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TORT INDEMNITY IN FLORIDA

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I. INTRODUCTION

One way for a defendant who is sued for damages in a tort action to avoid sustaining a loss resulting from his liability to the plaintiff is to successfully assert a claim against another party for indemnity. The law of indemnity allows a defendant held liable in tort for damages to obtain reimbursement for his loss from another party. Accordingly, an attorney who represents a defendant in a tort action should always consider whether the client has a valid claim for indemnity. This determination requires a detailed knowledge of the law of indemnity.

Last year, the Florida Supreme Court decided two cases which have a profound and far-reaching impact on the law of indemnity in Florida. In *Houdaille Industries, Inc. v. Edwards* the court held that a tortfeasor who is personally at fault in any way in causing injury to a third person will be denied common law indemnity. This decision changes the prior law. Before 1979, a tortfeasor could recover common law indemnity even though at fault in causing injuries to a third person, although only in limited circumstances to be discussed below.

In the companion case to *Houdaille, Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Co.*, the Florida Supreme Court held that an indemnity agreement will not be construed to confer the right to indemnity against damages caused by the indemnitee's own tortious conduct, unless the intent to provide such indemnity is stated in "clear and unequivocal" language in the indemnity agreement.

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1. 374 So. 2d 490 (Fla. 1979).

2. 374 So. 2d 487, 489 (Fla. 1979). The court extended its earlier holding in University Plaza Shopping Center, Inc. v. Stewart, 272 So. 2d 507 (Fla. 1973). In *University Plaza*, the Florida Supreme Court held that an indemnification agreement would not be construed to provide indemnity against an indemnitee's sole negligence unless the intent to provide such indemnity was expressed in clear and unequivocal language in the agreement. *Id.* at 511-12.
The purpose of this article is to analyze the impact of these two important cases on the Florida law of tort indemnity and to discuss the basic principles of tort indemnity in Florida and in other jurisdictions. This analysis will include not only an evaluation of common law and contractual indemnity in Florida as modified by the Houdaille and Spring Lock decisions, it will also include an analysis of (1) statutory alterations of the Florida law of tort indemnity; (2) the right of the indemnitee to recover attorney's fees and costs as part of his damages in an indemnity action; (3) the principles of pleading indemnity; (4) third party practice involving indemnity claims and the effect of a judgment or settlement in the injured third party's action; and (5) the statute of limitations for indemnity claims.

II. COMMON LAW INDEMNITY

A. General Background

In the law of torts, numerous rules have developed which enhance a plaintiff's chances of recovery for his injuries by extending liability to more than one defendant. Many examples of these rules exist: the rule which makes an employer liable for injuries caused by the negligence of his employee, the rule which imposes joint and several liability on concurrently negligent tortfeasors who cause a single, indivisible injury, the rule which holds both a retailer and a manufacturer responsible for injuries caused by a defectively manufactured product, and the rule which places liability on a party owing a nondelegable duty to prevent injuries caused by the negligence of an independent contractor hired to perform


the nondelegable duty.\textsuperscript{7} 

In each of the above examples, the plaintiff may elect to seek recovery for his total damages from only one of the responsible defendants. If the plaintiff is successful in this endeavor, one defendant will pay the entire loss even though other responsible defendants contributed by their tortious conduct to causing it. The defendant who shoulders the entire loss will naturally wish to shift part or all of that loss to other responsible defendants. “Contribution” is the principle of law which allows one defendant to shift a part of his loss to other responsible defendants. The principle of law which allows one defendant to shift his entire loss to other responsible defendants is called “indemnity.”\textsuperscript{8}

Common law indemnity, as distinguished from contractual indemnity, is created by law without regard to the actual consent of the parties. As stated by Professor Leflar:

The right to indemnity may arise from a contract, \ldots Other types of the right to indemnity are commonly called quasi contractual, or arising out of a “contract implied by law.” Indemnity between persons liable for a tort falls within this type of case. As between such persons, the obligation to indemnify is not a consensual one; it is based altogether upon the law’s notion— influ-

\textsuperscript{7} See Mastrandrea v. J. Mann, Inc., 128 So. 2d 146 (Fla. 3d Dist. Ct. App. 1961).

