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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

GULF POWER COMPANY,
a foreign company,

Third-Party Plaintiff, CASE NO. 84-2818

77,247

VS.

COX CABLE CORPORATION,

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

VS.

BURNUP & SIMS CABLE COMPANY, INC.

Fourth-Party Defendant.

RESPONDENT, GULF POWER COMPANY'S BRIEF
ON JURISDICTION

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INTRODUCTION

References to the conformed copy contained in the petitioner's brief will be designated (A -___), with citation to the appropriate page of the appendix. The parties will be designated by their proper names or as indicated in the respondent's brief.

STATEMENT OF THE FACTS AND CASE

The First District Court of Appeal has set forth, in the decision under review, the pertinent facts of this case. Gulf Power Company v. Cox Cable Corporation, 15 F.L.W., 2809 (Fla. 1st DCA, Nov 15, 1990). The decision of the district court of appeal in the case before this court, does not expressly or directly conflict with the decision of other district courts of appeal or of the Supreme Court on the question of law presented. The question of law is whether the contractual language found in the agreement entered into between Gulf Power Company and Cox Cable Corporation constitutes, as found by the district court of appeal, an agreement to indemnify Gulf Power Company for damages which resulted from the possible joint negligence of Cox Cable Corporation and Gulf Power Company.

Gulf Power Company ("Gulf") entered into a contract with Cox Cable Corporation ("Cox") on January 1, 1978, which granted a license to Cox to attach its property to Gulf's utility poles. Included in this agreement were several paragraphs which dealt with the issue of Cox's duty to indemnify Gulf for any damages that may arise from Cox's actions in attaching its property to Gulf's poles. These paragraphs include the following:

"Whereas complete indemnification of licensor is contemplated hereunder...(A-2, N.1).

... [N]ow and at all times the assent by licensor to that requested by licensee shall not deprive licensee of the full indemnification which is the prime condition of this undertaking. (A-2, N.1).

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 ... which may arise out of or caused by the erection, maintenance, presence, use or removal of said attachment 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... (A-2, N.1).[1]

On July 16, 1981, Michael Lewis, an employee of Burnup & Sims, the sub-contractor of Cox Cable, was injured while installing Cox's equipment on Gulf's poles. Thereafter, Lewis filed suit against Gulf which in turn filed suit against Cox and Burnup & Sims, Inc. Gulf sought recovery, inter alia, on the theory of contractual indemnity.

Gulf sought and obtained summary judgment in the action filed by Lewis at the trial level, but that judgment was reversed on appeal. Following the reversal of the trial court's decision,

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[1]This paragraph was not quoted completely in the First District Court of Appeal's opinion. The contractual language does make a material difference to the jurisdictional question under review.

Gulf settled Lewis' claim. Gulf then sought to prosecute its third-party claim against Cox. Cox in turn moved for and obtained summary judgment at the trial level. The trial court found that the contractual indemnity language relied upon by Gulf was invalid under Florida law because it was not specific enough to indemnify Gulf Power against its own negligence. However, in the district court's opinion, the contract was sufficiently specific to require Cox to indemnify Gulf in matters which resulted from the joint negligence of the parties to the agreement. The First District Court of Appeal correctly identified the current state of the law when it stated:

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

(A-7) (Citations included) (emphasis supplied).

The petitioner, Cox Cable, now seeks to invoke the discretionary jurisdiction of this court based on the alleged conflicts of the District Court opinion below with Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental and Equipment Company, 374 So. 2d 487 (Fla. 1979).

SUMMARY OF THE ARGUMENT

The decision of the district court below does not expressly and directly conflict with this Court's decision in Charles Poe Masonry. The case at bar does not involve the same controlling facts as Charles Poe Masonry, and as such does not present a rule of law which directly conflicts with a rule of law previously announced by another appellate court of this state. Thus this Court should deny the petition for discretionary review.

The First District Court of Appeal correctly found the contractual indemnification language contained in the agreement between Gulf and Cox Cable sufficiently specific and unambiguous to require indemnificaton for liablity arising out of the joint negligence of the parties to the contract. The district court's decision is not only consistent with Charles Poe Masonry, but also with United Parcel Service of America, v. Enforcement Security Corporation, 525 So.2d 424 (Fla. 1st DCA) rev. den. 525 So.2d 878 (Fla. 1987), Marino v. Weiner, 415 So.2d 149 (Fla. 4th DCA 1982), and Mitchell Maintenance Systems v. Department of Transportation, 442 So.2d 276 (Fla. 4th DCA 1983). The district court of appeal has correctly held that the language found in Gulf, is so similar to that found in the line of cases mentioned above that it requires indemnification for the joint negligence of Cox and Gulf. As the case at bar does not directly and expressly conflict with Charles Poe Masonry, this Court should deny the petition for discretionary jurisdiction.

ARGUMENT

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH CHARLES POE MASONRY INC. V. SPRING LOCK SCAFFOLDING RENTAL AND EQUIPMENT COMPANY, 374 SO.2d 47 (FLA 1979).

The decision of the First District Court of Appeal in Gulf Power Company v. Cox Cable Corporation, does not present an express and direct conflict with prior decisions of this Court or decisions of the Fourth District Court of Appeal. This court should deny the petitioner's attempt to invoke its discretionary jurisdiction.

