by Gulf Power's sole negligence or the parties' joint negligence. The agreement does not provide that Cox Cable will indemnify Gulf Power for losses caused in whole or in part by Gulf Power's negligence (as in Farber), nor does it provide indemnification for all losses except those caused by Gulf Power's sole neglect (as in Mitchell Maintenance). The general language providing indemnification for "any and all claims" arising out of the circumstances stated above has repeatedly been held not sufficiently specific to require indemnity. University Plaza, 272 So.2d at 511; United Gas Pipeline Co. v. Gulf Power Co., 334 So.2d 310, 312 (Fla. 1st DCA), cert. denied, 341 So.2d 1086 (Fla. 1976) ("any injury or damage"); Ryder Truck Rental, Inc. v. Coastline Distributing of Tampa, Inc., 512 So.2d 1093, 1094 (Fla. 2d DCA 1987) ("any claim or cause of action"); Leadership Housing System of Florida, Inc. v. T & S Electric, Inc., 384 So.2d 733, 734 (Fla. 4th DCA 1980) ("any ... cause [ ] of action whatsoever"); Gulf Oil Corp., 196 So.2d at 457 ("all loss ... in any manner connected with"); and Florida Power & Light Co. v. Elmore, 189 So.2d 522, 523 (Fla. 3d DCA 1966), cert. denied, 200 So.2d 810 (Fla. 1967) ("any liabilities whatsoever"). Paragraph 10 indicates nothing more than Cox Cable's undertaking to indemnify Gulf Power for any vicarious liability which might attach to Gulf Power (as the

owner or lessee of the power poles) as a result of negligence on the part of Cox Cable. See, Charles Poe Masonry, 374 So.2d at 489.[4]

Any reliance by Gulf Power on language outside paragraph 10 does not alter this result. "Complete indemnification" [R. 172] does not specifically require Cox Cable to indemnify Gulf Power in cases of joint or sole negligence and is even more general than language held insufficient in University Plaza and other cases cited above. The "full indemnification" language [R. 173] has no greater effect and must be read in the context in which it appears: Gulf Power's consent to the cable attachments on its poles would not affect its right to be indemnified from vicarious liability as the owner of the poles. Finally, the 'assumption of risk' language also lacks the required specificity and similar verbage has been rejected under the standard adopted by this Court in Charles Poe Masonry and University Plaza. See, CSX Transportation, Inc. v. Becker Sand & Gravel Co., 576 So.2d 902 (Fla. 1st DCA 1991).

In the absence of language meeting the minimum "clear and unequivocal" standard established by this Court, the indemnity provision here cannot be enforced by Gulf Power against Cox Cable under the circumstances at issue and the decision of the appellate court below must be reversed.

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[4] Gulf Power's liability to Lewis was direct and not vicarious. [R. 217] After proceedings in the courts below, Lewis' claim against Gulf Power was limited to the sufficiency of the warning, if any, given by Gulf Power of dangerous conditions arising from the unsafe work practices of cable workers on its utility poles. [R. 103]; Lewis v. Gulf Power Co., 501 So.2d at 8. This duty to warn arose out of Gulf Power's superior knowledge of the dangers faced by workers, such as Lewis, working on and around its electrical poles. E.g., Horton v. Gulf Power Co., 401 So.2d 1384, 1386 n. 1 and 2 (Fla. 1st DCA), rev. denied, 411 So.2d 382 (1981).

II. THE APPELLATE COURT ERRED IN CONSTRUING PARAGRAPH 9 OF THE AGREEMENT AND THEREBY ALTERED THE PARTIES' UNDERTAKING.

The appellate court improperly rejected the trial court's interpretation of paragraph 9 of the parties' agreement. Gulf Power placed only that provision of the agreement at issue in its breach of contract claim against Cox Cable. The trial court found paragraph 9 to be clear and unambiguous and that Cox Cable had fully complied with its terms. The court below looked outside the terms of paragraph 9 and reversed the summary judgment on the basis of a duty it inferred from other provisions of the agreement. That expansive reading of paragraph 9 far exceeds its plain meaning and effect, and should be reversed.[5]

Gulf Power alleged that Cox Cable breached one very narrow and specific term of the agreement. Paragraph 5 of the third-party complaint reads as follows:

> That the said Cox Cable Corporation did further breach the terms of the aforesaid contract by violating the terms of Paragraph 9 thereof in failing to utilize employees and contractors who were experienced in working with and around energized electrical conductors.

[R. 5] This allegation tracks the language of paragraph 9, which states in pertinent part:

> In the installation and maintenance of its facilities Licensee shall utilize employees and contractors who are experienced in working with and around energized electrical conductors.

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[5] In the interests of justice and avoidance of protracted litigation, the court should dispose of all contested issues properly raised and argued before the Court. Kennedy v. Kennedy, 303 So.2d 629 (Fla. 1974); Friddle v. Seaboard Coast Line Railroad Co., 306 So.2d 97, 98 (Fla. 1974); see also, Jacobson v. State, 476 So.2d 1282, 1285 (Fla. 1985); Savoie v. State, 422 So.2d 308, 310 (Fla. 1982).

[R. 177] No question was raised whether Cox Cable breached any other provision of the agreement. Therefore, the sole issue focused by Gulf Power in its pleading, and the proper subject of the trial court's inquiry, was whether Cox Cable failed to utilize employees and contractors who were experienced in working with and around energized electrical conductors.

Cox Cable filed affidavits from Larry F. Lewis, General Manager of Cox Cable in Pensacola [R. 170] and Richard A. Mueller, Director of Operations Engineering for Cox Cable [R. 201], in support of its motion for summary judgment. These affidavits showed that Cox Cable had no employees installing cable at the accident site; and that Cox Cable hired Burnup & Sims, a cable installation contractor personally known to Mr. Lewis to be well-qualified and one of the largest and most established cable installation companies in the nation, to perform this work.

At the summary judgment hearing, Gulf Power argued only that paragraph 9 was breached. [T. 12-13; 14-15] Gulf Power did not contend that its claim was based on any other provision of the agreement. On this record, the trial court properly found that:

> [t]he requirements imposed by this provision are clear: Cox Cable's obligation extended only to ensuring the experience of its own employees and the experience of its cable installation contractor. Where, as here, the meaning of a contract is clear under ordinary rules of English, that meaning cannot be changed by a Court. There is no question for a jury to decide regarding the meaning of this provision, and the unrefuted evidence of record demonstrates that Cox cable [sic] fully complied with its obligation under paragraph 9 by hiring Burnup & Sims, one of the largest and most experienced cable installation companies in the nation.

[R. 216]

The appellate court erred in rejecting the trial court's interpretation of paragraph 9 and substituting its own construction of other, independent terms of the contract to substantively change the meaning of this provision. There was no occasion for the

appellate court to look at the contract as a whole to "ascertain the intent of the parties." 570 So.2d at 381-82. The intent of the parties is directly stated in the simple language of paragraph 9; that provision does not require resort to other independent terms of the contract to determine its meaning. The appellate court's analysis serves only to depart from, not further, the plain language of the parties' agreement. It is axiomatic that a court is powerless to rewrite the clear and unambiguous terms of a voluntary contract. National Health Laboratories, Inc. v. Bailmar, Inc., 444 So.2d 1078, 1080 (Fla. 3d DCA), rev. denied 453 So.2d 43 (Fla. 1984). That rule is violated by the opinion below.

The trial court followed established law in reaching its decision. Where, as here, the wording of the contract is clear and determination of liability depends upon the legal effect to be drawn therefrom, the issue is one of law only and determinable by summary judgment. Shafer & Miller v. Miami Heart Institute, Inc., 237 So.2d 310, 311 (Fla. 3d DCA 1970); Harbour Square Development Corp. v. Miller, 517 So.2d 773, 774 (Fla. 2d DCA 1988). A trial court is entitled to construe a contract on a motion for summary judgment without receipt of other evidence as to the meaning of a particular provision. Hartman Services, Inc. v. Southeast First National Bank of Miami, 399 So.2d 404, 406 (Fla. 3d DCA 1981). The decision in Hartman suggests that a trial court is vested with some measure of discretion in that regard. The trial court in this case gave reasonable and natural effect to the language of paragraph 9, and the appellate court made no finding of error upon which that determination could be disturbed.

The cases cited by the court below, J & S Coin Operated Machines, Inc. v. Gottlieb, 362 So.2d 38 (Fla. 3d DCA 1978) and Mount Vernon Fire Insurance Co. v. Editorial America, S. A., 374 So.2d 1072 (Fla. 3d DCA 1979), do not compel the conclusion that all parts of the agreement must be construed together in this case. The decision in J & S Coin arose from a declaratory judgment action as to the parties' rights

under a franchise agreement, where the trial court had considered only a modification agreement and not its effect on the underlying franchise agreement. 362 So.2d at 38. Mount Vernon involved the construction of an entire insurance policy to determine whether an endorsement was waived or was ambiguous. 374 So.2d at 1073. Those cases involve circumstances where courts are construing the effect of dependent provisions of the parties' contract. Neither decision supports the proposition that, in a breach of contract action, all independent terms of an agreement must be considered where the plaintiff limits its claim to one unambiguous term. Construction of the entire agreement is not appropriate where a party, in alleging a breach of contract, places one specific and plainly worded provision at issue.

Even if other provisions of the agreement could be referred to in ascertaining the parties' intent behind paragraph 9, nothing in the language of that section is susceptible to creating a duty to warn "all parties" when Cox Cable became aware of deficiencies in Burnup & Sims' work. 570 So.2d at 382. Such a forced construction is improper because it can be achieved only by rewriting the parties' contract and changing the obligations under paragraph 9. See, National Health Laboratories, 444 So.2d at 1078. This results in an entirely new duty and theory of liability: not that Cox Cable failed to utilize employees and contractors experienced in working with and around energized electrical conductors, as alleged in the third-party complaint, but that Cox Cable breached some duty to correct or warn about the practices of Burnup & Sims.[6]

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[6] The undisputed evidence of record shows that Cox Cable fulfilled even the duty reached by the appellate court. The record shows that, on each occasion when Cox Cable was contacted by Gulf Power about problems with Burnup & Sims' work practices, Cox Cable discussed these problems with supervisory personnel of Burnup & Sims and was assured that Burnup & Sims was aware of the problems and that corrective action would be taken. [R. 101-102] Lewis was also warned by his supervisor of the dangers of overtightening the

Gulf Power's pleading and its argument at the summary judgment hearing do not rely on any other provision of the agreement for its breach of contract claim. Gulf Power did not seek leave to amend in order to assert any other theory of liability against Cox Cable. In fact, Gulf Power noticed its claims for trial and was apparently satisfied with the issues framed by its pleadings. Cox Cable properly responded to those issues and this case should not be unilaterally expanded on appeal under notions of contract interpretation.

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guy wires. [R. 100] As a matter of law, this uncontradicted evidence is sufficient to relieve Cox Cable of any liability. See, Horton v. Gulf Power Co., 401 So.2d at 1386.

III. GULF POWER DID NOT SEEK CONTRIBUTION FROM COX CABLE.

Gulf Power's third-party complaint did not seek contribution from Cox Cable. Gulf Power sought to shift the entire blame for Lewis' injuries to Cox Cable through indemnification and breach of contract claims. Prior to the summary judgment hearing, throughout the long history of this case, Gulf Power made no assertion of contribution against Cox Cable. Under the circumstances, the appellate court erred in ruling that Gulf Power should be allowed to now seek contribution.

Gulf Power's pleading belies any suggestion of a contribution claim. Gulf Power made no allegation of joint negligence, the sine qua non of a contribution claim. See, Home Insurance Co. v. Advance Machine Co., 443 So.2d 165, 169 (Fla. 1st DCA 1983). Gulf Power's contention that Cox Cable was "the sole and proximate cause" of Lewis' injuries may have set forth a defense to Lewis' claim, but it is inimical to a contribution claim. See, Martin v. United States, 162 F. Supp. 441 (E.D. Pa. 1958); Hayes v. City of Wilmington, 243 N.C. 525, 91 S.E.2d 673 (N.C. 1956). Gulf Power's prayer for relief states:

> Wherefore, Defendant, Gulf Power Company, demands judgment against the Third-Party Defendants, Cox Cable Corporation and Burnup & Sims Cable Company of Florida [sic] for all damages that are adjudged against the Defendant, Gulf Power Company in favor of the Plaintiff.

[R. 6] (emphasis supplied). Under the circumstances, Gulf Power should not be permitted to transform what is clearly a third-party claim for indemnity into one for contribution. See generally, Dean Co. v. U.S. Home Corp., 523 So.2d 1152, 1153 (Fla. 2d DCA 1987) ("Dean II"), enforcing 485 So.2d 438 (Fla. 2d DCA 1986) ("Dean I"), rev. denied, 528 So.2d 1184 (Fla. 1988) .

The decisions in Dean I and Dean II are noteworthy. In Dean I, U. S. Home filed a third-party complaint against Dean for indemnification. 485 So.2d at 438. U. S. Home argued in its opening statement at trial of the third-party claim that Dean was the sole proximate cause of the plaintiff's damage. Id. at 439. At the conclusion of the trial, the trial court found the parties jointly liable and allowed U. S. Home to amend its pleading to seek contribution from Dean. Id. On appeal, the Second DCA disallowed the amendment at that late stage of the proceeding, finding that: "the ground rules had been effectively set at the outset of the trial of the third party claim . . ." Id. The court also observed that the trial court's discretion to permit amendment wanes as litigation progresses. Id. On a subsequent appeal, after the trial court allowed the amendment on remand, the appellate court again disallowed the assertion of a contribution claim. 523 So.2d at 1153. The reviewing court determined that U. S. Home had confined its cause of action to a claim for indemnification, rather than for contribution. Id.

