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IN THE SUPREME COURT OF FLORIDA

SUP. CT. CASE NO.: 91,767
3RD DCA CASE NOS.: 94-03011
95-00534

DADE COUNTY SCHOOL BOARD,

Petitioner,

vs.

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

Respondents.
_____/

RESPONDENTS/CROSS-PETITIONERS' BRIEF ON THE MERITS

WALTON LANTAFF SCHROEDER & CARSON
By: JOHN P. JOY
KENNETH L. VALENTINI
Attorneys for Respondents
707 S.E. 3rd Avenue, Suite 300
P.O. Box 14309
Ft. Lauderdale, Florida 33302
(954) 463-8456

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WALTON LANTAFF SCHROEDER & CARSON

707 SOUTHEAST 3RD AVENUE, FORT LAUDERDALE, FLORIDA 33316 · TEL. (954) 463-8456

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INTRODUCTION

This is an appeal by Petitioner DADE COUNTY SCHOOL BOARD ("DCSB") from a decision of the Third District Court of Appeal which affirmed in substantial part a final judgment which required DCSB to reimburse Respondents for monies paid in settlement of various personal injury claims. The final judgment was entered pursuant to a jury verdict which found that Petitioner DCSB was 100% at fault for the accident in suit.

Respondents, RADIO STATION WQBA, CITY OF MIAMI, SUSQUEHANNA PFALTZGRAF and THREE KINGS PARADE, INC. (hereinafter "THREE KINGS") cross-appeal the portion of the Third District's ruling which deleted the language regarding execution from the final judgment and affirmed the denial of THREE KINGS's claim for pre-judgment interest on the settlement monies paid.

In this brief, references to the Record will be as follows:

Record-on-Appeal - ("R." followed by the page number).

Trial Transcript - ("TR." followed by the page number).

All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

THREE KINGS takes issue with several statements made by DCSB in its brief. Additionally, there is a need to reference additional portions of the record which are pertinent to both the main appeal and the cross-appeal. Therefore, THREE KINGS hereinafter submits its own statement.

In its brief, Petitioner DCSB does not challenge the sufficiency of the evidence supporting the jury's finding that DCSB was 100% at fault for the incident in suit. Accordingly, other than to put the various issues on appeal in perspective, THREE KINGS will not specifically recount the extensive lay and expert testimony elicited during the jury trial which resolved the question of who was responsible for the accident. Rather, THREE KINGS will summarize (by category) the facts of record which are pertinent to the issues in the subject proceeding.

THE ACCIDENT

The Nineteenth Annual Three Kings Day Parade was held on January 7, 1990 on Calle Ocho, Dade County, Florida. (TR. 327). The Miami Senior High School marching band participated in the parade and its majorettes utilized flaming batons. (TR. 330). At the parade, a fourteen (14) year old Miami High student (Maria Lozano) who was assisting the majorettes had a can of flammable liquid which was utilized to ignite batons. (TR. 415, 421). There was no adult supervising Lozano with the actual ignition process, and she had not received any training or instruction from Miami Senior High regarding safety precautions during this

process. (TR. 420-421; 440-441). In the course of reigniting a majorette's baton, the can containing flammable liquid caught fire. (TR. 421, 441). In response to this situation, another Miami High student who was assisting with the ignition process (Alfredo Sans) kicked the can. (TR. 442-43; 449). Sans served as a majorette "sweetheart" who assisted the majorettes with equipment at school events. (TR. 427). The kicked, flaming can resulted in burn injuries to several spectators (Mayda Gonzalez, Lozaro Noda, Ricardo Gonzalez, Sergio Perez and Arnaldo Martinez). (R. 1316, 1318, 1320, 1322, 6070, 6199; TR. 294).

The Miami Senior High Marching Band had participated in the Three Kings Day Parade for approximately 15 years. (TR. 330). However, Miami High's majorettes had never utilized flaming batons in the Three Kings Day Parade (TR. 330) or in any other street parade. (TR. 941-42; 979). The decision by Miami High's band directors to utilize flaming batons in the 19th Annual Three Kings Day Parade was made a few days before the parade commenced. (TR. 981-984; Pltf's Exhibs. 8 & 9). Prior to the parade Miami High never advised THREE KINGS that the majorettes would be utilizing flaming batons during the street parade. (TR. 334).

The parade commenced on Southwest 4th Avenue and proceeded in a westerly direction along Calle Ocho (Southwest 8th Street) with the terminus at Southwest 27th Avenue. All participants were required to enter the parade at Southwest 4th Avenue where city fire and police authorities were on hand. (TR. 320, 332, 699). However, the ignition materials were not brought in

through the parade entrance past the police and fire officials. Rather, the flammable liquid containers were brought in by students Lozano and Sans well down the parade route (at approximately Southwest 22nd Avenue), just before the judges' viewing stand. (TR. 417-19).

During the course of the six day jury trial, DCSB admitted that it had a duty to supervise students engaged in school sanctioned activities. (TR. 766). Additionally, voluminous lay and expert testimony was elicited to establish that DCSB was negligent in failing to provide proper adult training or supervision of minor children who were engaged in the handling and ignition of flammable materials during a street parade. Numerous Miami High and DCSB officials admitted at trial that the failure to have adult involvement and/or adequate fire extinguishing equipment in such a dangerous activity constituted a violation of school procedure and/or an inappropriate practice. (TR. 518, 520-21, 524, 580, 676, 851, 854, 857-59).

THE PARTIES AND THEIR RELATIONSHIPS

DCSB was involved with the parade in several respects. First, it was the party responsible for the actions of the Miami High students, teachers, band directors, etc. who were involved in the unfortunate incident. Second, as part of its involvement in the parade, DCSB had signed a "Participation Agreement" wherein it agreed to indemnify THREE KINGS PARADE, INC. and CITY OF MIAMI for any claim resulting from DCSB's participation and

actions during the Three Kings Day Parade. (R. 288).[1] This agreement was executed in conjunction with DCSB's sponsorship of the parade which included an advertising banner which accompanied the Miami Senior High School marching band in the parade. (Moffi Depo. pp. 53, 179 [at R. Vol. XVI-XVII]).

RADIO STATION WQBA and its parent company, SUSQUEHANNA PFALTZGRAF, were the organizers of the parade. (TR. 315). In conjunction with this, Julio Mendez, a former employee of WQBA (TR. 314), testified that an application was submitted to the CITY OF MIAMI to obtain a permit for the parade. (TR. 322, 345-46). In the application, THREE KINGS PARADE, INC. agreed that it would be "financially, administratively, and programmatically responsible for all aspects of the event." (TR. 322). Additionally, THREE KINGS PARADE, INC. entered into an agreement with the CITY OF MIAMI pertaining to the conduct of the parade. In this agreement, THREE KINGS PARADE, INC. undertook to secure the services of the City Departments of Police, Fire, Rescue and Inspection to "insure the safety and welfare of the participants and the attending crowds." (TR. 348-49; Def. Exhib. No. A-2). Pursuant to the THREE KINGS/CITY OF MIAMI contract, the duties undertaken by THREE KINGS' were non-delegable (in the absence of consent from the city). (Def. Exhib. No. A-2).

THE PURPOSE OF THE INDEMNITY CONTRACT

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[1] An identical Participation Agreement had also been sent to Miami Senior High School when they were invited to participate in the 19th Annual Three Kings Day Parade. (T. 327-328; 1009-1012; Pltf. Exhibs. Nos. 5 and 6; see also, Pltf. Exhib. for Identification No. 1-A.).

In addition to stating various rules pertaining to DCSB's participation in the Three Kings Day Parade, the Participation Agreement provided:

> 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.

The agreement was signed by Dade County Public School's employee, John Moffi. (Moffi Depo. pp. 4-6, 18-19). At the time Moffi signed the agreement he was responsible for administering DCSB's advertising budget for the Office of Vocational, Adult, Career and Community Education. (Moffi Depo. pp. 6, 18-19). Mr. Moffi signed the agreement at the time he purchased an advertising package which included an OVACCE banner which was carried by the Miami Senior High School marching band. (Moffi Depo. pp. 53, 179). Although Moffi contended that the indemnity agreement only pertained to advertising (Moffi Depo. p. 34), he admitted that as part of the contract he had purchased the right to have a banner held by the Miami Senior High School marching band. (Moffi Depo. p. 179). Moffi had signed numerous other agreements on behalf of Dade County Public Schools which contained similar indemnity/hold harmless clauses. (Moffi Depo. pp. 10, 14, 117-19, 156-57, 185-86, 187-88).

