IN THE SUPREME COURT
THE STATE OF FLORIDA

CASE NO. SC09-1914
Lower Tribunal No. 4D08-2482

DONALD WENDT, KENNY WENDT and CLARKE WARNE,

Petitioners,

v.

LA COSTA BEACH RESORT CONDOMINIUM ASSOCIATION, INC.,

Respondent.

PETITIONERS' INITIAL BRIEF ON THE MERITS

ON DISCRETIONARY REVIEW FROM A DECISION OF THE FOURTH DISTRICT COURT OF APPEAL

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PRELIMINARY STATEMENT

Petitioners, DONALD WENDT, KENNY WENDT and CLARKE WARNE, are the Appellants/Plaintiffs below and are collectively referred to herein as "DIRECTORS".

Respondent, LA COSTA BEACH RESORT CONDOMINIUM ASSOCIATION, INC., is the Appellee/Defendant below and is referred to herein as "ASSOCIATION".

References to the Record will be designated as "R" followed by the page number(s) and paragraph number(s) when applicable.

References to the Appendix will be designated as "A" followed by the page number(s).

STATEMENT OF THE CASE AND THE FACTS

Nature of the Case

This is an appeal from a decision of the Fourth District Court of Appeal holding DIRECTORS did not and cannot state a cause of action against ASSOCIATION for contractual or statutory indemnification in connection with a prior action ASSOCIATION brought against them because Florida law does not recognize a right to indemnification in connection with the defense of actions between a corporation and its directors in the absence of a right to common law indemnity and affirming the dismissal of DIRECTORS' initial complaint with prejudice (the "Decision"). (A:1-5)

The Facts

ASSOCIATION is the Florida corporation not for profit responsible for operating and maintaining La Costa Beach Club Resort, a Condominium ("La Costa").[1] ASSOCIATION is contractually obligated to indemnify its officers and directors by Article XII of its Bylaws entitled "Indemnifications" (the "Indemnification Provision"). The Indemnification Provision specifically states:

> The Association ***shall*** indemnify every Director and every Officer, his heirs, and personal representatives against all loss, cost and expense reasonably incurred by him in connection with any action, suit or

[1] The Declaration of Condominium, Articles of Incorporation, By-Laws (the "By-laws") and all amendments thereof governing the operation and administration of La Costa were made part of DIRECTORS' Complaint as Composite Exhibit "A". (R. 9-84)

> proceeding to which he may be made a party by reason of his being or having been a Director or Officer of the Association, except to matters wherein he shall be finally adjudged in such action, suit or proceeding, to be liable for or guilty of gross negligence or willful misconduct. The foregoing rights shall be in addition to and not exclusive of all other rights to which such Director or Officer may be entitled. (Emphasis added.)

(R76)

DIRECTORS are La Costa unit owners who formerly served on ASSOCIATION's Board of Directors without compensation. (A:1, R2, 3 ¶¶6,9,10-12) ASSOCIATION filed an action against DIRECTORS in 2003 based upon alleged breaches of the fiduciary duty owed in their respective capacities as directors (the "Earlier Action"). There is no final adjudication holding DIRECTORS liable for or guilty of gross negligence or willful misconduct.[2] (A:1, R3, ¶13, R4, ¶20, R86-91)

DIRECTORS filed a separate action against ASSOCIATION (the "Indemnification Proceeding") seeking: (i) contractual indemnification based upon the Indemnification Provision and *Fla. Stat.* §607.0850(9)(b) (A:1, R1-5,¶¶1-26); (ii) mandatory statutory indemnification pursuant to *Fla. Stat.* §§607.0850(2),

[2] The Second Amended Complaint filed in the Earlier Action under Broward County Circuit Court Case No. 03-12095 CACE 03 was made part of DIRECTORS' Complaint as Exhibit "B". (R.86-91) The Decision contains a recitation of the jury findings and trial court's granting of DIRECTORS' motion for new trial in the Earlier Action even though these specific facts are not contained within the four corners of DIRECTORS' Complaint and attached exhibits. (A:1)

607.0850(3) and 607.0850(9)(a) (A:1, R1-3,¶¶1-15, R5-7,¶¶27-32) and (iii) statutory indemnification pursuant to *Fla. Stat.* §607.0850(9)(c) in connection with the Earlier Action. (A:1, R1-3,¶¶1-15, R7-8,¶¶33-37) DIRECTORS specifically allege they (i) served as uncompensated volunteers on ASSOCIATION's Board of Directors, (ii) properly discharged their duties as directors and (iii) acted in good faith and in a manner each reasonably believed to be in, or not opposed to, the best interests of ASSOCIATION with regard to the exercise of their business judgment in the Indemnification Proceeding. (R6,¶31, R7-8,¶36)

This appeal arises out of the Indemnification Proceeding. ASSOCIATION moved to dismiss DIRECTORS' initial complaint contending: (i) DIRECTORS failed to state a cause of action under Florida law and (ii) DIRECTORS waived their indemnification claims by failing to assert them as counterclaims in the Earlier Action (the "Motion to Dismiss"). (R139-153) The trial court granted the Motion to Dismiss without hearing and entered a final order dismissing the Indemnification Proceeding *with prejudice* (the "Dismissal Order"). (R 265,266)

DIRECTORS sought reversal of the Dismissal Order in the appeal below. The Fourth District dispensed with oral argument and affirmed the Dismissal Order in all respects. (A:1-5) DIRECTORS sought discretionary review by this Court pursuant to *Art.* V, §§3(b)(3) and 3(b)(4), *Fla. Const.* and *Fla. R. App. P.* 9.030(a)(2)(A)(iv) and 9.030(a)(2)(A)(vi) after the Fourth District denied

DIRECTORS' Motions for Rehearing and Rehearing *En Banc*. This Court entered an order accepting jurisdiction on February 5, 2010.