This case merits a similar analysis. Gulf Power's suggestion that it was seeking contribution did not occur until just three weeks before trial was initially scheduled to begin. The third-party complaint had been pending for nearly 5-1/2 years, and 6 months had passed since Gulf Power settled Lewis' claim; yet Gulf Power made no effort to amend its pleading. Most importantly, Gulf Power filed a notice for trial several months before, suggesting that the pleadings were settled, the case at issue and that Gulf Power was satisfied with the issues it had framed. Similar to the circumstances in Dean I and Dean II, the facts were well-known to Gulf Power prior to the entry of summary final judgment, yet it made no effort to change the ground rules which it had set. Under these facts, the trial court's ruling was within its discretion and should not be disturbed.

The decision of the court below should not be upheld under these circumstances. Gulf Power never indicated an intent to seek contribution prior to the summary judgment

hearing and nothing in its pleadings would alert Cox Cable to any such intent. Therefore, no motion to dismiss or for more definite statement was necessary. Further, Gulf Power seeks to change the operative issues in this case. In Hart Properties, Inc. v. Slack, 159 So.2d 236 (Fla. 1963), this Court explained why parties must be bound by their pleadings in a summary judgment proceeding:

> We hold again that issues in a cause are made solely by the pleadings and that the function of a motion for summary judgment is merely to determine if the respective parties can produce sufficient evidence in support of the operative issues made in the pleadings to require a trial to determine who shall prevail.
>
> Pleadings are the allegations made by the parties to a suit for the purpose of presenting the issue to be tried and determined. They are the formal statements by the parties of the operative, as distinguished from the evidential, facts on which their claim or defense is based.
>
> The science of pleading is considerably less exacting and much simpler than in the days when Professor Crandall taught the intricacies of Stephen's Rule of Pleading. Nevertheless, pleadings under present rules are intended to serve the same purpose. This purpose is to present, define and narrow the issues, and to form the foundation of, and to limit, the proof to be submitted on the trial. The objective sought in the present rules is to reach issues of law and fact in one affirmative and one defensive pleading.
>
> This purpose will not be served nor this objective achieved if operative issues, as distinguished from evidential issues, are allowed to be created outside the pleadings in depositions, admissions, affidavits, and the like, which may be filed in a cause. If this were allowed neither the parties nor the court would be able to say with certainty what the triable issues in a cause are.

Id. at 239. (Emphasis supplied.) (Quotations and citations omitted.) A defendant is entitled to have its motion for summary judgment decided on the pleadings as they stand at the time of the hearing. Id. at 240. In reliance on Roberts v. Braynon, 90 So.2d 623 (Fla. 1956), the Court stated that where summary judgment is warranted, but the matters

presented indicate that the losing party may have a cause of action or defense not pled, the proper procedure is to enter summary judgment with leave to amend. Id. at 240. However, Roberts expressly held that the granting or denial of such an amendment will rest within the sound discretion of the trial judge. 90 So.2d at 627.

The decision in Bernard Marko & Associates, Inc. v. Steele, 230 So.2d 42 (Fla. 3d DCA 1970), illustrates the proper application of these principles. In that case, the appellate court relied upon Hart Properties in affirming a summary judgment where the plaintiff offered no evidence at the summary judgment hearing that his complaint misstated his position. Id. at 44. Because no such evidence was presented, the plaintiff was not entitled to amend his complaint and allege a new fraud theory that was not encompassed by his original pleading. Id. Like Gulf Power, the plaintiff in that case failed to seek leave to amend from the trial court. Id.

The case cited by the court below, Dorset House Association, Inc. v. Dorset, Inc., 371 So.2d 541 (Fla. 3d DCA 1979), relies on both Hart Properties and Bernard Marko, id. at 542, and must be read consistent with those decisions. In light of Roberts, Hart Properties and Bernard Marko, the issue of whether to grant leave to amend properly rests in the sound discretion of the trial court. To read Dorset to broadly require leave to amend would usurp the trial court's authority and create an unreasonable burden on the trial court and defendant to consider and refute every conceivable unpled cause of action which a plaintiff could have, when determining a motion for summary judgment. Rule 1.510(c) simply does not require that procedure. Moreover, Dorset must be balanced against the competing rule that the trial court's discretion to allow amendment to the pleadings is substantially diminished where, as here, the litigation has entered its final stages. See, e.g., Ruden v. Medalie, 294 So.2d 403, 406 (Fla. 3d DCA 1974); Brown

v. Montgomery Ward & Co., 252 So.2d 817, 819 (Fla. 1st DCA 1971), cert. denied, 257 So.2d 561 (Fla. 1972).

In this case, Gulf Power presented no evidence at the summary judgment hearing to show that it had misstated its position. Gulf Power had already noticed its claims for trial and merely argued that it was asserting a claim against Cox Cable for contribution. Notably, Gulf Power never sought leave from the trial court to amend its pleadings. See Bernard Marko. Nor did Gulf Power ask for rehearing of the trial court's decision for that purpose. A contribution claim would have injected entirely new operative issues into the case, beyond those raised in the breach of contact and indemnity claims. See, Dean Co., 485 So.2d at 439. Under the circumstances of this case, the trial court's order is proper under Roberts, Hart Properties and Bernard Marko and should not have been disturbed on appeal.

IV. THE INDEMNITY LANGUAGE OF THE AGREEMENT IS VOID AND UNENFORCEABLE UNDER SECTION 725.06, FLORIDA STATUTES.

The agreement does not comply with Florida law regulating indemnity provisions in construction contracts. Section 725.06, Florida Statutes, provides that an agreement in connection with construction, which purports to indemnify a party from its own negligence, is void and unenforceable unless the indemnity provision contains either a monetary limitation on the extent of indemnification or is supported by specific consideration. Neither of these conditions was met by the agreement in this case. The appellate court's narrow interpretation of the statute should be rejected in favor of a broad construction which fulfills the law's remedial purpose.

Section 725.06 provides:

> 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 it, or any guarantee of, or in connection with, any of them, between an owner of real property and an architect, engineer, general contractor, subcontractor, sub-subcontractor, or materialman, or between any combination thereof, wherein any party referred to herein obtains indemnification from liability for damages to persons or property caused in whole or in part by any act, omission, or default of that party arising from the contract or its performance shall be void and unenforceable unless:
>
> 1. The contact contains a monetary limitation on the extent of the indemnification and shall be a part of the project specifications or bid documents, if any, or
>
> 2. The person indemnified by the contract gives a specific consideration to the indemnitor for the indemnification that shall be provided for in his contract and section of the project specifications or bid documents, if any.

The statute is broadly written to encompass a variety of contracts beyond an owner-contractor agreement to construct improvements on real property. Pertinent to this case, omitting superfluous language, the statute applies to:

> [A]ny agreement . . . in connection with, any construction, alteration . . . of a . . . structure, appurtenance, or appliance . . . between an owner of real property and . . . general contractor. . . .

(Emphasis supplied.) This statute is remedial in nature; therefore, it should be liberally construed by the Court in order to advance the remedy provided by the Legislature. See 49 Fla. Jur. 2d, Statutes § 188 (1970). The statute should be applied in a manner to confer its benefits to the fullest extent consistent with its terms. Id. at § 189.

The nature of the agreement between Gulf Power and Cox Cable falls within the terms of the statute. In A-T-O, Inc. v. Garcia, 374 So.2d 533 (Fla. 3d DCA 1979), the court held that section 725.06 applied to a written indemnity provision printed on the reverse side of a delivery receipt for a leased mobile scaffold. Id. at 536. Rejecting the argument that the statute did not apply to such agreements, the court looked to the substance of the agreement and determined that the scaffold was designed and actually used as an aid in construction. Id. The purpose and substance of the parties' agreement here demonstrate that it is an agreement in connection with construction or alteration of a structure, appurtenance or appliance and thereby subject to the terms of section 725.06.

The parties' agreement provides both for the construction of Cox Cable's television cable system on Gulf Power's poles and for Cox Cable's continued license to use those poles. The parties' agreement contemplates a "construction" phase followed by a "lease" phase. Pertinent to the construction phase, Cox Cable needed Gulf Power's permission prior to making any "attachment" to its poles, a term which was defined as:

> [A]ny material or apparatus now or hereafter used by Licensee in the construction, operation or maintenance of its plant attached to poles.

[R. 173] (emphasis supplied). Cox Cable's equipment had to be installed and maintained in accordance with national electrical safety codes, and in compliance with drawings describing "required construction," which served as "construction guides" for Cox Cable. [R. 174] Finally, Cox Cable was required to obtain necessary consent from governmental authorities or other owners of the property where the poles were located, in order for Cox Cable to "construct and maintain" its facilities thereon. [R. 176]

While not specifically enumerated in the statute, the parties fall within the broad categories outlined in section 725.06. Because the statute is remedial, this Court may apply it in situations within the contemplated legislative scheme, although not literally within the terms of the statute, where that application is consistent with the legislative purpose. 49 Fla. Jur. 2d, Statutes § 189 (1970). Nothing in the terms of section 725.06 indicates that the Legislature intended to limit operation of the statute to the persons specifically listed; therefore, those categories should not be deemed exclusive. Gulf Power should be treated as an 'owner' for the purposes of the statute, as owner of the poles upon which Cox Cable's system was to be constructed. Because construction was to occur on the utility poles and not on realty, per se, Gulf Power is not technically an "owner of real property," as stated in the statute. However, Gulf Power occupies the same position in all material respects as owner of the property on which the construction occurred.

Likewise, for purposes of the construction phase of the agreement, Cox Cable occupies the position of a 'general contractor' under section 725.06. Cox Cable had many of the typical rights and responsibilities of a general contractor, including the following: Cox Cable was required to perform the work in a safe manner and in a

manner satisfactory to Gulf Power (paragraph 2); Cox Cable was required to comply with applicable industry codes, drawings and specifications provided by Gulf Power for construction (paragraph 3); Gulf Power reserved the right to inspect new installations and periodically inspect existing installations (paragraph 7); Cox Cable reserved the right to utilize subcontractors (paragraph 9); and Cox Cable was required to carry liability and worker's compensation insurance for the work (paragraph 10). [R. 173-78]

The appellate court's interpretation of section 725.06 is overly restrictive. The court held the statute inapplicable on the grounds that Gulf Power was not seeking to have improvements made but rather Cox Cable was seeking a license to use Gulf Power's property. 570 So.2d at 383. The language of the statute does not support that restriction. Cox Cable and Gulf Power agreed that Cox Cable could construct and maintain its cable plant on Gulf Power's poles, and Gulf Power receives compensation for granting Cox Cable that right. The appellate court's rationale would preclude the statute from applying to a variety of similar agreements, such as a contract whereby an owner of realty agrees that a contractor can construct and use improvements on its property; for example, if Gulf Power owned a vacant lot and allowed Cox Cable to construct and use a building thereon. The statute plainly would apply under those circumstances and no logical reason exists to deny its application in this case.

CONCLUSION

The decision of the First District Court of Appeal below should be reversed and this case remanded for affirmance of the final summary judgment in favor of Cox Cable.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to J. Nixon Daniel, Esq., Beggs & Lane, Post Office Box 12950, Pensacola, Florida 32576-2950, on this 2nd day of August, 1991.

Mark E. Holcomb
ATTORNEY

APPENDIX

APPENDIX

THIS AGREEMENT made as of January 1, 19 78, by and between the Gulf Power Company, a corporation of the State of Maine, hereinafter called Licensor, party of the first part and Cox Cablevision Corporation, hereinafter called Licensee, party of the second part,

WITNESSETH:

WHEREAS, Licensee proposes to furnish television service to residents of a portion of Escambia County excluding any incorporated areas for which the Licensee does not have a Franchise. The portion of Escambia County area covered by this Agreement is set forth in Exhibit "F" by Township, Range, and Section, and will need to erect and maintain aerial cables, wires and associated appliances throughout the area to be served, and desires to attach certain of such cables, wires and appliances to poles of Licensor; and

WHEREAS, Licensor is willing to permit, to the extent that it may lawfully do so, the attachment of said cables, wires and appliances to its poles where, in its judgement, such use will not interfere with its own service requirements, including considerations of economy and safety.

WHEREAS, Licensee has represented and warranted unto the Licensor that it may lawfully enter into this contract and exercise the rights and privileges hereunder vouchsafed in manner and form as set forth; and

WHEREAS, complete indemnification of Licensor is contemplated hereunder.

NOW, THEREFORE, in consideration of the mutual covenants, terms and conditions herein contained, the parties hereto do

hereby mutually covenant and agree as follows:

1. Before making attachment to any pole or poles of Licensor, Licensee shall make application therefor in the form set forth in Exhibit A, hereto attached and made a part hereof, and if the proposed attachment is satisfactory to Licensor, a permit therefor will be granted in the form set forth in Exhibit A, provided nevertheless, now and at all times the assent by Licensor to that requested by Licensee shall not deprive Licensor of the full indemnification which is a prime condition of this undertaking. An attachment is defined as any material or apparatus now or hereinafter used by Licensee in the construction, operation or maintenance of its plant attached to poles.

2. Licensee shall, at its own expense, make and maintain said attachments in safe condition and in thorough repair and in a manner satisfactory to Licensor and so as not to interfere with the use of said poles by Licensor, or by other utility companies using said poles, or interfere with the use and maintenance of facilities thereon or which may from time to time be placed thereon. Licensee shall, at any time, at its own expense, upon notice from Licensor, remove, relocate, replace or renew its facilities placed on said poles, or transfer them to substituted poles, or perform any other work in connection with said facilities that may be required by Licensor; provided, however, that in cases deemed by Licensor to be an emergency, Licensor may arrange to remove, relocate, replace or renew the facilities placed on said poles by Licensee, or transfer them to substituted poles or perform any other work in connection with said facilities that may be required in the maintenance, replacement, removal or relocation

of said poles, the facilities thereon or which may be placed thereon, or for the service needs of Licensor, and Licensee shall, on demand, reimburse Licensor for the expense thereby incurred, and shall indemnify Licensor for all liability to which Licensor might be subjected in such emergency work.

