OA 5-6-98.

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IN THE SUPREME COURT OF FLORIDA

DADE COUNTY SCHOOL BOARD,

Appellants,

Sup. Ct Case No. 91,767
3rd DCA Case Nos. 95-0534
& 94-3011

vs.

RADIO STATION WQBA, CITY OF MIAMI, SUSQUEHANNA PFALTZGRAFF and THREE KINGS PARADE, INC.

Appellees.
_____/

BRIEF OF APPELLANT DADE COUNTY SCHOOL BOARD ON THE MERITS

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INTRODUCTION

This appeal is from a decision from the Third District Court of Appeal affirming final judgment in favor of Appellee on the basis of equitable subrogation. The Appellant, DADE COUNTY SCHOOL BOARD, will be referred to as "SCHOOL BOARD" and the Appellees collectively as "THREE KINGS."

The following symbols will be used for reference purposes:

"R" for reference to the Record on Appeal.

"TR" for reference to the trial transcript.

"Ex." for reference to the exhibits admitted into evidence at trial.

All emphasis is added unless indicated to the contrary.

BASIS OF JURISDICTION

This appeal is brought pursuant to Florida Rules of Appellate Procedure 9.120. Appellant, SCHOOL BOARD sought review of the decision of the Third District Court of Appeal on the grounds that the decision is in express and direct conflict with a decision of another district court of appeal or the Supreme Court on the same question of law, specifically, Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corporation, 537 So.2d 561 (Fla. 1988) and Dober v. Worrell, 401 So.2d 1322 (Fla. 1981).

STATEMENT OF THE FACTS AND THE CASE

This is an appeal from a final judgment entered in the above consolidated action which arises out of an accident on January 7, 1990, during the Three Kings Day Parade. The parade was sponsored by RADIO STATION WQBA, CITY OF MIAMI, SUSQUEHANNA PFALTZGRAFF and THREE KINGS PARADE INC. ("THREE KINGS").

The parade was run by Radio Station WQBA as a promotional event and organized by Julio Mendez, an employee of the station. (R. 314, 326). There were actually two different types of participants associated with the parade: marching bands, such as Miami High School, that actually performed in the parade and also private and community supporters who sponsored the parade through various advertising packages. The Radio Station required supporters to sign a "Participation Agreement," which was intended to apply to the method of advertising selected by the entity. (TR. 328).

As part of its adult education department, the SCHOOL BOARD operates the Office of Vocational, Adult, Career and Community Education (OVACCE). John Moffi was the OVACCE employee in charge of the advertising in order to recruit students for the adult education program.

In late 1989, a WQBA employee, Lourdes Peters, contacted John Moffi, of the Office of Vocational, Adult, Career and Community Education (OVACCE) of Dade County Public Schools, to sell him an

advertising package for the parade. (R. 2734 - 2965). Moffi, on behalf of OVACCE, purchased an advertising package which included radio promotional announcements and a banner for OVACCE which would be carried in the parade by a high school marching band. (Moffi Depo. p.126). THREE KINGS, as parade sponsors, selected the Miami High marching band to carry OVACCE's banner. (R. 2971, 2789). OVACCE did not specifically request the marching band to be selected. (R. 2784 - 87). OVACCE has no relationship with Miami Senior High School (R. 2795).

When Moffi purchased an advertising package, he was sent a Participation Agreement to sponsor the Miami High marching band. (Plaintiff's Ex. 6). The Participation Agreement contained parade instructions on the top half of the page and towards the end, stated:

> Furthermore, we agree to defend and hold harmless the Parade Organizing Committee, WQBA Radio station, and the City of Miami from any claim resulting from our participation and actions during the Three Kings' Day Parade.

When John Moffi signed this form on behalf of OVACEE, the form was silent as to the marching band which would be selected by THREE KINGS. This marching band was later inserted on the form by Lourdes Peters. (Moffi Depo. p. 213).

Unknown to OVACEE, THREE KINGS had enticed Miami High's band directors with prize money in excess of one thousand dollars. (TR. 330). Miami High was never provided with any guidelines or limitations as to what the band could perform. (TR. 910). After

being told to "do something special" by the parade sponsors, the band directors decided to have the majorettes use fire batons, similar to other band competitions where they had used flaming batons. (TR. 974 - 976, 901). As the majorettes neared the judging area, one of the student helpers, Chris Lozano, a sister of one of the majorettes, dropped a can of flammable liquid which was used to ignite the batons. (TR. 421, 441). When a fire began to flare, Alfredo Sans, a student bystander, without warning, kicked the can away causing it to land in the area occupied by spectators. (TR. 926 - 927). As a result, several persons in the stands were burned. (R. 1316, 1318, 120, 1322, 6070, 6199; TR. 294).

The injured spectators individually[1] brought suit in Dade County Circuit Court against the SCHOOL BOARD and THREE KINGS, as well as the two students involved and the manufacturer of the flaming batons. (R. 2- 29, 1421 - 1472, 2692 - 2702). The first complaint was filed by Mayda Gonzalez and Lazara Noda in Case No. 91-13341 CA 26 (R. 2 - 29). Subsequently, a lawsuit filed by Ricardo Gonzalez in Case No. 91-32702 CA 26 was consolidated with the Mayda Gonzalez case. (R. 1555). Each of these Complaints affirmatively show that there was never a claim against THREE KINGS

[1] The lawsuits were commenced individually, with the exception of Mayda Gonzalez and Lazara Noda, and were later consolidated.

for any vicarious liability stemming from the acts of the SCHOOL BOARD.[2]

