OA 5-6-98

047.

IN THE SUPREME COURT OF FLORIDA

DADE COUNTY SCHOOL BOARD,

Appellant,

SUPREME CT CASE NO.: 91,767
THIRD DCA CASE NO.: 94-03011
95-00534

vs.

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

Appellees.
_____/

REPLY BRIEF OF APPELLANT/ANSWER BRIEF TO CROSS-APPEAL ON THE MERITS

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STATEMENT OF THE FACTS AND THE CASE

FACTS RELATIVE TO THE MAIN APPEAL

The SCHOOL BOARD feels compelled to address certain facts and statements contained in the Answer Brief. THREE KINGS states that the SCHOOL BOARD does not challenge the sufficiency of the evidence concerning who was responsible for the accident. Even though the SCHOOL BOARD believes it was not 100% at fault as determined by the jury, it is unnecessary to reach this issue because THREE KINGS is not entitled to recovery for equitable subrogation. Thus, while the SCHOOL BOARD takes issue with several assertions of fact regarding the accident as recited by THREE KINGS' Statement of Facts, the SCHOOL BOARD will not belabor the point here.

Obviously, the SCHOOL BOARD disagrees with the purpose of the Participation Agreement (indemnity contract) as stated by THREE KINGS. THREE KINGS states that the form was signed by a Dade County Public School employee, John Moffi, an Educational Specialist with the Office of Vocational, Adult, Career and Community Education (OVACCE), but THREE KINGS overlooks the wealth of evidence that demonstrates that the indemnity provision applied to the method of advertising and not to the acts of the marching band.

For instance, although titled a "Participation Form," the bottom of the form clearly indicates that Mr. Moffi was agreeing only to sponsor the Miami High School marching band. Mr. Moffi admitted that by agreeing to be a sponsor, he purchased the right to have a banner held by the Miami High School marching band, which

would promote OVACCE and not the marching band. (Moffi Depo. p.123). Miami High School was chosen by the Radio Station WQBA, not Mr. Moffi, as the party who would carry the banner for OVACCE. (Moffi Depo. p.126). In his deposition, Mr. Moffi also testified that to the extent the Participation Agreement allowed for indemnity, it only pertained to advertising. (Moffi Depo. p.34). The unrefuted evidence showed that Moffi was without authority to execute such an indemnity contract on behalf of the SCHOOL BOARD.

THREE KINGS correctly notes that in the personal injury lawsuits filed against both the SCHOOL BOARD and THREE KINGS, the claimants made similar allegations and counts against both THREE KINGS and the SCHOOL BOARD. THREE KINGS, however, overlooks the fact that they were sued for their own active negligence in causing or contributing to the cause of the accident. None of the Complaints filed by the injured spectators contained any allegations of vicarious liability against THREE KINGS. In addition to claims based upon simple negligence, claims were also presented against both the SCHOOL BOARD and THREE KINGS for strict liability for alleged involvement in an abnormally dangerous and/or ultrahazardous activity by utilizing flaming batons. THREE KINGS neglects to mention that the strict liability counts were never viable and therefore could never serve as the basis for any type of vicarious or technical liability. Specifically, the trial court correctly found that use of fire batons was not an abnormally dangerous activity and summary judgment was entered in favor of the SCHOOL BOARD. (R. 1746 - 1747). As a result, this count for strict

liability did not impose any purported vicarious or technical liability on THREE KINGS.

Although THREE KINGS contends that they were able to settle all of the claims asserted against them in the suits by the injured spectators, as well as two other claims pre-suit (Sergio Perez & Arnaldo Martinez[1]), THREE KINGS concedes that the settlements were not global as they failed to settle on account for the SCHOOL BOARD's negligence. Indeed, the Mayda Gonzalez release states, "[t]his General Release shall not release said third parties, including The School Board of Dade County, Florida, Alfredo Sans and Maria Chris Losano, for liability as a of their own actions and/or inactions." (Def. Trial Exh. C). Since the SCHOOL BOARD was not included on these releases (with the exception of the release signed by Perez and Martinez), the only inference to be drawn is that THREE KINGS settled for their own acts of negligence, and not on account of any vicarious liability. This compelling evidence conclusively demonstrated that THREE KINGS faced their own independent exposure for the incident and cannot be heard to complain that they are entitled to reimbursement for their own negligence.

THREE KINGS admits that in the two personal injury lawsuits by the injured spectators, Mayda Gonzalez and Lazara Noda in Case No.

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[1] The settlement with Martinez was not even raised as part of the proceeding below until after the jury verdict and THREE KINGS moved for entry of judgment reflecting the amounts paid in settlement to this claimant as well. This is significant because the release signed by Martinez in favor of THREE KINGS was not in evidence at the time of trial.

91-13341 CA 26 (R. 2 - 29 and A.1), and Ricardo Gonzalez in Case No. 91-32702 CA 26, that THREE KINGS never provided any separate notice of claim in compliance with §768.28. It is only in the independent action for indemnity that THREE KINGS, for the first time, gave notice of the claim for indemnity pursuant to §768.28. Further, it is undisputed that no notice was ever given to the SCHOOL BOARD of any claim for equitable subrogation. As discussed more fully in Point III below, no proof was ever presented at trial on the issue of compliance with §768.28 nor was an appropriate proffer ever tendered by THREE KINGS.