3. Licensee's cables, wires and appliances, in each and every location, shall be erected and maintained in accordance with the requirements and specifications of the National Electrical Safety Code, and the National Electric Code where applicable, and specifications of the Licensor for construction, and any amendments or revisions of said codes or practices, and in compliance with any rules or orders now in effect or that hereafter may be issued by any other authority having jurisdiction. Drawings marked Plates 1 to 4 inclusive, attached hereto and made a part hereof, are descriptive of required construction under some typical conditions, and are to serve as construction guides for Licensee. Such drawings may be superseded, amended or added to from time to time as may be required by Licensor. Licensee's application for permit to make an attachment shall constitute Licensee's representation to Licensor that the pole is of adequate height to permit the spacing and afford the ground clearance specified in said code, rules or orders; and, despite the issuance of a permit to attach, Licensee will at no time make an attachment to a pole or a substitute pole if the spacing on the pole or the ground clearance will not be in strict conformity with said code or rules or orders.

4. If it should appear to the Licensor that a pole is too short or inadequate, or that rearrangement of Licensee's

facilities on the pole or guying of the pole are desirable, to accommodate the attachments of the Licensee, Licensor shall notify the Licensee of the pole substitution, additions, changes and rearrangements Licensor deems desirable and the estimated cost thereof, and such notice shall constitute a denial of the permit unless Licensee shall authorize Licensor to make the substitutions, additions, changes and rearrangements specified by Licensor, and in event of such authorization, Licensee shall reimburse Licensor, on demand, for all costs incurred by the Licensor in connection therewith. Licensee further agrees to reimburse, on demand, the owner of any other facilities attached to said pole for any expense incurred by that owner.

5. Licensor reserves to itself, its successors and assigns, the right to maintain its poles and to operate its facilities thereon in such manner as will best enable it to fulfill its own service requirements. Licensor shall not be liable to Licensee for any interruption to service of Licensee or for interference with the operation of the cables, wires and appliances of Licensee arising in any manner out of the use of Licensor's poles hereunder, or of Licensee's or Licensor's customers, arising in any manner out of the use of Licensor's poles hereunder, or use of any other poles occupied by Licensor and Licensee regardless of ownership of said poles. Licensee voluntarily assumes all risks, disabilities, and expense, arising therefrom, and all expense in connection with any investigations or remedial measures performed by Licensor in connection therewith.

6. Licensee shall submit to Licensor evidence, satisfactory to Licensor, of its authority to erect and maintain its facilities within public streets, highways and other thoroughfares, and shall secure any necessary consent from state or municipal authorities or from the owners of the property upon which the poles are located to construct and maintain Licensee's facilities thereon.

7. Licensor, because of the importance of its service, reserves the right to inspect each new installation of Licensee on its poles and in the vicinity of its lines or appliances and to make periodic inspections semi-annually or oftener as plant conditions may warrant, of the entire plant of Licensee; and Licensee shall, on demand, reimburse Licensor for the full expense of such inspections. 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 Licensor.

8. Licensee shall pay to Licensor, for attachments to poles under this agreement, an annual rental of $5.07 per pole for the year 1977. For each subsequent year, the rental will be computed annually (Exhibit E) and will be twenty-two (22) percent of the weighted average cost of a 40 foot class 5 pole for the twenty-five (25) year period prior to the billing year (Exhibit B) multiplied by the yearend fixed charge rate (Exhibit C) experienced by Licensor, plus additional construction, operating, and maintenance costs experienced by Licensor as a result of Licensee's attachments (Exhibit D), plus the cost to Licensor of additional benefits received by the Licensee as a result of occupying Licensor's

poles (Exhibit D). Annual costs in Exhibits C and D will be those experienced by Licensor in the year immediately prior to the billing year.

Said rental shall be payable semi-annually, in advance, on the first day of January and on the first day of July of each year during which this agreement remains in effect; except that the first payment of rental hereunder shall be such pro rata amount as may be due for use of poles from the effective date of the permit to the next January or July rent payment date. Rental shall accrue, and shall be paid in advance, from the effective date of each Licensor's permit whether the attachments permitted be actually made or not. All rent payments are due in advance at the times specified without notice or grace.

In addition to advance rental as herein provided, Licensee shall pay to Licensor at the time of the issuance of each permit Licensor's estimated cost of providing the space for all of the attachments covered by that permit.

9. In the installation and maintenance of its facilities Licensee shall utilize employees and contractors who are experienced in working with and around energized electrical conductors. Licensee shall exercise special precautions to avoid damage to facilities of Licensor and of others supported on said poles; and hereby assumes all responsibility for any and all loss for such damage. Licensee shall make an immediate report to Licensor of the occurence of any damage and hereby agrees to reimburse Licensor for the expense incurred in making repairs.

10. Licensee shall indemnify, 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 Licensee and employees of any contractor or sub-contractor performing work for Licensee, and also, including payments made under any Workmen's Compensation Law or under any plan for employees' disability and death benefits, which may arise out of or be caused by the erection, maintenance, presence, use or removal of said attachments or by the proximity of the respective cables, wires, apparatus and appliances of the Licensee, or by any act of Licensee on or in the vicinity of Licensor's poles, or on, or in the vicinity of any other poles occupied jointly by Licensor and Licensee regardless of ownership of said poles. It is understood that the right of entry is granted upon the express condition that all risks thereasto be assumed by Licensee and its employees. Licensee shall carry insurance to protect the parties hereto from and against 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. The amounts of such insurance against liability due to damage to property shall be Fifty Thousand Dollars ($50,000.00) as to any one person and One Hundred Thousand Dollars ($100,000.00) as to any one accident, and against liability due to injury to or death of persons Two Hundred Thousand Dollars ($200,000.00) as to any one person and Five Hundred Thousand Dollars ($500,000.00) as to any one accident. Licensee shall also carry such insurance as will protect it from all claims under any Workmen's Compensation Laws in effect that may be applicable to it. All insurance

required shall name the Licensor as an insured and shall remain in force. Licensee shall submit to Licensor certificates by each company insuring Licensee to the effect that it has insured Licensee for all liabilities of Licensee under this agreement and that it will not cancel or change any policy of insurance issued to Licensee except after thirty (30) days notice to Licensor.

11. Licensee may at any time remove its attachments from any pole or poles of Licensor, but shall immediately give Licensor written notice of such removal. No refund of any rental will be due on account of such removal.

12. Upon notice from Licensor to Licensee that the use of any pole or poles is forbidden by municipal authorities or property owners, the permit covering the use of such pole or poles shall immediately terminate and the cables, wires and appliances of Licensee shall be removed at once from the affected pole or poles, unless Licensee shall forthwith obtain valid authority thereasto.

13. Licensee shall solely furnish to its customers amplified audio and/or video signals combined or separate. The providing of other types of service shall constitute a breach of this agreement and termination shall be effected in accordance with the provisions set forth in Section 14.

14. If Licensee shall fail to comply with any of the provisions of this agreement including the specifications hereinbefore referred to, or default in any of its obligations under this agreement and shall fail within thirty (30) days after

written notice from Licensor to correct such default or non-compliance, Licensor may, at its option, forthwith terminate this agreement or the permit covering the poles as to which such default or non-compliance shall have occurred. Failure of Licensee to perform the work as required to correct default or non-compliance shall authorize Licensor to perform such work, at the expense of Licensee, and without liability therefor.

15. Bills for inspections, expenses and other charges under this agreement shall be payable within thirty (30) days after presentation. Non-payment of bills shall constitute a default of this agreement. All money payments hereunder past due and unpaid shall bear interest at 8% per annum and reasonable collection costs.

16. Failure to enforce or insist upon compliance with any of the terms or conditions of this agreement shall not constitute a general waiver or relinquishment of any such terms or conditions, but the same shall be and remain at all times in full force and effect.

17. Nothing herein contained shall be construed as affecting the rights or privileges previously conferred by Licensor, by contract or otherwise, to others, not parties to this agreement, to use any poles covered by this agreement; and Licensor shall have the right to continue and extend such rights or privileges. The attachment privileges herein granted shall at all times be subject to such existing contracts and arrangements.

18. Licensee shall not assign, transfer or sublet the privileges hereby granted without the prior consent in writing of Licensor.

19. No use, however extended, of Licensor's poles, under this agreement, shall create or vest in Licensee any ownership or property rights in said poles, but Licensee's rights therein shall be and remain a mere license. Nothing herein contained shall be construed to compel Licensor to maintain any of said poles for a period longer than demanded by its own service requirements.

20. This agreement shall become effective upon its execution and, if not otherwise terminated, shall continue in effect for a term of three (3) years and thereafter until terminated by either party giving to the other party at least six (6) months written notice of intention to terminate. Upon termination of the agreement in accordance with any of its terms, Licensee shall immediately remove its cables, wires and appliances from all poles of Licensor. If not so removed, Licensor shall have the right to remove them at the cost and expense of Licensee and without any liability therefor.

21. When applying for initial permit and at each application for subsequent permits, Licensee shall furnish bond or satisfactory evidence of contractual insurance coverage as provided on the attached Schedule of Bond or required contractual insurance to guarantee the payment of any sums which may become due to Licensor for rentals, inspections, or for work performed for the benefit of Licensee under this agreement including the removal of attachments upon termination of this agreement by any of its provisions.

22. Subject to the provisions of Section 18 hereof, this agreement shall extend to and bind the successors and assigns of the parties hereto.

23. Licensor does not warrant the extent of its rights of way and thereto Licensee must in case of need obtain adequate approval from the underlying fee owners and indemnify the Licensor thereasto.

24. As further consideration for the grant of the permits herein provided for, Licensee agrees that it will make application of Licensor for all its electric service requirements, and, upon Licensor's acceptance thereof, purchase at applicable rates, all its electric service requirements from Licensor.

25. As a part of the consideration for this agreement, Licensee agrees that it will within one hundred eighty (180) days from the date of this agreement, show sufficient evidence to the satisfaction of the Licensor of the commencement and continuation of construction of the tower, antenna and television signal receiving system, and installation of television signal distribution system on Licensor's poles. In default of the above, Licensor may cancel this agreement upon ten (10) days written notice to the Licensee.

26. At the expiration of three (3) years from the date of this agreement, and at the end of every three (3) year period thereafter, the method and items involved in the computation of the annual pole rental payable hereunder for succeeding periods shall be subject to modification at the request of either party in writing to the other party not later than sixty (60) days before the end of any such three year period.

If within sixty (60) days after receipt of such a request by either party from the other, the parties hereto fail to agree upon a readjustment, the Licensor may forthwith terminate the right of the Licensee to make additional attachments. Any such termination of the right to make additional attachments shall not terminate the right of the Licensee to maintain the attachments theretofore made, and all such prior attachments shall continue thereafter to be maintained pursuant to and in accordance with the terms of this agreement until such time as the agreement is terminated as provided herein.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be duly executed the day and year first above written.

ATTEST:

Asst. Sec. Treas.

COX CABLEVISION

BY _____

Vice President

ATTEST:

_____

GULF POWER COMPANY

BY _____

SCHEDULE OF REQUIRED BOND

OR

INSURANCE COVERAGE

Number Of Attachments	Amount Of Coverage
0- 500	$15,000.00
501-1000	20,000.00
1001-1500	25,000.00
1501-2000	30,000.00
2001-2500	35,000.00
Over 2500	50,000.00

EXHIBIT A

City of _____

State of _____

_____

NAME OF LICENSEE

In accordance with the terms of Agreement dated _____, 19 ___, application is hereby made for permit to make attachments to the following poles:

Pole No.	Location and Type of Attachments

NAME OF LICENSEE

By _____

Title _____
Licensee

Permit granted _____, 19 ___, except is subject to Licensee's approval below if pole rearrangements are required.

Estimated cost of pole rearrangements required to provide space for CATV attachments $ _____ as shown on DSO No. _____.

GULF POWER COMPANY

By _____

_____
Licensor

The above charges for rearrangements approved

By _____ Permit No. _____

Title _____ Total Poles _____
Licensee

EXHIBIT

GULF POWER COMPANY - AVERAGE UNIT COST OF 40 FT POLES

YEAR	NO OF 40 FT POLES SET	DISPERSION FACTOR	NUMBER SURVIVING POLES	PERCENT POLES REMAINING	MATERIAL PLUS LABOR	REMAINI PLANT PORTIO
1976	1488	0.99236	1476	0.04498	104.73	4.71
1975	1235	0.97695	1206	0.03675	114.18	4.20
1974	1532	0.96124	1472	0.04485	111.11	4.98
1973	1988	0.94525	1879	0.05724	108.05	6.18
1972	1958	0.92896	1818	0.05540	104.99	5.82
1971	2146	0.91240	1958	0.05964	101.93	6.08
1970	1295	0.89555	1159	0.03532	98.86	3.49
1969	1530	0.87843	1343	0.04094	95.80	3.92
1968	1193	0.87103	1039	0.03165	92.95	2.94
1967	1823	0.84335	1537	0.04683	89.83	4.21
1966	1629	0.82534	1344	0.04095	84.82	3.47
1965	1669	0.80700	1346	0.04102	86.55	3.55
1964	1590	0.78823	1253	0.03817	71.06	2.71
1963	1367	0.76915	1051	0.03203	81.35	2.61
1962	1345	0.74959	1008	0.03071	80.61	2.48
1961	2277	0.72956	1661	0.05060	73.81	3.73
1960	2135	0.70904	1513	0.04611	71.57	3.30
1959	2064	0.68802	1420	0.04325	74.49	3.22
1958	2085	0.66649	1389	0.04233	61.72	2.61
1957	2549	0.64443	1642	0.05003	65.35	3.27
1956	1955	0.62186	1215	0.03703	61.29	2.27
1955	1575	0.59879	943	0.02873	58.98	1.69
1954	1419	0.57523	816	0.02486	55.90	1.39
1953	1411	0.55123	777	0.02369	53.75	1.27
1952	1053	0.52680	554	0.01690	54.99	0.93

*TOTAL WEIGHTED AVERAGE POLE COST FOR 1976 IS 85.04

EXHIBIT "C"

1976 annual fixed charge rate to be used for computing 1977 attachment rental.