The standard applied to petitions for discretionary review requires that a direct and express conflict between the decision which is the subject of the petition and decisions of the supreme court or another district court of appeal which have dealt with the same question of law. Art. V, § 3(b)(3), Fla. Const. It is the primary function of the Supreme Court in review of conflicting decisions to stabilize the law by review of the decisions which form patently irreconcilable precedents. Florida Power & Light Co v. Bell, 113 So.2d 697 (Fla. 1959). However, for an express and direct conflict with a prior decision to exist, it must be shown that the allegedly conflicting cases are "on all fours" factually in all material respects. Id. at 698 citing Ansin v. Thurston, 101 So.2d 808 (Fla. 1958). See also Jenkins v. State, 385 So.2d 1356 (Fla. 1980). In Florida Power & Light Co., the court stated that it could exercise its discretionary jurisdiction to review decisions which were alleged to conflict, only when

there has been an announcement of a rule of law which conflicts with the rule previously announced by the Supreme Court or another district court of appeal or where the lower court applies a rule of law to produce a different result in a case involving substantially the same controlling facts as the prior case disposed of by the previous appellate court. 113 So.2d 698. Also in Florida Star v. B.J.F., Justice Barkett correctly stated in dicta

> "We have operated within the intent of the constitution's framers, as we perceive it, in refusing to exercise our discretion where the opinion below establishes no point of law contrary to the decision of this Court or another District Court."

530 So.2d 286, 289 (Fla. 1988).

To determine if an express and direct conflict exists, it is necessary to review the contractual language interpreted by the Courts in Charles Poe Masonry, and compare it with the language found in United Parcel Service, and the language in the instant case. In Charles Poe Masonry, the contractual language in pertinent part stated:

> The lessee assumes all responsibility for the claims asserted by any person whatsoever growing out of the erection and maintenance, use or possession of said equipment and agrees to hold the company harmless from all such claims."

374 So.2d 489

This court held that such language did not sufficiently disclose the intention to indemnify Spring Lock for its affirmative misconduct. Id. at 489. In Leadership Housing Systems of Florida, Inc. v. T & S Electric, Inc., the Fourth District Court of Appeal found fatally vague a contract which included the provision:

> "(a) contractor shall forever indemnify ... from... loss whatsoever due to or arising out of the claim to arise out of the performance by contractor of the contract and/or doing or failing to do anything by the contractor."

384 So.2d 733, 734 (Fla. 4th DCA 1980).

The contractual language found in the contract between Gulf and Cox Cable is materially different from that found in Charles Poe Masonry. The contract in the instant case provides in pertinent part:

> Whereas complete indemnification of licensor is contemplated hereunder... (A-2, N.1).
>
> ... [N]ow and at all times the assent by licensor to that requested by licensee shall not deprive licensor of the full indemnification which is the prime condition of this undertaking. (A-2, N.1).
>
> Licensee shall indemnify, protect and save the licensor forever harmless from and against any and all claims...which may arise out of or caused by the erection, maintenance, presence, use or removal of said attachment 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... (A-3)

Thus, it becomes clear that the decision of the First District Court of Appeal is not "on all fours" with the factual situation found in Charles Poe Masonry. The district court has correctly applied the current rule of law to the specific contractual language found in the case at bar. In United Parcel Service, the Court reviewed an indemnity clause which provided as follows:

> ...Enforcement Security Corp. agrees to be responsible for and to indemnify and hold harmless United Parcel Service, Inc.,...from any claims,...of any kind or nature whatsoever arising or alleged to have arisen in part out of or in consequence of the work hereunder

> which it may incur or sustain by reason of any act or admission of vendor or any employee of vendor...except from and against all losses, damages, expense etc., as set forth herein-above, arising out of the sole negligence of UPS.

525 So.2d 425. (Emphasis added).

The district court of appeal held this language presented a clear and unequivocal intent of the parties to indemnify the indemnitee for any damages arising out of the joint negligence of UPS and ESC.

In United Parcel Service, ESC sought to invoke this court's discretionary power of review on the theory that the First District Court of Appeal's decision was in conflict with Charles Poe Masonry, and Leadership Housing. Review was properly denied by this Court. Enforcement Security Corp v. United Parcel Service of America, Inc., 525 So.2d 878 (Fla. 1987). (denying discretionary review.)

In the instant case, the First District Court of Appeal has held that the language contained in the indemnity provisions of the contract executed by Gulf and Cox sufficiently clear to require indemnification in cases of joint negligence. The district court rightly held that the contractual language was consistent with the current rule of law.

CONCLUSION

The petitioner failed to demonstrate the existence of a direct and express conflict between the decision of the First District Court of Appeal in this matter and decisions of this court or other district courts of appeal. The rule of law formerly expressed by this court has been correctly applied in the case at bar. Therefore, since no conflict exists, this court should deny the petitioner's request that its discretionary power to review the decision of the lower court be denied.

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I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to Mark E. Holcomb, Esquire, Huey, Guilday, Kuersteiner & Tucker, P.A., Post Office Box 1794, Tallahassee, Florida 32302, by U.S. Mail this the 15th day of February, 1991.

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