In the interim, both THREE KINGS and the SCHOOL BOARD, separately settled with each of the injured spectators. The SCHOOL BOARD settled with Mayda Gonzalez for $350,000.00, Ricardo Gonzalez for $225,000.00 and Lazara Noda for $25,000.00 (Defendant's Trial Ex. C & D). THREE KINGS likewise settled with Mayda Gonzalez for $1,500,000.00, Ricardo Gonzalez for $400,000.00, and Lazara Noda for $90,000.00. (R. 6062 - 6070). In addition, THREE KINGS settled presuit with another claimant, Sergio Perez, in the amount of $25,000.00 (R. 6062 - 6070). It is undisputed that THREE KINGS included the SCHOOL BOARD as a party on only one release, which was the release involving Sergio Perez's injuries.[3]

In Case Nos. 81-13341 and 91-32702, THREE KINGS instituted cross-claims and/or intervenors' complaints against the SCHOOL BOARD arising out of the personal injury lawsuits brought by parade spectators, Mayda Gonzalez, Lazara Noda, and Ricardo Gonzalez, yet failed to provide any written notice of their indemnity claims prior to bringing suit. In the other companion case, Case No. 92-

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[2] The Complaints in the underlying cases allege that THREE KINGS was sued for failing to exercise reasonable care to supervise parade participants, negligence per se, and failure to warn. (R. 2-29, 491 - 522, 1421 - 1472).

[3] In moving for judgment on the verdict post-trial, THREE KINGS included another claimant, Martinez, with whom they settled with for $25,000. (R. 6062 - 6070). However, at no time during pretrial proceedings or during trial did THREE KINGS plead or attempt to seek partial indemnification as to this claimant.

16488, THREE KINGS sued the SCHOOL BOARD for indemnity evolving out of THREE KINGS' settlement with spectator, Sergio Perez. Only in that lawsuit, did THREE KINGS attach to the complaint a copy of a notice letter regarding this claim only, addressed to the SCHOOL BOARD and the Department of Insurance dated November 18, 1991. (R. 2700 - 2702, 6104 - 6110).

THREE KINGS brought suit in this consolidated case, either by direct actions or cross-claims, against DADE COUNTY SCHOOL BOARD on very specific theories of liability, namely contractual indemnity and common law indemnification. (R. 245 - 288). In its claim for common law indemnification, THREE KINGS contended that they were wholly without fault and that their liability, if any, was derivative, technical and/or vicarious. In the claim for contractual indemnity, THREE KINGS maintained they were seeking indemnity under the Participation Agreement only.

At a hearing held on June 8, 1993 before Judge Harvey Goldstein, on cross motions for summary judgment filed by the SCHOOL BOARD and THREE KINGS (R. 4954 - 4996, 245-288), the SCHOOL BOARD argued that Mr. Moffi had absolutely no connection with Miami High's marching band and that the Participation Agreement signed by Mr. Moffi concerned <u>parade advertising</u> only. Further, the SCHOOL BOARD argued based upon the Affidavit of Johnnie Brown, Esq., (R. 4904 - 4907) that the Participation Agreement was invalid as signed by John Moffi, because it was never submitted to the SCHOOL BOARD's Attorney's Office for review prior to execution as required by SCHOOL BOARD policy and that Mr. Moffi had no authority to bind the

SCHOOL BOARD in any matter involving indemnification arising out of a claim for personal injuries.[4]

In its Motion for Summary Judgment, the SCHOOL BOARD also argued that THREE KINGS was not entitled to indemnification under the Participation Agreement for their own acts of negligence citing the line of cases commencing with Charles Poe Masonry v. Spring Lock Scaffolding, 373 So.2d 487 (Fla. 1979). On this point, the trial judge agreed and initially granted summary judgment in favor of the SCHOOL BOARD. (R. 4944 - 4945, 1119 - 1120).

Dissatisfied with the trial court's ruling, THREE KINGS filed a Motion for Rehearing (R. 5057-5062). They argued that they were not seeking indemnification pursuant from their own negligence, but rather partial indemnification under the Participation Agreement. Judge Goldstein granted the rehearing and entered partial summary judgment in favor of THREE KINGS for contractual indemnification for that portion of damages paid by THREE KINGS to the spectators injured during the Three Kings Day Parade, which were attributable to the actions or inactions of the SCHOOL BOARD. (R. 5055 - 5056). According to this court order of October 22, 1993, a trial would be held to apportion the respective percentages of fault attributable to THREE KINGS and the SCHOOL BOARD. (R. 5055 - 5056).

On October 29, 1993, the SCHOOL BOARD filed its own Motion for Rehearing and/or Motion for Reconsideration of the partial summary

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[4] In addition, the Participation Agreement was never signed by a representative of THREE KINGS.

judgment entered in favor of THREE KINGS. (R. 1199 - 1210). By the time the hearing was held on the Motion for Rehearing, Judge Gisela Cardone was the presiding judge and as a successor judge, refused to vacate any rulings of the previous sitting judge and therefore denied the SCHOOL BOARD's Motion for Rehearing. (R. 5513).

These consolidated lawsuits were tried before Judge Marshall Ader, who was never previously assigned to any of these matters, beginning on July 19, 1994 and ending with a jury verdict on July 27, 1994. (R. 5732 - 5735). At trial, the SCHOOL BOARD admitted it owed a duty to supervise the majorettes but denied that it caused any damages as claimed by THREE KINGS for indemnity.[5] At trial, THREE KINGS chose only to present evidence of who was at fault in causing the fire, and not the elements of indemnification. Since the only claims presented were for indemnification, the SCHOOL BOARD defended the case by showing that there was no basis for indemnification. Specifically, the SCHOOL BOARD offered as evidence the underlying complaints which asserted direct liability claims against THREE KINGS and the also the releases prepared by THREE KINGS, which again pertained only to direct liability claims against THREE KINGS and not on account of any vicarious liability for the acts of the SCHOOL BOARD.