THREE KINGS contends that they never sought indemnity for any damages due to their fault and instead sought reimbursement for any claim resulting from the SCHOOL BOARD's participation in the parade. Contrary to the assertions made by THREE KINGS, the trial court did not rule that THREE KINGS was entitled to be reimbursed for damages paid by them which were due to the SCHOOL BOARD's fault. Instead, the court determined that a trial would be held to apportion the respective fault of the parties.

At trial, the trial judge did not allow the Complaints filed against THREE KINGS to be received in evidence. Unlike the releases which the trial judge did allow into evidence which would only indicate a settlement was reached, the underlying complaints filed by the injured spectators would affirmatively show that the THREE KINGS settled on their own behalf only for their own liability. For this reason, the Complaints should have been admitted into evidence.

It is important to note that it was not until the post trial proceedings that THREE KINGS claimed recovery under the theory of equitable subrogation. (R.6063). Although the trial court granted Final Judgment for THREE KINGS, the trial court never identified the basis for THREE KINGS' entitlement to final judgment. It was not until this matter was on appeal to the Third District that the theory of equitable subrogation was fully argued and decided in THREE KINGS' favor. Interestingly, both the lower court and the Third District have never addressed the viability of the claim for contractual indemnification.

Notably absent from the recitation of the Statement of Facts in THREE KINGS' Answer Brief on the Merits is any discussion of any evidence supporting its claim for contractual indemnification. The reason for this is quite simple because THREE KINGS wholly failed to prove the essential elements of a case for contractual indemnification at the time of trial. At trial, THREE KINGS focused solely at proving who was at fault in causing the accident and not in presenting any evidence to explain the scope of the contractual indemnity clause, whether it is enforceable against the SCHOOL BOARD, the basis of the claims asserted against them by the spectators, and the basis of the settlements.

On appeal, the Third District correctly concluded that THREE KINGS was not entitled to common law indemnity since the jury expressly concluded that there was no technical, derivative or vicarious relationship between the parties to give rise to common law indemnification. Notwithstanding that THREE KINGS failed to

prove the elements of common law indemnification at trial, common law indemnification is unavailable because of the jury's express finding of no special relationship. THREE KINGS has never appealed the jury's finding on this point and any attempts to raise this issue at this time have been waived.

FACTS RELATIVE TO THE CROSS APPEAL

The SCHOOL BOARD does not contest any of the factual recitations pertaining to the issue of prejudgment interest as raised by the cross-appeal. The Third District found no merit in the issue of prejudgment interest raised by THREE KINGS in its cross appeal.

In this appeal to the Supreme Court, THREE KINGS is raising an additional issue on its cross-appeal, specifically the portion of the order of the Third District striking the language providing for execution on the judgment. The Final Judgment, which has not been amended since rendition of the decision of the Third District's opinion, still reads in part as follows:

> IT IS ADJUDGED that Plaintiffs/ Crossclaimants, THREE KINGS PARADE INC. RADIO STATION WQBA, SUSQUEHANNA BROADCASTING COMPANY and CITY OF MIAMI, recover from defendant, DADE COUNTY SCHOOL BOARD, the sum of Two Million Thirty Five Thousand Dollars and No Cents ($2,035,000.00), that shall bear interest at the rate of 12% per year for which let execution issue...."

The Final Judgment does not contain any language limiting execution to those amounts in excess of the sovereign immunity amounts.

SUMMARY OF THE ARGUMENT

Judgment should have been entered in favor of the SCHOOL BOARD. The SCHOOL BOARD was entitled to summary judgment on the issues of contractual indemnification and common law indemnification. This cause should never have been submitted to a jury because as a matter of law, there is no basis for recovery against the SCHOOL BOARD in this case.

THREE KINGS failed to prove a claim for indemnification, common law or contractual, as a matter of law. First, THREE KINGS failed to prove and cannot prove that they were sued for vicarious, technical, or derivative liability for the acts of the SCHOOL BOARD in order to be entitled to indemnification. Additionally, since the jury expressly concluded that there was no vicarious relationship between THREE KINGS and the SCHOOL BOARD, there is no basis for a claim for indemnification, whether common law or contractual.

Moreover, there is no basis for the imposition of contractual indemnification under the Participation Agreement. Although titled a "Participation Agreement," it was not signed by the participant, but rather by a sponsor who only purchased advertising in conjunction with the parade. Further, there was no evidence at trial that the Participation Agreement was executed by a person with the proper authority to bind the SCHOOL BOARD, as a governmental entity.

Finally, THREE KINGS claims that judgment was correctly entered under equitable subrogation principles, a theory which was never even pled or raised until after the jury verdict was rendered. Even if equitable subrogation was properly raised in the proceedings in this case, THREE KINGS did not discharge the entire debt in order to be entitled to invoke the theory of equitable subrogation. Since THREE KINGS only paid for their own share of liability and did not include the SCHOOL BOARD in all of its settlements, the doctrine of equitable subrogation is inapplicable.

As to compliance with the notice provisions of §768.28, THREE KINGS argues that the notice requirements are inapplicable to an action for contractual indemnity. They fail to cite any cases or legal authority, however, that contractual indemnification claims are exempt from operation of the sovereign immunity statute, which by its own terms applies to all tort claims. Under Florida law, since a claim for contractual indemnity is grounded upon an underlying tort, yet is a new claim seeking different relief than the main action, the sovereign immunity statute applies and separate notice must be given to the state agency. Even if the notice was given by the parade spectators was sufficient, THREE KINGS still failed at trial to affirmatively <u>prove</u> notice in accordance with the statute.