Cost of Money	9.82
Depreciation	2.46
Income Taxes	3.11
Maintenance	1.30
Administrative and General	1.44
Ad Valorem Taxes	0.84
Miscellaneous Taxes	0.12
TOTAL	19.09

EXHIBIT "D"

Calculation of Additional Construction, Operating, and Maintenance Costs Experienced by Licensor as a Result of Licensee's Attachments

1. Construction, Operating, & Maintenance Expense

A = Additional Crew Time Required/Pole

B = Crew Cost/Hour

C = % Poles Climbed/Year

Annual Rental/Pole = A x B x C

Calculation of Licensor Costs for Additional Benefits Received by Licensee

1. Tree Trim Cost

A = Licensor Tree Trim Cost/Mile

B = % Benefit to Licensee

C = Number of Poles/Mile

Annual Rental/Pole = A x B ÷ C

2. Grounding Cost

A = Licensor Grounding Cost/Pole

B = % Poles Grounded

C = Yearend Fixed Charge Rate

D = % Allocated Space on Pole

Annual Rental/Pole = A x B x C x D

3. Lightning Protection Cost

A = Licensor Arrestor Cost/Pole

B = % Poles with Arrestors

C = Yearend Fixed Charge Rate

D = % Allocated Space on Pole

Annual Rental/Pole = A x B x C x D

EXHIBIT "B"

CATV Annual Attachment Rental Calculation for 1977 Billing

1. Historical Weighted Average Cost For 40'/5 Pole (Exhibit B) $ 85.04

2. Allocated Space on Pole: A total of 16' of space is available above the 18' height on the pole. CATV attachments are allocated a maximum of 3.5' or 22% of the total space above the 18' height. Use of this space must comply with applicable code clearances, and with Plates 1-6 which are a part of this Agreement.

3. Year End Fixed Charge Rate (Exhibit C) 19.09%

4. Base Annual Rental for Pole Space = % allocated space on pole x weighted average cost for 40' pole x year-end fixed charge rate

   Base Annual Rental/Pole = 22% x $85.04 x 19.09% = $3.57

5. Additional Annual Rental/Pole for:

   a. Additional construction, operating, and maintenance costs of Licensor = 5 minutes/crew/pole @ $32.00/ Crew/Hour x average % of poles climbed = $32.00 x .083 x 10% = 27¢

   b. Additional benefits to Licensee with resultant cost to Licensor

      (1) Annual rental/pole for tree trim = Licensor 1976 tree trim cost/mile x % benefit to Licensee ÷ No. poles/mile = $423.59 x 5% ÷ 35 = 61¢

      (2) Annual rental/pole for grounds = Licensor 1976 cost/pole grounded x % poles grounded x year-end fixed charge rate x % allocated space on pole = $35.18 x 17% x 19.09% x 22% = 25¢

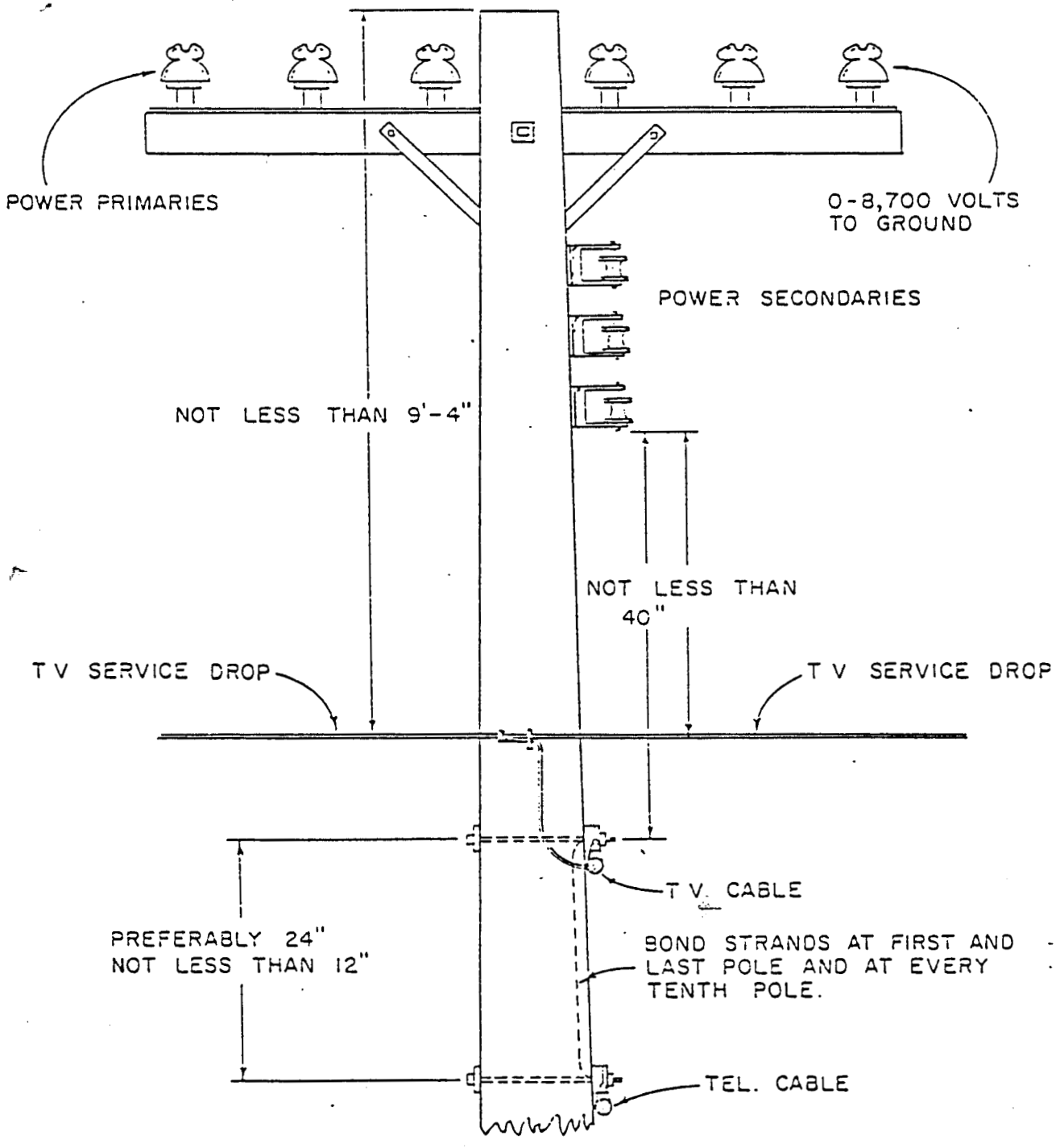
      (3) Annual rental/pole for lightning protection = Licensor arrestor cost/pole x % poles with arrestors x year-end fixed charge rate x % allocated space on pole = $52.16 x 17% x 19.09% x 22% = 37¢