At the close of the Plaintiff's case, as well as the close of all the evidence, the SCHOOL BOARD moved for a directed verdict arguing that THREE KINGS failed to prove a prima facie case for

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[5] The SCHOOL BOARD strenuously objected to the claim for contractual indemnity because THREE KINGS were never sued by the underlying claimants for vicarious liability.

contractual indemnification. (TR. 750 - 759). First, THREE KINGS failed to present any evidence that they had settled any of the claims for vicarious liability or on account of the negligence of the SCHOOL BOARD. Specifically, THREE KINGS presented absolutely no testimony to explain the contractual indemnity clause, to explain the basis of the claims asserted against them by the spectators, or to explain the settlement agreements, and in particular the releases themselves.[6] The motion was deferred and the case was submitted to the jury for its determination.

In response to question number 2 of the verdict form, the jury found that there was no special relationship between THREE KINGS and the SCHOOL BOARD whereby THREE KINGS was technically, derivatively, or vicariously responsible for the negligence of the SCHOOL BOARD. (R. 5734 - 5735). The jury found in response to question 3 that there was no negligence on the part of THREE KINGS, and found the SCHOOL BOARD responsible for 90% of the negligence and Alfredo Sans for 10%. (TR. 5734 - 5735).

Following rendition of the jury verdict, both sides moved for entry of judgment in their favor.[7] (R. 5983 - 5992, 5993 - 6055). The SCHOOL BOARD argued that since the jury found there was no special relationship, there was no basis for common law indemnity. Further, as to the contractual indemnification claim, since the

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[6] In addition, the SCHOOL BOARD argued that the Plaintiffs had failed to comply with the notice requirements contained in Florida Statute § 768.28.

[7] Interestingly, the trial judge questioned what the verdict actually meant. (R. 1116)

jury found no vicarious, technical or derivative liability on the part of THREE KINGS, which is a necessary element of a contractual indemnity claim also, the SCHOOL BOARD argued judgment should be entered in its favor. The SCHOOL BOARD also argued that final judgment in favor of the SCHOOL BOARD was supported by the fact that all underlying claims made against THREE KINGS were solely for the direct negligence of THREE KINGS. Finally, according to the SCHOOL BOARD, final judgment in its favor was mandated by the fact that the settlement agreements with the injured spectators reflected settlement only of the claims made against THREE KINGS for their own negligence.

By contrast, THREE KINGS argued that since the jury found that the SCHOOL BOARD was liable for the acts of Alfredo Sans, it was 100% responsible for the incident, and therefore the verdict meant that THREE KINGS discharged and paid a loss which ought to be borne by the SCHOOL BOARD. (R. 6062 - 6070).

Other post-trial motions filed by the SCHOOL BOARD included a Motion in Accordance with Motion for Directed Verdict (R. 5979 - 5992), and a Motion for New Trial. (R. 5975 - 5982). Additionally, the SCHOOL BOARD filed a Motion for Entry of Final Judgment for Non-Compliance with Florida Statute §768.28. (R. 5993 - 6055).

Subsequently, the Court entered an order dated November 23, 1994 denying these post-trial motions and entering Final Judgment

in favor of THREE KINGS for $2,035,000.00 plus interest on the judgment at the rate of 12% per annum. (R. 6252)[8]

On appeal to the Third District Court of Appeal, the SCHOOL BOARD raised five points, including that the judgment should have been entered in its favor under both the common law and the contractual indemnification claims, failure to comply with §768.28 notice requirements, improper jury selection and improper language in the final judgment which permitted execution against a sovereign entity. THREE KINGS cross-appealed that portion of the post-trial order which denied them prejudgment interest.

On appeal, the Third District Court of Appeal affirmed judgment in favor of THREE KINGS, but on a new ground not raised by THREE KINGS until the post-trial phase of this case. (A. 1) Specifically, the Third District determined that THREE KINGS was entitled to equitable subrogation, although that theory was never pled nor presented to a jury for its determination. While the Third District Court of Appeal acknowledged that equitable subrogation was never pled in the trial court, it claimed that the record nonetheless supported a cause of action for equitable subrogation, citing to West American Insurance Co. v. Yellow Cab Co., 495 So.2d 204 (Fla 5th DCA 1986) and Transport Int'l Pool, Inc. v. Pat Salmon & Sons of Florida, Inc., 609 So.2d 658 (Fla. 4th DCA 1992). The Third District Court of Appeal correctly noted that common law indemnity was not available because of the jury's

[8] Unfortunately, the Final Judgment itself does not specify the basis for the trial court's decision that THREE KINGS were entitled to judgment in their favor.

express finding of no special relationship between the parties. Interestingly, the majority opinion issued by the Third District Court of Appeal is silent on the issue of contractual indemnity.

Thereafter, the SCHOOL BOARD's motion for rehearing, rehearing en banc, and/or motion to certify the decision was denied by the Third District on October 1, 1997 (A. 2). Judge Cope, however, issued a revised 20 page dissenting opinion. (A. 3). This appeal ensued by the filing of a timely Notice to Invoke Discretionary Jurisdiction pursuant to Fla.R.App.P. 9.120 (A. 4). On January 22, 1998, this Honorable Court accepted jurisdiction of this cause. (A. 5).

POINT ON APPEAL

WHETHER A JUDGMENT CAN BE SUSTAINED ON A THEORY WHICH WAS NEVER EXPRESSLY TRIED BY THE PARTIES AND WHICH WAS RAISED FOR THE FIRST TIME POST-TRIAL?