As to the cross-appeal, the Third District Court of Appeal correctly struck the language of the judgment permitting execution against the SCHOOL BOARD. As a governmental entity, the SCHOOL

BOARD is immune from execution of a judgment; instead relief must be sought in the form of a claims bill to the Legislature.

Finally, the Third District Court of Appeal correctly denied THREE KINGS' claim for prejudgment interest. Not only does sovereign immunity bar recovery of prejudgment interest, but at no time were the "damages" claimed by THREE KINGS liquidated as of a prior date in order to give rise to entitlement to prejudgment interest as a matter of law.

ARGUMENT

I. 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

At the onset of their argument, THREE KINGS states that they were entitled to a judgment pursuant to the doctrine of equitable subrogation. THREE KINGS argues that the essence of THREE KINGS' claim was for reimbursement of monies paid in settlement and that the legal theory under which reimbursement was sought is irrelevant, because a jury trial was necessary in any event to determine the parties' percentages of fault. Further, THREE KINGS claims that the parties had a fair opportunity to litigate the applicability of the doctrine of equitable subrogation in the post trial proceedings.

This argument is flawed for several reasons. The SCHOOL BOARD does not contest that a trial was necessary to determine the requisite degrees of fault. The SCHOOL BOARD's complaint is that a trial on apportionment of fault alone is insufficient. While apportionment of fault is a necessary step to prove indemnification or equitable subrogation, THREE KINGS overlooks that there are other elements of a claim for equitable subrogation that THREE KINGS failed to prove at trial. For instance, equitable subrogation does not arise until the entire obligation is satisfied by the subrogee. Cleary Brothers Construction Co. v. Upper Keys

Marine Construction Inc., 526 So.2d 116, 117 (Fla. 3d DCA 1988).[2]

In the present case, THREE KINGS never discharged the entire debt that was owed in whole or in part by the SCHOOL BOARD. The releases THREE KINGS received from the original plaintiffs affirmatively show that the claims against the SCHOOL BOARD were preserved and not included in the settlement by THREE KINGS. Specifically, the releases in evidence at trial failed to include the SCHOOL BOARD (with the exception of Sergio Perez) and therefore the claims against the SCHOOL BOARD were not extinguished. Indeed, these releases conclusively show that THREE KINGS did not intend to pay the debt of another and in fact did not do so. In the Mayda Gonzalez release, all claims against the SCHOOL BOARD were expressly preserved. The releases absolutely show that they paid for their own active negligence and not on account of the SCHOOL BOARD's actions.

Contrary to THREE KINGS' simplistic argument, the legal theory upon which a claim is brought does make a difference. At trial, the SCHOOL BOARD defended the action based upon common law and contractual indemnification. Since equitable subrogation was never raised until the post-trial phase of this case, the SCHOOL BOARD

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[2] THREE KINGS acknowledges that they did not pay the entire debt. Nevertheless, they argue that equitable subrogation still applies relying upon language in Furlong v. Leybourne, 138 So.2d 352 (Fla. 3d DCA 1962) and Cleary Brothers. In Furlong, although the actual payment of monies was partial, the entire obligation was satisfied. Similarly, Cleary Brothers held that subrogation extends to anyone provided the entire debt is paid. Since the entire obligation or debt was not satisfied, these cases afford no protection to THREE KINGS's argument and equitable subrogation does not apply.

was unaware of the necessity of raising other affirmative defenses specifically geared to a claim for equitable subrogation. For instance, while the defense of "release" is pertinent in an action for equitable subrogation, the defense of "release" is wholly inapplicable to an action for indemnification. Therefore, without proper notice of the legal theory sought to be invoked by the THREE KINGS as plaintiff, the SCHOOL BOARD was prejudiced in its ability to raise certain defenses which would have been dispositive of the THREE KINGS' claims.

In its Answer Brief, THREE KINGS' declares that due process is met as long as the opposing party has the opportunity to "litigate the applicability of [the] doctrine in post trial proceedings."[3] THREE KINGS' approach in failing to raise its legal theory until after trial is tantamount to "trial by ambush." Not only does this approach disregard the very basic tenets of our system of justice, but it also turns the doctrine of due process of law on its head. Under the most elementary principles of due process, the SCHOOL BOARD was certainly entitled to notice of this claim prior to trial. The SCHOOL BOARD suggests that to condone any other practice goes against the very fabric of our system of jurisprudence.[4]

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[3] The trial judge never expressly addressed the claim for equitable subrogation that was raised for the first time post-trial. Additionally, the final judgment is silent that it was based, in whole or in part, on the theory of equitable subrogation.

[4] The SCHOOL BOARD questions exactly how does a party "litigate" a theory raised post trial, when the trial has already been concluded and the opportunity to present evidence in opposition already lost?

The decisions of this Court in Dober v. Worrell, 401 So.2d 1322 (Fla. 1981) and Arky, Freed, et. al. v. Bowmar Instrument Corp., 537 So.2d 561 (Fla. 1988) are predicated upon these basic precepts of due process and compel reversal of the decision of the Third District Court of Appeal in our case. In Dober, this Court held that failure to raise an affirmative defense before a trial court rules on a motion for summary judgment precludes raising that issue for the first time on appeal. Similarly here, since the theory of equitable subrogation was raised for the first time post-trial, the SCHOOL BOARD was unaware of the necessity to raise the affirmative defenses of "release" and "accord and satisfaction."