THE LAWSUITS AND CROSS-CLAIMS

Two personal injury lawsuits were filed against DCSB and THREE KINGS. (R. 491, 3351). The injured spectators also named the manufacturer of the flaming batons and students Alfredo Sans

and Maria Lozano as defendants. THREE KINGS DAY PARADE, INC., SUSQUEHANNA BROADCASTING COMPANY and RADIO STATION WQBA were sued as entities who had "sponsored and hosted the THREE KINGS DAY PARADE in accordance with a permit issued by the CITY." (R. 493, 3352).

In both personal injury lawsuits the claims against THREE KINGS and DCSB were virtually identical. That is, there were claims for negligence in permitting flammable and hazardous material to be used in a dangerous manner; failure to warn spectators of a fire hazard; and, negligently allowing a minor without adequate supervision or training to possess flammable materials in a crowded area. (R. 494-95, 507-08, 3353-54). There was also an independent claim against DCSB only for negligent failure to supervise the students who were involved in the ignition process and kicking of the flaming can. (R. 500, 512-13, 3358-59). A claim was also made against THREE KINGS that it (along with DCSB, Sans and Lozano) were strictly liable for being involved in an abnormally dangerous and/or ultrahazardous activity, to wit: utilizing flammable liquids and flaming batons in close proximity to parade spectators. (R. 501-03, 514-16, 3360-61).

In response to these claims, THREE KINGS denied that it was negligent (R. 532-33, 535-36); affirmatively asserted that the negligence of DCSB was the sole cause of the injuries (R. 538); and, asserted cross-claims against DCSB for indemnity and contribution. (R. 541-45, 1813-14). More specifically, in its

various cross-claims, THREE KINGS asserted that its liability (as a parade sponsor) was technical or derivative and that it was wholly without fault. (R. 542-43, 544, 1813-14). Further, THREE KINGS asserted that DCSB was obligated under the Participation Agreement to indemnify THREE KINGS for any claims due to DCSB's participation and actions in the parade. (R. 543-44, 1813-14).

In the third consolidated lawsuit, THREE KINGS filed an independent action against DCSB seeking damages and a declaratory judgment that DCSB was obligated to indemnify THREE KINGS for any and all claims and judgments against THREE KINGS (including the claim of SERGIO PEREZ which was settled by THREE KINGS' insurer prior to suit) which were due to the fault of DCSB. (R. 2692-2701).

THE SETTLEMENTS

THREE KINGS was able to settle any and all claims which had been asserted against it in the two lawsuits by the injured spectators. (R. 1316, 1318, 1320, 6070; TR. 294). Additionally, the claims by SERGIO PEREZ and ARNALDO MARTINEZ had been settled pre-suit.[2] However, the settlements were not global as THREE KINGS continued to pursue its claims against DCSB for reimbursement of the settlement monies. (R. 541-45, 1813-14).

PRE-TRIAL PROCEEDINGS

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[2] DCSB was included on the releases signed by Perez and Martinez. Accordingly, THREE KINGS retained contribution rights against DCSB for these settlements, in addition to the indemnity theory. (R. 1322).

With regard to THREE KINGS' cross-claim for contractual indemnity, the parties filed cross-motions for summary judgment. THREE KINGS asserted that it was not seeking indemnity for any damages due to its fault (R. 5023); however, THREE KINGS contended that pursuant to the clear language of the Participation Agreement, DCSB was obligated to indemnify THREE KINGS for any claim resulting from DCSB's participation and actions during the Three Kings Day Parade of 1990. (R. 5023-24). After considering the respective arguments, the trial court ruled that under the indemnity agreement THREE KINGS was entitled to be reimbursed for damages paid by THREE KINGS which were due to DCSB's fault. The court ordered a jury trial for this purpose. (R. 5055-56).

STATUTORY NOTICES GIVEN TO DCSB

In the two lawsuits filed by the injured spectators against DCSB and THREE KINGS, copies of the certified letters sent to DCSB and the Insurance Commissioner were appended to the Complaints. (R. 21-28, 492, 1467, 1472, 3352). These pleadings (including the exhibits) were incorporated by reference in THREE KINGS' cross-claims against DCSB. (R. 541, 1813-14).[3] Additionally, in the independent action filed by THREE KINGS against DCSB, THREE KINGS attached copies of the certified

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[3] Although DCSB maintained in its pleadings at different points in the proceedings that statutory notice was insufficient (R. 2705, 2710), it entered into a stipulated summary judgment in the Mayda Gonzalez case that all conditions precedent to giving statutory notice under § 768.28, Fla. Stat. had been met. (R. 1044-45).

letters (dated November 18, 1991) sent to DCSB and the Insurance Commissioner wherein THREE KINGS notified DCSB of its claim for reimbursement of settlement monies paid to claimant Sergio Perez as well as any other claims and judgments pertaining to the January 7, 1990 incident at the Three Kings Day Parade wherein spectators were burned.[4] (R. 2700-02, 6104-10).

TRIAL

Pursuant to the trial court's order that there would be a jury trial to determine the respective percentages of fault between THREE KINGS and DCSB, the trial of the consolidated cases came upon to be heard. By the time the jury trial to determine fault commenced, the injured spectators had settled with all Defendants. (TR. 294). Thus, the only remaining issues pertained to THREE KINGS' claim for reimbursement of the settlement monies it had paid.

During trial, THREE KINGS made a proffer of this 1991 statutory notice referenced above. (TR. 760). Further, at numerous points during the trial the judge indicated that he wanted to have a hearing to consider the issues pertaining to DCSB's statutory notice defense after completion of the jury trial to determine fault. (TR. 769, 782-83, 1054).

VERDICT

The jury found, by verdict dated July 27, 1994, that DCSB was responsible for the actions of Alfredo Sans at the parade.

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[4] As noted previously, the settlement with Arnaldo Martinez was included in this category.

The jury further found that the DADE COUNTY SCHOOL BOARD was 90% negligent and Alfredo Sans was 10% negligent. THREE KINGS (including RADIO STATION WQBA and CITY OF MIAMI) was absolved of all negligence for the injuries to the spectators. Finally, the jury found that there was no "special relationship" between RADIO STATION WQBA and CITY OF MIAMI, as parade sponsors, and DADE COUNTY SCHOOL BOARD whereby the parade sponsors were technically, derivatively or vicariously responsible for any negligence of DADE COUNTY SCHOOL BOARD. (R. 5734-35).

POST-TRIAL PROCEEDINGS

On August 2, 1994 DCSB filed a Motion for Entry of Final Judgment asserting that based on the jury verdict THREE KINGS was not entitled to reimbursement of the monies it had paid in settlement of the spectator personal injury claims. (R. 5983). Further, in apparent compliance with the trial court's earlier ruling that the statutory notice defense would be taken up in a later proceeding, DCSB also filed a Motion for Entry of Final Judgement for Non-Compliance with Fla. Stat. Sec. 768.28. (R. 5993, 6056). In opposition to this latter motion, THREE KINGS filed the various statutory notices that had been filed in the consolidated cases with regard to the various spectator claims, including THREE KINGS independent 1991 notice with regard to its claim for reimbursement of the settlement monies it had paid. (R. 6087-6111).

On October 17, 1994, THREE KINGS filed its Motion for Entry of Final Judgment. (R. 6062-6070). In its motion THREE KINGS

alleged that the jury's verdict (finding DCSB 100% responsible for the accident) reflected that the parade sponsors were entitled to full indemnity and/or equitable subrogation for the settlement monies paid. With regard to equitable subrogation, THREE KINGS asserted that the jury's verdict demonstrated that it had, in effect, discharged an obligation and paid a loss which "ought to be borne by DADE COUNTY SCHOOL BOARD". Based on the fact that DCSB had stipulated that the amounts paid by THREE KINGS were reasonable, THREE KINGS sought a judgment ordering reimbursement of all settlement monies paid. (R 6063).

In opposition to THREE KINGS' Motion for Judgment, DCSB on October 28, 1994 submitted a legal memorandum arguing that THREE KINGS was not entitled to a judgment under common law indemnity, contractual indemnity and/or equitable subrogation. (R 6074). In response, THREE KINGS filed papers arguing that it was entitled to a judgment under its indemnity theory and further that it was entitled to a judgment under principles of equitable subrogation. As to the latter theory, THREE KINGS asserted that equitable subrogation should be invoked to afford relief wherever justice demanded, irrespective of technical legal rules [citing West American Ins. Co. v. Yellow Cab, 495 So.2d 204 (Fla. 5th DCA 1996)].

On November 23, 1994, the trial court entered a Final Judgement for THREE KINGS. In its order, the trial court stated that its ruling in favor of THREE KINGS was based on the jury's finding that DCSB was 100% of fault for the accident in suit, as

well as DCSB's stipulation that the amounts which THREE KINGS had paid in settlement of the claims were reasonable. (R 6265).