\textsuperscript{8} The distinction between contribution and indemnity was elevated to constitutional significance in Seaboard Coast Line R.R. v. Smith, 359 So. 2d 427 (Fla. 1978), where the court held that the tort exemption provision of Florida Workmen’s Compensation Act, ch. 17481 § 11, 1935 Fla. Laws 1462 (current version at FLA. STAT. § 440.11 (1979)), was constitutional in barring third party claims for contribution against employers under the recently enacted Uniform Contribution Among Tortfeasors Act, ch. 75-108, 1975 Fla. Laws 205 (current version at FLA. STAT. § 768.31 (1979)). The court in an earlier decision had held that the same tort exemption provision was unconstitutional in barring third party claims for indemnity against employers. Sunspan Eng’r & Constr. Co. v. Spring-Lock Scaffolding Co., 310 So. 2d 4 (Fla. 1975). The court’s definition of contribution and indemnity is therefore particularly authoritative. The court stated:

Initially, it is pertinent to observe that there is a clear distinction between the common law right of indemnity and the present, and relatively new, remedy of contribution. This distinction is highly pertinent in the consideration of the equal protection argument of appellant. Indemnity—or the right to assert it—is founded on express or implied contract, upon the breach of some duty owed the party seeking indemnity by the underwriter or upon the character of the conduct as between the two.

Contribution was unknown to the common law. It is a statutory recognition of the common liability of multiple tortfeasors to the injured party. The statute provides for a distribution of that liability among the wrongdoers. In contrast to indemnity, contribution does not rest on the legal relationship between the tortfeasors.

359 So. 2d at 428-29 (footnotes omitted)(emphasis in original).
enced by an equitable background—of what is fair and proper between the parties . . . . The quasi contractual idea of unjust enrichment of course underlies any holding that one who has been compelled in discharging his own legal obligation to pay off a claim which in fairness and good conscience should be paid by another can secure reimbursement from that other.9

1. The Contributory Negligence and No Contribution Rules

Common law indemnity developed in Florida and in many other jurisdictions in conjunction with the rules of law which prevented a plaintiff who was contributorily negligent from recovering any damages for his injuries, and which also prevented contribution between defendants whose fault contributed to causing a plaintiff's indivisible injuries. An understanding of common law indemnity requires an understanding of the interplay among these three rules of law.

Scholars have identified several major factors which persuaded American courts to develop the doctrine that the contributory negligence of the plaintiff was a complete defense to his claim for damages. First, the principle of fault, upon which the doctrine of contributory negligence is based, was given prominent recognition in the nineteenth century as one means of keeping the tort liability of growing industry within bounds.10

Second, the doctrine of contributory negligence reflected the individualistic attitude of the common law as reflected in the often-utilized moral maxim that each person should exercise care and prudence in his or her individual affairs.11 Judicial acceptance of the contributory negligence defense as a complete bar to a plaintiff's claim for injuries was fostered by other factors as well, such as (1) a desire to control what the courts perceived to be plaintiff-minded juries,12 (2) a "[s]cholastic urge to find a single proximate cause" of an accident,13 and (3) the failure of the common law to develop an acceptable method of apportioning damages where the plaintiff sustained a single, indivisible injury.14

13. James, supra note 10, at 696.
The principle that a plaintiff's fault justifies denying his recovering was accompanied by a corollary doctrine that a defendant's fault also justifies denial of contribution among joint tortfeasors. The rule that there can be no contribution between joint tortfeasors had its origin in Merryweather v. Nixan, where the defendants had acted intentionally and in concert, leading the court to hold that contribution would be denied to a deliberate wrongdoer. Although early American cases limited the Merryweather rule to cases of willful misconduct, the great majority of courts soon extended the rule to deny contribution between negligent tortfeasors not acting in concert where their negligence nevertheless concurred to cause a single, indivisible injury. Dean Prosser attributed this change in judicial attitude to a lapse in judicial reasoning caused by the adoption of procedural rules allowing concurrently negligent tortfeasors to be joined in the same action. It is possible, however, that the contributory negligence doctrine was the more fundamental reason. To have allowed contribution between concurrently negligent tortfeasors while denying plaintiffs a comparative fault doctrine would have been inconsistent and would have thereby weakened the rationale for making contributory negligence a complete defense. This is probably one reason why insurance companies have often opposed the adoption of statutes allowing contribution among tortfeasors. The interplay between the rules of contributory negligence and contribution between joint tortfeasors was demonstrated dramatically in Florida, where the legislature adopted a contribution statute within three


16. W. Prosser, supra note 10, at § 65. The Restatement of Restitution adopted the no contribution rule and stated that the rule was "explainable only on historical grounds." Restatement of Restitution § 102, Comment a (1937).