WHETHER THE EVIDENCE ADDUCED AT TRIAL SUPPORTS A CLAIM FOR EQUITABLE SUBROGATION?

WHETHER JUDGMENT SHOULD HAVE BEEN ENTERED IN FAVOR OF THE SCHOOL BOARD WHERE THERE WAS NO BASIS FOR COMMON LAW AND/OR CONTRACTUAL INDEMNIFICATION?

WHETHER JUDGMENT SHOULD HAVE BEEN ENTERED FOR THE SCHOOL BOARD DUE TO THE FAILURE OF THREE KINGS TO COMPLY WITH THE NOTICE OF CLAIM PROVISIONS OF FLORIDA STATUTE § 768.28(6)(a)?

SUMMARY OF THE ARGUMENT

The decision of the Third District Court of Appeal affirming judgment in favor of THREE KINGS is erroneous and must be reversed.

The Third District Court of Appeal improperly affirmed judgment in favor of THREE KINGS on the grounds of equitable subrogation which was never raised nor proved at trial. This Honorable Court has consistently recognized that a party is entitled to be apprised of the nature of the allegations against it so that it can prepare an appropriate defense. In this case, THREE KINGS sued the SCHOOL BOARD solely for common law and contractual indemnification and never raised the theory of equitable subrogation until the post-trial phase of this case. Due process requires proper notice of the nature of an adversary's claim and the opportunity to defend. Had appropriate notice been given to the SCHOOL BOARD that THREE KINGS' claim was based upon equitable subrogation, the SCHOOL BOARD would have raised its total and complete defenses of release, as well as accord and satisfaction. Furthermore, the decision of the Third District Court of Appeal affirming on the grounds of equitable subrogation, without requiring a remand for THREE KINGS to plead and prove such a claim, is in direct violation of the law of this State.

Not only was equitable subrogation improperly invoked by the Third District Court of Appeal, but the theory has no application to this case where THREE KINGS failed to prove a case to support a claim for equitable subrogation. Specifically, THREE KINGS failed

to prove that they discharged a debt in its entirety that was owed by the SCHOOL BOARD in order to be entitled to any relief under equitable subrogation. Instead, THREE KINGS simply proceeded to trial to prove who was at fault in causing the subject fire and not whether they paid any claims on behalf of the SCHOOL BOARD. Since the record fails to support the application of equitable subrogation, the decision of the Third District must be reversed.

Additionally, the decision of the Third District Court of Appeal is erroneous since there was no basis for common law and/or contractual indemnification. In its verdict, the jury expressly found there was no vicarious, derivative, or technical relationship between THREE KINGS and the SCHOOL BOARD to give rise to a claim for indemnity. Further, since THREE KINGS never settled any claims for vicarious liability, they are precluded from recovery for indemnification. The Complaints filed by the injured spectators and the releases drafted by THREE KINGS conclusively demonstrate that THREE KINGS simply settled its own claims for direct negligence on their own part and not on behalf of the SCHOOL BOARD.

Moreover, the indemnification provision as contained within the Participation Agreement does not obligate a sponsor to indemnify for the acts of a parade participant. Therefore it is inapplicable to require the SCHOOL BOARD to be liable for the actions of the marching band. The undisputed testimony and circumstances thereto, demonstrated that the purpose of the indemnification provision in the Participation Agreement pertained

only to the method of advertising and does not cover the acts of a parade participant.

Furthermore, even if the indemnification provision was applicable, it is not enforceable against the SCHOOL BOARD because John Moffi, of OVACCE, lacked the requisite authority to bind the SCHOOL BOARD in contracts of indemnification. His uncontradicted testimony, combined with the affidavit of Johnnie Brown, Assistant School Board Attorney, conclusively demonstrated that Moffi was not authorized to sign and/or bind the SCHOOL BOARD to contracts of indemnity. Only the SCHOOL BOARD, as a governmental entity under Florida law, possesses that power. As a result, judgment in favor of THREE KINGS was improper.

Finally, judgment was in favor of the SCHOOL BOARD was mandated in light of THREE KINGS' failure to comply with the notice provisions of Florida Statute 768.28(6)(a). Not only was proper notice of the claim never given to the SCHOOL BOARD as required by the sovereign immunity statute, but notice was never proved at the time of trial. Since § 768.28(6)(a) is to be strictly construed, the failure to comply with this statute was fatal to THREE KINGS' case. This deficiency is even more apparent in light of the decision of the Third District Court of Appeal because no notice of the claim for equitable subrogation was ever given to the SCHOOL BOARD before judgment was entered.

Accordingly, judgment in favor of THREE KINGS is improper and must be reversed.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IS CONTRARY TO FLORIDA LAW BECAUSE IT IMPROPERLY AFFIRMS A JUDGMENT IN FAVOR OF A PARTY UNDER A THEORY NEVER PLED NOR ARGUED UNTIL AFTER RENDITION OF THE JURY VERDICT

The decision of the Third District Court of Appeal affirming judgment in favor of THREE KINGS on the basis of equitable subrogation, where that theory was never pled or tried to a jury, is in violation of Florida law and must be quashed. Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corporation, 537 So.2d 561 (Fla. 1988) and Dober v. Worrell, 401 So.2d 1322 (Fla. 1981).

This Court has expressly recognized that due process and Florida civil practice dictate that parties be given proper notice of the nature of an opponent's claim in order to prepare an appropriate defense. Moreover, this Court has held that recovery is precluded on an unpled claim, despite evidence being presented at trial which may actually support that claim. The opinion of the Third District Court of Appeal is in direct contravention of these elementary principles of due process.