In the post-trial proceedings, THREE KINGS also sought pre-judgment interest on the settlement monies from the dates same were paid. (R. 6182). This motion was denied. (R. 6264-66).

On appeal to the Third DCA, DCSB sought reversal of the final judgment and remand for entry of judgment in its favor. Alternatively, a new trial was sought (due to purported error in the trial court's failure to dismiss a juror for cause). In response, THREE KINGS argued that the trial court had correctly entered judgment in its favor pursuant to the contract executed by DCSB (wherein DCSB agreed to indemnify THREE KINGS for damages sustained which were attributable to the actions of DCSB). THREE KINGS further argued that, even assuming that there was any error in any rulings pertaining to the contractual indemnity issue, said error was harmless under § 59.041, Fla. Stat. as the record as a whole showed that THREE KINGS was entitled to the judgment under two alternative theories.

The first alternative theory was common law indemnity. THREE KINGS argued that THREE KINGS' contract with DCSB (as a parade participant) as well as THREE KINGS' status as a parade sponsor/organizer/permit holder (who had agreed to "insure" the safety and welfare of participants and spectators and also be "responsible for all aspects of the parade"), in combination with the jury verdict finding that it was fault free, demonstrated that its responsibility was, in truth, merely technical or

derivative. THREE KINGS further argued that any alleged error with regard to entry of judgment pursuant to the contractual indemnity theory was harmless in light of fact that it was entitled to a judgment based on the doctrine of equitable subrogation. Finally, via cross-appeal THREE KINGS sought reversal of the denial of its claim for prejudgment interest.

In affirming the judgment under review (with the exception of the language permitting execution of the judgment against DCSB), the Third District Court of Appeal stated that it found no merit in the arguments for reversal in the main appeal. The Third District recognized that the award could not be supported on common law indemnity grounds because of the jury's technical finding that there was no special relationship between the parties. The Third District at p. 5 further opined:

> However, considering the record as a whole, and particularly the jury verdict finding DCSB 100% at fault for causing the injuries to the spectators, we hold that the doctrine of equitable subrogation applies to provide the sponsors recompense.

SUMMARY OF THE ARGUMENT

Petitioner has not established conflict jurisdiction in this Court and/or an entitlement to relief on the merits.

In the proceedings in the trial court, the judge ordered that a jury trial be conducted to determine the parties' respective percentages of fault so that THREE KINGS' claims for reimbursement of settlement monies paid could be adjudicated. DCSB had a full and fair opportunity to present its best case on these issues and no complaint of error is made with regard to the jury's finding that DCSB was 100% responsible for the accident in suit. Further, once the fault issue was decided the trial court conducted post-trial proceedings in which THREE KINGS requested judgement in is favor pursuant to the doctrine of equitable subrogation. In response to this claim for relief, DCSB had a full and fair opportunity to put forth all of its available defenses and counter-arguments to the applicability of this theory of recovery. In the course of the post-trial proceedings, DCSB never asserted its purported complete legal defense to THREE KINGS' equitable subrogation claim, to wit: release.

Even if said defense had been asserted it would have been rejected as, pursuant to Florida's Uniform Contribution Among Joint Tortfeasors Act, a release from an injured Plaintiff only bars the released tortfeasor's liability to another alleged tortfeasor for contribution (and not indemnity or subrogation).

Further, on the merits of the subject reimbursement claim the decision of the Third District affirming in substantial part the judgment in favor of THREE KINGS was correct. Under the indemnity contract executed by DCSB, THREE KINGS was entitled to be indemnified for damages it sustained which were attributable to the actions of DCSB. The jury verdict established that DCSB was 100% responsible for the incident in suit, and THREE KINGS was not barred from pursuing this contractual indemnity claim even though the original Plaintiffs had made allegations of fault against it.

The trial court also correctly found that the plain language of the indemnity agreement applied to the claims at issue. Although on hindsight DCSB did not believe the indemnity provision was applicable to the claim at issue, Florida subscribes to the objective theory of contracts. Under this analysis the indemnity clause was plainly applicable to the claims in suit. Further, the record before the trial court established that the contract was executed by a DCSB representative who had executed numerous similar indemnity agreements on other occasions. Pursuant to section 230.22, DCSB has authority to enter into contracts. Accordingly, THREE KINGS was entitled to contractual indemnity.

However, even assuming that there was any error in any rulings pertaining to the contractual indemnity claim, said error was harmless under section 59.041, Florida Statutes. The record

as a whole shows that THREE KINGS was entitled to judgment under two alternative theories.

The first was common law indemnity. The facts and evidence of record showed that, pursuant to the various agreements to which THREE KINGS was a party, its liability as parade sponsor/organizer was merely technical. It had agreed to "be . . . responsible" for all aspects of the parade. THREE KINGS also had agreed to "insure" the safety and welfare of participants and spectators. Moreover, at the time it settled the lawsuits pending against it, claims were pending against THREE KINGS that it was strictly liable for permitting an unreasonably dangerous activity to occur in a parade which was being held pursuant to a permit issued to THREE KINGS. THREE KINGS also had a contractual relationship with DCSB regarding its participation in the parade. These facts, along with the jury verdict finding that THREE KINGS was not actively negligent, demonstrate based on the record as a whole that THREE KINGS' responsibility was merely technical or derivative. Thus, even assuming there was an error in entering judgment under a contractual indemnity theory, no miscarriage of justice occurred considering the record as a whole.

Further, any alleged error with regard to entry of judgment pursuant to the contractual indemnity theory was further harmless in light of the fact that the jury's verdict finding DCSB 100% responsible established that THREE KINGS was also entitled to judgment based on the doctrine of equitable subrogation. Pursuant to this theory, the court is to disregard technical

rules and enter judgment for a party who has discharged a debt which ought to be borne by the defendant.

DCSB's assertion that THREE KINGS failed to comply with the statutory pre-conditions to suit against a state agency is without merit. Section 768.28's terms apply to tort actions against a governmental entity and therefore are not applicable to THREE KINGS' claim for contractual indemnity. Alternatively, under Florida law, when notice has been given to the state of claims by an injured party, it is not necessary to give additional notice for a claim seeking contribution for those same injuries. Further, the statutory notice given by THREE KINGS to DCSB when THREE KINGS filed the independent action seeking indemnity on "any and all claims or judgments" pertaining to the parade satisfied the statutory requirement.

With regard to the final judgment affording execution, because the sovereign immunity statute provides that a governmental entity is liable in tort to the same extent as private individuals, execution should issue against the state in this case as if the state were a private individual. The statute also allows for entry of a judgment in excess of the statutory tort limit.

With further regard to the cross-appeal, the Third District incorrectly affirmed the trial court's denial of THREE KINGS' claim for pre-judgment interest. The Participation Agreement was a valid contractual relationship entered into by DCSB. Florida courts have permitted pre-judgment interest claims when the cause

of action is contractual in nature and thus outside of the statute prohibiting such claims. In any event, THREE KINGS should obtain an "award" of pre-judgment interest for the purposes of presenting a claims bill to the legislature.

ARGUMENT

I. **THE THIRD DISTRICT COURT OF APPEAL CORRECTLY RULED THAT THREE KINGS WAS ENTITLED TO A JUDGMENT PURSUANT TO THE DOCTRINE OF EQUITABLE SUBROGATION WHERE THE CLAIM FOR RELIEF UNDER THIS THEORY WAS RAISED IN A PROCEEDING WHICH OCCURRED FOLLOWING THE JURY TRIAL WHICH DETERMINED FAULT AND THE PARTIES HAD A FAIR OPPORTUNITY TO LITIGATE THE APPLICABILITY OF THIS DOCTRINE IN THE POST-TRIAL PROCEEDINGS.**

The crux of DCSB's position on this issue is that it was prejudiced by the fact that THREE KINGS' request for entry of judgment pursuant to the doctrine of equitable subrogation was not made until after the jury had resolved the question of who was at fault for the accident in suit. More specifically, DCSB asserts that because it was never apprised that the claim against it was for equitable subrogation, it never had the opportunity to assert at trial the complete defense which it had to the equitable subrogation claim, to wit: release. (Petitioner's Brief at pp. 16-21).