Likewise, this Court's decision in Arky, Freed compels reversal of the subject decision under review. In Arky, Freed, this court determined that where a party proved one case at trial, which was different from the case pled in the pleadings, the opposing party was entitled to a directed verdict where it was evident that the party was prejudiced in its ability to defend against new charges. Similarly here, the SCHOOL BOARD was prejudiced in its ability to counter these new arguments of equitable subrogation at the time of trial since it was unaware of this post verdict change of theory. This is exactly the situation that the Arky Freed case was designed to avoid.

THREE KINGS asserts that the SCHOOL BOARD was not prejudiced in its ability to raise the defense of "release" in the post trial proceedings by claiming that the releases the injured spectators

executed in favor of the SCHOOL BOARD were already in evidence. THREE KINGS misconstrues the defense of "release" by confusing it with the offering of evidence of the actual release agreements themselves. The defense of "release" is much broader than the actual offering into evidence the releases executed by the injured spectators. In the subject case, the releases themselves were merely placed into evidence without explanation from any witnesses concerning the purpose of the release, the scope of the release and why the settlements were made in the first place. Since the claim at trial was never presented for equitable subrogation so that the defense of "release" was appropriate, this type of evidence was never offered. Moreover, while the release agreements themselves were in evidence, they were offered solely to prove the SCHOOL BOARD's defense to the claims for indemnity, i.e. that THREE KINGS sued and settled for their own acts of negligence and that both parties paid for their own share of liability. Contrary to THREE KINGS' argument, the release agreements were not offered to prove the defense of "release."

Finally, at page 27 of the Answer Brief, THREE KINGS argues that even if the SCHOOL BOARD was given the opportunity to present the "release" defense, this defense would have failed. On this point, THREE KINGS appears to be confused because they state that the releases in favor of the SCHOOL BOARD only discharged the SCHOOL BOARD from further direct liability to the injured spectators and not from THREE KINGS's claim for "reimbursement." THREE KINGS misconstrues the evidentiary purpose of those releases

vis-a-vis a claim for equitable subrogation. These releases in favor of the SCHOOL BOARD by the injured spectators demonstrate that THREE KINGS could not have satisfied the entire debt because the SCHOOL BOARD was still required to expend its own sums to settle with the injured parties. Therefore, these releases constitute a complete defense to the claim for equitable subrogation and the "release" defense would have succeeded.[5]

THREE KINGS further maintains that a release of an injured party's rights against one defendant does not constitute a defense to an equitable subrogation claim for reimbursement of settlement monies by the other defendant who is an "innocent settlor" citing to Polec v. Northwest Airlines Inc. 86 F.3d 498 (6th Cir. 1996). It is doubtful that under any view of the evidence that THREE KINGS can be considered an "innocent settlor." This is especially true where they had the opportunity to settle the claims globally with the injured spectators, thereby retaining their subrogation rights, but instead chose only to protect themselves thereby leaving the SCHOOL BOARD hanging in the proverbial wind.

Moreover, since THREE KINGS faced substantial potential liability for its own negligent acts, it can hardly be deemed an "innocent settlor." By contrast, THREE KINGS is more properly

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[5] See Munson & Associates v. Doctors Mercy Hospital, 458 So.2d 789 (Fla. 5th DCA 1984)(where first set of tortfeasors settled only for their own liability to plaintiff and expressly left open plaintiffs's rights to pursue claims against health care providers, but plaintiff subsequently settled with the health care providers, the general release barred rights of first set of tortfeasors to pursue remedy of equitable subrogation against second set of tortfeasors).

characterized as a "mere volunteer,"[6] who paid sums towards a settlement which they were without obligation to do, as evidenced by the jury verdict in this case which found them to be without fault. While the SCHOOL BOARD recognizes that equitable subrogation is designed to prevent unjust enrichment, it cannot serve as a basis for recovery for a party who makes a poor business decision to settle a case, instead of awaiting a judgment to establish that it is truly without liability.

In footnote 7, THREE KINGS attempts to distinguish the cases cited in the dissenting opinion below for the proposition that a party is not entitled to subrogate against a tortfeasor who has been released by the injured plaintiff. While these cases are generally brought in the nature of claims for subrogation by a health insurance carrier to seek reimbursement of monies paid in benefits to injured persons, there is no justification to change the basic rule that in subrogation a party only acquires those "shoes" that the injured party has. Under equitable subrogation, the subrogee stands in the same posture of the plaintiff/subrogor ¬and cannot acquire any greater rights. Underwriters at Lloyds v. City of Lauderdale, 382 So.2d 702 (Fla. 1980)(subrogation allows a party required to pay a legal obligation owed by another to step into the shoes of the injured party and assert the latter's original claim against the wrongdoer) Since the injured parties

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[6] The doctrine of equitable subrogation does not apply to mere volunteers. Boley v. Daniel, 72 Fla. 121, 72 So. 644 (1916); Eastern National Bank v. Glendale Federal Savings and Loan Association, 508 So.2d 1323 (Fla. 3d DCA 1987).

extinguished their claims with the SCHOOL BOARD by operation of releases in the SCHOOL BOARD's favor, THREE KINGS' claim for equitable subrogation must fail. Holyoke Mut. Ins. Co. v. Concrete Equipment, 394 So.2d 193 (Fla. 3d DCA 1981).

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

Despite the definitive jury verdict finding that there was no special relationship between the SCHOOL BOARD and THREE KINGS to give rise to a claim for common law indemnification, THREE KINGS still contends that it is entitled to judgment under a theory of common law indemnification. THREE KINGS seeks to overcome this express jury finding by arguing that they had a relationship with the SCHOOL BOARD whereby they had vicarious, constructive, derivative, or technical liability to the injured spectators.