6. Total Annual Rental/Pole = 4 + 5A + 5B(1) +5B(2) +5B(3)
   = $3.57 + .27 + .61 + .25 + .37

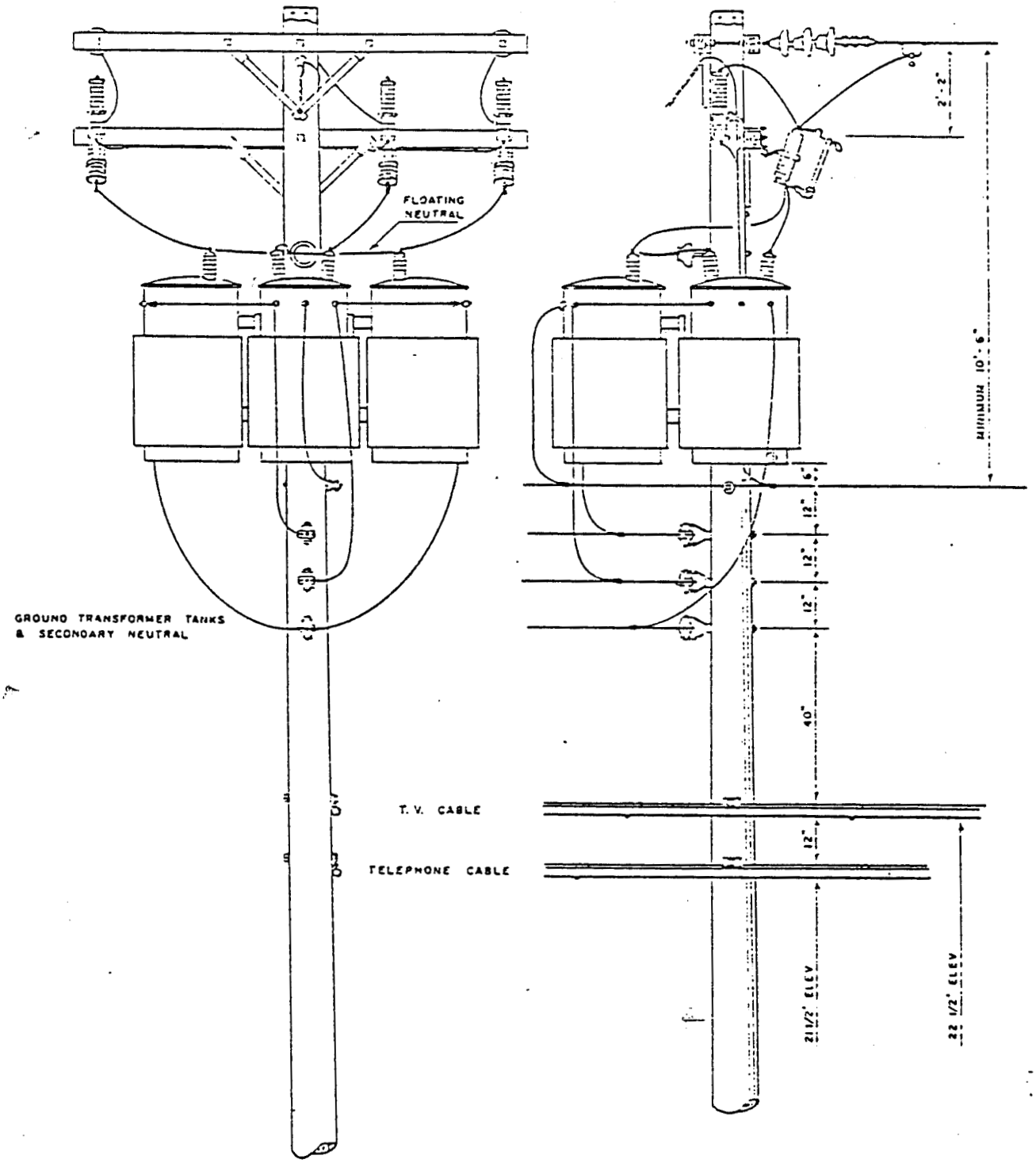
   = $5.07

ATTACHMENT OF TV DISTRIBUTION SYSTEM TO POLES

NO AMPLIFIER – NO SWITCH

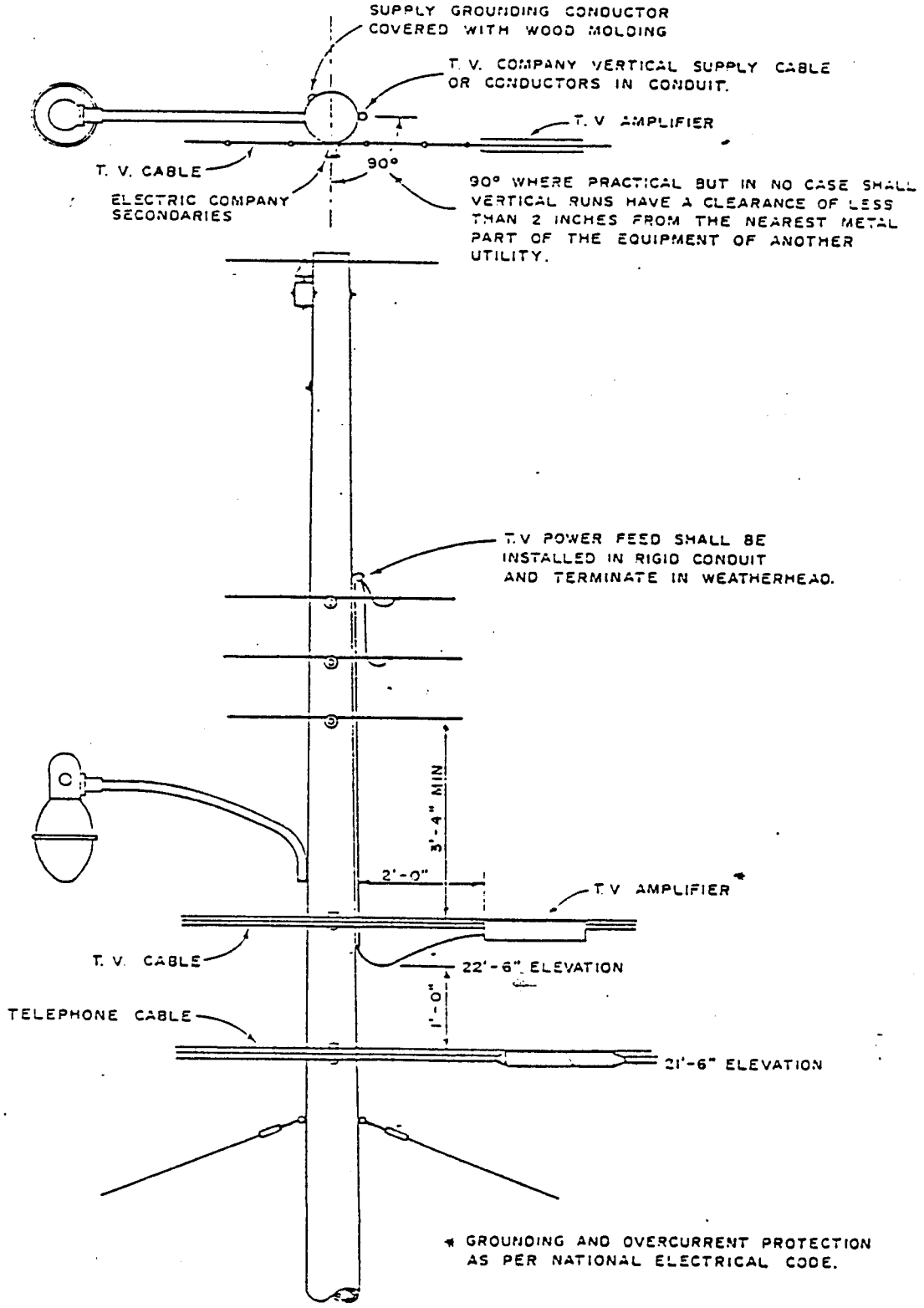


DATE	REVISIONS	PLATE
ENG. ____ DRN. H.W.T.		1
APPROVED		

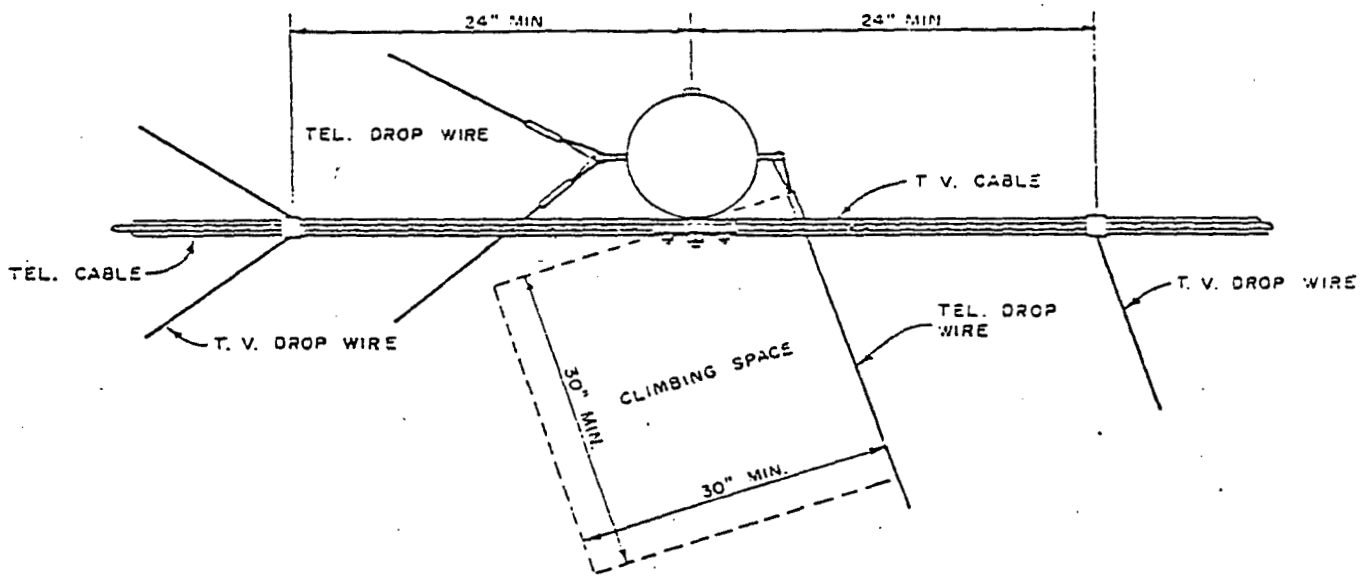


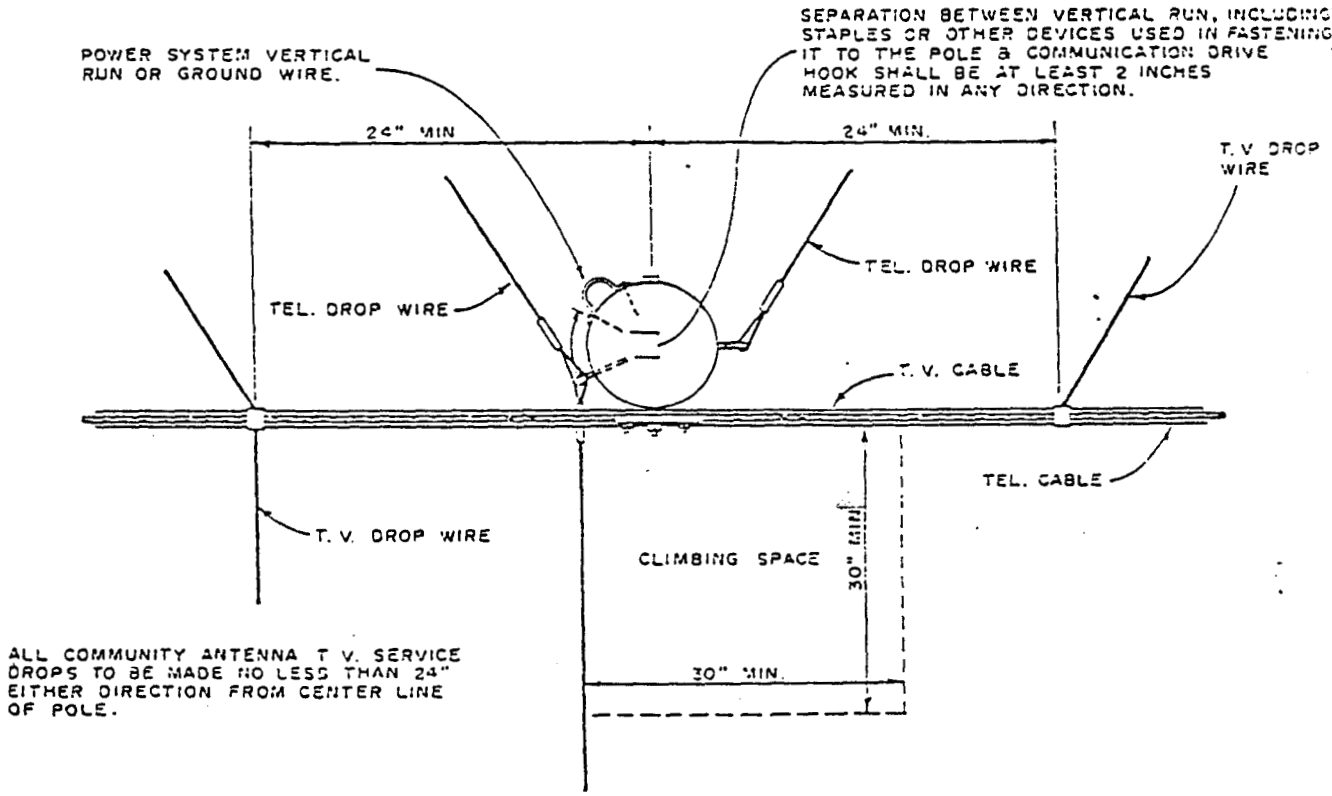
ATTACHMENTS OF T. V. DISTRIBUTION SYSTEM TO DISTRIBUTION POWER POLES

DATE _____	REVISIONS	PLATE
ENG. _____ DRN. A.B.T.	_____ _____ _____	2
APPROVED _____	_____ _____ _____	



DATE _____	REVISIONS	PLATE
ENG. _____ DRN H W T	_____ _____ _____	3
APPROVED _____	_____ _____ _____	





ALL COMMUNITY ANTENNA T V. SERVICE DROPS TO BE MADE NO LESS THAN 24" EITHER DIRECTION FROM CENTER LINE OF POLE.

DATE _____	REVISIONS	PLATE 4 22
ENG. _____ DRN. H W T		
APPROVED _____		

IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA

MICHAEL D. LEWIS,

Plaintiff,

vs.

GULF POWER COMPANY,
a foreign company,

Case No. 84-2818-CA-01
Division "A"

Defendant,

vs.

COX CABLE CORPORATION and
BURNUP & SIMS CABLE COMPANY OF FLORIDA,

Third-Party Defendants.

THIRD-PARTY COMPLAINT

The Defendant and Third-Party Plaintiff, Gulf Power Company, sues Third-Party Defendants, Cox Cable Corporation, and Burnup & Sims Cable Company of Florida and alleges:

1. Plaintiff filed a complaint against the Defendant, Gulf Power Company, a copy being attached.

2. That all damages allegedly sustained by the Plaintiff were the direct and proximate result of the negligence of Burnup & Sims Cable Company of Florida and that the said Burnup & Sims Cable Company of Florida would therefor be responsible for any damages adjudged against the Defendant, Gulf Power Company, in this cause.

3. That all times material hereto there was an agreement in effect between the Defendant, Gulf Power Company, and the Third-Party Defendant, Cox Cable Corporation, a copy of which is attached hereto and made a part hereof as if fully set forth herein.

4. That by the terms of the aforesaid contract Cox Cable Corporation agreed to completely indemnify Gulf Power Company for any damages which may be adjudged against it as a result of said Cox Cable Corporation's actions pursuant to the contract.

5. That the said Cox Cable Corporation did further breach the terms of the aforesaid contract by violating the terms of Paragraph 9 thereof in failing to utilize employees and contractors who were experienced in working with and around energized electrical conductors.

6. That the said Cox Cable Corporation was negligent in the pursuance of the aforesaid contract and said negligence was the

sole and proximate cause of the Plaintiff's alleged injuries.

WHEREFORE, Defendant, Gulf Power Company, demands judgment against the Third-Party Defendants, Cox Cable Corporation and Burnup & Sims Cable Company of Florida for all damages that are adjudged against the Defendant, Gulf Power Company in favor of the Plaintiff.

JACK GRAFF, of Counsel
LEVIN, WARFIELD, MIDDLEBROOKS, MABIE,
THOMAS, MAYES & MITCHELL, P.A.
226 South Palafox Street, Seville Tower
Post Office Box 12308
Pensacola, Florida 32581

IN THE CIRCUIT COURT, FIRST
JUDICIAL CIRCUIT OF FLORIDA,
ESCAMBIA COUNTY, FLORIDA

MICHAEL D. LEWIS

CASE NO. 84-2618 CA 01

Plaintiff

Vs

GULF POWER COMPANY

Defendant

Vs

COX CABLE CORPORATION, ETAL

Third Party Defendant

DATE 9/14/84
HOUR 10:00 AM
DEPUTY SHERIFF

3488

THIRD PARTY SUMMONS

THE STATE OF FLORIDA:

To All and Singular the Sheriffs of said State:

YOU ARE HEREBY COMMANDED to serve this summons and a copy of the third party complaint or petition in the above styled cause upon the third party defendant Cox Cable Corporation.

Each third party defendant is hereby required to serve written defenses to said third party complaint or petition on Gerald A. McGill, plaintiff's attorney, whose address is 801 South 12th Avenue, Pensacola, Florida, and on Jack Graff, defendant's attorney, whose address is 226 South Palafox St., Pensacola, Florida, within 20 days after service of this summons upon you, exclusive of the day of service, and to file the original of said written defenses with the clerk of said sourt either before service on said attorneys or immediately thereafter. If you fail to do so, a default will be entered against you for the relief demanded in the third party complaint or petition.

WITNESS my hand and the seal of said Court on September 4, 19____.

SEAL

As Clerk of said Court

By: _____
As Deputy Clerk

Jack Graff
Attorney for Defendant

226 South Palafox St.
Pensacola, Fla. 32501

C T SYSTEM®
C T Corporation System
The Corporation Trust Company

SERVICE OF PROCESS TRANSMITTAL FORM

RECD SEP 17 1984

TO: C T CORPORATION SYSTEM
(C T Office)
ATLANTA GEORGIA
(City) (State)
FROM: C T CORPORATION SYSTEM
(Originating Agent)
Per A. BOUTLIER/pn
Plantation, Florida
(City) (State)
DATE: 9/12/84 VIA: First Class Mail

TO: James Hatcher, Atty.
Legal Department
Cox Cable Communications, Inc.
1400 Lake Hearn Drive
Atlanta, GA 30319
(Authorized Recipient)

VIA: [XX] Certified First Class Mail #390766
[ ] Messenger

RE: PROCESS SERVED IN FLORIDA
(Jurisdiction)

FOR COX CABLEVISION CORPORATION
(Name of Company)
GEORGIA
(Domestic State)

ENCLOSED ARE COPIES OF LEGAL PROCESS SERVED UPON OR RECEIVED BY THE STATUTORY AGENT OF THE ABOVE COMPANY AS FOLLOWS:

1. TITLE OF ACTION: Michael D. Lewis, Pltf. vs. Gulf Power Company, Dft/ThirdPartyBltf. vs. Cox Cable Corporatinn, et al, ThirdPartyDfts.