DCSB's argument in this regard must fail for several reasons. First, the record in this case clearly reveals that the essence of THREE KINGS' claim against DCSB was for reimbursement of monies paid in settlement of the spectator personal injury claims. Regardless of the legal theory under which reimbursement was sought (i.e., contribution, indemnity and/or equitable subrogation), a jury trial to determine the parties' relative percentages of fault for the accident in suit was necessary. In their brief at page six DCSB correctly acknowledges that, pursuant to the trial court's order of October 23, 1993, "a trial would be held to apportion the respective percentages of fault

attributable to THREE KINGS and the SCHOOL BOARD." [citing (R. 5055-5056)]. With regard to THREE KINGS' claims for contractual indemnification (i.e. indemnification for damages due to DCSB's percentage of fault) and contribution (on the claims of Sergio Perez and Arnaldo Martinez where DCSB was included on the releases in favor of THREE KINGS), a jury trial to assess relative fault was necessary. Further, on THREE KINGS' claim for common law indemnity it was required to prove that it was wholly without fault. See, Houdaille Industries, Inc. v. Edwards, 374 So. 2d 490 (Fla. 1979). In a similar manner, a jury determination that DCSB was 100% responsible for the injuries to the spectators would lay a legal predicate for THREE KINGS to obtain reimbursement of the settlement monies it had paid in self-protection. See, West American Ins. Co. v. Yellow Cab, 495 So. 2d 204 (Fla. 5th DCA 1986), rev. denied, 504 So. 2d 769 (Fla. 1987)(Party who settled personal injury claim entitled to reimbursement under equitable subrogation doctrine where jury found adverse party 100% at fault for accident).

Thus, DCSB cannot complain about the necessity for a jury determination of the parties' respective percentages of fault. The real issue then is whether DCSB can meet its burden in this Court to establish that, considering the record as a whole, it sustained prejudice as a result of the fact that THREE KINGS requested entry of judgment in its favor on the basis of the equitable subrogation doctrine following the jury's determination of the parties' respective percentages of fault. For the

following reasons, THREE KINGS respectfully asserts that DCSB has not and cannot meet this burden.

DCSB's claim of prejudice is grounded on its contention that it was precluded from asserting the "complete defense" it allegedly had to THREE KINGS' equitable subrogation claim, to wit: release. This contention is belied by both the record in this case as well as the law applicable to the merits of this asserted defense.

The releases which allegedly constituted a legal defense to THREE KINGS' claim for equitable subrogation (which said releases were issued by the injured spectators in favor of DCSB) were part of the record before the trial court at the time that THREE KINGS requested entry of judgment in its favor. In fact, these releases had been placed in evidence by DCSB during the jury trial to determine the parties' respective percentages of fault. (TR. 1056; Def. Exhibs. C & D). However, in the filings made by DCSB in opposition to THREE KINGS' request for entry of judgment on the basis of the equitable subrogation doctrine (based on the jury's finding that DCSB was 100% at fault), DCSB never asserted its alleged complete legal defense of release. (R. 6073). Accordingly, the record in this case does not support either a contention or a finding that DCSB never had an opportunity to assert its alleged complete defense of release in the post-trial proceedings which culminated in the entry of the judgment under review.

Moreover, neither this Court's decisions in Dober v. Worrell, 401 So. 2d 1322 (Fla. 1981) nor Arky, Freed, et al. v. Bowmar Instrument Corp., 537 So. 2d 561 (Fla. 1988) support Petitioner's cause. In Dober, the Worrells sued Dr. Dober for medical malpractice. The trial court granted summary judgment for Dr. Dober based on the statute of limitations defense. On appeal the Worrells asserted for the first time that the period of limitations should be tolled based on Dr. Dober's alleged fraudulent concealment of facts surrounding the incident. Even though the records revealed that the Worrells had knowledge of the alleged concealment when initiating the suit, the District Court determined that the cause should be remanded so that the Worrells could have an opportunity to amend their pleadings to assert the fraudulent concealment issue. Id. at 1323.

After accepting conflict jurisdiction, this court in Dober approved the decision of the Fourth DCA to the extent it affirmed the Summary Judgment entered by the trial court but disapproved that portion which remanded the case for repleading of issues not previously raised. Id. at 1325. More specifically, this Court held that the failure to raise an affirmative defense before a trial court considering a Motion for Summary Judgment precludes raising that issue for the first time on appeal from that judgment. Id. at 1323.

Clearly, both the facts and rule of law involved in Dober are distinctly different from those presented by the decision

under review. Accordingly, Dober cannot serve as a basis for reversal.

This Court's decision in Arky, Freed also does not require reversal. There, Bowmar made several specific allegations of legal malpractice against Arky, Freed and also included a general allegation that Arky, Freed had generally failed to be "adequately prepared for trial" in the handling of a litigation matter for Bowmar. Id. at 562; see also, Arky, Freed, et al. v. Bowmar Instrument Corp., 527 So.2d 211, 212 (Fla. 3d DCA 1987). However, twelve days before trial Bowmar, in answers to Expert Witness Interrogatories, revealed an entirely new specific charge of negligence, i.e., that Arky, Freed had negligently failed to assert or prove a particular defense on Bowmar's behalf, despite Bowmar's direct instructions to do so. Arky, Freed immediately moved for a continuance, or in the alternative to exclude all evidence relating to this belated claim. The continuance was denied and a jury trial proceeded on the new claim. The jury returned a verdict in Bowmar's favor. Id. at 562.

On appeal, the Third District reversed the final judgment in favor of Bowmar and remanded for a new trial. In so doing, the Third District rejected Arky, Freed's request that on remand the trial court be instructed to direct a verdict in its favor. On this latter issue, the Third District certified conflict with other DCA opinions to the extent said decisions required a directed verdict in every case where a plaintiff pleads one cause of action and proves another at trial. I. at 214, n. 7.

In Arky, Freed, this Court ruled that on remand Arky, Freed was entitled to a directed verdict based on the fact that Bowmar had not proved at trial the specific acts of negligence alleged in the Complaint under circumstances where it was evident that Arky, Freed had been prejudiced in its ability to defend against the new, specific charge of professional negligence. Id. at 562-563.

The decision under review does not contain either the facts or the rule of law present in Arky, Freed. In the decision under review, a jury trial was ordered to determine who was at fault for the accident in suit. Based on the jury's finding that DCSB was 100% responsible for the accident, THREE KINGS sought entry of a judgment in its favor under a theory based on indemnity and/or equitable subrogation. The applicability of the equitable subrogation theory was briefed by the parties post-trial and the trial court ruled that THREE KINGS was entitled to reimbursement of the settlement monies paid based on the jury's finding that DCSB was 100% responsible for the accident.

THREE KINGS respectfully submits that record before this Court is so far removed from the facts in Arky Freed that said decision can and should have no application to the decision under review. There also was no issue in the decision under review with regard to whether or not the appropriate remedy was a new trial, as opposed to a directed verdict. Rather, the Third DCA in the decision under review ruled that the judgment in favor of THREE KINGS should be affirmed "considering the record as a

whole, in particular the jury verdict finding DCSB 100% at fault for causing the injuries to the parade spectators."[5]

Moreover, the fact that THREE KINGS never plead a claim for subrogation did not bar its request in the trial court for judgment under such theory (R. 6073, 6078) following the jury verdict which found DCSB 100% at fault. See, Kala Invs., Inc. v. Sklar, 538 So.2d 909, 918 n. 8 (Fla. 3d DCA 1989)(subrogation raised for first time in reply brief and court found same fully supported by record); West American, 495 So.2d at 207 (West American's failure to plead subrogation did not bar recovery under that doctrine where cause of action for same fully

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[5] The remaining District Court decisions cited by Petitioner (at pp. 17-18) similarly do not support reversal. In Designers Tile Int'l Corp. v. Capitol C Corp., 499 So. 2d 4 (Fla. 3d DCA 1986) and Freshwater v. Vetter, 511 So. 2d 1114 (Fla. 2d DCA 1987) the appellate courts held that the trial courts had erred in permitting a plaintiff to amend its pleadings during trial and send the new theory to the jury where the plaintiff had failed to prove the originally pleaded claim at trial (thereby entitling the defendant to a directed verdict on the originally pleaded claim). In the jury trial under review (which was to determine respective fault) THREE KINGS indisputably put on adequate evidence to send the fault issues to the jury and in addition thereto established the elements of equitable subrogation by establishing that it had settled claims in self protection (via the releases which were put in evidence) and that it had discharged an obligation, in whole or part, which in equity ought to be borne by DCSB. See, infra re: elements of equitable subrogation action. Further, in Dean Co. v. U.S. Home Corp., 485 So. 2d 438 (Fla. 2d DCA 1986) the plaintiff was precluded from amending to assert a new claim after trial where it had renounced the new claim during trial. Id. at 440. Additionally, based on the originally pleaded (and tried) claim in Dean Co., the defendant had no reason to focus its defense with evidence relevant to the new claim. Id. at 439-40. Obviously, in the jury trial under review the parties presented all of the evidence at their disposal on the question of who was responsible for the accident in suit and this determination laid a predicate for granting relief under the equitable subrogation doctrine.

supported by evidence presented at trial and all elements of that cause were tried). Given the jury's finding regarding fault, this Court should disregard any technical legal rules that would otherwise apply to an indemnity claim and prevent the unjust enrichment of DCSB by upholding the judgment under review.