18. As the Florida Supreme Court has stated: "There is no equitable justification for recognizing the right of the plaintiff to seek recovery on the basis of apportionment of fault while denying the right of fault allocation as between negligent defendants." Lincenberg v. Issen, 318 So. 2d 386, 391 (Fla. 1975).


years after the Florida Supreme Court judicially abolished the contributory negligence doctrine in favor of a comparative negligence rule.21

2. Common Law Indemnity as an Exception to the No Contribution Rule

Common law indemnity "evolved in the unnatural surroundings of an inflexible rule against contribution"22 and was recognized as an exception to this rule23 which was created to alleviate its harshness.24 To justify the exception, courts were required to find distinguishing circumstances of sufficient magnitude to warrant a departure from the no contribution rule.

In one class of cases, common law indemnity was awarded without violating the fault principle upon which the no contribution and contributory negligence rules were rationalized. Fault had no role in claims for indemnity made by an indemnitee who was not personally at fault in causing injuries to the third person, such as an employer held liable solely because of respondeat superior. In this class of cases, therefore, indemnity could be allowed on principles of restitution without regard to the no contribution rule.25

In cases where both the indemnitee and the indemnitor were at fault, however, a sufficient reason to excuse the indemnitee’s fault had to be found before indemnity could be allowed. A small number of decisions outside of Florida allowed indemnity based on principles of the "last clear chance" doctrine, which had become the primary exception to the contributory negligence rule.26 By similar reasoning, some courts held that a defendant who is merely negligent is entitled to indemnity from a defendant who has en-

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25. The Restatement of Restitution has recognized this well-established right to indemnity in this class of cases. "A person who, without personal fault, has become subject to tort liability for the unauthorized and wrongful conduct of another, is entitled to indemnity from the other for expenditures properly made in the discharge of such liability." RESTATEMENT OF RESTITUTION § 96 (1937).
gaged in reckless conduct.  

The factors which support exceptions to the contributory negligence rule can arguably be applied to justify indemnity as well since both the contributory negligence and no contribution rules are bottomed on the same fault principle. The great majority of courts, however, refused to allow indemnity based upon these factors. The probable explanation for this is that the sympathy for a person suffering from personal injuries which led to the recognition of exceptions to the contributory negligence rule was absent where one negligent defendant was seeking indemnity from another.

Indemnity when both the indemnitee and the indemnitor have been negligent has also been recognized in favor of a municipality held liable for injuries caused by a dangerous condition in a sidewalk or street which was created by an adjacent landowner or a person using the street with the municipality's permission. In these municipality cases, indemnity has been allowed even though the municipality was aware of the dangerous condition, unless the condition existed long enough to signify the municipality's acquiescence in its continuance. Although the courts often speak of active and passive negligence as a basis for indemnity, these cases are better explained by an understandable desire on the part of the courts to protect the public coffers. This is accomplished by shifting a portion of the extensive liability imposed on municipalities for maintenance of sidewalks and streets to the private parties who actually create the dangerous condition. Indemnity has also been applied for the benefit of a private person when the plaintiff was injured by a dangerous condition negligently created on the defendant's property by the indemnitor. In these cases, however, there

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29. In the Restatement of Restitution it is stated:
The fact that the payor knew of the existence of the dangerous condition is not of itself sufficient to bar him from restitution. In many cases it is only because he had knowledge of the condition that he is liable to the person harmed. If, however, the payor not only knew of the condition but acquiesced in its continuance, he becomes in effect, a joint participant with the other in the tortious conduct and hence is barred from indemnity.

Restatement of Restitution § 95, Comment a (1937).
30. See cases cited in Restatement of Restitution, Reporters' Notes § 95, at 153-57 (1937).
has been a greater tendency to allow indemnity only to owners who did not have actual knowledge of the defective condition but were merely passively negligent.\(^3\)

In spite of the prevailing no contribution rule, the municipality cases are justifiable to the extent that the policy of protecting the public finances, together with the equities involved, outweigh the policies of the no contribution rule. The private landowner cases are justifiable to the extent that the active-passive negligence basis of indemnity is sound.

A further basis for awarding indemnity, which has been rejected in Florida,\(^8\) can be found in cases from other jurisdictions which allow a negligent tortfeasor to recover indemnity from a doctor whose negligence has aggravated an injured third person's injuries, thereby increasing the negligent tortfeasor's liability to the injured third person.\(^8\) This basis of indemnity can best be justified as an exception to the no contribution rule by principles governing the apportionment of damages between parties who partially cause the loss to the plaintiff.

3. **Common Law Indemnity Based Upon a Duty Owed to Indemnitee**

The most significant and consistent factor used to justify the allowance of common law indemnity where both parties are at fault has been the recognition of a duty owed by the indemnitor to the indemnitee arising out of some prior relationship between the parties. This duty is sometimes referred to as a pretort duty between the indemnitee and the indemnitor.