2. DOCUMENT(S) SERVED: [X] ThirdParty Summons [X] ThirdParty Complaint [ ] Exhibits [ ] Statement of Claim
[X] Answer, Copy of Complaint Case # 84-2818 CA 01

3. COURT: [XX] Escambia County Circuit Court, Florida.
[ ]

4. NATURE OF ACTION: ThirdPartyPltf. seeks judgment for damages ajudged against the m in favor of Pltf. alleging negligence in the hiring of employees and contractors around energized electrical conductors resulting in personal injuries sustained on July 16, 1981 to Pltf.

5. [XX] PROCESS SERVED ON: FLORIDA AGENT
[ ] PROCESS RECEIVED IN C T PLANTATION OFFICE VIA [ ] Certified Mail [ ] Regular Mail
FROM [ ] COURT [ ]
Envelope Post Marked _____ enclosed.

6. DATE AND HOUR OF SERVICE:
DATE RECEIVED: 9/12/84 at 10 a.m.

7. APPEARANCE OR ANSWER DUE: [XX] Within 20 days
[ ]
ThirdParty

8. PLAINTIFF'S ATTORNEY(S): Jack Graff
226 S. Palafox St.
Seville Tower
Pensacola, Fla. 32501

9. REMARKS:
[ ] This confirms our telephone call to your office.
[ ] Above telephoned to C T office and is sent to you per their instructions.

cc: Dow, Lohnes & Albertson
Att: Brent N. Rushforth
1225 Connecticut Avenue, NW, Ste. 500
Washington, DC 20036

KINDLY ACKNOWLEDGE RECEIPT BY SIGNING THE CARBON COPY AND RETURNING IT TO →

RECEIVED AND FORWARDED ON 9/14/84 (Date)
BY: C T CORPORATION SYSTEM
Per Daniel A. Sullivan/mp
2 Peachtree St., NW, Ste. 111
(Address)
Atlanta, GA 30383

CT316A (REV. A)-5M-7/82

IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA

MICHAEL D. LEWIS,

Plaintiff,

vs.

GULF POWER COMPANY, a foreign corporation,

Defendant.

CASE NO: 84-[illegible] CA

DIVISION: A

COMPLAINT

COMES NOW the Plaintiff, MICHAEL D. LEWIS, by and through his undersigned attorneys, and sues the Defendant, GULF POWER COMPANY, a foreign corporation, and alleges:

1. This is an action for damages in which the amount in controversy exceeds the sum of $5,000.00.

2. At all times relevant to this action, the Plaintiff, MICHAEL D. LEWIS, was a resident of Escambia County, Florida.

3. At all times relevant to this action, the Defendant, GULF POWER COMPANY, was a foreign corporation, licensed to do business and doing business within the State of Florida.

4. On or about July 16, 1981, the Plaintiff, MICHAEL D. LEWIS, was working for Burnup & Sims, Inc., in Escambia County, Florida, and was employed and in the process of stringing cable for Burnup & Sims, Inc. on electrical power poles owned by the Defendant, GULF POWER COMPANY.

5. To the best knowledge and belief of the Plaintiff, there was an agreement between the Defendant, GULF POWER COMPANY, and Burnup & Sims, Inc. to authorize and allow Burnup & Sims, Inc. and its employees to utilize the electrical power poles owned by the Defendant, GULF POWER COMPANY, to string cable on said electrical power poles.

6. On the date and place set out above, the Plaintiff, MICHAEL D. LEWIS, was in the process of tightening guy wires to a Gulf Power Company pole when the guy wires suddenly and without warning became live with electrical current, contrary to normal and safe practice, and there was an apparent short-circuit between the wires and an explosion occurred.

7. As a direct result of the above, the Plaintiff suffered electrical burns and was otherwise electrocuted, and his clothing was set on fire.

8. The Plaintiff's injuries were proximately caused by the negligence on the part of the Defendant, GULF POWER COMPANY, in the construction and/or

maintenance, and supervision of the [illegible] the electrical poles and wires belonging to GULF POWER COMPANY.

9. As a result of the above, the Plaintiff, MICHAEL B. LEWIS, has suffered bodily injury resulting in pain and suffering, disability, great disfigurement, mental anguish, loss of the capacity for the enjoyment of life, loss of earnings and loss of ability to earn money, both in the past and in the future, and may have suffered aggravation of an unknown and pre-existing condition. The losses are permanent and continuing in nature, and the Plaintiff will continue to suffer the losses in the future.

WHEREFORE, the Plaintiff, MICHAEL B. LEWIS, demands judgment against the Defendant, GULF POWER COMPANY, for [illegible] and all other damages as trial by jury is demanded.

Gerald A. McGill, Esquire
SOUTHWORTH & McGILL, P.A.
801 North 12th Avenue
Pensacola, Florida 32501
(904) 438-0020
Attorneys for Plaintiff

SUMMONS

IN THE CIRCUIT COURT, F[illegible]UDICIAL CIRCUIT OF FLORIDA, Escambia County, State of Florida

MICHAEL D. [illegible]

Plaintiff

VS

CASE NO. [illegible] -CA-0[illegible]

DIVISION ______

GULF POWER COMPANY

Defendant

SUMMONS

THE STATE OF FLORIDA:

To All and Singular the Sheriffs of Said State:

YOU ARE HEREBY COMMANDED to serve this Summons and a copy of the Complaint in the above styled cause upon the defendant GULF POWER COMPANY, a foreign corporation

Each defendant is hereby required to serve written defenses to said complaint on plaintiff's Attorney, GERALD A. MCGILL, whose address is 801 North 12th Avenue, Pensacola, Florida 32501

within 20 days after service of this Summons upon you, exclusive of the day of service, and to file the Original of said written Defenses with the Clerk of said Court either before service on Plaintiff's Attorney or immediately thereafter. IF YOU FAIL TO DO SO, A DEFAULT WILL BE ENTERED AGAINST YOU for the relief demanded in the Complaint.

WITNESS MY HAND and Seal of said Court on [illegible], 198[illegible]

ERNIE LEE MAGAHA
As Clerk of said Court

By [signature] Deputy Clerk

IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA

GULF POWER COMPANY.
a foreign company,

Third-Party Plaintiff, CASE NO. 84-2818 CA-01

vs

COX CABLE CORPORATION,

Third-Party Defendant/ DIVISION 'A'
Fourth-Party Plaintiff,

vs

BURNUP & SIMS CABLE COMPANY, INC.

Fourth-Party Defendant.

==========

ORDER GRANTING SUMMARY JUDGMENT

Third-party Defendant, Cox Cable Corporation, seeks summary judgment on the Third-Party Complaint of Gulf Power Company. Cox claims that it is entitled to summary judgment as a matter of law because the unrefuted evidence of record demonstrates that Cox Cable fully complied with the terms of its contract with Gulf Power and that the contractual indemnity language relied upon by Gulf Power is invalid and unenforceable under Florida law. This Court agrees and grants summary judgment.

Plaintiff, Michael Lewis, was injured during the course and scope of his employment with Burnup & Sims while assisting other Burnup & Sims' employees in stringing cable on Gulf Power's Poles. Lewis sued Gulf Power for his injuries and Gulf Power filed a Third-Party Complaint against Burnup & Sims and Cox Cable. Gulf Power's claim against Cox Cable was for contractual indemnification, based on Cox Cable's alleged breach of Paragraph 9 of its contract with Gulf Power.

Subsequent proceedings limited Lewis' claim against Gulf Power to the sufficiency of the warning, if any, given by Gulf Power of dangerous conditions arising from the unsafe work practices of cable workers on its utility poles. Gulf Power settled with Lewis and Gulf Power sought contractual indemnification from Cox Cable for Lewis' claim.

Paragraph 9 of the Gulf Power/Cox Cable contract states, in pertinent part, as follows:

> In the installation and maintenance of its facilities Licensee (Cox Cable) shall utilize employees and contractors who are experienced in working with and around energized electrical conductors.

The requirements imposed by this provision are clear: Cox Cable's obligation extended only to ensuring the experience of its own employees and the experience of its cable installation contractor. Where, as here, the meaning of a contract is clear under ordinary rules of English, that meaning can not be changed by a Court. There is no question for a jury to decide regarding the meaning of this provision, and the unrefuted evidence of record demonstrates that Cox cable fully complied with its obligation under paragraph 9 by hiring Burnup & Sims, one of the largest and most experienced cable installation companies in the nation.

The sole claim upon which Lewis ultimately proceeded against Gulf Power was the sufficiency of the warning, if any, given by Gulf Power of dangerous conditions arising from the unsafe work practices of cable workers on its utility poles. This duty to warn arose out of Gulf Power's superior knowledge of the danger faced by workers, such as Lewis, working on and around its electrical poles. Gulf Power's liability is direct, based upon its superior knowledge; as a mater of law, liability cannot be vicariously imposed upon the utility for the negligence of a contractor or its employees.

It is well settled that contracts providing indemnification for one's own negligence are disfavored in Florida and are to be strictly construed. Such contracts will be enforced only if they expressly state in clear and unequivocal terms an intent to indemnify a party against the consequences of his own wrongful acts. This determination must be made by the Court as an issue of law.

Paragraph 10 of the Gulf Power/Cox Cable contract states, in pertinent part, as follows:

> Licensee (Cox Cable) shall indemnify, protect and save the Licensor (Gulf Power) 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 Licensee and employees of any contractor or subcontractor performing work for Licensee, and also, including payments made under any Workmen;s Compensation Law or under any plan for employees; disability and death benefits, which may arise out of or be caused by the erection, maintenance, presence, use or removal of said attachments or by the proximity of the respective cables, wires, apparatus and appliances of the Licensee, or by andy act of Licensee on or in the vicinity of Licensor; poles, or on, or in the vicinity of any other poles occupied jointly by Licensor and Licensee regardless of ownership of said poles. It is understood that the right of entry is granted upon the express condition that all risks thereasto be assumed by Licensee and its employees. Licensee shall carry insurance to protect the parties hereto from and against any and all claims, demands, actions, judgments, 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.

On its face, this provision does not reflect any intention on the part of Cox Cable to indemnify Gulf Power for Gulf Power's own wrongful acts or omissions. Florida courts have

consistently refused to enforce such general indemnification language. The contract does not require Cox Cable to indemnify Gulf Power for Gulf Power's own negligence and cannot be enforced in any manner which would require Cox Cable to do so.

Gulf Power also claims indemnification from liability by operation of Section 725.06, Florida Statutes. This statute has been interpreted by the First District Court of Appeal to apply in situations where a party to a contract seeks to obtain indemnification from another party for its own active negligence. The statute broadly applies to agreements incidental to construction and, therefore, must be applied in this case.

Section 725.06 requires, however, that the contract contain a monetary limitation on the extent of the indemnification as a part of the project specifications or bid document, or the person indemnified by the contract must give specific consideration for the indemnification. In this case, the indemnification clause is void and unenforceable because it contains neither a monetary limitation on the extent of indemnification, nor is it supported by specific consideration.

Third-Party Plaintiff, Gulf Power, therefore, takes nothing by its third-party claim, and Third-Party Defendant, Cox Cable Corporation, goes hence without day.

ORDERED at Pensacola, Escambia County, Florida, this the 26 day of January, 1990.

/S/ LACEY A. COLLIER

CIRCUIT JUDGE

Conformed Copies to:

Mark E. Holcomb, Esquire
J. Nixon Daniel, Esquire

BE IMPOSED ON CONVICTED INDIGENT CRIMINAL DEFENDANTS WITHOUT AFFORDING THEM SPECIAL NOTICE OR A HEARING SEPARATE FROM THE SENTENCING HEARING.

[8] As to appellant's second point on this issue, the law is clear, and appellee concedes, that the amount of restitution to be paid by defendant must be determined by the court, and that the task may not be delegated to a probation or parole officer. Section 948.03(1)(e), F.S. (1989); *Doner v. State*, 515 So.2d 1368 (Fla. 2d DCA 1987). The trial court's order that the defendant "make restitution as determined by probation and parole" must therefore be reversed, and the matter remanded with directions that the amount of restitution, if any, be determined by the trial court.

AFFIRMED in part, and REVERSED and REMANDED in part.

MINER and WOLF, JJ., concur.

WEST KEY NUMBER SYSTEM

GULF POWER COMPANY, a Foreign Company, Appellant,

v.

COX CABLE CORPORATION, Appellee.

No. 90-589.

District Court of Appeal of Florida, First District.

Nov. 15, 1990.

Rehearing Denied Dec. 18, 1990.

Employee of cable installation contractor brought suit against power company to recover damages for electrical burns suffered while stringing cable. Power company filed third-party complaint against cable company seeking indemnification and claiming breach of contract and negligence. Following settlement of employee's claim, the Circuit Court, Escambia County, Lacey Collier, J., granted cable company summary judgment against power company, and power company appealed. The District Court of Appeal, Wolf, J., held that: (1) material issues of fact precluded summary judgment, and (2) statute limiting contractual indemnification did not apply.

Reversed and remanded.

1. Judgment ⇐186

Where affidavits reveal clear cause of action, trial court should not grant summary judgment which does not grant leave to amend complaint.

2. Contracts ⇐147(3)

In construing a provision of a contract, court should look at contract as a whole to ascertain the intent of the parties.

3. Judgment ⇐181(19)

In action arising out of injuries suffered by employee of cable installation contractor hired to string cable for cable company, fact question as to whether cable company complied with its obligation to "utilize employees and contractors who are experienced in working with and around energized electrical conductors" precluded summary judgment for cable company on power company's third-party claim that cable company had breached parties' licensing agreement.

4. Indemnity ⇐8.1(1)

Contracts which purport to indemnify a party against its wrongful acts are viewed with disfavor and will be enforced only if contract expresses a clear and unequivocal intent to protect indemnitee from its own wrongful acts.

5. Indemnity ⇐3

The degree of specificity required for indemnification by contract in cases of joint negligence is less stringent than that required in situation where indemnitee is solely negligent.