Even assuming that DCSB would have exercised its opportunity in the trial court to assert the release defense to THREE KINGS' equitable subrogation claim, said contention would have failed. There has never been a contention by the injured spectators that the releases given by them to DCSB did not discharge DCSB from further direct liability to said bodily injury claimants; however, with regard to the reimbursement claim by THREE KINGS (another person alleged to be jointly liable for the same injuries) against DCSB, those same releases in favor of DCSB only discharged DCSB from liability to THREE KINGS for contribution. See, § 768.31 (5) (b) Fla. Stat.[6]

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[6] The only exception to this statement would be with regard to THREE KINGS' claim for reimbursement of settlement monies paid to claimants Sergio Perez and Arnaldo Martinez as DCSB never proffered any releases in its favor signed by these claimants. Further, on the releases issued by these claimants in favor of THREE KINGS, DCSB was included on these releases as a discharged party. (R. 1322; Def. Exhib. "D"). As such, with regard to these reimbursement claims THREE KINGS retained contribution rights. See, § 768.31 (d) Fla. Stat. Furthermore, when the jury's verdict established that THREE KINGS was not, in fact, a joint tortfeasor THREE KINGS became entitled to recovery of these settlement payments via the equitable subrogation doctrine. See, West American Ins. Co. v. Yellow Cab Co., 495 So. 2d 204 (Fla. 5th DCA 1986), rev. denied, 504 So. 2d 769 (Fla. 1987); see also, § 768.31 (e), Fla. Stat. (provision of Contribution Act which authorizes contribution claim by liability insurer does not impair subrogation rights).

Furthermore, a release of the injured party's rights against one defendant (alleged to be jointly liable with another defendant for the same injuries) does not constitute a defense to an equitable subrogation claim for reimbursement of settlement monies paid to the injured party by the other defendant who can establish that he or she was an "innocent settlor". See, Polec v. Northwest Airlines, Inc., 86 F. 3d 498 (6th Cir. 1996). As more specifically developed infra, equitable subrogation is a broad equitable doctrine which is intended to avoid unjust enrichment to parties who are responsible for injuries.[7]

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[7] Two cases were cited in the dissenting opinion below for the proposition that a health insurer who has paid benefits to its policyholder is not entitled to subrogate against a tortfeasor who has been released by the injured insured. See, Sutton v. Ashcraft, 671 So. 2d 301 (Fla. 5th DCA 1996) and High v. General American Life Ins. Co., 619 So. 2d 459 (Fla. 4th DCA 1993). These opinions are patently inapplicable to the subject issue as neither case involved a post-settlement claim for reimbursement of settlement monies paid by one alleged tortfeasor against another. In this latter context, the "shoe" which an innocent settlor steps into is in actuality the right of the injured person to pursue a claim (against the responsible party) for the portion of the damages paid by the innocent settlor which, in equity, should be paid by the responsible party in order to avoid unjust enrichment. See, Benchwarmers, Inc. v. Gorin, 689 So. 2d 1197 (Fla. 4th DCA 1997)(release in favor of subsequent tortfeasor was not a defense to initial tortfeasor's claim for equitable subrogation to obtain reimbursement of settlement monies paid); West American Ins. Co. v. Yellow Cab Co., supra (innocent settlor obtained equitable subrogation recovery against at fault party who had previously been released by plaintiff); but see, Munson & Assoc., Inc. v. Doctor's Mercy Hospital, 458 So. 2d 789 (Fla. 5th DCA 1984). However, even assuming that the health insurer/subrogation cases cited in the dissenting opinion applied, an estoppel exception to the release defense exists when the released party has knowledge of a pending lawsuit by the subrogating party to obtain reimbursement of the benefits paid. See, Ortega v. Motors Ins. Co., 552 So. 2d 1127 (Fla. 3d DCA 1989). Here, DCSB was on notice of THREE KINGS claims for reimbursement (via THREE KINGS' cross-claims and

(continued...)

II. CONSIDERING THE RECORD AS A WHOLE, THREE KINGS WAS ENTITLED TO COMMON LAW INDEMNIFICATION OR, ALTERNATIVELY, EQUITABLE SUBROGATION AND THEREFORE THE JUDGMENT UNDER REVIEW SHOULD BE AFFIRMED.

THREE KINGS, as indemnitee, has proven that it was wholly without fault, as necessary for a claim of common law indemnity under Houdaille Industries, Inc. v. Edwards, 374 So.2d 490, 493 (Fla. 1979). In this appeal, DCSB does not challenge the sufficiency of the evidence supporting the verdict finding that DCSB was 100% at fault for the incident in suit.

Houdaille also requires a special relationship between the indemnitee and indemnitor which would make the indemnitee only vicariously, constructively, derivatively, or technically liable for the wrongful acts of the indemnitor. 374 So.2d at 492. Notwithstanding the jury's finding, the record before this Court as a whole shows that THREE KINGS had a relationship with DCSB whereby THREE KINGS had vicarious, constructive, derivative, or technical liability to the injured spectators.

The record in this case reveals that THREE KINGS' exposure to the original Plaintiffs was in part based on a claim for strict liability for involvement in an abnormally dangerous and/or ultra-hazardous activity, to wit: utilizing flammable liquids and flaming batons in close proximity to parade spectators. (R. 501-03, 514-16, 3360-61). Further, when the veil of the "paper pleadings" in this case is pierced and the

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[7] (...continued)
independent action) of any liability or monies paid to the spectator claimants.

real facts of this case are examined, the subject record is filled with facts establishing that the claim of liability against THREE KINGS was, in fact, based on THREE KINGS' vicarious liability for injuries which occurred during the parade it put on. These undisputed facts of record include: THREE KINGS' technical involvement in the incident as the parade promoter and "permit holder"(TR. 315, 322, 345-46); THREE KINGS' agreement with the City wherein THREE KINGS agreed to be responsible for all aspects of the parade regarding the conduct of the parade and to "insure the safety and welfare of the participants and attending crowds" (TR. 348-49); and, the contractual agreements between THREE KINGS and DCSB wherein: A) Miami Senior High School agreed to be a participant in the parade (TR. 328); and, B) DCSB agreed to indemnify THREE KINGS for any claim resulting from DCSB's participation in the parade. All of these facts of record (along with the jury's finding that THREE KINGS was fault free) demonstrate that, in actuality, THREE KINGS was a party who was saddled with ultimate liability for the acts of the parade participants.

Florida, of course, recognizes a cause of action sounding in strict liability for ultra-hazardous or abnormally dangerous activities. See generally, Great Lakes Dredging & Dock Co. v. Sea Gull Operating Corp., 460 So.2d 510 (Fla. 3d DCA 1984). The vicarious liability created under that doctrine may give rise to a claim for common law indemnity. Cf., Metropolitan Dade County v. Florida Aviation Fueling Co. (FAFCO), 578 So.2d 296, 299 n. 4

(Fla. 3d DCA 1991) (finding "potentially viable" vicarious liability claim based on ultrahazardous activity entitling county to seek contractual indemnity for ultrahazardous acts of its lessee for which county was sued by original plaintiff); Cf. also, Houdaille, 374 So.2d at 493-94 n.3 (manufacturer whose liability arises because of supplier's defective product incorporated into manufacturer's product may have right of indemnification against supplier; such manufacturer could be without fault regarding its relationship with supplier).

Further, the relationship between THREE KINGS (as parade organizer/permit holder) and DCSB (as a parade participant) was sufficient in and of itself to establish a special relationship for purposes of a common law indemnity claim. See, Brickell Biscayne Corp. v. Morse/Diesel, Inc., 683 So.2d 168, 170 (Fla. 3d DCA 1996) (finding that developer had common law indemnity claim against architects and construction manager with whom it had a contractual relationship); Mortgage Guarantee Ins. Corp. v. Stewart, 427 So.2d 776 (Fla. 3d DCA 1983)(landowner who had non-delegable duty to maintain premises in reasonably safe condition had special relationship for purposes of common law indemnity with realty company tortfeasor who performed active operations on property). As stated previously, although THREE KINGS had a non-delegable duty to insure the safety of parade spectators, the party with whom THREE KINGS contracted to actually participate in and perform a parade activity (DCSB) had the primary duty to

supervise the student/participants. See, Rupp v. Bryant, 417 So.2d 658 (Fla. 1982).[8]

Thus, in liberally construing the record as a whole to determine whether a miscarriage of justice occurred - § 59.041 Fla. Stat. - THREE KINGS respectfully submits that the record in this case reveals that it was entitled to common law indemnity as a matter of law based on the undisputed facts establishing its status and relationship with DCSB and also the jury's finding that THREE KINGS was wholly without fault for the Plaintiffs' injuries.