The significance of this pretort duty in justifying common law indemnity was recognized in the first important case in Florida to establish the right to common law indemnity, *Seaboard Air Line Railway v. American District Electric Protective Co.*\(^8\) In this case, the railway company entered into a contract with a signal company which allowed the signal company to "maintain" and "operate" a

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32. Stuart v. Hertz Corp., 351 So. 2d 703 (Fla. 1977). In Underwriters at Lloyds v. City of Lauderdale Lakes, 382 So. 2d 702 (Fla. 1980), however, the Florida Supreme Court held that the initial tortfeasor may bring a separate, independent action for subrogation against a negligent doctor.


34. 143 So. 316 (Fla. 1932).
signal system on the railway's property. An employee of the railway was injured when the signal company negligently allowed a wire to sag. In an indemnity action by Seaboard against the signal company, the court held that Seaboard was entitled to indemnity from the signal company because, although the railway was negligent to its employee in failing to warn him of the sagging wire, the signal company violated its duty to safely maintain and operate the signal system.

The court's holding is stated, in part, as follows:

Generally, one of two joint tortfeasors cannot have contribution from the other. But there are exceptions to this rule, one of which is in that class of cases where although both parties are at fault and both liable to the person injured, such as an employee of one of them, yet they are not in pari delicto as to each other, as where the injury has resulted from a violation of the duty which one owes the other, so that as between themselves, the act or omission of the one from whom indemnity is sought is the primary cause of the injury.36

4. Justifiable Reliance as a Basis for Common Law Indemnity

Justifiable reliance has also been an important justification for allowing common law indemnity. In various cases, justifiable reliance, though not expressly identified as a factor justifying an allowance of indemnity, has been implicitly involved as a corollary to the duty owed by one tortfeasor to another. In Seaboard Air Line, for example, the railway relied upon the signal company to perform its contractual duty to prevent its wires from sagging. In many cases, however, justifiable reliance has been expressly recognized as a prerequisite to the allowance of common law indemnity.36

In addition to case authority, scholarly opinion has recognized justifiable reliance as an important basis for justifying common law indemnity. As Professor Bohlen has stated, "Justifiable reliance is left as the soundest ground upon which the right to indemnity can be placed."37

35. Id. at 316 (emphasis in original). Seaboard Air Line Ry. was followed in Suwannee Valley Elec. Coop. v. Live Oak, Perry, & Gulf R.R., 73 So. 2d 820 (Fla. 1954), which involved a similar factual situation.
36. See cases cited in RESTATEMENT OF RESTITUTION, Reporters' Notes §§ 90, 93 (1937).
37. Bohlen, Contribution and Indemnity Between Torteasors, 22 CORNELL L.Q. 469, 478
5. Distinction Between Active and Passive Negligence as a Basis for Common Law Indemnity

Another important basis of common law indemnity has been the court-drawn distinction between active and passive negligence. Active negligence is the negligent creation of a dangerous condition or the negligent failure to act for the protection of an injured person after gaining actual knowledge of the dangerous condition. Passive negligence is the negligent failure to discover a dangerous condition created by another.\(^{38}\)

The Florida cases frequently refer to active and passive negligence as a basis for awarding indemnity. The clearest and most comprehensive discussions of the active-passive tortfeasor indemnity rule as it existed before 1979 in Florida are found in Winn-Dixie Stores, Inc. v. Fellows\(^{39}\) and Florida Power Corp. v. Taylor,\(^{40}\) both of which define passive negligence as the failure to discover a dangerous condition created by another and active negligence as the creation of the dangerous condition or the negligent failure to act after making an actual discovery of its existence.

The principle defect in the analysis contained in these cases is that they recognize the right to indemnity based upon a difference in the kinds of negligence involved. They dispense with the additional requirement that there be a pretort duty between the parties. This is unsound because the law of negligence does not generally make any distinction between acts of omission and acts of commission.\(^{41}\) For example, if a customer negligently fails to dis-

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38. The origin of the distinction between active and passive negligence and the significance that it has been accorded in allowing common law indemnity has been described by Professor Bohlen.

The principal authority for the view that the negligence of the defendant against whom indemnity is sought must be different in kind from that of the claimant and not merely prior in time of commission is the case of Union Stockyards Co. v. Chicago R.R., [196 U.S. 217 (1904)]. The great authority of the Court has led to an undue acceptance of the view that "active" negligence in creation of the dangerous condition on the part of the defendant and "passive" negligence on the part of the claimant in failing to discover the danger are essential to indemnity.

Bohlen, supra note 37, at 482 (citation added) (footnotes omitted).

