IN THE SUPREME COURT OF FLORIDA

DADE COUNTY SCHOOL BOARD,

Petitioner/Appellants,

Sup. Ct Case No. 91,767
3rd DCA Case No. 95-534
& 94-3011

vs.

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

Respondents/Appellees.
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# JURISDICTIONAL BRIEF OF PETITIONER DADE COUNTY SCHOOL BOARD

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## INTRODUCTION

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

The following symbols will be used for reference purposes:

"A" for reference to the Appendix.

All emphasis is added unless indicated to the contrary.

## STATEMENT OF THE FACTS AND THE CASE

As noted by Judge Cope in his dissenting opinion, this is a case where the "liability insurer for the organizers of the Three Kings Parade is seeking to shift its insurance loss" to the SCHOOL BOARD. This case arises out of an accident on January 7, 1990 during the 19th Annual Three Kings Day Parade, which was sponsored by RADIO STATION WQBA, CITY OF MIAMI, SUSQUEHANNA BROADCASTING CO., and THREE KINGS PARADE, INC.

The parade was run by the Radio Station as a promotional event. Advertising packages were offered in exchange for parade sponsorship. Supporters of the Parade were required to sign a "Participation Agreement" which was intended to apply only to the method of advertisement selected by the entity. In this particular instance, the Office of Vocational, Adult, Career and Community Education (OVACCE) of the Dade County Public Schools agreed to sponsor the Miami High marching band. After being enticed with prize money for the best band, the Miami High school marching band elected to use flaming twirling batons. As the majorettes neared the judging area, a can of flammable liquid fell, and a student bystander kicked the can into the crowd of spectators. As a result, several spectators were burned.

The injured plaintiffs brought suit for personal injury against THREE KINGS and the SCHOOL BOARD. The liability insurer for THREE KINGS settled with the injured plaintiffs and releases

were executed on behalf of THREE KINGS, but not on behalf of the SCHOOL BOARD, with two exceptions. Thereafter the liability carrier (in the name of THREE KINGS) sued the SCHOOL BOARD for contractual indemnity and common law indemnity. No claim for equitable subrogation was made prior to rendition of the jury verdict.

Summary judgment was entered in favor of THREE KINGS on the claim for contractual indemnity. According to the trial court, the "Participation Agreement" contractually required the SCHOOL BOARD to indemnify THREE KINGS for the actions of the marching band.

At trial, THREE KINGS failed to present any evidence that they had settled any of the claims due to vicarious liability or on account of the negligence of the SCHOOL BOARD. In response to a special verdict interrogatory, the jury found no special relationship between the SCHOOL BOARD and THREE KINGS. Nevertheless, based upon this verdict, final judgment in the amount of $2,035,000 was entered in favor of THREE KINGS on the issue of contractual indemnity.

On appeal, the Third District Court of Appeal affirmed the judgment in favor of THREE KINGS not on the theories presented at trial, but instead 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 this theory was never pled or presented to a jury for its determination. Although the Third District Court of Appeals noted that equitable subrogation was never pleaded in the

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

Thereafter, the SCHOOL BOARD filed a motion for rehearing, rehearing en banc and/or motion to certify the decision to the Supreme Court, which was denied by the Third District on October 1, 1997. (A. 2). Judge Cope 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).

## BASIS OF JURISDICTION

This appeal is brought pursuant to Florida Rules of Appellate Procedure 9.120. Petitioner seeks 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).

## ARGUMENT

**THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IS IN EXPRESS AND DIRECT CONFLICT WITH THE DECISION OF THE FLORIDA SUPREME COURT IN 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)**

The decision of the Third District Court of Appeals affirming judgment in favor of THREE KINGS on the basis of equitable subrogation, where that theory was never pled or presented to a jury, is in express and direct conflict with the decision of the Florida Supreme Court in 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).

In the present case, the issue is whether a judgment can be sustained based upon a theory which was never expressly tried by the parties and raised for the first time post-trial.

In Arky, Freed, this Court 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 which 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.

Similarly, in Dober v. Worrell, 401 So.2d 1322 (Fla. 1981), 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 Judge Cope in his dissenting opinion, "the essence of due process is notice and the opportunity to be heard." The decision of the Third District Court of Appeal is contrary to the law of this Court and the State of Florida. The decision of the Third District Court of Appeal, which permits the theory of equitable subrogation to be raised for the first time post trial, emasculates the concepts of due process and opportunity to be heard. This is particularly so where SCHOOL BOARD has a complete defense to THREE KINGS' claim, such as accord and satisfaction as well as release, which the SCHOOL BOARD never raised since a claim for equitable subrogation was never pleaded or tried.

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.

The District Court of Appeal, by this decision, as well as by the Fifth District Court of Appeal in the West American case and the Fourth District Court of Appeal in the Transport Int'l case are creating exceptions to overrule the well established precedent of this Court in Arky Freed. As such, the decision of the Third District Court of Appeal is erroneous and should be reversed. Accordingly, Petitioner respectfully requests that this Court accept jurisdiction of this cause and allow Petitioner the opportunity to file a thorough brief on the merits.

## CONCLUSION

Based upon the foregoing arguments and citations of authority, Petitioner, DADE COUNTY SCHOOL BOARD, respectfully requests that this Honorable Court accept jurisdiction of this cause and provide Petitioner the opportunity to brief this matter on the merits.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 7th day of NOVEMBER, 1997 to: JOHN P. JOY, ESQUIRE, 2 South Biscayne Boulevard, 25th Floor, Miami, Florida 33131, and to PETE DeMAHY, ESQUIRE, 141 Northeast 3rd Avenue, Bayside Office Center, Penthouse, Miami, Florida 33132.

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