SUMMARY OF THE ARGUMENT

The Decision's holding that Florida law does not recognize a right to indemnification in connection with actions between a corporate indemnitor and its directors in the absence of a right to common law indemnity is contrary to the plain language of *Fla. Stat.* §607.0850 and in conflict with interpretative case law finding entitlement to indemnification under similar circumstances.

The Decision nullifies vital rights explicitly bestowed by Florida law and abrogates a statutory scheme intentionally designed to encourage corporate service by qualified persons by protecting participants in both for profit and not for profit corporate governance from exposure to an excessive risk of undue financial responsibility for the defense of claims asserted against them by reason of their corporate actions and capacity. The Decision also eviscerates contractual protection expressly authorized by *Fla. Stat.* §607.0850(7) and customarily afforded by corporate documents.

ASSOCIATION, as indemnitor, is obligated by *Fla. Stat.* §607.0850 and the Indemnification Provision to indemnify DIRECTORS, as indemnitees, in connection with the Earlier Action even though ASSOCIATION is also the party suing them for damages. DIRECTORS are entitled to indemnification because they were sued as a direct consequence of having served on ASSOCIATION's governing board and there is no final adjudication against them establishing any of

the prohibitive conduct delineated by *Fla. Stat.* §607.0850(7) or the terms of the Indemnification Provision.

The plain language of *Fla. Stat.* §607.0850(9) gives DIRECTORS the right to seek court-ordered indemnification as the result of ASSOCIATION's failure and refusal to meet its contractual and statutory indemnification obligations.[3] The Decision must be quashed and the Dismissal Order must be reversed because all three counts of the complaint properly state a cause of action upon which relief may be granted under Florida law.

The Dismissal Order must also be reversed because it is contrary to the plain language of *Fla. Stat.* §607.0850(9) which expressly recognizes claims for corporate indemnification as independent actions that do not ordinarily arise out of the transaction or occurrence that is the subject matter of the underlying proceeding. DIRECTORS' indemnification claims arise from the contractual Indemnification Provision in ASSOCIATION's Bylaws and statutory rights created by *Fla. Stat.* §607.0850(2), 607.0850(3) and *Fla. Stat.* §607.0850(9). Such claims fall outside the scope of compulsory counterclaims contemplated by *Fla. R. Civ. P.* 1.170(a) because ASSOCIATION's claims in the Earlier Action arise from a different transaction or occurrence to wit: alleged breaches of fiduciary duty.

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[3] *Fla. Stat.* §607.0850(9) is procedural in nature and authorizes application for indemnification "to the court conducting the proceeding, to the circuit court, or to another court of competent jurisdiction" upon "the failure of a corporation to provide indemnification".

STANDARD OF REVIEW

The standard upon review of an order dismissing a complaint for failure to state a cause of action with prejudice is *de novo. Fla. Dept. of Corrections v. Abril*, 969 So.2d 201, 204 (Fla. 2007); *Stubbs v. Plantation General Hospital LP*, 2008 WL 2907995, *1 (Fla. 4th DCA 2008); *Garnac Grain Co, Inc. v. Mejia*, 962 So.2d 408, 410 (Fla. 4th DCA 2007).

"The reviewing court 'must accept the allegations of the complaint as true, but do[es] not defer to the trial court's conclusions regarding the sufficiency of the allegations'." *Jiminez v. Community Asphalt Corp.*, 968 So.2d 668, 670 (Fla. 4th DCA 2007)(Citation omitted.) "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 102 2. L.Ed. 80 (1957); *Jiminez*, 968 So.2d at 670.

ARGUMENT

I. THE DECISION MUST BE REVERSED BECAUSE IT VITIATES IMPORTANT INDEMNIFICATION RIGHTS CREATED BY THE PLAIN LANGUAGE OF *FLA. STAT.* §§607.0850(2), 607.0850(3), 607.0850(7) AND 607.0850(9) IN CONNECTION WITH ACTIONS BETWEEN A CORPORATION AND ITS DIRECTORS AND IS CONTRARY TO INTERPRETATIVE CASE LAW

The current provisions of *Fla. Stat.* §§607.0850(2) and 607.0850(3) expressly impose a mandatory indemnification obligation on corporations for expenses incurred by officers and directors in "any proceeding by or in the right of the corporation" "if such person acted in good faith and in a manner he or she reasonably believed to be in, or not opposed to, the best interests of the corporation" after a defense that is wholly or partially "successful on the merits or otherwise". *Fla. Stat.* §§607.0850(2) and 607.0850(3) The Decision is contrary to the plain language of *Fla. Stat.* §607.0850(2) and must be reversed because the Fourth District failed to correctly recognize that "any proceeding by or in the right of the corporation" specifically contemplates all "action[s] between a corporation and its directors". (A:4)

A. Statutory Indemnification

Florida law governing corporations for profit has expressly permitted corporate indemnification of directors in connection with actions "by or in the right of the corporation" since the 1963 enactment of *Fla. Stat.* §608.13(14)(b). The 1971 enactment of *Fla. Stat.* §608.13(14)(c) first made such indemnification

mandatory when a director's defense is "successful on the merits or otherwise".