In support of this contention, THREE KINGS argues that they had potential technical liability under the doctrine of strict liability for ultra-hazardous or abnormally dangerous activities. While fire may be dangerous activity, it is not an abnormally dangerous activity such that strict liability should be imposed. Southern Pine Extracts Co. v. Bailey, 75 So.2d 774 (Fla. 1954); Southern Cotton Oil v. Anderson, 80 Fla. 441, 86 So. 629 (Fla. 1920). Moreover, although some of the complaints filed by the injured spectators did originally contain counts for strict liability, the record reflects that the trial court found that use of the fire batons was not an abnormally dangerous activity and a

summary judgment was entered in favor of the SCHOOL BOARD. (R. 1746 - 1747). As a result, there was no purported vicarious, constructive, derivative or technical liability to be imposed upon THREE KINGS.

THREE KINGS next argues that since it was a parade organizer and the SCHOOL BOARD was a parade participant, a special relationship was created for purposes of a common law indemnity claim.[7] The issue of the nature of the relationship between the SCHOOL BOARD and THREE KINGS was a fact issue for the jury's determination, which the jury answered in the negative. This jury finding completely forecloses THREE KINGS' attempts to recover under common law indemnity.

Inconsistently, THREE KINGS argues that the jury's finding that THREE KINGS was without fault compels that they are entitled to common law indemnity, yet maintains that the jury's finding of no special relationship must be discarded. Since the existence of a special relationship between the parties is pivotal to the maintenance of a claim for common law indemnity, the jury finding of no special relationship must stand.

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[7] THREE KINGS relies on the case, Brickell Biscayne Corp. v. Morse/Diesel, Inc., 683 So.2d 168 (Fla. 3d DCA 1996), in support of its contention that a special relationship existed between the parties. In Morse/Diesel, supra, the developer was found to have a special relationship with architects with whom it had a contractual relationship. The SCHOOL BOARD submits that unlike Morse/Diesel, our case is more akin to the facts in the earlier appeal in the same case, Brickell Biscayne Corporation v. WPL Associates, 671 So.2d 247 (Fla. 3d DCA 1996), wherein the developer was denied a claim for common law indemnity because it had no relationship with any of the three subconsultants named in the action and no duty to pay the condo association for the subconsultant's acts.

Further, THREE KINGS argues they were entitled to contractual indemnity under the Participation Agreement and that the record as a whole supports their claim for contractual indemnification. Again, THREE KINGS argues equitable considerations why they should be entitled to contractual indemnification, but ignores the evidence in the record that proves the SCHOOL BOARD cannot be liable for contractual indemnity as a matter of law. Specifically, the clear undisputed evidence in the record establishes that John Moffi lacked the proper authority to bind the SCHOOL BOARD and that the intent of the Participation Agreement's provision was to obtain indemnity from the parade participant and not the sponsor. Moreover, the jury expressly found that there was no special relationship between the parties to give rise to indemnity.

Although THREE KINGS continues to maintain that their settlements "could only have been for the vicarious liability claims," the record simply does not support this contention. The blame must be assessed solely on THREE KINGS' failure to prove entitlement to indemnification by engaging in the "apportionment" procedure as set forth in Association for Retarded Citizens v. State, Department of Health and Rehabilitation Services, 619 So.2d 452 (Fla. 3d DCA 1993). While the SCHOOL BOARD agrees that the jury verdict in this case satisfies the first prong of an apportionment procedure to establish the degrees of fault of the parties, it cannot serve to replace the second portion of an apportionment hearing. It was still incumbent on THREE KINGS, to

establish with competent proof, that they settled claims entirely based upon the SCHOOL BOARD's fault. The evidence is wholly lacking in the record to support THREE KINGS' claims that it settled only for the SCHOOL BOARD's fault and this omission in the evidence during THREE KINGS' case in chief at trial is fatal.

Next, THREE KINGS argues that the indemnity agreement is applicable to the acts for which THREE KINGS seeks indemnity. In support, THREE KINGS relies solely upon two pieces of evidence: that a similar agreement sent to Miami High for the previous year, which incidentally was never placed into evidence and only marked for identification as Plaintiff's Exh. 1 for ID, and that the advertising package included the right to have a banner displayed by the marching band. Thus THREE KINGS argues that the use of flaming batons "inure[d] to the benefit of DCSB in the form of enhanced exposure," and as a result THREE KINGS should be entitled to indemnity arising from that participation and actions during the parade. This simplistic argument disregards one significant point. OVACCE, as a parade sponsor, cannot be responsible for the acts of the parade participant where it was the marching band, who made the decision to employ flaming batons and who has the ultimate control over everything that followed behind that advertising banner.

A party seeking indemnification has the burden to show that the settlement or portions thereof fall within the coverage of the indemnity clause. Keller Industries, Inc. v. Employer's Mutual Lability Insurance Company, 429 So.2d 779 (Fla. 3d DCA 1983). THREE KINGS has wholly failed to meet this burden.

Further, THREE KINGS claims that the contract is valid because it was singed by John Moffi who was responsible for administering OVACCE's advertising budget. § 230.22, Florida Statutes (1989) clearly restricts the SCHOOL BOARD's ability to enter into contracts to occasions when it "act[s] as a body as a whole." THREE KINGS cannot establish that the contract was ever approved by the SCHOOL BOARD, through its members while acting as a body as a whole. In fact, the evidence in the affidavit from SCHOOL BOARD attorney, Johnnie Brown, directly contradicts this assertion by THREE KINGS.