Alternatively, even if this Court finds that the record as a whole does not support the existence of a special relationship between THREE KINGS and DCSB, THREE KINGS was still entitled to a judgment in its favor under the doctrine of equitable subrogation in light of the jury's finding that DCSB was 100% at fault. Through subrogation, courts seek to do justice without regard to form. This doctrine applies where one has paid a legal obligation which ought to have been paid, either wholly or partially, by another. See generally, Underwriters at

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[8] On this point, even the trial court noted (at the directed verdict stage of the trial) that as a parade sponsor THREE KINGS was subject to technical and vicarious liability to anyone who might be injured by the parade operations (TR. 770) and that the evidence presented could establish that THREE KINGS' liability would not have arisen if it had not been for certain conduct by DCSB. (TR. 772). See also, TR. 766 where counsel for DCSB acknowledged that the essence of the evidence put on by THREE KINGS in its case-in-chief was that DCSB had breached its admitted duty to supervise the Miami High parade participants.

Lloyds v. City of Lauderdale Lakes, 382 So.2d 702, 704 (Fla. 1980)(Equitable subrogation is a remedy available to a party who has paid a loss to shift the loss to the responsible party when the allegedly responsible parties are not joint tortfeasors). Subrogation generally prevents unjust enrichment and is "part of the universe usually spoken of as being inhabited by only indemnity or contribution." Kala Invs., Inc. v. Sklar, 538 So.2d 909, 917 (Fla. 3d DCA 1989). Having been found completely without fault by the jury, it is clear that THREE KINGS' payment to Plaintiffs was a debt owed by DCSB. The equities thus require that DCSB repay THREE KINGS for discharging same even absent the indemnity technicality of a special relationship between the parties.

For subrogation to apply, a party must not be a mere volunteer. Rather, it must make payment in protection of its interest. Kala, 538 So.2d at 917; see, 73 Am. Jur. 2d Subrogation § 6 (1974) (Subrogation "is broad enough to include every instance in which one person, not acting as a mere volunteer or intruder, pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter."). THREE KINGS may not be deemed a volunteer merely because the jury ultimately found it to be without fault. As a named defendant in Plaintiffs' original suit, THREE KINGS settled to protect its own interests which were in jeopardy because of such suit. As the Fifth District has stated:

> The right of subrogation is not necessarily confined to those who are legally bound to make payments, but extends as well to persons who pay the debt in self-protection, since they might suffer loss if the obligation is not discharged. . . . In the face of the lawsuit in which it was named as a defendant, West American [who was ultimately found to be completely without fault] was not a volunteer but settled with the injured passenger to protect its own interests.

West Am. Ins. Co. v. Yellow Cab Co., 495 So.2d 204, 206 (Fla. 5th DCA 1986), review denied, 504 So.2d 769 (Fla. 1987).[9]

III. JUDGMENT FOR THREE KINGS ON ITS CLAIM FOR CONTRACTUAL INDEMNIFICATION WAS PROPER WHERE THREE KINGS WAS NOT BOUND BY PLAINTIFFS' ALLEGATIONS OF FAULT AGAINST IT AND THE CONTRACT APPLIED TO THE ACTS WHICH CAUSED THE INJURIES. ALTERNATIVELY, THREE KINGS WAS ENTITLED TO EQUITABLE SUBROGATION.

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[9] The general rule is that subrogation does not lie unless the demand of the creditor (here, Plaintiffs) is paid in full. Fowler v. Lee, 106 Fla. 712, 143 So. 613, 614 (Fla. 1932). Although there is authority for the proposition that subrogation does not exist until the subrogee (here, THREE KINGS) pays the entire debt owed to the claimant, see, Cleary Bros. Constr. Co. v. Upper Keys Marine Constr., Inc., 526 So.2d 116, 117 (Fla. 3d DCA 1988), the right to subrogation extends to anyone "paying any part of the debt of another provided the entire debt is paid." Furlong v. Leybourne, 138 So.2d 352, 356 (Fla. 3d DCA 1962) (emphasis added). Indeed, in Fowler [cited by the Third District in Furlong at p. 356, n. 3] this court explained that the balance of the debt may be satisfied by the principal or in some other manner. Fowler, 143 So. at 614; see also, Underwriters at Lloyds v. City of Lauderdale Lakes, 382 So. 2d 702 (Fla. 1980)(wherein this court noted that equitable subrogation is designed to afford relief where one is required to pay a legal obligation which ought to have been borne, either wholly or partially, by another). Here, Plaintiffs' claims were satisfied by both THREE KINGS' and DCSB's settlements and therefore, contrary to Petitioner's contention THREE KINGS was entitled to subrogation under the operation of Fowler, Underwriters at Lloyds and Furlong.

THREE KINGS was entitled to contractual indemnity from DCSB for damages due to DCSB's negligence, under the clear terms of the indemnity contract. See, Alonzo Cothron, Inc. v. Upper Keys Marine Constr., Inc., 480 So.2d 136 (Fla. 3d DCA 1985)(holding that broad language in contract required indemnitor to indemnify indemnitee for damages due to indemnitor's negligence).[10]

DCSB attempted to avoid its indemnity obligation by arguing that there were allegations of fault made against THREE KINGS by the original Plaintiffs. However, THREE KINGS' contractual indemnity claim was clearly cognizable despite those allegations, "as the law has always permitted a person to bring an indemnity claim quite apart from the characterization of his conduct in the original complaint filed by the injured party." Mortgage Guarantee Ins. Corp. v. Stewart, 427 So.2d 776, 780 (Fla. 3d DCA 1983).

It is further evident that THREE KINGS had settled claims for which it could have been found vicariously liable and the settlements were reasonable. First, as discussed above, THREE KINGS was faced with a factual scenario by which it was subject to vicarious liability as a parade organizer for DCSB's breach of its duty to supervise the parade operations performed by Miami High. THREE KINGS need not show that such a theory would have ultimately prevailed had it been tried. See, FAFCO, supra at n.4

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[10] On this appeal, THREE KINGS does not contend that it is entitled to contractual indemnification under the Participation Agreement for its own acts of negligence. Rather, this claim is limited solely to indemnification for DCSB's negligence.

(finding potentially viable vicarious liability claim despite argument that same may have failed if tried and appealed). Additionally, the relevant releases apply to all claims which were or could have been asserted against THREE KINGS. These general releases obviously included claims for vicarious liability for the acts of DCSB. (R. 1316, 1318, 1320, 1322). Further, DCSB has stipulated to the reasonableness of the amounts paid by THREE KINGS. (TR. 263). And, ultimately, the jury's verdict demonstrated that THREE KINGS dI pay for, and only for, its vicarious liability. Cf., Metropolitan Dade County v. Gassin, 449 So.2d 828 (Fla. 3d DCA 1984)(County was entitled to directed verdict on its indemnity claim where, without proof in record of any fault on part of County, its liability to plaintiffs could only have been based upon its ownership of escalator).

Thus, in light of the record as a whole, THREE KINGS has shown that its settlement could only have been for vicarious liability claims. Therefore, the trial court correctly found that THREE KINGS was entitled to contractual indemnity from DCSB.[11]

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[11] DCSB cites to Association for Retarded Citizens v. State, Department of Health & Rehabilitative Servs., 619 So.2d 452 (Fla. 3d DCA 1993) and argues that the case does not apply because THREE KINGS never settled claims seeking vicarious liability. ARC explicitly authorized the use of a post-settlement "apportionment" hearing to determine what claims were settled. This was precisely the purpose the subject jury trial served, and in light of the jury's verdict finding DCSB 100% at fault, it is clear that the only claims THREE KINGS settled were those based entirely on DCSB's fault. Thus, no additional "apportionment" hearing is required.

DCSB next argues that the indemnification agreement does not apply to the acts for which THREE KINGS seeks indemnity. The interpretation of an indemnity agreement is generally a matter of law for the court. Improved Benevolent & Protected Order of Elks of the World, Inc. v. Delano, 308 So.2d 615, 617 (Fla. 3d DCA 1975). The goal is to determine the intention of the parties as evident from the contract language as well as the circumstances surrounding the making of the agreement. Id.

The agreement provides:

> [W]e 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.