The 1982 enactment of *Fla. Stat.* §617.028 extended the applicability of *Fla. Stat.* §607.014, then governing indemnification by corporations for profit, to corporations not for profit for the first time.[4] The legislative extension of statutory indemnification to directors of corporations not for profit and statutory distinction between the treatment of developer appointees and owner elected condominium directors delineated by *Fla. Stat.* §617.0831 preclude reliance upon prior law to limit the scope of corporate indemnification to which condominium directors are now entitled.[5]

The statutory exclusion of developer directors from the protection afforded owner elected directors prevents the anomaly that would result if developer appointees could seek payment from owners who had sued them successfully based upon exculpatory clauses drafted by the condominium developer and renders

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[4] *Fla. Stat*. §617.0831 entitled "Indemnification and liability of officers, directors, employees and agents" renders the provisions of *Fla. Stat.* §607.0831 entitled "Liability of directors" and *Fla. Stat*. §607.0850 also entitled "Indemnification and liability of officers, directors, employees and agents" applicable to corporations not for profit organized pursuant to *Fla. Stat. Ch.* 617 and rural electric cooperatives organized pursuant to *Fla. Stat. Ch.* 425. *Fla. Stat.* §617.0831 replaced *Fla. Stat.* §617.028 effective July 1, 1991. *Fla. Stat.* §607.0850 replaced *Fla. Stat.* §607.014 effective July 1, 1990.

[5] The plain language of the current statute, *Fla. Stat.* §617.0831, expressly excludes condominium developer appointees from the definition of "director" used in *Fla. Stat.* §607.0850

the case law upon which the Decision relies obsolete.[6] The Decision's reliance upon cases that did not consider the provisions of *Fla. Stat.* §607.0850(7) or its predecessor because they arose before the 1982 enactment of *Fla. Stat.* §617.028 is misplaced.

Florida law reflects an express legislative intent to encourage corporate service through protection from undue financial hardship:

> [t]he service of qualified persons on the governing boards of nonprofit corporations and associations is critical to the efficient and effective conduct of such organizations in the provision of services and other benefits to the citizens of the state . . . [W]ithin reasonable limits, persons offering their services as directors of such nonprofit organizations should be permitted to perform without undue concern for the possibility of litigation arising from the discharge of their duties as policy makers . . . [T]he service of qualified persons on the governing boards of corporations, credit unions, and self-insurance trust funds is in the public interest and . . . Within reasonable limitations, such persons should be permitted to perform without undue concern for the possibility of litigation arising from the discharge of their duties as policy makers . . .

Ch. 87-245, §1, *Laws of Fla*.

The plain language of *Fla. Stat.* §607.0850(2) specifically permits indemnification in connection with "any proceeding by or in the right of the

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[6] *Century Village, Inc.* v. *Chatham Condominium Associations,* 387 So.2d 523 (Fla. 4th DCA 1980)(Lessor precluded from recovering attorneys fees under its own condominium recreation lease.) The same rationale was applied in both *Penthouse North Association, Inc. v. Lombardi,* 461 So.2d 1350 (Fla.1984) and *Old Port Cove Property Owners Association, Inc. v. Ecclestone,* 500 So.2d 331 (Fla. 4th DCA 1986)(Developer appointed directors sued for breaches of fiduciary duty held to be precluded from relying upon their own documents as a basis for entitlement to the recovery of attorneys fees.)

corporation" and even contemplates such indemnification after an adjudication of liability "to the extent that, the court in which such proceeding was brought, or any other court of competent jurisdiction" determines "such person is fairly and reasonably entitled to indemnity for such expenses which such court shall deem proper" "despite the adjudication of liability but in view of all circumstances of the case".[7] *Fla. Stat.* §607.0850(2) is based upon §8.51 of the Model Business Corporation Act (the "Model Act") which similarly permits indemnification "in connection with a proceeding by or in the right of the corporation" subject to certain limitations.

Fla. Stat. §607.0850(3) requires corporate indemnification for "expenses actually and reasonably incurred" in connection with "any proceeding by or in the right of the corporation" as "referred to" by *Fla. Stat.* §607.0850(2) "[t]o the extent . . . a director . . . has been successful on the merits or otherwise in defense of any proceeding . . . or in defense of any claim, issue or matter therein". See *Winner v. Catalado*, 559 So.2d 696, 697 (Fla. 3rd DCA 1990)(Corporation obligated to indemnify defendant named in shareholders derivative action after he won.) *Fla. Stat.* §607.0850(3) is based upon §8.52 of the Model Act which similarly "creates a

[7] The Decision fails to address the plain language of *Fla. Stat.* §607.0850(2). The Decision mentions *Fla. Stat.* §607.0850(1) without explanation. (A:1) That subsection does not apply in this case because the scope of indemnification allowed by that subsection is limited to proceedings "*other than* an action by, or in the right of, the corporation". (Emphasis supplied.)

statutory right of indemnification in favor of the director who meets the requirements of that section". *Official Comment*, §8.52