6. Judgment ⇐181(19)

Material issue of fact as to whether cable company, as well as power company, was negligent in not informing employee of cable installation contractor of known dangerous condition created by over-tightening lines on electrical poles precluded summary judgment for cable company on power company's claim for contractual indemnification.

7. Indemnity ⇐3

Statute limiting contractual indemnity between real property owner and party contracting to make improvements to property did not apply to contract whereby power company allowed cable company to attach cable to power company's poles. West's F.S.A. § 725.06.

J. Nixon Daniel III of Beggs & Lane, Pensacola, for appellant.

David H. Burns and Mark E. Holcomb of Huey, Guilday, Kuersteiner & Tucker, P.A., Tallahassee, for appellee.

WOLF, Judge.

Gulf Power Company (Gulf) seeks review of the trial court's order granting Cox Cable Corporation's (Cox) motion for summary judgment as to Gulf's third party action. We find merit in Gulf's contentions and reverse.

This litigation arises from a contract entered into by Gulf and Cox on January 1, 1978. The contract was a licensing agreement which allowed Cox to attach cables, wires, and appliances to poles belonging to Gulf. Among other items, the contract required Cox to ensure the safe installation and maintenance of any wires, cables or devices attached to the poles belonging to Gulf; Cox also was required to indemnify Gulf. Cox contracted with Burnup and Sims, Inc., a cable installation contractor, to perform the installation.

On July 16, 1981, Michael Lewis, an employee of Burnup and Sims, suffered electrical burns while in the process of stringing cable. Mr. Lewis brought suit against Gulf. Gulf then filed a third party complaint against Cox seeking indemnification and claiming breach of contract and negligence on the part of Cox. Gulf also asserted claims against Burnup and Sims.

The third party complaint alleged that Cox was negligent in its performance of the contract and that the negligence of Cox was the sole and proximate cause of Michael Lewis' injuries. Gulf further alleged that Cox breached the terms of paragraph 9 of its contract with Gulf. Paragraph 9 reads in pertinent part:

> In the installation and maintenance of its facilities, licensee shall utilize employees and contractors who are experienced in working with and around energized electrical conductors.

Gulf also sought indemnification, pursuant to the contract, from Cox for any damages which Gulf might be required to pay Lewis as a result of his injuries.[1]

In the original cause of action by Michael Lewis, summary judgment was granted in favor of Gulf. The ruling was appealed. This court reversed because it determined that a question of fact existed regarding the sufficiency of Gulf Power's warning to Michael Lewis regarding the dangerous conditions arising from unsafe work practices of the cable workers (overtightening

1. The contract between Gulf (licensor) and Cox (licensee) contains the following sections concerning indemnification:
Page 1 of the contract contains the following provision:
"Whereas complete indemnification of licensor is contemplated hereunder."
Page 2 of the contract contains the following language:
"assent [to proposed attachment] by licensee shall not deprive licensee of full indemnification which is a prime condition of the undertaking."
Paragraph 10 of the contract reads in pertinent part:
Licensee shall indemnify, protect and save the licensor forever harmless from and against all claims and demands for damage to property and injury or death, including but not restricted to employees of licensees or employees of any contractor or subcontractor performing work for licensee ... which may arise out of or caused by erecting material.

wires). *Lewis v. Gulf Power Co.*, 501 So.2d 5, 7 (Fla. 1st DCA 1987), *rev. denied*, 508 So.2d 14 (Fla.1987). The determination by the district court of appeal did not address the causes of action between Gulf and Cox. Gulf eventually settled with Michael Lewis. Cox then sought summary judgment against Gulf. Both parties submitted affidavits; the most relevant facts contained therein revealed:

1) Cox contracted with Burnup and Sims to install the cable line. Cox had no employees working on the cable installation. Burnup and Sims, a cable installation contractor personally known by Cox to be well qualified and one of the largest, most established cable companies in the nation, to perform the work.

2) Cox had been notified on several occasions by Gulf of problems with Cox's contractor, Burnup and Sims, Inc., including incidents involving over-tightening of lines. In addition, Cox assured Gulf that it would contact Burnup and Sims to assure that the problems were corrected.

The trial court granted summary judgment, finding in pertinent part:

1) Gulf Power's claim was for contractual indemnification, based on Cox Cable's alleged breach of Paragraph 9 of its contract with Gulf Power.

2) Cox Cable fully complied with the terms of its contract with Gulf Power, specifically paragraph 9, by hiring Burnup and Sims, an experienced cable company.

3) The contractual indemnity language relied upon by Gulf Power is invalid and unenforceable under Florida law because it was not specific enough to indemnify Gulf against its own negligence.

4) Section 725.06, Florida Statutes, precludes utilization of the indemnification clause in the instant case.

We find that the trial judge erred in granting summary judgment.

Summary judgment is appropriate only when there is no genuine issue of fact and the movant is entitled to judgment as a matter of law. *Zygmont v. Smith*, 548 So.2d 902 (Fla. 1st DCA 1989), and *Tri-City Used Cars, Inc. v. Grim*, 566 So.2d 922 (Fla. 1st DCA, 1990). The burden is upon the moving party to conclusively demonstrate that there are *no* genuine issues of material fact existing at the time of the motion. *Clark v. Van de Walle*, 332 So.2d 360 (Fla. 2nd DCA 1976). In determining whether to grant a summary judgment, the court should not only consider the pleadings but also must examine the pertinent discovery as well as any affidavits on file. Rule 1.510(c), Fla.R.Civ.P. All inferences reasonably justified by the materials in front of the court must be liberally construed in favor of the nonmoving party. *Harvey Building, Inc. v. Haley*, 175 So.2d 780 (Fla.1965). In light of these general principals, we examine the issues before this court.

I. Whether the trial court erred in determining that Cox fully complied with its contractual obligations under paragraph 9 and was entitled to a summary judgment as to Gulf's claim for breach of contract.

[1, 2] Cox asserts that the trial judge properly limited its scope of inquiry to the specific wording of paragraph 9 in determining whether Cox breached its contractual obligation.[2] Thus, they assert that the determination that Cox hired a contractor who was experienced in working with and around energized electrical conductors was dispositive. We feel that this was too narrow an interpretation. In construing a pro-

2. Appellee also asserts that the third party complaint inadequately pleads a case for contribution, indemnification, negligence, and breach of contract. While we agree that the pleading appears somewhat deficient, the appellee never moved to dismiss or for a more definite statement. The pleading here was not so deficient as to require granting a summary judgment. Further, in cases where affidavits reveal a clear cause of action, the trial court should not grant a summary judgment which does not grant leave to amend the complaint. *Dorset House Ass'n, Inc. v. Dorset, Inc.*, 371 So.2d 541 (Fla. 3rd DCA 1979).

vision of a contract, the court should look at the contract as a whole to ascertain the intent of the parties. *J & S Coin Operated Machines, Inc. v. Gottlieb*, 362 So.2d 38 (Fla. 3rd DCA 1978); *Mount Vernon Fire Ins. Co. v. Editorial America*, 374 So.2d 1072 (Fla. 3rd DCA 1979).

[3] In light of the other provisions in the contract relating to Cox's responsibilities for injuries to parties working on the lines, a fact finder can reasonably infer that Cox not only had a duty to hire experienced contractors, but Cox also had a duty to make all reasonable efforts to correct or to warn all parties when they became aware of deficiencies in the practices employed by their contractor or that their contractor was utilizing inexperienced employees in an inherently dangerous situation.[3] *See Lewis v. Gulf Power, supra*, at 7. We, therefore, find that the trial court erred in granting summary judgment on the issue of breach of contract.

II. Whether the trial court erred in granting summary judgment for Cox on Gulf's claim for indemnification.

[4, 5] Contracts which purport to indemnify a party against its own wrongful acts are viewed with disfavor in Florida. *Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Co.*, 374 So.2d 487 (Fla.1979). Such contracts protecting a party in situations where they are solely negligent will be enforced only if they express a clear and unequivocal intent to protect the indemnitee from its own wrongful acts. *University Plaza Shopping Center, Inc. v. Stewart*, 272 So.2d 507 (Fla.1973). The degree of specificity required for indemnification in cases of joint negligence is, however, less stringent. *United Parcel Service of America, Inc. v. Enforcement Security Corp.*, 525 So.2d 424 (Fla. 1st DCA 1987).

The indemnification language in the instant case is similar to the language in *United Parcel Service of America, Inc.* which this court held was sufficient to sustain indemnification in cases where the parties are jointly liable.

[6] In light of the affidavits in the instant case indicating Cox's knowledge of the potentially dangerous situation, a jury could reasonably infer that Cox as well as Gulf was negligent in not informing the plaintiff of the known dangerous condition. There were still factual issues to be resolved concerning whether Gulf and Cox were, in fact, joint tort-feasors. The trial court, therefore, erred in determining that the indemnification clause was invalid and unenforceable under Florida law. *See United Parcel Service of America, Inc.*

III. Whether section 725.06, Florida Statutes, precludes Gulf from maintaining an action for indemnification against Cox.

Section 725.06, Florida Statutes, provides:

> Construction contracts; limitation on indemnification.—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 it, or any guarantee of, or in connection with, any of them, between an owner of real property and an architect, engineer, general contractor, subcontractor, sub-subcontractor, or materialman, or between any combination thereof, wherein any party referred to herein obtains indemnification from liability for damages to persons or property caused in whole or in part by any act, omission, or default of that party arising from the contract or its performance shall be void and unenforceable unless:
>
> (1) The contract contains a monetary limitation on the extent of the indemnification and shall be a part of the project

3. We are not holding that Cox had a duty to actively supervise its independent contractor, Burnup and Sims, but rather that based on the contract in the instant case, a jury could reasonably find a duty to attempt to rectify a potentially dangerous situation which they became aware of.

specifications or bid documents, if any, or

(2) The person indemnified by the contract gives a specific consideration to the indemnitor for the indemnification that shall be provided for in his contract and section of the project specifications or bid documents, if any.

[7] This statutory provision expressly applies in situations when an owner of real property contracts for improvements to property. In the instant case, however, Gulf was not seeking to have improvements made, but rather Cox was seeking a license to utilize the property of Gulf. Section 725.06, Florida Statutes, therefore, does not apply in this situation and would not preclude Gulf from seeking indemnification.

In view of the foregoing, we reverse the final summary judgment and remand to the trial court.

WENTWORTH and MINER, JJ., concur.

BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LIMITED, Appellant,

v.

Gerald LEWIS, as Comptroller of the State of Florida and Head of the State of Florida Department of Banking and Finance, Appellee.

No. 90-977.

District Court of Appeal of Florida, First District.

Nov. 15, 1990.

International banking corporation filed application for renewal of its license to operate agency office in state. Three days after publishing notice of renewal, the Department of Banking and Finance, Gerald Lewis, Comptroller, issued final order denying renewal, and international banking corporation appealed. The District Court of Appeal, Wolf, J., held that Department was not authorized to issue final order prior to expiration of statutory 21-day period after publication of notice, absent finding that emergency existed.

Vacated and remanded.

1. Administrative Law and Procedure ⇐309

Agencies generally may only take summary action, action which affects fundamental rights of party prior to giving party notice and opportunity to be heard, in emergency situations; when agency determines that there is emergency and need for immediate final order, there must be finding of immediate danger to public health, safety, or welfare, and order itself must recite with particularity facts underlying such finding. West's F.S.A. §§ 120.54(9)(a)3, 120.59(3).

2. Administrative Law and Procedure ⇐309

Licenses ⇐22

Protection afforded by Administrative Procedure Act as to summary dispositions which affect rights of parties applies to renewal of business licenses. West's F.S.A. §§ 120.54(9)(a)3, 120.59(3).

3. Banks and Banking ⇐17

Department of Banking and Finance was not authorized to issue final order denying international banking corporation's application for renewal of its license to operate agency office in state, based upon financial condition, violations of law, and public interest, prior to expiration of statutory 21-day period after publication of notice, within which international banking corporation could request hearing, absent finding that emergency existed. West's F.S.A. §§ 120.59(3), 120.60(5).

Julian Clarkson, Bruce H. Robertson, and Susan L. Turner of Holland & Knight, Tallahassee, for appellant.

determined to grant the preference. The phrase, "by general law," indicates only that the legislature has discretion in deciding whether or not to exercise the constitutional authority to classify land as agricultural. It does not, as the majority suggests, give the legislature the discretion to determine *how the land shall be classified.* Any doubt as to that discretion is removed by the final phrase in the provision and by the clear intent of the provision that any special tax treatment for agricultural land shall be based solely on the character or use of the land. I am not persuaded by the argument that the "character or use" requirement relates only to assessment but not to classification of land. Unless land is classified agricultural, it will never be eligible for the special assessment. If it is so classified, the special assessment follows. Under the majority's construction of the provision, the legislature could extend favored tax treatment to a select number of agricultural land owners by simply designing the classification in such a way as to exclude all others. I cannot concur with an opinion construing the provision to permit the legislature to circumvent its clear purpose. That purpose is to authorize favored treatment for agricultural land provided that any tax advantages shall result solely from the character or use of the land. By classifying land as agricultural or non-agricultural based on criteria wholly unrelated to use, the legislature can deny special tax treatment to those who are using their land for a bona fide agricultural purpose. I would therefore hold that classification as well as assessment must be based on character or use of the land. Accordingly, I would recede from *Rainey* and reaffirm our more recent holdings that use is the guidepost in classifying agricultural land. *See Tuck* and *Roden.*

Because section 193.461(4)(a)4. classifies land based on a factor wholly unrelated to use, I concur in the result of the majority opinion ruling the statute unconstitutional.

CHARLES POE MASONRY, INC., et al., Petitioners/Cross-Respondents,

v.

SPRING LOCK SCAFFOLDING RENTAL EQUIPMENT COMPANY et al., Respondents/Cross-Petitioners.

No. 54349.