In 1981, in Dober v. Worrell, supra, this Court disapproved a procedure where an appellate court allows a party to assert matters not previously raised. Specifically, this Court held that failure to raise an affirmative defense, before a trial court considers

summary judgment, precludes raising that issue for the first time on appeal. As stated by this Court:

> It is our view that a procedure which allows an appellate court to rule on the merits of a trial court judgment and then permits the losing party to amend his initial pleadings to assert matters not previously raised renders a mockery of the "finality" concept in our system of justice. Clearly, this procedure would substantially extend litigation, expand its costs, and, if allowed, would emasculate summary judgment procedure.

Dober at 1324. (emphasis supplied).

Following the decision in Dober, the appellate courts still grappled with this simple concept of due process. In 1986, the Second District Court of Appeal was confronted with a case strikingly similar to the case at bar. In Dean Co. v. U.S. Home Corp., Inc., 485 So.2d 438 (Fla. 2d DCA 1986), a third party defendant was likewise sued for indemnification, but was found liable at the conclusion of trial for 50% "contribution." The Second District determined that the theories of indemnification and contribution were entirely different and held that upon remand, the cause of action against the third party defendant must be dismissed.

Similarly, that same year in Designers Tile International Corp. v. Capitol C. Corp., 499 So.2d 4 (Fla. 3d DCA 1986), the Third District Court of Appeal was also faced with situation where a litigant presented its entire case under a theory of negligent hiring, but the trial court had permitted it to amend its complaint at the close of all the evidence to support a claim for vicarious

liability. Since there was no evidence to support the claim actually tried, the Third District ordered the complaint dismissed.

The following year, the Second District was again presented with a case where the theory was alter ego of a corporation, but the plaintiff failed to produce any evidence on this point. After directing a verdict on this question, the trial court permitted the plaintiff to amend to include a personal fraud allegation. On these facts, the Second District held that the fraud count must be dismissed. See Freshwater v. Veter, 511 So.2d 1114 (Fla. 2d DCA 1987).

On conflict with these cases, this Court in Arky, Freed, supra, held that where a claim was not presented with sufficient particularity for the defendant to prepare a defense, recovery was precluded on that unpled claim. In that case, a client filed a counterclaim against a law firm alleging general negligence. Twelve days before trial, the client disclosed that its general negligence claim encompassed a specific charge that the law firm failed to assert and prove a particular defense. The firm moved for a continuance and to exclude such evidence. Both of these motions were denied. The trial concluded with a jury verdict in favor of the client. On appeal, this Court noted that the client did not prove the allegations of the counterclaim but rather proved a claim not pled with sufficient particularity for the law firm to prepare a defense. Accordingly, this Court held that litigants, at the onset of a suit, must be compelled to state their pleadings

with sufficient particularity for a defense to be prepared and the verdict was directed to be entered in favor of the law firm.

In the present case, the parties only agreed to try a case for contractual and common law indemnification. These theories were the only causes of action pled and tried by consent of the parties. Indeed, Judge Harvey Goldstein in his order granting rehearing and partial summary judgment in favor of THREE KINGS, concluded only that THREE KINGS was entitled to "contractual indemnification for that portion of the damages paid which are attributable to the actions/or inactions of the Cross-Defendant, DADE COUNTY SCHOOL BOARD relative to the THREE KINGS PARADE of January 7, 1990." According to Judge Goldstein's order, a trial was to be held only "to apportion the respective percentages of fault attributable to [the parties]." This court order clearly establishes that the only claim to be tried was apportionment of fault, not entitlement to anything other than contractual indemnification. At no time was a claim for equitable subrogation to be tried.

Not only was a claim for equitable subrogation never expressly tried by the parties, it was never even impliedly tried at trial. Under a claim for equitable subrogation, once THREE KINGS paid settlements to the injured plaintiffs, THREE KINGS stepped into the shoes of the injured plaintiffs. The injured plaintiffs, however, had already settled their claims against the SCHOOL BOARD pursuant to settlements and therefore the individual plaintiffs' claims were extinguished. See Brickell Biscayne Corporation v. WPL Associates, Inc. 671 So.2d 247 (Fla. 3d DCA 1996). Indeed, as Judge Cope noted

in his thorough dissenting opinion, the SCHOOL BOARD had a complete defense to the claim for equitable subrogation namely accord and satisfaction, and release. Since the SCHOOL BOARD was never apprised that the claim against it was for equitable subrogation, it never had the opportunity to present such defenses at the time of trial.

The case of Kala Investments Inc. v. Sklar, 538 So.2d 90 (Fla. 3d DCA 1989) does not save THREE KINGS' claim for equitable subrogation. In that case, having decided that a summary judgment had been erroneously entered on one claim, the Third District explained that Kala's remedy upon remand was a claim for equitable subrogation and therefore the case was remanded with instructions to allow Kala and its insurer to amend their cross-claims and third party claims to "request relief by way of equitable subrogation." Id. at 919. Unlike our case, Kala Investments involved a reversal of summary judgment and a remand for further proceedings.

Similarly the case of West American Insurance Co. v. Yellow Cab Co. of Orlando, Inc., 495 So.2d 204 (Fla. 5th DCA 1986), does not support the procedure imposed by the Third District. Although in that case, the Fifth District did allow an equitable subrogation theory to be raised for the first time on appeal, the appellate court found that a claim for equitable subrogation had actually been tried by the parties. However, both THREE KINGS and the Third District miss the mark because in our case, the elements of equitable subrogation were never actually tried by the parties.

Under the Arky, Freed case, as well as Dober and its progeny,

THREE KINGS' effort to raise a new cause of action for the first time after verdict is improper and must be rejected. By this decision, the Third District Court of Appeal has created an exception to overrule the well established precedent of this Court in Arky Freed. As a result, SCHOOL BOARD was denied due process of law and the decision must be reversed.