Florida is one of eight states[8] that have enacted separate statutory provisions to expressly provide for indemnification in connection with actions by the corporation and one of thirteen states[9] with statutory provisions authorizing indemnification for more than just expenses in connection with such actions. ABA, *Model Business Corp. Act Annot.*, 8-410-8-411 (2008)

§1 of the Introductory Comment to Ch. 8, Subch. E of the Model Act recognizes:

> *Indemnification* (including advance for expenses) *provides financial protection by the corporation for its directors* against exposure to expenses and liabilities that may be incurred by them *in connection with legal proceedings based on an alleged breach of duty in their service to* or on behalf of *the corporation.* Today, when both the volume and the cost of litigation have increased dramatically, *it would be difficult to persuade responsible persons to serve as directors if they were compelled to bear personally the cost of vindicating the propriety of their conduct in every instance in which it might be challenged*.

(Emphasis added.)

§2 of the Introductory Comment to Ch. 8, Subch. E of the Model Act further explains:

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[8] The others states are Illinois, Louisiana, Maryland, Michigan, Missouri, Nevada and New York.

[9] The others states are District of Columbia, Illinois, Indiana, Louisiana, Maryland, Michigan, Minnesota, Missouri, Nevada, New York, North Dakota and Wisconsin.

> The basic standards for indemnification set forth in this subchapter for a civil action . . . are good faith and reasonable belief that the conduct was in or not opposed to the best interests of the corporation. . . . *In some circumstances, a director or officer may be found to have violated a statutory or common law duty and yet be able to establish eligibility for indemnification under these standards of conduct. In addition, this subchapter permits a director or officer who is held liable for violating a statutory or common law duty, but who does not meet the relevant standard of conduct, to petition a court to order indemnification . . . on the ground that it would be fair and reasonable to do so.*

Emphasis added.

These policy considerations are especially significant in the context of a not for profit condominium association where the board of directors is comprised of uncompensated unit owners who volunteer their services.

B. Statutory Interpretation And Application

Interpretative case law has consistently recognized that *Fla. Stat.* §607.0850 can obligate a corporation to indemnify its directors in connection with an action between itself and the director indemnitees even though it is the same party suing them for damages. The Decision nullifies the plain language of the statute.

The Fourth District considered the 1977 version of *Fla. Stat.* §607.014(2), which is substantively similar to the current version of *Fla. Stat.* §607.0850(2), in *Penthouse North Association, Inc. v. Lombardi*, 436 So.2d 184 (Fla. 4th DCA 1983) approv'd in part, quashed in part, 461 So.2d 1350 (Fla. 1984). This Court expressed no issue with the Fourth District's statutory construction and conclusion

that "as can be seen from section 607.014(2) an officer and director is entitled under certain circumstances, to indemnity, notwithstanding adjudication of liability against him in favor of the corporation".[10] *Penthouse North Association, Inc.*, 436 So.2d at 187

The Second District affirmed a determination that, under a prior statute containing language identical to *Fla. Stat.* §607.0850(9)(c), former director indemnitees of a corporation not for profit were entitled to attorneys fees they had incurred in connection with an action they brought against the indemnitor corporation to compel production of its books in *Myakka Valley Ranches Imp. Ass'n, Inc. v. Bieschke*, 610 So.2d 3 (Fla. 2nd DCA 1992).

The Decision recognizes conflict with *Turkey Creek Master Owners Ass'n, Inc. v. Hope*, 766 So.2d 1245, 1247 (Fla. 1st DCA 2000). That case involved a homeowners association's appeal of an order determining the former director indemnitees who had been sued by that indemnitor corporation for breach of fiduciary duty were entitled to indemnification under *Fla. Stat.* §607.0850(9)(c) based solely on the pleadings. The First District reversed the order but remanded the matter for the trial court "to consider the relevant circumstances" as required by *Fla. Stat.* §607.0850(9)(c) and authorized the trial court to "again enter such an

[10] This Court quashed that decision in part on ex post facto grounds holding the statute was not applicable in that case. *Penthouse North Association, Inc.*, 461 So.2d at 1352

order for indemnification" upon finding the fair and reasonable entitlement contemplated by that subsection of the statute. *Id*. at 1246-1247. The First District held:

> Section 607.0850(9), Florida Statutes (1993) provides that the trial court may order a corporate plaintiff to indemnify the defendant for fees and expenses in an action by the corporation against one or more of its directors or employees.

Id. at 1246. The First District concluded by reiterating that *Fla. Stat.* §607.0850 "provides for indemnification in a case such as this one where a corporation has sued its own agent" and that a corporation "faces the possibility of being required to pay the legal expenses of the very party it is suing". *Id.* at 1247

The Fourth District found a former property owners association director lacked "standing to seek indemnity as a director pursuant to chapter 617, Florida Statutes" based upon the prior determination that "he had acted 'in his capacity as an individual and member owner,' not as a director, in the underlying litigation" in *Hill v. Palm Beach Polo and Country Club Property Owners Ass'n, Inc.*, 885 So.2d 879, 880 (Fla. 4th DCA 2004) citing *Hill v. Fed. Ins. Co.,* 883 So.2d 147 (Fla. 4th DCA 2002). The Fourth District identified "the dispositive issue" as "the capacity in which the property owner acted in the underlying litigation". *Id.* at 881 The Decision incorrectly concludes *Hill* does not "recognize a right to indemnification in actions between a corporation and its directors" because it fails to recognize the former director would have been found to have had standing to seek

indemnification if it had been found that he had acted in his corporate capacity in the underlying litigation. (A:3)