Moreover, in the absence of statutory authority, governmental entities are prohibited from agreeing to indemnify private entities. See Op.Att'y Gen.Fla. 93-34 (1993).

Finally, the SCHOOL BOARD needs to address the "equity" arguments presented by THREE KINGS that they are entitled to "reimbursement" given the record as a whole. As noted by Judge Cope in his dissenting opinion, the equities do not tip in favor of THREE KINGS. Pursuant to the decision of the Third District, the SCHOOL BOARD has been held liable under a theory which was never pled or raised until after trial. As to the claim for contractual indemnification, there has never been a fair hearing regarding the scope of that agreement. In any event, it is illogical to suggest that purchasers of radio advertising packages are liable for the actions of the marching band who carry the advertising banners. Even if the scope of the agreement is to provide indemnity by an advertiser for the acts of the parade participant that carried the

advertising as THREE KINGS suggests, THREE KINGS never proved that this was a valid contract. The undisputed evidence proved that the SCHOOL BOARD never approved this contract and therefore it cannot be bound thereunder. If equitable considerations are to be applied, the equities weigh in favor of the SCHOOL BOARD and the final judgment should be reversed.

III. 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).

THREE KINGS asserts that since their claims were grounded on the indemnity contract, § 768.28's notice requirements do not apply. Although THREE KINGS seek to characterize the claims for indemnity as purely based upon contract, THREE KINGS overlooks the fact that common law indemnity, as well as contractual indemnification are actions predicated upon tort. See Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979).[8]

THREE KINGS next argues that their claims for indemnity were cross-claims between existing parties and therefore no separate notice was required under the statute citing Orange County v. Gipson, 548 So.2d 658 (Fla. 1989)(cross-claims which are "part and parcel" of the original action do not require separate notice). As

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[8] See also Evanston Insurance Co. v. City of Homestead, 563 SO.2d 755 (Fla. 3d DCA 1990) wherein the Third District held sovereign immunity applies in a claim for reimbursement under policy of insurance. Since THREE KINGS' claim for contractual indemnification is a claim for reimbursement under a contract, the holding of Evanston is on point and sovereign immunity is applicable.

a result, THREE KINGS attempts to rely upon the written notices of the claims as provided by the individual spectators.[9]

Further, THREE KINGS suggests that at page 766 of the trial transcript, the SCHOOL BOARD "stipulated" that the "essence" of THREE KINGS' claims are the same as those of the underlying claimants. As a result, THREE KINGS contends that no further notice was needed. A review of the trial transcript at page 766 reveals that counsel for the SCHOOL BOARD merely acknowledged that the SCHOOL BOARD has a responsibility to supervise the students. This is what the underlying complaints against the SCHOOL BOARD were all about, and what THREE KINGS attempted to prove at trial. Again, THREE KINGS misses the mark that because it was not only their burden at trial to prove who caused the fire, but rather whether they were entitled to common law and/or contractual indemnification. THREE KINGS unfortunately proved up the wrong case. This fatal flaw is what the SCHOOL BOARD has been complaining about throughout this case.

THREE KINGS' claims for common law and contractual indemnity were not "part and parcel" of the main claims, but rather were distinct separate actions. Indeed, indemnity is a purely different animal than contribution. Contribution is a creature of statute,

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[9] On page 42 of their Brief, THREE KINGS represents that in the Mayda Gonzalez case, the SCHOOL BOARD entered into a stipulated summary judgment that all statutory notice provisions had been met. The record, however, reflects that the SCHOOL BOARD only stipulated Mayda Gonzalez had met the notice requirements of her claim for her own personal injuries. At no time did the SCHOOL BOARD stipulate or agree that THREE KINGS satisfied their separate notice requirements.

§768.31, whereas indemnity is grounded upon a common law relationship or an express contract between the parties. Houdaille Industries v. Edwards, 374 So.2d 490 (Fla. 1979). Unlike contribution which simply requires that the other party be a joint tortfeasor involved in causing harm to the plaintiff, indemnity requires the existence of a special relationship or express written agreement. Houdaille Industries, supra. The law imposes these additional requirements because indemnity, unlike contribution, is a demand for complete reimbursement, and includes other elements of damage such as attorneys fees, costs, and interest. Since indemnification is significantly broader than a simple derivative action for contribution, the holding of Gipson is unavailing.

THREE KINGS acknowledges that written notice of their claims under §768.28 was provided by them in only one case, Case No. 92-16488 involving Sergio Perez).[10] Even if this one notice of claim for indemnity was sufficient, THREE KINGS still failed to prove compliance with the notice requirements at the time of trial in this action, despite the fact they were on clear notice of the SCHOOL BOARD's affirmative defense of non-compliance with the notice provisions of §768.28.

In response, THREE KINGS argues that they adequately established compliance with the statutory notice requirements by a

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[10] Clearly no notice was ever given of the claim for settlement monies paid to ARNALDO MARTINEZ of $25,000 since reimbursement for this claim was never raised by THREE KINGS in the pleadings or otherwise until the post-trial phase of this proceeding.

trial proffer and cite to the trial transcript at page 760. A review of that page reveals that THREE KINGS made only a fleeting reference to a notice letter, but at no time did they ever present that letter, have it marked for identification, or have it placed into evidence. As such, no evidentiary proffer was made and any reference is meaningless. See e.g. §90.104 (offer of proof required as predicate to new trial or reversal of judgment).