41. Florida Standard Jury Instructions 4.1 states:

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances or in failing to do something that a reason-
cover a dangerous condition created by the negligence of the store's employees, it is clear that his negligence will reduce his recovery under the defense of comparative negligence. There can be no justification for a different result where one defendant sues another for indemnity.

The distinction between active and passive negligence has played a proper role, however, in extending common law indemnity to cases where there was a pretort duty between the indemnitor and the indemnitee upon which the latter was entitled to rely. For example, if the purchaser of a product failed to inspect the product before using it or selling it because of his reliance upon the supplier, his negligence is not necessarily incompatible with allowing common law indemnity on the basis of the purchaser's reliance on the proper performance of the duty owed by the supplier. If, however, the purchaser in this example discovered that the product was defective and unsafe, he could no longer claim reliance. His active negligence would therefore bar his claim for common law indemnity.

B. Houdaille Industries, Inc. v. Edwards

*Houdaille Industries, Inc. v. Edwards* illustrates the continuing attempt by third parties held liable to an injured employee to recover common law indemnity from the employer. The third party tortfeasor in *Houdaille, Florida Wire and Cable Co.* supplied steel wire cable to the employer, Houdaille Industries, which used the steel wire cable in manufacturing concrete beams by stretching the steel cable through a mold into which the concrete was poured. Eddie Edwards, an employee of Houdaille, was killed when the cable broke. Edwards' personal representative sued Florida Wire for his wrongful death, alleging that Florida Wire had caused Edwards' death by breaching its implied warranty of ably careful person would do under like circumstances.

In Missouri Pac. R.R. v. Whitehead & Kales Co., 566 S.W.2d 466, 472 (Mo. 1978) the court stated: "Negligence is negligence. There is no such thing as 'good' negligence and 'bad' negligence, or some kind of negligence which should be overlooked and another kind which should not." In a similar vein, Prosser has observed, "Gross negligence is merely the same thing as ordinary negligence, 'with the addition' as Baron Rolfe once put it 'of a vituperative epithet.'" W. Prosser, *supra* note 10, at § 34.

42. 374 So. 2d 490 (Fla. 1979).

43. A recent summary of the same struggle in admiralty between third parties and employers of injured employees can be found in Misener Marine Constr. Co. v. Southport Marine, Inc., 377 So. 2d 757 (Fla. 2d Dist. Ct. App. 1979).
Florida Wire in turn filed a third party complaint for indemnity against Houdaille, alleging that Houdaille was actively negligent in its use of the steel wire cable and that Houdaille's negligence constituted a breach of duty owed to Florida Wire. The trial court granted Houdaille's motion for summary judgment. If Florida Wire were held liable to the plaintiff, the court reasoned, its liability could only be based upon primary wrongdoing, such as a breach of warranty or active negligence. On appeal, the district court reversed, ruling that the allegations of the third party complaint were sufficient to entitle Florida Wire to indemnity against Houdaille Industries under the active-passive tortfeasor doctrine.

In reaching this conclusion, the district court reasoned that Florida Wire could not automatically be held to be an active tortfeasor because "[b]reach of warranty is a species of liability which may, or may not, involve actual fault or active negligence on the part of the manufacturer."

The Florida Supreme Court reversed. In doing so, it completely abolished the distinction between active and passive negligence as a basis for common law indemnity. The Florida Supreme Court stated, *inter alia*, that:

"Florida Wire's claim that Edwards' death resulted solely from the negligence of Houdaille states a complete defense to the original action. It does not establish that Florida Wire is vicariously, constructively, derivatively, or technically liable for Houdaille's negligence. If both Florida Wire and Houdaille are at fault, no matter how slight the fault of the former, the principles of indemnity preclude Florida Wire's recovery of indemnity against Houdaille."

The fault referred to in the above quotation was Florida Wire's strict liability for breaching an implied warranty of fitness by manufacturing and selling a defective product. The holding in *Houdaille*, accordingly, not only abolishes common law indemnity in active and passive negligence cases, but also abolishes it where

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44. 374 So. 2d at 492.
45. *Id.*
46. *Id.*
48. *Id.* at 1114.
49. 374 So. 2d at 494.
the defendant claiming indemnity is held strictly liable for creating a dangerous condition which injures a plaintiff.

To be entitled to receive common law indemnity under the holding in *Houdaille*, therefore, a party must show that he is entirely without fault and has been subjected to liability to the injured third person because of the imposition of some "vicarious, constructive, derivative or technical" liability. Whatever definition is given to these terms must, of necessity, exclude liability based in any way on the personal fault of the party claiming indemnity.