The Fourth District previously held a corporate indemnitee [O'Brien] was entitled to indemnification in connection with tort claims, including fraud, made against him by a corporate indemnitor [PRC] based upon a contractual agreement and *Fla. Stat.* §607.0850(3) stating "when an indemnification agreement and statute provide for the recovery of attorneys fees in favor of a corporate officer who has successfully defended a claim on the merits or otherwise, we now hold that attorneys fees should be awarded by the court unless the officer has expressly waived that right". *O'Brien v. Precision Response Corp.*, 942 So.2d 1030, 1032 (Fla. 4th DCA 2006) *O'Brien* involved a corporate indemnitor [PRC] which "disputed the claim, and alleged its own contract and tort claims, including fraud, against . . . O'Brien" [the indemnitee] after an arbitration proceeding was initiated by a third party [New River]. *Id*. at 1031-1033 The Decision incorrectly concludes *O'Brien* does not "recognize a right to indemnification in actions between a corporation and its directors" based upon the erroneous supposition that O'Brien "successfully defended claims which [a] third party asserted against him".[11] (A:3-

[11] "[T]he arbitrator found *against PRC* on *its claims against O'Brien*" . . . "*PRC lost* on *its claims against O'Brien* and came away without any recovery from *O'Brien*. . . the Arbitration panel indisputably held that the *claims of PRC against O'Brien had failed*, *O'Brien* was successful on the merits "or otherwise" *as to all legal theories asserted against him by PRC*." *Id.* at 1033 (Emphasis supplied.)

4)

The Decision must be reversed because the holding that DIRECTORS cannot state a cause of action against ASSOCIATION for contractual or statutory indemnification in connection with the Earlier Action expressly and directly conflicts with decisions of other district courts of appeal, with the Fourth District's own decisions and with the plain language of *Fla. Stat.* §607.0850.

C. Common Law Distinguished

Indemnification rights created by statute or contract are separate and distinct from any right to indemnification which may arise under common law. They are completely independent theories of recovery with different elements.[12] *Cox Enterprises, Inc. v. News-Journal Corp.*, 2009 WL 2949266, *5 (M.D. Fla. 2009) vacated in part on other grounds by *Cox Enterprises, Inc. v. News-Journal Corp.*, 2009 WL 5173524 (M.D.Fla. 2009); *Dade County School Board v. Radio Station WQBA*, 731 So.2d 638, 642-644 (Fla. 1999) (Summary judgment on contractual indemnification claim reversed with remand for further proceedings but jury finding that no special relationship existed between parties precluded common law

[12] "Prior to the enactment of statutory indemnification provisions, corporate indemnification was a matter of contract and the common law." Jennings and Horky, *Indemnification of Corporate Officers and Directors*, 15 Nova L. Rev. 1357, 1359 (1991) (Examining Florida's statutory history of mandatory and permissive corporate obligations to indemnify officers, directors or employees for litigation expenses incurred in connection with suits based upon acts committed in their corporate capacities.)

indemnification.); *Camp, Dresser & McKee, Inc. v. Paul N. Howard Co.*, 853 So.2d 1072, 1077 (Fla. 5th DCA 2003)(Contractual indemnity "is concerned with express terms of the agreement to indemnify" and not with 'special relationships' or vicarious, constructive, derivative or technical liability".); *Fla. Dept. of Transportation v. V.E. Whitehurst & Sons, Inc.*, 636 So.2d 101, 104 (Fla. 1st DCA 1994)(Pleading requirement that indemnitee allege it is without fault "holds true for common law indemnity" but "does not apply to contractual indemnity".)

The Decision confuses the definition of the word "indemnity" with the common law right of a nonnegligent party who is vicariously liable for the actions of another to seek payment from the active wrongdoer.[13] (A:2-5)

The Decision must be reversed because the imposition of any form of common law entitlement, in other words, liability attributable to the wrongful acts of another, as a prerequisite for the exercise of corporate indemnification rights created by *Fla. Stat.* §607.0850 and by contract is contrary to the plain language of the statute and interpretative case law.

D. Contractual Indemnification

Fla. Stat. §607.0850(7) provides "[t]he indemnification and advancement of expenses provided pursuant to this section are not exclusive", expressly empowers

[13] Indemnification is "[t]he action of compensating for loss or damage sustained". *Black's Law Dictionary* (8th ed. 2004) The word is synonymous with reimbursement or repayment. *Koile v. State*, 934 So.2d 1226, 1236 (Fla. 2006)(Pariente, J. concurring in part and dissenting in part)

a corporation to "make any other or further" contractual provision for indemnification "under any bylaw" and delineates certain misconduct which precludes indemnification as a matter of law. Indemnification provisions and agreements are "subject to the general rules of contractual construction; thus an indemnity contract must be construed based upon the intentions of the parties". *Dade County School Board*, 731 So.2d at 643 citing *University Park Shopping Ctr. v. Stewart*, 272 So.2d 507, 511 (Fla. 1973).