Finally, THREE KINGS questions whether this issue has been properly preserved for appellate review contending that the SCHOOL BOARD failed to renew its prior motion for directed verdict at the close of all the evidence. The record indicates that the issue of lack of compliance with the notice provisions of §768.28 was clearly raised as part of the SCHOOL BOARD's motion for directed verdict at the close of the Plaintiff's evidence. (TR. 782 - 783). The trial judge specifically stated at the close of all the evidence that he wanted "something further" on the issue of notice (TR. 1056). See Stokes v. Ruttger, 610 So.2d 711 (Fla. 4th DCA 1992)(where motion for directed verdict was made at the close of the plaintiff's case, but not renewed at the close of all the evidence, trial court still properly considered post-trial motion for directed verdict and motion for judgment notwithstanding the verdict).

In the absence of any proof on the issue of compliance with §768.28, THREE KINGS failed to prove a prima facie case against the SCHOOL BOARD. As such, a directed verdict in favor of the SCHOOL

BOARD was required and therefore, the SCHOOL BOARD is entitled to judgment in its favor as a matter of law.

CROSS-APPEAL

I. THE THIRD DISTRICT CORRECTLY STRUCK THE LANGUAGE IN THE JUDGMENT PROVIDING FOR EXECUTION BECAUSE FLORIDA LAW DOES NOT AUTHORIZE EXECUTION AGAINST A SOVEREIGN ENTITY

Florida law bars execution of a judgment against a sovereign entity. As a political subdivision of the State of Florida, its liability is limited by the statutory cap provided by §768.28(5). As discussed more fully below in response to THREE KINGS' cross-appeal as to prejudgment interest, sovereign immunity still applies because this action for indemnity is predicated upon tort claims. Therefore, §768.28 bars execution of a judgment in excess of the statutory cap. This is particularly true where the SCHOOL BOARD, having already settled the claims of the injured spectators arising out of this same incident or occurrence, has already exhausted its statutory cap.

Section 768.28(5) authorizes the rendition of a judgment in excess of the maximum liability where that portion exceeding the cap is reported to the Legislature and paid only upon "further act of the Legislature." As correctly noted by the majority opinion by the Third District, no such authorization was obtained. Further as noted by Judge Cope in his revised dissent, execution against a sovereign is not permitted. State ex rel. Davis, 99 Fla. 333, 126 So. 374, 380 (1930)(seizure of state property improper to satisfy

judgment against governmental entity). Indeed, enforcement of a judgment against an governmental entity is accomplished by compelling the entity to issue payment by the filing of a petition for a writ of mandamus addressed to the appropriate governmental officer.

THREE KINGS cites no authority which permits execution of a judgment against the SCHOOL BOARD. Instead, they urge this Court to 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). The Wilcox case dealt with enforcement of a deputy commissioner's order in a workers' compensation case against a state entity. In determining that the employee is entitled to full enforcement of the deputy commissioner's order, the Third District specifically noted that since the Workers' Compensation Act requires the state and its agencies to have insurance, there is no concern that enforcement of the order will result in execution and levy against state property. This case is both factually and legally distinguishable from the present case. Unlike the Workers' Compensation system which requires state entities to maintain insurance for workers' compensation claims, state entities are not required to purchase tort insurance. Even if they do, there is no waiver of sovereign immunity protection. § 768.28(5). Therefore, the Wilcox case does not permit execution against the state in an action for tort. The Third District was correct by striking that portion of the judgment ordering execution and the decision of the Third District on this point should be affirmed.

II. THE THIRD DISTRICT CORRECTLY DENIED THREE KINGS' CLAIM FOR PREJUDGMENT INTEREST SINCE THE DOCTRINE OF SOVEREIGN IMMUNITY BARS PREJUDGMENT INTEREST AGAINST THE SCHOOL BOARD

The Third District correctly denied the PARADE SPONSORS' claim for prejudgment interest pursuant to the doctrine of sovereign immunity which expressly forbids the assessment of prejudgment interest against a sovereign entity such as the SCHOOL BOARD. §768.28(5), Florida Statutes.

Assessment of prejudgment interest against the state is improper because governmental entities are not liable for interest in the absence of an express statutory provision or a stipulation by the government that interest will be paid. Broward County v. Finlayson, 555 So.2d 1211 (Fla. 1990). Section 768.28(5) is to be strictly construed. Berek v. Metropolitan Dade County, 396 So.2d 756 (Fla. 3d DCA 1981)(a strict construction is necessary in accordance with "the policy of protecting the public against profligate encroachment on taxpayers' monies."). Immunity from interest is an attribute of sovereignty, implied by law for the benefit of the state.[11] Treadway v. Terrell, 117 Fla. 838, 158 So. 512 (1935).

In order to circumvent this well established rule of law, THREE KINGS argues that §768.28(5) is not applicable and therefore prejudgment interest is proper. THREE KINGS forgets that this

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[11] In this case, one sovereign entity, the City of Miami, is seeking recovery of prejudgment interest against another sovereign entity, the SCHOOL BOARD. One must question whether the benefit of the state is served by requiring one sovereign entity to pay prejudgment interest to another.

action for indemnification and/or equitable subrogation was based upon the alleged tortious conduct of the SCHOOL BOARD which was the basis of the personal injury claims of the injured spectators. THREE KINGS completely ignores the basic proposition in the case, Commercial Carrier v. Indian River County, 371 So.2d 1010 (Fla. 1979), wherein this Honorable Court clarified that actions for contribution or indemnity are still tort claims for purposes of §768.28 immunity. As a result, § 768.28 is applicable in an action for indemnification and/or equitable subrogation.