(See A.1); see also, Robbie v. City of Miami, 469 So.2d 1384 (Fla. 1985)(Under Florida's objective theory of contracts, inquiry is not whether parties meant the same thing but rather whether they said the same thing).

The record in this case also shows: A) that an Identical Participation Agreement was sent to Miami High with regard to the marching band's participation in the parade (TR. 327-28; 1009-1012; Pltf's Exhibs. 5 & 6; see also Pltf. Exhib. No. 1-A for Identification); and B) that DCSB sponsored the Miami High School marching band by purchasing an advertising package, which included the right to have the Miami High School marching band carry a banner. (Moffi Depo. p. 179). John Moffi admitted that he had purchased the right to have the band display the banner. (Moffi Depo. p. 179). He explained that he wanted the banner to

be carried as close to the front of the parade as possible so as to achieve the greatest possible exposure. (Moffi Depo. p. 54). In light of these circumstances, it is clear that DCSB's "participation and actions during the Three Kings Day Parade" included operations performed by the Miami Senior High School Marching Band. Obviously, any conduct of the band to enhance the quality of its performance--i.e., the use of flaming batons--inures to the benefit of DCSB in the form of enhanced exposure. Thus, DCSB should be required to indemnify THREE KINGS for the injuries arising from "that participation and [those] actions during the . . .[p]arade."

The Participation Agreement signed by John Moffi, which contains the indemnity agreement, constitutes the express, written contract giving rise to THREE KINGS' entitlement to contractual indemnity. DCSB had authority to enter into the subject indemnity contract. § 230.22, Florida Statutes (1989), entitled "General powers of school board", provides in pertinent part:

> (4) CONTRACT, SUE, AND BE SUED.--The school board shall constitute the contracting agent for the district school system. It may, when acting as a body, make contracts, also sue and be sued in the name of the school board[.]

This Court should find the contract valid under this statute where it was executed by John Moffi at a time when he was responsible for administering DCSB's advertising budget for the Office of Vocational, Adult, Career and Community Education. (Moffi Depo. pp. 4-6, 18-19). Indeed, Moffi had signed numerous

other agreements on behalf of Dade County Public Schools which contained similar indemnity/hold harmless clauses. (Moffi Depo. pp. 10, 14, 117-19, 156-57, 185-86, 187-88). To refuse to uphold the contract, therefore, would result in an unjust award to DCSB, especially in light of the jury's verdict finding DCSB to be 100% at fault.

Even if this Court concludes that the trial court erred in finding that the terms of the contract support indemnification, the judgment under review should still be affirmed. § 59.041, Fla. Stat. Any such error would be harmless in light of THREE KINGS' right to reimbursement under the doctrine of equitable subrogation discussed supra. Because the jury found DCSB to be 100% at fault in causing the injuries and THREE KINGS was not acting as a volunteer in settling Plaintiffs' claims, DCSB would be unjustly enriched if some form of "indemnity" were not permitted.

IV. THE NOTICE REQUIREMENTS OF § 768.28 WERE NOT APPLICABLE TO THREE KINGS' CLAIM FOR CONTRACTUAL INDEMNITY. ALTERNATIVELY, THE REQUIREMENTS WERE COMPLIED WITH WHERE THE UNDERLYING PLAINTIFFS PROVIDED PROPER NOTICE OF THEIR TORT CLAIMS AND THREE KINGS PROVIDED A SEPARATE GLOBAL NOTICE PRIOR TO FILING ITS INDEPENDENT ACTION FOR REIMBURSEMENT ON ALL SPECTATOR CLAIMS.

Section 768.28 (6)(a), Florida Statutes, requires that notice be given to the state or one of its agencies or subdivisions, as well as to the Department of Insurance, before a cause of action may be maintained against the relevant public entity. This requirement, of course, applies in tort actions

against the sovereign. See generally, Levine v. Dade County School Bd., 442 So.2d 210 (Fla. 1983)(interpreting statute to require notice to agency and Department of Insurance in student's action against school board for negligence). However, where the state has entered into an express, written contract, sovereign immunity is no defense in an action against the state for breach of that contract. Pan-Am Tobacco Corp. v. Department of Corrections, 471 So.2d 4, 6 (Fla. 1984). This rule applies only when the state had authority to enter into the subject contract. Id. at 5, 6.

Thus, because THREE KINGS' claim was grounded on the indemnity contract between the parties, section 768.28's notice requirements should not apply. This conclusion is supported by analogy to the cases which hold that the state is liable for pre-judgment interest in such actions. See, e.g., Public Health Trust v. State, Department of Management Servs., 629 So.2d 189, 189 (Fla. 3d DCA 1993)("The state's asserted defense of sovereign immunity does not bar recovery of prejudgment interest in a successful action in contract."); Dade County v. American Re-Insurance Co., 467 So.2d 414, 418 (Fla. 3d DCA 1985)("Where . . . allowance of prejudgment interest would be legal and just as between private parties. . .the state. . .is liable for interest on a claim arising out of its breach of contract.").

THREE KINGS further acknowledges the authority which provides that indemnity actions for the torts of governmental entities are covered by the sovereign immunity statute. See,

Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010, 1022 (Fla. 1979)("Actions for contribution or indemnity grounded on the tortious conduct of the state or its agencies and subdivisions are no less tort claims for purposes of section 768.28 than direct actions."). However, unlike this case, the indemnity claims in Commercial Carrier were not based on an express contract. Thus, the general language there does not compel a finding that THREE KINGS' claim for contractual indemnity is exclusively a tort action which required notice to DCSB prior to the filing of same. Indeed, the opposite conclusion should follow given the distinction between Commercial Carrier and this case.

Additionally, in Evanston Insurance Co. v. City of Homestead, 563 So.2d 755 (Fla. 3d DCA 1990), this Court rejected an excess carrier's claim for breach of contract against its insured, the city, seeking reimbursement under the policy of monies paid to settle a medical malpractice claim. Evanston should not be read to say that contractual indemnity claims seeking to recover for the torts of a governmental agency shall be deemed to be tort claims for the purposes of applying section 768.28. Rather, that ruling was apparently based on the specific language of the policy, which provided for reimbursement for amounts the city was "legally obligated to pay," and the principle that immunity is waived to the extent that liability insurance is purchased. Thus, since the city was only liable for $200,000 under section 768.28 and did not purchase insurance

applicable to the remainder of the retained limit under the excess policy, reimbursement was prohibited. Id. at 757. In the instant case, the indemnity contract applies to the first dollar paid by THREE KINGS, and the distinction described above between THREE KINGS' claim and that in Commercial Carrier warrants a finding that THREE KINGS' claim does not sound in tort.

Even if this Court were to conclude that THREE KINGS' contractual indemnity claims were truly tort claims, the statute's notice requirements are not a bar to THREE KINGS' recovery herein. When a party brings a cross-claim against the governmental entity for contribution, seeking to recover for liability arising out of the main action, the defendant/cross-plaintiff need not provide separate notice of such claim to the governmental entity. See, Orange County v. Gipson, 548 So.2d 658, 660 (Fla. 1989)("[W]here. . .a crossclaim for contribution is 'part and parcel'. . .of the original action against a state agency notice of filing the crossclaim is not necessary.").

In two of the consolidated cases (91-13341 and 91-32702), to which both DCSB and THREE KINGS were named defendants, the underlying Plaintiffs provided the proper notice to DCSB and the Department of Insurance, and such notices were attached to the underlying complaints (R. 21-28, 492, 1467, 1472, 3352) and incorporated by reference into THREE KINGS' crossclaims for indemnity against DCSB filed in those suits. (R. 541). Further, in the Mayda Gonzalez case, DCSB had entered into a stipulated summary judgment that all statutory notice provisions had been

met. (R. 1044-45). Because the crossclaims sought to recover for any underlying liability to the injured spectators, they should be considered to be "part and parcel" and a "logical product" of the original actions for purposes of applying the notice provisions of section 768.28. Id. "Requiring a second notice in this instance would be a totally unwarranted elevation of form over substance." Id.; see also, TR. 766 (where DCSB's counsel admitted that the "essence" of the underlying personal injury suits and THREE KINGS reimbursement claim was the same, i.e. DCSB's negligent supervision of the Miami High students).

Thus, DCSB's claim that the statutory notice requirements were not satisfied with regard to THREE KINGS' crossclaims is without merit.

THREE KINGS also complied with the statute regarding its independent action (case no. 92-16488) against DCSB seeking to recover monies paid to SERGIO PEREZ as well as any other claims and judgments pertaining to the January 7, 1990 incident at the THREE KINGS DAY PARADE wherein spectators were burned. (R. 2700-02, 6104-10). THREE KINGS provided statutory notice (dated November 18, 1991) of these claims to DCSB and the Department of Insurance and attached same to that complaint (R. 2700-02, 6104-10). During trial, THREE KINGS made a proffer of this letter. (TR. 760).