The court in *Houdaille* did not refer to earlier holdings which allowed common law indemnity to a passively negligent tortfeasor. Instead the court rested its holding upon cases such as *Stuart v. Hertz Corp.*,

which denied common law indemnity to an actively negligent tortfeasor. The *Houdaille* decision nevertheless overrules sub silentio earlier cases which recognized the right of a passively negligent tortfeasor to receive common law indemnity.

The *Houdaille* result is logical in view of Florida's adoption of the Uniform Contribution Among Joint Tortfeasor's Act, which allows contribution to joint tortfeasors on a comparative fault basis. As Professor Bohlen aptly observed many years ago, the allowance of common law indemnity where both tortfeasors are at fault "is justified only by the traditional denial of contribution between joint or co-tortfeasors. Had this taboo not existed, justice would have been satisfied by a proper apportionment of the burden in accordance with the respective responsibility, of which culpability is only one element, of the claimant and defendant."

In addition to holding that Florida Wire's fault in breaching its implied warranty of fitness barred its common law indemnity claim, the Florida Supreme Court also held that a user of a product owes no duty to a supplier to exercise reasonable care in using the product, unless there is a contract between the user and supplier which imposes such a duty. It follows that even a supplier of

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50. 351 So. 2d 703 (Fla. 1977).
52. FLA. STAT. § 768.31 (1979).
54. The court indicated:

Furthermore, we find Florida Wire's contention that *Houdaille* owed a duty to it to be without merit. The user of an item supplied by another, in the absence of a
a product who is not at fault, such as a retailer who is held strictly liable for injuries caused to a third person, cannot recover common law indemnity from a negligent user of the product by contending that his negligent use of the product breached a duty owed to the supplier.55

Other jurisdictions have reached a result similar to the one reached in Houdaille. In Pachowitz v. Milwaukee & Suburban Transport Corp.,56 a Wisconsin court well states the reasoning supporting the doctrine that contribution on a comparative fault basis, is incompatible with common law indemnity to a tortfeasor whose fault contributed to causing the third person’s injuries. In that case, the injured plaintiff sued the Transport Company for negligently allowing her to alight from its bus at a defective and uneven curb. The company cross-claimed for contribution or indemnity against the city of Milwaukee, on the theory that the city was actively negligent in creating the dangerous condition while the Transport Company was only passively negligent in failing to discover it.57 In refusing to allow the indemnity claim, the court reasoned, in part, as follows:

If the Transport Company were found to be 95 percent negligent, and the city 5 percent negligent, under its cause of action for contribution, the Transport Company would recover from the city 5 percent of the total award of damages. However, under its cause of action for indemnity, the Transport Company would have a right to 100 percent reimbursement against the city in such a 95-5 situation if it could establish that its negligence was “passive” while the negligence of the city was “active.” Such an all-or-nothing result between negligent co-tort-feasors would be contrary to the Wisconsin concept of imposing liability and awarding recovery in proportion to the percentage of causal negligence attributable to each of the co-tort-feasors.58

The above-stated principles in Pachowitz have been followed in a number of cases.59

contract, does not owe the latter any duty of care in connection with the use of the item so as to create a duty upon the user to indemnify the supplier.

374 So. 2d at 494.
56. 202 N.W.2d 268 (Wis. 1972).
57. Id. at 270.
58. Id.
C. The Status of Common Law Indemnity After Houdaille

A proper understanding of the wide-reaching impact of the *Houdaille* decision requires an examination of the Florida cases and theories of common law indemnity that existed prior to *Houdaille* in order to determine which of these cases and theories of common law indemnity continue to be valid.

1. Cases Involving Fault Which Preclude Indemnity Under Houdaille

   a. Indemnitee's Negligence Generally as Barring Common Law Indemnity

   The holding in *Houdaille* that indemnity will be denied whenever the tortfeasor seeking indemnity is at fault, regardless of the relative equities of the parties or other considerations, is of course, entirely consistent with the many decisions prior to *Houdaille* which denied indemnity where the tortfeasor seeking indemnity was found actively negligent. *Houdaille* ratifies these prior decisions and extends their principle to include all negligence.

   Therefore, a negligent automobile driver held liable for the aggravation of an injured plaintiff's injuries caused by the malpractice of a treating physician will be denied indemnity against the treating physician or hospital. The same result obtains where a surgeon who is sued for malpractice seeks indemnity against another doctor whose alleged negligent postoperative treatment caused the plaintiff's toe to be amputated. Similarly, where a plaintiff's injury is aggravated by doctor's negligent administration of a drug which was improperly placed on the market, the initial tortfeasor cannot obtain indemnity from either the doctor or the drug manufacturer. The Florida Supreme Court has recently held, however, that the initial tortfeasor whose liability to the injured plaintiff has been increased by the subsequent negligence of

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60. See Stuart v. Hertz Corp., 351 So. 2d 703 (Fla. 1977).