EVEN IF THE THEORY OF EQUITABLE SUBROGATION WAS TIMELY INVOKED, THE EVIDENCE IN THE RECORD DOES NOT SUPPORT A CLAIM FOR EQUITABLE SUBROGATION

Not only does the SCHOOL BOARD strenuously object to the decision of the Third District Court of Appeal affirming judgment on the grounds of equitable subrogation where no notice was given of this claim, the SCHOOL BOARD also objects to the application of equitable subrogation in this case where the elements of equitable subrogation are wholly unsupported by the record.

In Cleary Brothers Construction Co. v. Upper Keyes Marine Construction Inc., 526 So.2d 116 (Fla. 3d DCA 1988), the differences between subrogation and indemnity were discussed at length. Although similar in nature, in that the parties are seeking reimbursement for monies paid by another, subrogation and indemnity are different. Unlike indemnification, the right to equitable subrogation does not arise until the entire obligation is satisfied by the subrogee. Cleary at 117. Indeed, no rights of subrogation arise from a partial satisfaction of the obligation. Id. at 117.

In the present case, THREE KINGS never discharged the entire debt which was owed in whole or in part by the SCHOOL BOARD.

First, the SCHOOL BOARD paid its own debt as evidenced by the settlements the SCHOOL BOARD reached with the injured parties. Further, the releases the THREE KINGS received from the injured parties failed to include the SCHOOL BOARD (with the exception of Sergio Perez). These releases affirmatively show that THREE KINGS did not intend to pay the debt of another and in fact did not do so. THREE KINGS paid solely for their own active negligence and not on account of the SCHOOL BOARD's actions.

THREE KINGS cannot cite to a single case where equitable subrogation was invoked in a situation such as this, i.e. where one defendant quickly settles tort claims solely for its own share of negligence, fails to include the other co-defendant on any releases, fails to discharge the entire debt, yet in hindsight still seeks reimbursement of settlement dollars paid. As an equitable remedy, the doctrine of equitable subrogation should not be invoked to reward a party who settles claims against it for its own active negligence, but who later decides that it is entitled to reimbursement against a party whom it failed to protect by including that party in those settlements thereby causing that party to be doubly exposed.[9]

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[9] An analogy is made to a cause of action for contribution where a party has paid in excess of its prorata share. In order to maintain a claim for contribution where a party has entered into a settlement with a claimant, Florida Statute § 728.31(d) requires the other tortfeasor's liability be extinguished by the settlement. By failing to include the SCHOOL BOARD on the releases (with the exception of Sergio Perez), THREE KINGS failed to extinguish the liability of the SCHOOL BOARD and for the same reasons, should not be entitled to equitable subrogation.

The record as a whole does not support a claim for equitable subrogation and therefore the decision of the Third District Court of Appeal must be quashed.

JUDGMENT IN FAVOR OF THE SCHOOL BOARD SHOULD HAVE BEEN ENTERED SINCE THERE IS NO BASIS FOR COMMON LAW OR CONTRACTUAL INDEMNIFICATION

The trial court erred by refusing to enter judgment in favor of the SCHOOL BOARD since there was no basis for recovery under either common law nor contractual indemnification where the elements of common law indemnification were completely lacking at trial and where the contractual indemnification provision is unenforceable as a matter of law.

A. There is no special relationship between the parties to give rise to common law or contractual indemnification.

In its verdict, the jury was specifically asked whether a special relationship existed between THREE KINGS and the SCHOOL BOARD whereby THREE KINGS was "technically, derivatively, or vicariously liable for any negligence of the DADE COUNTY SCHOOL BOARD?" and the jury answered in the negative. The jury's express finding of no special relationship between THREE KINGS and the SCHOOL BOARD not only precludes recovery for common law indemnification, it also completely forecloses recovery for contractual indemnification. In order for contractual indemnification to be properly imposed, there must exist a basis for the assumption of liability. Absent a special relationship

between the parties or express consideration, a contractual indemnification provision is invalid as a matter of law.[10]

At no time during the nine day trial did THREE KINGS prove that they were subject to or incurred liability because of the acts of the SCHOOL BOARD. As THREE KINGS cannot prove they were subject to liability because of some "vicarious, constructive, derivative or technical liability," they are barred from recovering indemnification.

Failure to establish some vicarious or derivative liability is fatal to THREE KINGS' claims for indemnification. Metropolitan Dade County v. Florida Aviation Fueling Company Inc., 578 So.2d 296 (Fla. 3d DCA 1991). In that case, the county appealed an adverse final summary judgment in its third party action for indemnity against a lessee of an aircraft fueling facility (FAFCO), pursuant to the indemnity clause of the lease. FAFCO moved for summary judgment on the county's claim for indemnity arguing that the county was negligent itself and because the indemnity clause did not provide for indemnification of the county by FAFCO for the county's own negligence and because negligence on the part of the

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[10] The caselaw in Florida is somewhat vague on the requirement of a special relationship between the parties in a contractual indemnification setting. However, the law in Florida is clear that for indemnity contracts to be enforceable, there must be some express consideration given in exchange for assumption of liability. See Kochan v. American Fire and Casualty Co., 200 So.2d 213 (Fla. 2d DCA 1967); Matey v. Pruitt, 510 So.2d 351 (Fla. 2d DCA 1987) See also Florida Statute § 725.06)(consideration necessary for indemnity in construction contracts). It is undisputed that no consideration was offered to OVACCE as an advertising sponsor for its alleged agreement to assume liability of a parade participant over whom it had absolutely no control.

county would bar a claim for common law indemnity. On appeal, the Third District held that while the county was not entitled to indemnity for its own negligence, it was entitled to indemnity on the claim for vicarious liability. Under FAFCO, THREE KINGS needed to establish that the settlement or portion thereof was attributable to the vicarious liability claim and that this portion was reasonable as to amount. THREE KINGS did neither at trial.