Supreme Court of Florida.

July 5, 1979.

Rehearing Denied Sept. 28, 1979.

General contractor's employee, who was injured in fall from scaffold, sued lessor manufacturer of scaffolding, which filed third-party complaint for indemnity against lessee subcontractor, the general contractor, and property owner. The Circuit Court for Dade County, George Orr, J., entered summary judgment in favor of lessee subcontractor and the lessor manufacturer appealed. The District Court of Appeal, Third District, 358 So.2d 84, affirmed in part and reversed in part, and remanded. Manufacturer filed petition and subcontractor filed cross petition for writ of certiorari. The Supreme Court, Sundberg, J., held that the language of the lease agreement demonstrated nothing more than an undertaking by contractor to hold manufacturer harmless from any vicarious liability which might have resulted from contractor's erection, maintenance or use of scaffold; it did not envision indemnity for manufacturer's misconduct.

Approved in part and quashed in part, and remanded with instructions.

Hatchett, J., dissented.

Opinion after remand, 375 So.2d 639.

1. Indemnity ⇐8.1(1)

Contracts of indemnification which attempt to indemnify a party against its own wrongful acts are viewed with disfavor.

2. Indemnity ⇐8.1(1)

Contracts of indemnification will be enforced only if they express an intent to indemnify against indemnitee's own wrongful acts in clear and unequivocal terms.

3. Indemnity ⇐8.1(2)

Lease agreement which provided, inter alia, that "lessee assumes all responsibility for claims asserted by any person whatever growing out of the erection and maintenance, use or possession of said equipment, and agrees to hold the company harmless from all such claims" demonstrated nothing more than undertaking by lessee to hold lessor harmless from any vicarious liability which might result from lessee's erection, maintenance or use of leased scaffold; agreement did not envision indemnity for lessor's affirmative misconduct, whether in connection with design and manufacture or erection, maintenance and use of scaffold.

Edward A. Perse of Horton, Perse & Ginsberg and P. J. Carroll & Associates, and Alan R. Dakan of High, Stack, Lazenby & Bender, Miami, for petitioners/cross-respondents.

Gary E. Garbis of Virgin, Whittle, Garbis & Gilmour, Miami, for respondents/cross-petitioners.

SUNDBERG, Justice.

This cause is before us on petition and cross-petition for writ of certiorari to review a decision of the District Court of Appeal, Third District, reported at 358 So.2d 84, which allegedly misapplied *Leonard L. Farber Co. v. Jaksch*, 335 So.2d 847 (Fla. 4th DCA 1976). The issue is whether respondent and cross-petitioner Spring Lock is entitled to indemnity from petitioner and cross-respondent Charles Poe Masonry, Inc. under either a common law or contractual theory. We have jurisdiction pursuant to article V, section 3(b)(3), Florida Constitution.

Arthur Lott suffered serious injury when he fell from a scaffold on a construction site. He filed an action for damages against the manufacturer of the scaffold, Spring Lock, and its insurer. The scaffold was leased by Spring Lock to Poe, which assembled and used it as subcontractor on the construction project. In the lease, "Poe undertook to maintain and use the equipment in a safe and proper manner, and to assume all responsibility for claims arising out of the erection, maintenance, use or possession of the equipment, and agreed to hold Spring Lock harmless from all such claims." [1] *Spring Lock Scaffolding Rental Equipment Co. v. Charles Poe Masonry, Inc.*, 358 So.2d 84, 85 (Fla. 3d DCA 1978). Miller & Solomon Construction Company was the general contractor on the project and Lott's employer.

Lott's action against Spring Lock sought recovery on three grounds; negligence, breach of implied warranty and strict liability. Spring lock filed a third-party complaint against its lessee Poe for common law and contractual indemnity, and against the general contractor and property owners for common law indemnity. Lott and Spring Lock entered into a Mary Carter agreement which fixed a $300,000 liability limit. The court granted the third-party defendants' motions for summary judgment.

The district court, relying on *Stuart v. Hertz Corp.*, 351 So.2d 703 (Fla.1977), held that Spring Lock was not entitled to common law indemnity since Lott's claim against respondent was based on negligence or breach of warranty. On the contractual indemnity issue, the court held that if upon trial it should be found that the injury was caused by the joint negligence of Spring Lock and Poe, Spring Lock would be entitled to indemnity from Poe on the basis of their indemnity agreement. Accordingly, the district court affirmed the summary judgment as to all third-party defendants on the issue of common law indemnity, but reversed as to Poe on the issue of contractual indemnity.

Petitioner maintains that Spring Lock cannot recover under either theory of in-

1. The indemnity agreement is set out in full later in this opinion.

demnity. We agree. Common law indemnity is unavailable for the reasons expressed in our companion decision filed today, *Houdaille Industries, Inc. v. Edwards*, 374 So.2d 490 (Fla.1979).

[1, 2] With respect to the possibility of contractual indemnity, we take note that contracts of indemnification which attempt to indemnify a party against its own wrongful acts are viewed with disfavor in Florida. *Florida Power & Light Co. v. Elmore*, 189 So.2d 522 (Fla. 3d DCA 1966); *Nat Harrison Associates, Inc. v. Florida Power & Light Co.*, 162 So.2d 298 (Fla. 3d DCA 1964). Such contracts will be enforced only if they express an intent to indemnify against the indemnitee's own wrongful acts in clear and unequivocal terms. *University Plaza Shopping Center, Inc. v. Stewart*, 272 So.2d 507 (Fla.1973).

[3] The lease between Spring Lock and Poe provided that:

> 2. The LESSEE shall at all times and at his own expense keep the leased equipment in good, safe and efficient working order, repair and condition and shall not permit anyone to injure, deface or remove it or any part thereof. LESSEE agrees to erect, maintain and use said equipment in a safe and proper manner and in conformity with all laws and ordinances pertaining thereto and in accordance with COMPANY safety rules and regulations. The COMPANY shall have no responsibility, direction or control over the manner of erection, maintenance, use or operation of said equipment by the LESSEE. *The LESSEE assumes all responsibility for claims asserted by any person whatever growing out of the erection and maintenance, use or possession of said equipment, and agrees to hold the COMPANY harmless from all such claims.* LESSEE agrees that use of the leased equipment shall be construed as an absolute acknowledgment by LESSEE that when delivered to LESSEE by COMPANY the equipment was in good order and repair, was properly erected and was in all respects adequate, sufficient and proper for the purposes for which it was intended. [Emphasis supplied.]

The underscored provision employs exactly the sort of "general terms" which we held in *University Plaza* do not disclose an intention to indemnify for consequences arising from the wrongful acts of the indemnitee.[2] The language of the lease agreement demonstrates nothing more than an undertaking by Poe to hold Spring Lock harmless from any vicarious liability which might result from Poe's erection, maintenance or use of the scaffold. It does not envision indemnity for Spring Lock's affirmative misconduct, whether in connection with design and manufacture or erection, maintenance and use of the scaffold. *Compare University Plaza with Joseph L. Rozier Machinery Co. v. Nilo Barge Line, Inc.*, 318 So.2d 557 (Fla. 2d DCA 1975).

Leonard L. Farber Co. v. Jaksch is readily distinguishable from this case. There the lease provided that "Lessee shall indemnify LESSOR and save it harmless from suits . . . *occasioned wholly or in part by any act or omission of Lessee* . . . ." 335 So.2d at 847–48 (emphasis supplied). The district court correctly determined that the "in part" language above manifested lessee's clear and unequivocal intent to indemnify lessor in cases where the lessee and lessor are found to be jointly at fault. The lease here under review contains no such explicit provision, and thus the district court erred in relying on *Farber* to reach its decision.

We are not unmindful of the fact that the majority in *University Plaza* limited its holding to instances where liability is based solely on the fault of the indemnitee. However, the public policy underlying that decision applies with equal force here, that is, to instances where the indemnitor and indemnitee are jointly liable. Under classical principles of indemnity, courts of law rightfully frown upon the underwriting of

2. In *University Plaza*, tenant agreed to indemnify landlord "from and against any and all claims for any personal injury or loss of life in and about the demised premises." 272 So.2d 507, 508–09 (Fla.1973).

wrongful conduct, whether it stands alone or is accompanied by other wrongful acts. *Stuart v. Hertz Corp.* Hence we extend the holding in *University Plaza* to cases where the indemnitor and indemnitee are jointly liable.

Accordingly, the writ of certiorari is granted, the decision of the District Court of Appeal, Third District, is approved in part and quashed in part, and the cause is remanded to the district court with instructions to reinstate the judgment of the trial court.

It is so ordered.

ENGLAND, C. J., and ADKINS, BOYD, OVERTON and ALDERMAN, JJ., concur.

HATCHETT, J., dissents.

HOUDAILLE INDUSTRIES, INC., Petitioner,

v.

Eddie EDWARDS, Sr., etc., et al., Respondents.

No. 54949.

Supreme Court of Florida.

July 5, 1979.

Rehearing Denied Sept. 28, 1979.

Suit to recover for breach of warranty was brought against manufacturer of steel wire cable. The manufacturer then filed a third-party suit for indemnity against the employer of the injured party, alleging that the employer was actively negligent in using improper and dangerous procedures for tensioning and detensioning the wire. The Circuit Court, Duval County, Charles A. Luckie, J., granted final summary judgment in favor of the employer as to the first two counts of the third-party complaint and dismissed the third count for failure to state a cause of action. The manufacturer appealed, and the District Court of Appeal, First District, 360 So.2d 1112, reversed and remanded. On certiorari, the Supreme Court, Alderman, J., held that: (1) absent special relationship between manufacturer and employer which would make manufacturer only vicariously, constructively, derivatively, or technically liable for wrongful acts of employer, there is no right of indemnification on part of manufacturer against employer, and (2) manufacturer's claim that employer's negligence solely and proximately caused injury to deceased employee did not establish claim for indemnity since, if this was the case, a judgment could not properly be awarded against manufacturer in favor of employer since manufacturer could not be held vicariously or constructively liable for employer's acts.

Decision of district court quashed, cause remanded.

1. Indemnity ⇐13.1(3)

Absent special relationship between manufacturer and employer which would make manufacturer only vicariously, constructively, derivatively, or technically liable for wrongful acts of employer, there is no right of indemnification on part of manufacturer against employer.

2. Indemnity ⇐13.1(1)

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.

3. Indemnity ⇐13.1(1)

Indemnity shifts 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 cost because it was the latter's wrongdoing for which the former is held liable.

TITLE XLI

STATUTE OF FRAUDS, FRAUDULENT TRANSFERS, AND GENERAL ASSIGNMENTS

CHAPTER 725

UNENFORCEABLE CONTRACTS

725.01 Promise to pay another's debt, etc.—No action shall be brought whereby to charge any executor or administrator upon any special promise to answer or pay any debt or damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person or to charge any person upon any agreement made upon consideration of marriage, or upon any contract for the sale of lands, tenements or hereditaments, or of any uncertain interest in or concerning them, or for any lease thereof for a period longer than 1 year, or upon any agreement that is not to be performed within the space of 1 year from the making thereof, or whereby to charge any health care provider upon any guarantee, warranty, or assurance as to the results of any medical, surgical, or diagnostic procedure performed by any physician licensed under chapter 458, osteopath licensed under chapter 459, chiropractor licensed under chapter 460, podiatrist licensed under chapter 461, or dentist licensed under chapter 466, unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith or by some other person by him thereunto lawfully authorized.
History.—s. 10, Nov. 15, 1828; RS 1995; GS 2517; RGS 3872; CGL 5779; s. 10, ch. 75-9.

725.03 Newspaper subscription.—No person shall be liable to pay for any newspaper, periodical or other like matter, unless he shall subscribe for or order the same in writing.
History.—s. 1, ch. 379, 1851; RS 1997; GS 2519; RGS 3874; CGL 5781.

725.04 Voluntary payment; pleading.—When a suit is instituted by a party to a contract to recover a payment made pursuant to the contract and by the terms of the contract there was no enforceable obligation to make the payment or the making of the payment was excused, the defense of voluntary payment may not be interposed by the person receiving payment to defeat recovery of the payment.
History.—ss. 1, 2, ch. 21902, 1943; s. 1, ch. 29737, 1955; s. 41, ch. 67-254.
Note.—Former s. 52.24.

725.05 Satisfaction for less than amount due.—When the amount of any debt or obligation is liquidated, the parties may satisfy the debt by a written instrument other than by endorsement on a check for less than the full amount due.
History.—s. 1, ch. 71-94.

725.06 Construction contracts; limitation on indemnification.—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 it, or any guarantee of, or in connection with, any of them, between an owner of real property and an architect, engineer, general contractor, subcontractor, sub-subcontractor, or materialman, or between any combination thereof, wherein any party referred to herein obtains indemnification from liability for damages to persons or property caused in whole or in part by any act, omission, or default of that party arising from the contract or its performance shall be void and unenforceable unless:

(1) The contract contains a monetary limitation on the extent of the indemnification and shall be a part of the project specifications or bid documents, if any, or

(2) The person indemnified by the contract gives a specific consideration to the indemnitor for the indemnification that shall be provided for in his contract and section of the project specifications or bid documents, if any.
History.—s. 1, ch. 72-52.
Note.—Former s. 768.085.

725.07 Discrimination on basis of sex, marital status, or race forbidden.—

(1) No person, as defined in s. 1.01(3) shall discriminate against any person based on sex, marital status, or race in the areas of loaning money, granting credit, or providing equal pay for equal services performed.

(2) Any violation of this section may be brought in the courts of this state by the individual upon whom the discrimination has been perpetrated in a civil action, and said individual shall be entitled to collect, not only compensatory damages, but, in addition thereto, punitive damages and reasonable attorney fees for a violation of this section.
History.—ss. 1, 2, ch. 73-251.