63. See Ewell Eng'r & Contracting Co. v. Cato, 361 So. 2d 728 (Fla. 4th Dist. Ct. App. 1978).
a treating physician may bring a separate, independent action against the physician for subrogation to recover that portion of the initial tortfeasor's losses which "in fairness should be shared with a negligent doctor." 64

A tortfeasor who is actively negligent in failing to protect a plaintiff from a dangerous condition actually discovered by the tortfeasor will also be denied common law indemnity. 65 The same result follows when a food store, knowing of a dangerous condition created by a construction company doing work within the store, negligently fails to protect its customer from the danger. 66

Similarly, if an electric power company knows that its high voltage transmission lines are in dangerous proximity to a roadway which has been elevated in connection with a construction project, but fails to act in a timely and reasonable way to eliminate the danger, it cannot recover indemnity for its liability to a person injured by the dangerous condition. 67 An electric power company will likewise be denied indemnity for damages to an injured plaintiff if the power company knows that construction equipment is being used in dangerous proximity to its transmission lines and thereafter unreasonably fails to de-energize its lines. 68

The same principle prevents a car wash operator, who knows that a dangerous traffic situation exists on his premises, from receiving indemnity from a driver who loses control of his automobile while waiting to use the facilities. 69 A county which operates a bus with tempered glass in an area in which it is anticipated that missiles might be thrown at the bus, and which is held liable to a passenger who is injured by a brick thrown through the bus window, is not entitled to indemnity against the manufacturer of the

64. Underwriters at Lloyds v. City of Lauderdale Lakes, 382 So.2d 702, 704 (Fla. 1980).
65. See Winn-Dixie Stores, Inc. v. Fellows, 153 So. 2d 45 (Fla. 1st Dist. Ct. App. 1963). In Fellows a business invitor who discovered that a dangerous display of Pepsi-Cola cartons had been constructed in its food store by a company supplying the soft drinks to the store and thereafter failed to correct the dangerous display was denied indemnity from the soft drink company for damages paid by the store operator to a plaintiff injured by the negligent display.
bus alleged to be liable for breach of warranty. Additionally, the owner of a health club held liable to its patron when a false ceiling collapsed cannot recover from the contractor who installed the ceiling, where the health club owner knows of the dangerous and defective ceiling prior to its collapse.

A tortfeasor who is guilty of negligently directing a subcontractor's activities; operating a train so fast around a curve that it cannot be safely stopped; running an elevator when a repairman is on top of the elevator car; contributing to causing injury to an elementary school student who is struck by a motor vehicle; manufacturing an elevator; performing an abortion; failing to provide warning signs, lights and other proper safety devices to inform travelers of hazardous road construction; leaving a surgical instrument in a patient's abdomen; furnishing defective equipment; and failing as a landlord to maintain an area of common usage, will be denied indemnity because of his primary fault.

Houdaille states in the most emphatic terms that a tortfeasor who is negligent in any way will be denied common law indemnity. Courts in other jurisdictions which distinguish between active and passive negligence as a basis for allowing common law indemnity should adopt the sound rationale utilized in Houdaille.

70. See General Motors Corp. v. County of Dade, 272 So. 2d 192 (Fla. 3d Dist. Ct. App. 1973).
74. See General Dynamics Corp. v. Adams, 340 F.2d 271 (5th Cir. 1965).
79. See Maybarduck v. Bustamante, 294 So. 2d 374 (Fla. 4th Dist. Ct. App. 1974). Although the court held that the doctor claiming indemnity would be entitled to receive it if he were held only vicariously liable, the opposite result would obtain under Houdaille if the doctor himself were negligent in either leaving the instrument in the patient or in failing to properly supervise the operation.
b. Indemnitee's Strict Liability Arising from His Creation of a Dangerous Condition Injuring a Third Person as Barring Common Law Indemnity

Negligence is not the only kind of fault which will preclude indemnity under the rule of Houdaille. As held in Houdaille itself, and in its companion case, Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Co., strict liability which is imposed upon a manufacturer who makes and supplies a defective product will also bar indemnity. The same result should follow where the tortfeasor claiming common law indemnity has been held strictly liable for keeping a wild animal or for engaging in an abnormally dangerous activity.