Similarly, the case, Association of Retarded Persons (ARC) v. State of Florida, 619 So.2d 452 (Fla. 3d DCA 1993), involved a parallel situation involving a claim for indemnification post settlement wherein HRS was sued for vicarious liability for the negligence of ARC and also for direct liability on the part of HRS. Like FAFCO, the appellate court determined that the indemnification agreement could not require ARC to indemnify HRS for HRS' own negligence (direct liability), but there could be indemnification for damages stemming from vicarious liability due to ARC's negligence. This opinion sets forth a post-settlement apportionment procedure, having first determined that HRS was in fact sued for vicarious liability. The court noted that in rendering a post-settlement apportionment, a trial judge is limited to consideration of only the language contained in the settlement agreement. See Dionese v. City of West Palm Beach, 500 So.2d 1347 (Fla. 1987)(in apportioning a settlement, an agreement to apportion the proceeds of a settlement agreement must be found on the face of the settlement agreement itself and agreed to by all parties to the settlement).

In our case, there was no need for the court to hold a post-settlement apportionment because THREE KINGS never settled claims for vicarious liability. Even if an apportionment analysis was required, a review of the releases prepared by THREE KINGS clearly shows that no portion of the settlement money paid by THREE KINGS was apportioned between the direct and vicarious liability claims.

Having failed to prove they were sued for vicarious liability, THREE KINGS has failed to prove a prima facie case of apportionment in order to recover for contractual indemnification. Instead, THREE KINGS simply went to trial to prove who caused the injuries to the spectators, instead of proving whether they were entitled to indemnification. For instance, they failed to adduce any evidence why they paid the claims and presented no testimony why the release failed to include the SCHOOL BOARD and which portions, if any, attributable to the direct and vicarious liability claims. Since the jury absolved them of negligence, in hindsight it would appear that THREE KINGS settled the claims at their own peril. THREE KINGS' poor business judgment, however, does not entitle them to obtain full recovery from the SCHOOL BOARD.

B. The Indemnification provision within the Participation Agreement does not obligate a sponsor to indemnify for the acts of a participant and is inapplicable.

An indemnity claimant bears the burden of establishing that the indemnification claim falls within the terms of the indemnity agreement. See BPS Guard Services, Inc. v. Gulf Power Co., 488 So.2d 638 (Fla. 1st DCA 1986). The indemnification provision relied upon by THREE KINGS, does not provide for indemnification

for the acts upon which THREE KINGS are attempting to seek indemnification.

The undisputed purpose of the Participation Agreement was to secure a sponsor for one of the participants in the parade. The agreement was given to Moffi as an advertiser on behalf of OVACCE. The Agreement was not an entry form for Miami Senior High School for it to "participate" in the parade.[11] Lourdes Peters, on behalf of THREE KINGS knew that Moffi signed the form on behalf of OVACCE and his signature on the form clearly specifies OVACEE only.

According to its literal reading, in the Participation Agreement OVACCE promised to indemnify the named entities "from any claim resulting from our participation and actions during the Three Kings' Day Parade." Since the signatory is OVACCE, then the "participation" is the purchase of advertising and not the actions of the marching band.[12]

In light of the undisputed testimony, the term, "our" as used in the Participation Agreement, means OVACCE only, and not the SCHOOL BOARD at large nor the Miami High marching band. Since the contents of the Participation Agreement applied only to advertising, any claim for indemnity under this agreement is

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[11] Certainly THREE KINGS, as the author of the agreement, could have required the execution of an entry form and indemnity agreement by those who enter marching bands in the parade. It evidently chose not to do so.

[12] For instance, if the method of adverting was improper, such as if it contained libelous statements or false advertising, then and only then would OVACCE possibly be held accountable under the agreement.

limited to the method of advertising only and not the actions of the actual parade participant.

If Coca-Cola, instead of OVACEE, agreed to purchase advertising and sponsor Miami High's marching band as a parade participant, no one would expect Coca-Cola to be responsible for the actions of the marching band and indemnify THREE KINGS for something the marching band did. In this case, the mere happenstance that the party who agreed to sponsor the Miami High marching band, also happened to be another department of the SCHOOL BOARD, should not change this result and the clear language of the Participation Agreement. The SCHOOL BOARD has simply no liability under this contract.

Accordingly, the indemnification provision is inapplicable for the acts THREE KINGS has sought indemnity for, namely the alleged negligent acts of the Miami High marching band in using flaming batons, and therefore judgment should have been entered in favor of the SCHOOL BOARD.

C. Even if the indemnification provision was applicable, it is not enforceable against the SCHOOL BOARD because Moffi was never authorized to enter into an indemnification agreement on behalf of the SCHOOL BOARD.

The evidence was undisputed below that Moffi lacked the requisite authority to bind the SCHOOL BOARD. THREE KINGS offered no evidence to contradict Moffi's clear delineation of his job duties and authority. As an educational specialist for OVACCE, his duties were to assist in the managing and promotion of the OVACCE. (Moffi Depo. p. 184-185). He affirmatively stated that he did not

have the authority to enter into contracts of indemnification on behalf of the SCHOOL BOARD. (Moffi Depo. p. 185, 199).