In support of their position that this is a contract action, THREE KINGS relies on three cases, the facts of which are readily distinguishable from the present case. While these cases stand for the proposition that a governmental entity cannot use sovereign immunity as a bar to recovery for breach of contract, these cases involve classic breach of contract situations and not actions based upon underlying tortious conduct for which there is immunity: Pan-Am Tobacco Corp. v. Department of Corrections, 471 So.2d 4 (Fla. 1984)(breach of contract action between vendor and the Department of Corrections (DOC) alleging improper cancellation by DOC); Dade County v. American Reinsurance Corp., 467 So.2d 414 (Fla. 3d DCA 1985)(breach of insurance contract by insurer against county seeking repayment of retrospective premiums under contract of insurance); and Public Health Trust v. State of Florida, Department of Management Services, 629 So.2d 189 (Fla. 3d DCA 1993)(failure by state to pay insurance claim and therefore liable for prejudgment interest on that claim).

A party may not circumvent the constitutional and statutory requirements of Article X, Section 13, Florida Constitution, by bringing the action as a breach of contract claim. Evanston Insurance Company v. City of Homestead, 563 So.2d 755 (Fla. 3d DCA 1990). In the Evanston case, which is analogous to the present case, Evanston Insurance Company sold the City of Homestead an excess hospital professional liability policy which provided that the city would indemnify Evanston for settlement of claims that the city became legally liable when the award exceeded the retained limit of $500,000. When a medical malpractice claim was presented against the city, Evanston elected to settle it for $2.7 million and demanded the city to pay the $500,000 for the underlying tort. When the City paid only $200,000 of the $500,000 and claimed that §768.28 prevented it from paying any more than the statutory cap, Evanston sued the City alleging breach of contract and argued that sovereign immunity did not apply. On appeal, the Third District noted that by paying in excess of the $200,000 statutory cap, Evanston acted as a volunteer. As such, the statutory amount of recovery was an absolute limit to a government entity's liability, including damages, costs, and post-judgment interest. The Evanston case clearly establishes that where, as here, another party voluntarily pays claims, it cannot seek reimbursement under a breach of contract theory to avoid the application of the sovereign immunity bar.

Moreover, this Court has noted that equitable considerations may preclude a claim for prejudgment interest. See Flack v. Graham,

461 So.2d 82 (Fla. 1984)("[i]n choosing between innocent victims ... it would not equitable to put the burden of paying interest on the public"). Applying equitable principles to the case at bar, an award of prejudgment interest against the SCHOOL BOARD would be unjust and excessive considering that fact that the SCHOOL BOARD would in essence be paying twice for the same claims it already settled itself, plus be liable for prejudgment interest on that amount as well.

Furthermore, even if sovereign immunity does not bar the claim for prejudgment interest, THREE KINGS is still not entitled to prejudgment interest because the amount in controversy was not liquidated. The law is clear in Florida that prejudgment interest is not recoverable in tort actions. Zorn v. Britton, 120 Fla. 304, 162 So. 879 (1935). Since actions for contribution or indemnity based upon the tortious conduct of the state or its agencies are still tort claims for purposes of §768.28, the rule denying prejudgment interest applies.

THREE KINGS argues that it is entitled to prejudgment interest from the date of the underlying personal injury claims were settled. While the jury decided the negligence of the parties, the jury never decided whether any money damages were paid on account of the SCHOOL BOARD'S negligence. Unless a verdict liquidates damages by fixing damages as of a prior date, prejudgment interest does not accrue. Argonaut Insurance Company v. May Plumbing Company, 474 So.2d 212 (Fla. 1985). Since the verdict did not fix any damages as of a prior date, prejudgment interest is improper.

Finally, THREE KINGS argues that even if §768.28 controls, the PARADE SPONSORS should still obtain an "award" of prejudgment interest to present as a "claims bill" to the legislature. This argument is nonsensical, because if the statute applies, then prejudgment interest is not available as a matter of law and a claims bill is not necessary. The Third District was correct in denying the PARADE SPONSORS' claim for prejudgment interest.

CONCLUSION

Based upon the foregoing arguments and citations of authority, Appellant, DADE COUNTY SCHOOL BOARD, requests that decision of the Third District Court of Appeal be reversed (with the exception of the language striking execution of the judgment and denial of the claim for prejudgment interest) and that this action be remanded to the lower court to enter judgment in accordance with the jury verdict in favor of the DADE COUNTY SCHOOL BOARD. Alternatively, if this Honorable Court determines that equitable subrogation is available, then the case should be remanded to the trial court to allow THREE KINGS to seek amendment of its claim against the SCHOOL BOARD under a theory of equitable subrogation and a new trial be ordered on this new count.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 30th day of MARCH, 1998 to: **JOHN P. JOY, ESQUIRE**, Walton, Lantaff, Schroeder & Carson, Attorneys for Respondents, 707 S.E. 3rd Avenue, Suite 300, Fort Lauderdale, Florida 33316-1155, **G. BART BILLBROUGH, ESQUIRE,** Cole, White & Billbrough, P.A., Co-Counsel for Respondents, 1390 Brickell Avenue, Third Floor, Miami, Florida 33131, and **PETE DeMAHY, ESQ.,** Co-Counsel for SCHOOL BOARD, 141 Northeast 3rd Avenue, Bayside Office Center, Penthouse, Miami, Florida 33132.

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