"The plain unambiguous meaning of "indemnify" is not "to compensate for losses caused by third parties," but merely "to compensate". *Atari Corp. v. Ernst & Whinney*, 981 F.3d 1025, 1032 (9th Cir. 1992) Indemnification provisions contained in corporate documents are properly construed to contemplate defense of a lawsuit brought by the corporate indemnitor [Atari] in which the corporate indemnitees "were found to be not liable". *Id.*

"[I]ndemnification commitments, whether in by-laws or by separate agreements, are almost universal for commercial corporate enterprises." [14] *Miller v. McDonald* (*In re World Health Alternatives, Inc.*), 385 B.R. 576, 596 (Bankr. D. Del. 2008) It is well settled under Delaware law that corporations can be obligated

[14] Florida courts rely upon Delaware corporate law to construe our corporate statutes and establish corporate doctrines when applicable Florida case law does not exist. *Klein v. FPL Group, Inc.*, 2004 WL 302292, *18 (S.D. Fla. 2004); *Nu Med Home Health Care, Inc. v. Hospital Staffing Services, Inc.*, 664 So.2d 353, 355 (Fla. 4th DCA 1995)

to provide indemnification and advance defense costs for actions brought by the corporation against former directors seeking damages to the corporation and that corporations cannot vitiate contractual indemnification obligations imposed through their bylaws by contending the litigation is based upon wrongful conduct that might preclude indemnification or establish a breach of a fiduciary duty if proved.

> [T]his opinion emphasizes the unambiguous fact that corporations that voluntarily extend to their officers and directors the right to indemnification and advancement under 8 *Del. C.* §145 have a duty to fulfill their obligations under such provisions with good faith and dispatch. It is no answer to an advancement action, as either a legal or logical matter, to say that the corporation now believes the fiduciary to have been unfaithful. Indeed, it is in those very cases that the right to advancement attaches most strongly.

Radiancy, Inc. v. Azar, 2006 WL 224059, *1 (2006); *Reddy v. Elec. Data Sys. Corp.,* 2002 WL 1358761 (Del.Ch. 2002); *Citadel Holding Corp. v. Roven,* 603 A.2d 818 (Del.1992). See also *Ridder v. CityFed Fin. Corp.,* 47 F.3d 85 (3d Cir.1995)(Perceived strength of case against directors did not justify denial of relief in the form of advancement mandated by bylaws and Delaware statute.); *Westar Energy, Inc. v. Lake*, 493 F. Supp. 2nd 1126 (D. Kan. 2007); *Envirokare Tech Inc. v. Pappas,* 420 F.Supp.2d 291, 295 (S.D.N.Y.2006)(Corporation obligated under bylaws to advance director's expense of defending corporation's breach of fiduciary claim against him.); *Pearson v. Exide Corp.,* 157 F.Supp.2d 429, 438 (E.D.Pa.2001)(Alleged wrongful conduct did not excuse corporation from

requirement to provide advancement under mandatory provision in corporate bylaws.)

DIRECTORS have a cause of action for contractual indemnification based upon the Indemnification Provision because ASSOCIATION chose to make such further contractual provision in its bylaws as authorized by *Fla. Stat.* §607.0850(7) (A: 1)

E. DIRECTORS Properly Stated Causes of Action

As To Count I

The Indemnification Provision, as contained in ASSOCIATION's Bylaws, is mandatory by its own terms and reflects ASSOCIATION's exercise of power as authorized by *Fla. Stat.* §607.0850(7). *Fla. Stat.* §718.303(1) specifically obligates ASSOCIATION to comply with its Bylaws. DIRECTORS alleged they are entitled to contractual indemnification by virtue of the Indemnification Provision and that ASSOCIATION has failed to provide such indemnification notwithstanding its obligation to do so under Count I of the Complaint. (R1-5, ¶¶1-26) The Decision and Dismissal Order must be reversed as to Count I because DIRECTORS properly stated a cause of action for court ordered indemnification in connection with the Earlier Action pursuant to *Fla. Stat.* §607.0850(9)(b) and the

Indemnification Provision. Alternatively, the Dismissal Order must be reversed, in part, with directions that DIRECTORS be granted leave to amend.[15]

As To Count II

DIRECTORS alleged they are entitled to mandatory statutory indemnification under *Fla. Stat.* §§607.0850(2) and 607.0850(3) and that ASSOCIATION failed to provide such indemnification notwithstanding its obligation to do so under Count II of the Complaint. (R-3, ¶1-15, R5-7, ¶27-32) DIRECTORS further alleged "[t]here has been no final adjudication in the Suit holding DIRECTORS liable for or guilty of gross negligence or willful misconduct" and "DIRECTORS are entitled to an order compelling mandatory indemnification under *Fla. Stat.* §607.0850(3) to the extent of their success in

[15] The Dismissal Order erroneously denies DIRECTORS the right to amend if DIRECTOR's failed to plead sufficient facts to state a cause of action. "Leave of court [to amend] *shall* be given freely when justice so requires." *Fla. R. Civ. P.* 1.190(a) (Emphasis added.) "A party should be allowed to amend its complaint if it may be able to allege additional facts to support its cause of action or another cause of action under a different legal theory." *Hawkins v. Crosby*, 910 So.2d 424, 425 (Fla. 4th DCA 2005) It is an abuse of discretion to deny amendment absent finding "a clear abuse of the privilege to amend or the complaint is clearly not amendable". *Boca Burger, Inc. v. Forum*, 912 So.2d 561, 568 (Fla. 2005). See also *Kay's Custom Drapes, Inc. v. Garrote*, 920 So.2d 1168, 1171 (Fla. 3rd DCA 2006)

