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JAN 25 1991
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IN THE SUPREME COURT OF FLORIDA
CASE NO. 77,247

COX CABLE CORPORATION,

Petitioner,

vs.

GULF POWER COMPANY,

Respondent.

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

PETITIONER, COX CABLE CORPORATION'S BRIEF ON JURISDICTION

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STATEMENT OF THE FACTS AND CASE

This proceeding seeks to invoke this Court's discretionary review of the decision of the First District Court of Appeal in Gulf Power Company v. Cox Cable Corporation, 15 F.L.W. 2809 (Fla. 1st DCA November 15, 1990), which expressly and directly conflicts with a decision of another district court of appeal and of the supreme court on the same question of law. Art. V, § 3(b)(3), Fla. Const. That question of law is whether lesser minimum standards of enforceability apply to indemnity contracts in cases where the parties are jointly negligent than in cases where the indemnitee is solely negligent. Petitioner, Cox Cable Corporation ("Cox Cable"), will briefly set forth the facts necessary to this Court's determination of jurisdiction.

Cox Cable entered into a contract with Respondent, Gulf Power Company ("Gulf Power"), on January 1, 1978 which authorized Cox Cable to attach its cables, wires and appliances to Gulf Power's utility poles. (A-1,2)[1] Cox Cable hired Burnup & Sims Cable Com, Inc. ("Burnup & Sims"), a cable installation contractor to perform this work. (A-2)

Among the provisions of the Cox Cable-Gulf Power agreement was the following:

> Licensee [Cox Cable] shall indemnify, protect and save the Licensor [Gulf Power] forever harmless from and against [sic] all claims and demands for damage to property and injury or death [sic], including but not restricted to employees of licensees [sic] or employees of any contractor or subcontractor performing work for licensee . . . which may arise out of or be caused by erecting material [sic].[2] (A-2, n.1)

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[1] References to the Appendix, containing a conformed copy of the decision of the court below, will be designated (A-___), with citation to the appropriate page of the Appendix.

[2] The district court did not quote this provision with complete accuracy, but any deviation from the actual contract language does not appear material to the jurisdictional question under review.

The contract also provided that:

> Whereas complete indemnification of licensor is contemplated hereunder.
>
> * * *
>
> [A]ssent [to proposed attachment] by licensee [sic] shall not deprive licensee [sic] of full indemnification which is a prime condition of the [sic] undertaking.

(A-2, n.1) These provisions were apparently considered by the court below in determining the contractual indemnity issue.

On July 16, 1981, an employee of Burnup & Sims, Michael Lewis, was injured while installing the cable. Lewis filed suit against Gulf Power, which filed a third-party complaint against Cox Cable and Burnup & Sims. (A-2) Gulf Power's claim against Cox Cable sought contractual indemnification and alleged breach of contract and negligence on the part of Cox Cable. (A-2)

Gulf Power initially obtained summary judgment in its favor on Lewis' claim, but that ruling was reversed on appeal. (A-3) Gulf Power later settled Lewis' claim and proceeded on its third-party claim against Cox Cable. (A-3) Cox Cable moved for and obtained summary judgment in its favor on Gulf Power's claim. (A-4) The trial court found, in pertinent part, that the contractual indemnity language relied upon by Gulf Power was invalid and unenforceable under Florida law because it was not specific enough to indemnify Gulf Power against its own negligence. (A-4) That ruling was reversed by the court below. (A-4)

The appellate court stated its reasoning as follows:

> Contracts which purport to indemnify a party against its own wrongful acts are viewed with disfavor in Florida. 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. The degree of specificity required for

> indemnification in cases of joint negligence is, however, less stringent.

(A-7) (citations omitted) (emphasis supplied). Cox Cable seeks to invoke the discretionary jurisdiction of this Court to review that decision of the First District Court of Appeal.

SUMMARY OF ARGUMENT

The decision of the court below expressly and directly conflicts with this Court's decision in Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Co., 374 So.2d 487 (Fla. 1979), and decisions of other district courts of appeal, on the minimum standards which contractual indemnity language must meet in order to be enforced in cases of joint negligence by the indemnitor and indemnitee. Since this Court's decision in Charles Poe Masonry, the law in Florida has very clearly been that the same strict standards apply whether the indemnitee is solely negligent or the parties are jointly negligent; namely, that an intent to protect the indemnitee from its own wrongful acts must be clearly and unequivocally expressed in the agreement. In this case, the appellate court has ruled that a less stringent standard applies in cases of joint negligence.

The Court should accept jurisdiction under article V, section 3(b)(3), Florida Constitution, to resolve this conflict. As a result of the lower court's ruling, Florida law is no longer uniform in its approach to interpretation of indemnity agreements. Because these agreements often play an important role in common commercial transactions, the law in Florida should be clarified on the minimum expression of intent necessary to ensure their enforceability.

For these reasons, Cox Cable respectfully urges the Court to accept jurisdiction in this case.