Thus, DCSB's claim that the required notice was lacking is without merit.[12]

CROSS-APPEAL

I. THE THIRD DISTRICT INCORRECTLY STRUCK THE LANGUAGE PROVIDING FOR EXECUTION ON THE SUBJECT JUDGMENT BECAUSE § 768.28 FLA. STAT. ALLOWS FOR ENTRY OF A JUDGMENT IN EXCESS OF THE LIABILITY LIMIT.

THREE KINGS acknowledges the authority which supports the proposition that execution may never issue against the state or one of its subdivisions regardless of whether the limits of liability in section 768.28 apply or have been met. See, § 55.11, Fla. Stat. (1993)("No money judgment or decree against a municipal corporation is a lien on its property nor shall any execution or any writ in the nature of an execution based on the judgment or decree be issued or levied."); see also, Northern Coats v. Metropolitan Dade County, 588 So.2d 1016, 1017 (Fla. 3d DCA 1991)("A judgment creditor may not obtain a lien against or

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[12] In its brief, DCSB argues that it was entitled to a directed verdict (and ultimately a judgment) for THREE KINGS' claimed failure to prove during trial that it provided the required statutory notice. It is questionable whether this argument has been properly preserved for appellate review as DCSB failed to renew its prior motion for directed verdict at the close of all the evidence (TR. 1056) and did not assert the notice issue in its Motion for Judgment in Accordance with Motion for Directed Verdict. (R. 5979-5982). See, 6551 Collins Avenue Corp. v. Millen, 104 So.2d 337 (Fla. 1958); Rule 1.480(b), Fla.R.Civ.P. The trial judge reserved ruling on DCSB's initial motion for directed verdict, but stated that the matter would be taken up while the jury was deliberating. (TR. 769, 782-83). The record shows that this was not done. However, assuming the notice defense has been properly preserved for review, THREE KINGS alternatively asserts that it adequately established compliance with the statutory notice requirements via its trial proffer (TR. 760) and during the trial court's post-trial consideration of the issue.

levy execution against the property of a county."); City of North Miami v. Williams, 555 So.2d 399, 399 (Fla. 3d DCA 1989)(striking "'let execution issue'" from final judgment against city); City of Haines City v. Allen, 549 So.2d 678, 678 (Fla. 2d DCA 1989)(same); Berek v. Metropolitan Dade County, 396 So.2d 756, 759 n.4 (Fla. 3d DCA 1981)("A judgment creditor may not. . .levy execution against the property or funds of a state, county, or municipal corporation in the absence of express authorization."), affirmed, 422 So.2d 838 (Fla. 1982). Nevertheless, THREE KINGS requests that this Court follow State, Department of Public Health v. Wilcox, 504 So.2d 444 (Fla. 3d DCA 1987), reversed on other grounds, 543 So.2d 1253 (Fla. 1989), on this issue.

In Wilcox, the state was required, pursuant to a judgment, to pay its employee certain worker's compensation benefits. The state complained on appeal that the trial court had no authority to order execution and levy against it. The Court rejected that contention in light of the language of the worker's compensation statute (§ 440.02) which indicates that the state is treated in the same manner as private employers under that law. 504 So.2d at 445. Similarly, section 768.28 (5) provides that the state and its agencies are liable in tort in the same manner and to the same extent as private individuals in like circumstances. Thus, THREE KINGS requests that the language on the original judgment regarding execution be reinstated.

II. THE THIRD DISTRICT INCORRECTLY AFFIRMED THE TRIAL COURT'S DENIAL OF THREE KINGS' CLAIM FOR PRE-JUDGMENT INTEREST WHERE SUCH CLAIM WAS BASED UPON THREE KINGS' CONTRACTUAL INDEMNITY CLAIM WHICH FALLS OUTSIDE THE

WALTON LANTAFF SCHROEDER & CARSON
707 SOUTHEAST 3RD AVENUE, FORT LAUDERDALE, FLORIDA 33316 • TEL. (954) 463-8456

PURVIEW OF § 768.28. ALTERNATIVELY, DCSB WOULD NOT BE HARMED BY A JUDGMENT FOR SAME TO BE PURSUED IN A CLAIMS BILL.

Because the provisions of section 768.28 do not apply to THREE KINGS' claim for contractual indemnity, the trial court erred in finding that THREE KINGS was not entitled to an award of pre-judgment interest.

Specifically, section 768.28, which by its terms prevents governmental liability for pre-judgment interest, also applies by its terms only to tort actions. § 768.28 (1), (5) Fla. Stat. Thus, as a general matter, where the state has entered into an express, written contract, sovereign immunity is no defense in an action against the state for breach of that contract. Pan-Am Tobacco Corp. v. Department of Corrections, 471 So.2d 4, 6 (Fla. 1984). Courts have routinely held that the state is therefore liable for pre-judgment interest in such actions. See, e.g., Public Health Trust v. State, Department of Management Servs., 629 So.2d 189, 189 (Fla. 3d DCA 1993)("The state's asserted defense of sovereign immunity does not bar recovery of prejudgment interest in a successful action in contract."); Dade County v. American Re-Insurance Co., 467 So.2d 414, 418 (Fla. 3d DCA 1985)("Where . . . allowance of prejudgment interest would be legal and just as between private parties. . .the state. . .is liable for interest on a claim arising out of its breach of contract."). And, THREE KINGS was otherwise entitled to pre-judgment interest because the final judgment liquidated damages as of the dates of the settlements. See, Hurwitz v. Frank, 598 So.2d 99, 100 (Fla. 4th DCA 1992)(holding that the trial court

erred in denying pre-judgment interest as the final judgment "liquidates damages from the date that the settlement was reached")(citing Argonaut Ins. Co. v. May Plumbing Co., 474 So.2d 212 (Fla. 1985)).[13]

However, even if this Court finds that section 768.28 applies to THREE KINGS' contractual indemnity claim and therefore this claim, THREE KINGS should still obtain an "award" of pre-judgment interest for the purposes of presenting a claims bill to the legislature. Support for this position is found within the statute itself, which provides for entry of a judgment in excess of the statutory limits of liability. § 768.28 (5), Fla. Stat. But see, State, Department of Transp. v. Bailey, 603 So.2d 1384, 1387 (Fla. 1st DCA 1992)("Where relief is precluded by the defense of sovereign immunity, the court is said to be lacking subject matter jurisdiction to grant the relief sought."). Entry of a judgment for pre-judgment interest in such circumstances should be no different than entry of a judgment for damages far in excess of the statutory limit. THREE KINGS can then present its full claim to the legislature and/or DCSB's insurer. As a result, the order denying THREE KINGS an award of pre-judgment interest should be reversed and this aspect of the cause remanded for entry of an appropriate order.

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[13] See Issue III of this brief wherein THREE KINGS has established the validity of the contract of indemnity.

CONCLUSION

No reversible error has been demonstrated by DCSB on its appeal. Considering the record as a whole, and particularly the jury verdict finding DCSB 100% at fault for causing the injuries to the parade spectators, THREE KINGS respectfully requests that the decision of the Third District Court of Appeal affirming the money judgment in its favor be affirmed in all respects with the exception that the portion of the opinion deleting the execution provision and denying THREE KINGS' motion for pre-judgment interest be reversed and the cause remanded for said relief.

WALTON LANTAFF SCHROEDER & CARSON
Attorneys for Respondents
707 S.E. 3rd Avenue, Suite 300
P.O. Box 14309
Ft. Lauderdale, Florida 33302
Telephone (954) 463-8456
Telecopier (305) 763-6294

By _____
JOHN P. JOY
Fla. Bar No.: 327018
KENNETH L. VALENTINI
Fla. Bar No.: 988863

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 9th day of March, 1998 to: JEFFREY A. MOWERS, ESQ., PETERS, ROBERTSON, LAX, PARSONS & WELCHER, Attorneys for Petitioner, 25 S. E. Second Avenue, #600, Miami, FL 33131; KENNETH R. DRAKE, ESQ., SMITH DEMAHY DRAKE COZAD & CABEZA,

P.A., Co-Counsel for Petitioner, 141 N.E. 3rd Avenue, Bayside Office Center, Penthouse, Miami, FL 33132 and GERALYN M. PASSARO, ESQ., Counsel for Petitioner, 600 South Andrews Avenue, Suite 405, Fort Lauderdale, FL 33301.

By: _____
JOHN P. JOY
KENNETH L. VALENTINI