The Decision and Dismissal Order must be reversed, at least in part, because it is devoid of the findings required by *Boca Burger* to support a dismissal with prejudice. (R265-266) The Complaint is not clearly unamendable and DIRECTORS could not have abused their amendment privilege because the Complaint at issue is their initial pleading. (R1-108) DIRECTORS are entitled to a grant of leave to amend if this Court holds that any count of their Complaint failed to allege sufficient facts to state a cause of action.

defense of the Suit". (R4, ¶20, R6-7,¶32) It is not evident, on the face of the Complaint, that DIRECTORS were unsuccessful in defense of the Earlier Action or that they are seeking indemnification for wrongful conduct outside the scope of the Indemnification Provision and Florida law. The Decision and Dismissal Order must be reversed as to Count II because DIRECTORS properly stated a cause of action for court ordered mandatory indemnification in connection with the Earlier Action pursuant to *Fla. Stat.* §607.0850(9)(a). Alternatively, the Dismissal Order must be reversed, in part, with directions that DIRECTORS be granted leave to amend.

As To Count III

DIRECTORS alleged they are fairly and reasonably entitled to statutory indemnification pursuant to *Fla. Stat.* §607.0850(9)(c) under Count III of the Complaint. (R1-3, ¶1-15, R7-8, ¶33-37). DIRECTORS expressly allege they (i) served as uncompensated volunteers on the ASSOCIATION's Board of Directors; (ii) properly discharged their duties as directors; and (iii) acted in good faith with regard to the exercise of their business judgment. (R7-8, ¶36) DIRECTORS further allege "[a]s a result, DIRECTORS are fairly and reasonably entitled to indemnification for their expenses relating to the Suit in view of all of the relevant circumstances". (R7-8, ¶36) These allegations of ultimate fact must be accepted as true on a motion to dismiss. The Decision and Dismissal Order must be reversed

as to Count III because DIRECTORS have properly stated a cause of action for court ordered indemnification pursuant to *Fla. Stat.* §607.0850(9)(c). Alternatively, the Dismissal Order must be reversed, in part, with directions that DIRECTORS be granted leave to amend.

II. CLAIMS FOR CORPORATE INDEMNIFICATION AND ADVANCEMENT ARE INDEPENDENT ACTIONS AND ARE EXPRESSLY CONTEMPLATED AS SUCH BY THE PLAIN LANGUAGE OF *FLA. STAT.* §607.0850(9)

The Dismissal Order must also be reversed because it is contrary to the plain language of *Fla. Stat.* §607.0850(9) which expressly recognizes claims for corporate indemnification as independent actions that do not ordinarily arise out of the transaction or occurrence that is the subject matter of the underlying proceeding. DIRECTORS' claims for contractual and statutory indemnification were not waived pursuant to *Fla. R. Civ. P.* 1.170(a) when they were not asserted as counterclaims in the Earlier Action.

Fla. Stat. §607.0850(9) is based upon §8.54 of the Model Act which provides, in pertinent part, "[a] director who is a party to a proceeding because he is a director may apply for indemnification or an advance for expenses to the court conducting the proceeding *or* to another court of competent jurisdiction".[16]

[16] The corresponding language of *Fla. Stat.* §607.0850(9) reads "a director, officer, employee, or agent of the corporation who is or was a party to a proceeding may apply for indemnification or advancement of expenses, or both, to the court

(Emphasis added.) The Official Comment to §8.54 explains "[a]pplication for indemnification under section 8.54 may be made *either* to the court in which the proceeding was heard or to another court of appropriate jurisdiction". (Emphasis added.)[17] The plain language of *Fla. Stat.* §607.0850(9) would be meaningless if indemnification claims were necessarily compulsory counterclaims by nature.[18]

Indemnification claims are not compulsory counterclaims because they do not ordinarily arise out of the facts and circumstances that give rise to the underlying litigation for which reimbursement is sought. Corporate indemnification and advancement claims arise out of the contractual or statutory provision affording such protection. *International Airport Centers, LLC v. Citrin*, 455 F.3d 749 (7th Cir. 2006)(Claim for advancement was not a compulsory

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conducting the proceeding, to the circuit court, or to another court of competent jurisdiction."

[17] Florida and forty (40) other states have adopted or substantively incorporated *Model Business Corp. Act* §8.54(a) as part of their statute governing court ordered indemnification. Analogous statutes in the remaining nine (9) states substantively differ as follows: Alaska, California, Illinois, Kansas, Louisiana, Missouri, New York, Oklahoma (limit jurisdiction to court in which underlying action was brought when there is an adjudication of liability in an action by or in right of the corporation); Delaware (limits jurisdiction to court in which underlying action was brought or Court of Chancery when there is an adjudication of liability in an action by or in right of the corporation).