ARGUMENT

THE DECISION OF THE COURT BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE SUPREME COURT AND WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL ON THE MINIMUM STANDARDS FOR ENFORCEMENT OF INDEMNITY CONTRACTS IN CASES OF JOINT NEGLIGENCE

The First District Court of Appeal has reached a conclusion on the minimum degree of specificity required for contractual indemnification in cases of joint negligence which is contrary to prior case law on that issue. The First District, in the decision under review, expressly determined that the degree of specificity required for indemnification in cases of joint negligence is less stringent than in cases where the indemnitee is solely negligent. Express and direct conflict exists between that decision and prior decisions of this Court and other district courts of appeal which have applied the same strict standards in both situations. The Court should accept jurisdiction to resolve this conflict.

This Court's 'conflict' jurisdiction may be exercised where a decision of a district court of appeal expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law. Art. V, § 3(b)(3), Fla. Const.; see generally, The Florida Star v. B.J.F., 530 So.2d 286 (Fla. 1988). This authority embodies the concept that the Court will function as a supervisory body in the state judicial system, exercising its appellate power to ensure the preservation of uniformity of principle and practice among the courts of the state. Jenkins v. State, 385 So.2d 1356, 1357-58 (Fla. 1980) (quoting Ansin v. Thurston, 101 So.2d 808 (Fla. 1958)). In reviewing this constitutional provision in Jenkins, the Court looked to the dictionary definition of the term "express" and found it to mean "to represent in words"; "to give expression to"; and "expressly" to mean "in an express manner." Id. at 1359. In Ford Motor Co. v. Kikis, 401 So.2d 1341 (Fla. 1981), this Court ruled that it is not necessary for a district court opinion

to identify a direct conflict of decisions, where the legal principles underlying its decision are set forth:

> This discussion, of the legal principles which the court applied supplies a sufficient basis for a petition for conflict review. It is not necessary that a district court explicitly identify conflicting district court or supreme court decisions in its opinion in order to create an "express" conflict under section 3(b)(3).

Id. at 1342 (footnote omitted). Under these principles, jurisdiction exists for this Court to review the decision of the court below.

In University Plaza Shopping Center, Inc. v. Stewart, 272 So.2d 507 (Fla. 1973), this Court adopted the following standard for interpretation of indemnity agreements which are alleged to require a party to be indemnified for the results of its own negligent acts:

> [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). 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). This Court has expressly extended those standards to cases where the indemnitor and indemnitee are jointly liable:

> 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.

Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Co., 374 So.2d 487, 489-90 (Fla. 1979).

In Charles Poe Masonry, the Court distinguished the Fourth District's decision in Leonard L. Farber Co. v. Jaksch, 335 So.2d 847 (Fla. 4th DCA 1976), which also involved joint negligence, where the agreement 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 determined that the "in part" language manifested a clear and unequivocal intent to indemnify the indemnitee in cases of joint negligence. See also, Marino v. Weiner, 415 So.2d 149, 151 (Fla. 4th DCA 1982). The only other type of language held to meet that standard in cases of joint negligence has involved all-encompassing terms which except only the sole negligence of the indemnitee. See, e.g., Mitchell Maintenance Systems v. State, Department of Transportation, 442 So.2d 276, 278 (Fla. 4th DCA 1983). In Leadership Housing Systems of Florida, Inc. v. T&S Electric, Inc., 384 So.2d 733 (Fla. 4th DCA 1980), a case involving joint negligence, the court held that 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 "clearly and expressly stated" standard of Charles Poe Masonry. Id. at 734.

The decision of the court below expressly and directly conflicts with the foregoing decisions on the correct standard to be applied in cases of joint negligence. While this Court stated in Charles Poe Masonry that the same standards apply in cases of joint negligence as in cases where the indemnitee is solely negligent, the court below stated that a less stringent standard applies. Moreover, the court below upheld language that

is contrary to the reported decisions upholding indemnity language in cases of joint negligence.

This Court should accept jurisdiction to resolve this conflict. As indemnity clauses become increasingly commonplace, it is important that consistent rules be applied which govern their enforceability. Only through a uniform rule of law can parties to such agreements comfortably know and assess the scope of their undertaking.

CONCLUSION

Jurisdiction should be accepted by this Court to resolve the express and direct conflict between the decision of the court below and the decisions of this Court and other district courts of appeal cited herein. Important aspects of the enforceability of indemnity agreements in cases of joint negligence require resolution by this Court. Cox Cable respectfully urges the Court to accept jurisdiction in this case and provide guidance on that point of law.

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 25th day of January, 1991.

Mark E. Holcomb
ATTORNEY

APPENDIX

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

GULF POWER COMPANY, a foreign company,

Appellant,

v.

COX CABLE CORPORATION,

Appellee.

* NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

* CASE NO. 90-589

Opinion filed November 15, 1990.

An appeal from the Circuit Court for Escambia County; Lacey Collier, Judge.

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, J.

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]

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[1] The contract between Gulf (licensor) and Cox (licensee) contains the following sections concerning indemnification:

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 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

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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.

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. Grem, 15 F.L.W. D2323 (Fla. 1st DCA, Sept. 13, 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 Wale, 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. Haly, 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.

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

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[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).

experienced in working with and around energized electrical conductors was dispositive. We feel that this was too narrow an interpretation. In construing a provision 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).

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.

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[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.

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 American, 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 of America, Inc. which this court held was sufficient to sustain indemnification in cases where the parties are jointly liable.

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 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 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.

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.