Furthermore, Moffi's lack of authority was also supported by the affidavit of Assistant Board Attorney Johnnie Brown wherein he states that pursuant to School Board rule, all contracts must be submitted to the Board Attorney for drafting and approval. The affidavit clearly establishes that this Participation Agreement was never submitted to the Attorney's Office for approval and that Moffi had no authority to enter into an indemnification and/or hold harmless agreement on behalf of the Dade County School Board.

Only the School Board, as an entity, has the authority to enter into contracts. § 230.22(4), Florida Statutes (1989)(the school board, as a body, may make contracts). Parties who do business or enter into contracts with governmental agents are "bound to ascertain the nature and extent of any authority" of that agent and if not, act at their own peril. Club on the Bay, Inc. v. City of Miami Beach, 439 So.2d 325 (Fla. 3d DCA 1983).

Even if the agreement covered the actions of the marching band, THREE KINGS still failed to obtain approval of the SCHOOL BOARD itself for the SCHOOL BOARD to be liable on an indemnity contract. Such liability can only be undertaken by the SCHOOL BOARD itself, by and through the employees upon whom such authority has been conferred. As a result, the indemnification provision is unenforceable against the SCHOOL BOARD.

THE SCHOOL BOARD WAS ENTITLED TO JUDGMENT IN ITS FAVOR DUE TO THREE KINGS' NON-COMPLIANCE WITH THE NOTICE PROVISIONS OF FLORIDA STATUTE § 768.28(6)(a).

Judgment should have been entered in favor of the SCHOOL BOARD based upon the failure of THREE KINGS to comply with the notice provisions of Florida Statute § 768.28(6)(a).

Florida Statute § 768.28(6)(a) requires that before suit can be filed against a governmental entity that a claimant provide written notice to the appropriate governmental agency, as well as the Department of Insurance within three years of accrual of the claim. This Court has consistently recognized that these requirements are conditions precedent which must be strictly construed before a proper claim can be maintained against the state or one of its agencies or subdivisions. Levine v. Dade County School Board, 442 So.2d 210 (Fla. 1983).

In Levine, this Court held that not only must notice be given before suit may be maintained, but also the Complaint must allege an allegation of such notice. Levine at 213. If the time has passed for providing notice, then the court has no alternative but to dismiss with prejudice. Levine supra; Askew v. County of Volusia, 439 So.2d 233 (Fla. 5th DCA 1984).

In this consolidated lawsuit, THREE KINGS brought suit against the SCHOOL BOARD on the separate and distinct claims for common law

and contractual indemnification.[13] In Case Nos. 81-13341 and 91-32702, THREE KINGS instituted cross-claims and/or intervenors' complaints against the SCHOOL BOARD arising out of the personal injury lawsuits brought by parade spectators, Mayda Gonzalez, Lazara Noda, and Ricardo Gonzalez, yet failed to provide any written notice of their indemnity claims prior to bringing suit. In the other companion case, Case No. 92-16488, THREE KINGS sued the SCHOOL BOARD for indemnity evolving out of THREE KINGS' settlement with another spectator, Sergio Perez. Only in that lawsuit, did THREE KINGS attach to the complaint a copy of the notice letter addressed to the SCHOOL BOARD and the Department of Insurance dated November 18, 1991.

Based upon this lack of proper notice, the SCHOOL BOARD pled as an affirmative defense the failure to comply with the conditions precedent contained in Florida Statute § 768.28(6)(a). At trial, THREE KINGS presented their case without ever addressing this affirmative defense. At the close of THREE KINGS' case and the close of all the evidence, the SCHOOL BOARD moved for a directed verdict on the grounds of non-compliance with the notice provisions, which was denied by the trial court. In the absence of establishing a prima facie case of compliance with the notice requirement, the trial court was required to enter final judgment

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[13] As these are uniquely different and separate claims than the claims for personal injuries brought by the individual spectators, THREE KINGS is precluded from relying on the notices of claim provided by the injured plaintiffs to the SCHOOL BOARD. Orange County v. Gipson, 539 So.2d 526 (Fla. 5th DCA 1989).

in favor of the SCHOOL BOARD in accordance with its Motion for Directed Verdict. Hardcastle v. Mohr, 483 So.2d 874 (Fla. 2d DCA 1986).

The lack of written notice pursuant to § 768.28(6)(a) is even more glaring when one considers the decision of the Third District Court of Appeal which affirmed on the theory of equitable subrogation which was never raised until the post-trial phase of this lawsuit. The decision of the Third District affirming on a new ground never previously raised flies in the face of the law of this State regarding written notice of a claim against a sovereign entity. At no time was notice ever given of a claim for equitable subrogation.

As the court in Hardcastle observed, having taken a case through trial without establishing the element of notice, "public policy and the interest required the application of res judicata to bar (plaintiff) from relitigating the identical facts and issues," and therefore judgment for the defendant was required. Id. at 875. Similarly, since either proper notice of the claim for common law and contractual indemnification was not provided and/or since notice was never proved at trial in accordance with Florida Statute § 768.28(6)(a), the SCHOOL BOARD was entitled to judgment in its favor as a matter of law.

CONCLUSION

Based upon the foregoing arguments and citations of authority, Appellant, DADE COUNTY SCHOOL BOARD, respectfully requests that this Honorable Court reverse the decision of the Third District Court of Appeal and remand to the trial court with instructions to enter judgment in favor of the SCHOOL BOARD.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 13th day of FEBRUARY, 1998 to: **RICHARD P. COLE, ESQ.,** Attorney for THREE KINGS, 1390 Brickell Avenue, Third Floor, Miami, Florida 33131, and to **PETE DeMAHY, ESQ.,** Co-Counsel for SCHOOL BOARD, 141 Northeast 3rd Avenue, Bayside Office Center, Penthouse, Miami, Florida 33132.

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