[18] As a general rule, "the legislature does not intend to enact useless legislation. A literal interpretation is not required if it would result in a "ridiculous conclusion". *Maddox v. State,* 923 So.2d 442, 446 (Fla.2006) "Courts should avoid readings that would render part of a statute meaningless." *Unruh v. State,* 669 So.2d 242, 245 (Fla.1996) citing *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So.2d 452, 456 (Fla. 1992); *Linstroth v. Dorgan*, 2008 WL 2356760 (Fla. 4th DCA 2008).

counterclaim because it arose out of employment contract and not litigation for which money is sought.); *Battenfeld Of America Holding Co., Ins., at al vs. Friedrich Theysohn GMBH*, 1999 WL 1096047 (D. Kan. 1999)(Corporate indemnitee who failed to assert crossclaim or counterclaim but sought mandatory statutory indemnification by post trial motion in underlying lawsuit held required to file separate action.)[19] DIRECTORS' claims fall outside the scope of *Fla. R. Civ. P.* 1.170(a) because ASSOCIATION's claims in the Earlier Action arise from alleged breaches of fiduciary duty and DIRECTORS' indemnification claims arise from the contractual Indemnification Provision in ASSOCIATION's Bylaws and statutory rights created by *Fla. Stat.* §607.0850(2), 607.0850(3) and *Fla. Stat.* §607.0850(9). (A:1, R 1-8, R 3, ¶13, R86-92)

Moreover, even if it was evident on the face of DIRECTORS' Complaint that the indemnification claims arose out of the same occurrence or transaction as the Earlier Action, such claims are not waived or compulsory pursuant to *Fla. R. Civ. P.* 1.170(a) because they were not mature as a matter of law.[20] See *U.S. v. Olavarrieta*, 812 F.2d 640, 644 (11th Cir.1987)("[C]ause of action for indemnity or

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[19] The compulsory counterclaim rule contained in *K. S.* §60-213(a) is substantively identical to *Fla. R. Civ. P.* 1.170(a).

[20] See also *Stainless Broadcasting Co. v. Guzewicz*, 1997 WL 379164 (E.D. Pa. 1997)(Counterclaim for indemnification by director had not matured and was not properly brought as compulsory counterclaim.); *Cockings v. Austin*, 898 P.2d 136 (Okla. 1995)(Minority shareholders sued by majority shareholders were not obligated to file claim for indemnification as a counterclaim because cause of action had not yet arisen.)

reimbursement does not accrue until payment of the principal's liability.").[21] "It 'would be bizarre to attach this sanction to a counterclaim that could not have been filed with the answer because it did not exist when the answer was due'." *Kellogg v. Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A.*, 807 So.2d 669, 672 (Fla. 4th DCA 2002)(Citation omitted.)

Similar factual circumstances to the case at bar were considered by the Texas Supreme Court in *Ingersoll-Rand Co. v. Valery Energy Corp.*, 997 S.W.2d 203, 208 (Tex. 1999) and described as "the rather anomalous situation of an indemnitor (Valery) acting concurrently as the plaintiff seeking damages from the indemnitee (Ingersoll-Rand)". The Texas Court noted their state rule was based on *Fed. R. Civ. P.* 13 (as is the Florida Rule) which requires that a claim be mature to be compulsory and held:

> an indemnity claim cannot be compulsory in the action whose judgment is the subject of the indemnity suit. In a suit for ... indemnity the injury upon which the suit might be based does not arise until some liability is established. In this case ... liability could not have

[21] See also *Alvarez v. Apollo Ship Chandlers, Inc.*, 2002 WL 31933666 (S.D. Fla.2002)(Indemnification claims are contingent upon finding of liability to another party.); *Dominion of Canada v. State Farm And Casualty Co.*, 754 So.2d 852 (Fla. 2nd DCA 2000)(Limitations period on indemnification claim does not commence until indemnitee has paid a judgment or made voluntary payment of legal liability to injured party); *Attorney's Title Insurance Fund, Inc. v. Punta Gorda Isles, Inc.*, 547 So.2d 1250 (Fla. 2nd DCA 1989)(Claim for indemnity does not accrue until underlying claim has been paid.); *Fireman's Fund Insurance Company v. Rojas*, 409 So.2d 1166 (Fla.3rd DCA 1982)(Indemnity claim accrues when indemnity liability is satisfied.)

been established until judgment was rendered.

Id. at 208.

The Dismissal Order is erroneous and must be reversed because *Fla. Stat.* §607.0850(9) expressly authorizes separate actions and *Fla. R. Civ. P.* 1.170(a) does not bar the claims asserted by DIRECTORS in the Indemnification Proceeding.

CONCLUSION

The Decision must be reversed and/or quashed to ensure consistent application of *Fla. Stat.* §607.0850. The Dismissal Order must be reversed upon remand because DIRECTORS have properly stated a cause of action under each count of their Complaint in the Indemnification Proceeding.

The Decision nullifies the plain language of *Fla. Stat.* §607.0850 and misapprehends important distinctions between corporate indemnification principles and tort principles. The Decision is contrary to express legislative intent and the public interest because the preclusion of contractual and statutory indemnification in actions between a corporation and its directors will discourage corporate service by qualified persons.

Alternatively, dismissal of the Indemnification Proceeding with prejudice was erroneous because the Complaint is not clearly unamendable. If the Decision and Dismissal Order are affirmed as to any count of the Complaint filed in the Indemnification Proceeding, the cause should be remanded with instructions that DIRECTORS be granted leave to amend.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail this ____ day of March 2010 to: MICHAEL W. MOSKOWITZ, ESQ., 800 Corporate Drive, Suite 510, Fort Lauderdale, Florida 33334.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of *Fla. R. App. P.* 9.210(a)(2).

By: _____
KEITH T. GRUMER