Where, however, the party claiming common law indemnity has not created the dangerous condition but is nevertheless subject to strict liability of a vicarious nature, he should be allowed common law indemnity. For example, the strict liability imposed upon an innocent retailer for selling a defective product manufactured by another is considered as "technical" or "constructive" liability under the holding in Houdaille. The retailer held strictly liable to his customer in these circumstances will be entitled to recover common law indemnity from the manufacturer of the defective product.

c. Indemnitee's Violation of Duty to Exercise the Highest Degree of Care for the Protection of Another as Barring Common Law Indemnity

Liability for damages caused by unintentional conduct is generally imposed for failure to exercise reasonable care. There are certain relationships, however, the principal one being the relationship between a common carrier and its passengers, which create a duty to exercise a higher than ordinary degree of care for the protection of other persons. This higher degree of care is defined as that amount of care which a very careful person would have exer-

82. 374 So. 2d 487 (Fla. 1979). See also Ford Motor Co. v. Hill, 381 So. 2d 249 (Fla. 4th Dist. Ct. App. 1979), which holds that a manufacturer's strict liability for manufacturing a defective product bars its claim for common law indemnity under the holding in Houdaille.
A common carrier, therefore, may be held liable to its passengers for damages caused by conduct that would not result in liability if engaged in by another defendant. May a common carrier whose liability to its passenger is based only upon a violation of this higher degree of care obtain indemnity from another defendant whose negligent or reckless conduct contributed to causing the plaintiff's injuries?

The leading case allowing such indemnity is United Airlines, Inc. v. Wiener. In this case, a United Airlines plane collided in midair with an air force jet fighter near Las Vegas. Forty-two passengers and five crew members died, as did the two air force pilots. The Ninth Circuit held that the government owed no contractual or other pretort duty to United. Nevertheless, it was obligated to indemnify United for the damages caused by its failure to exercise the highest degree of care.

A Florida Court has reached an opposite conclusion. In Aircraft

85. Florida Standard Jury Instruction 4.5 states:

The reasonable care required of a common carrier for the safety of a passenger is the highest degree of care that is consistent with the mode of transportation used and the practical operation of the business of a common carrier of passengers. In such a case negligence of a common carrier may consist either in doing something that would not be done or in failing to do something that would be done by very careful persons under the conditions and the circumstances then affecting the carrier and the passenger.

86. 335 F.2d 379 (9th Cir. 1964).

87. Id. at 404. The court's rationalization was grounded upon the particular facts of the case, as is shown in the following:

United's duty to appellees' decedents was to exercise the highest degree of care; the government's duty was to exercise ordinary care. The government's negligent acts occurred literally from the start to the finish of this tragic incident. The cumulative effect of these negligent acts was to dispatch United's flight 736 and the government's highspeed jet training mission, conducted by a student pilot who was virtually blindfolded and an instructor whose cockpit preoccupations were greater than ordinarily demanded of pilots flying under VFR conditions and responsibilities, into the same area without warning to those in control of either craft.

If we accept the government's assertions, the government's pilots discovered United's peril in time to effectively respond but engaged in a maneuver destined to encounter rather than to evade. Contrasted with all of this is the finding that United's pilots, to some disputed degree of probability, could have seen the jet and, in discharge of the obligation to exercise the highest degree of care for their passengers, should have seen and avoided the jet. In view of the disparity of duties, the clear disparity of culpability, the likely operation of the last clear chance doctrine and all the surrounding circumstances, the findings that United and the government were in pari delicto are clearly erroneous and we hold that there is such difference in the contrasted character of fault as to warrant indemnity in favor of United in the nongovernment employee cases.

Id. (footnote omitted)(emphasis in original).
Taxi Co. v. Perkins, a taxicab owner previously held liable to an injured passenger sought common law indemnity from the driver and owner of the other vehicle involved in the collision. The district court of appeal affirmed the dismissal of the taxicab owner's complaint for common law indemnity because it was established that both drivers were "actively" negligent.

The holding in Aircraft Taxi Co. is consistent with the subsequent holding in Houdaille. Both agree in refusing to contrast the character of fault by reference to the higher standard of care. A breach of the duty to exercise the highest degree of care, even though ordinary care was exercised, therefore, precludes common law indemnity in Florida.

d. Indemnitee's Negligence as Barring Common Law Indemnity Against a Tortfeasor Guilty of Reckless Conduct

Reckless or willful conduct is higher on the scale of culpability than is negligence. This difference in culpability has led negligent defendants to claim indemnity against co-defendants alleged to have been reckless.

In Seaboard Coast Line Railroad v. Smith, an employer's bus collided with a train operated by the Seaboard Coast Line Railroad Company. The passenger employees, unable to sue their employer because of the tort exemption provision of the Florida Workmen's Compensation Act, instead sued Seaboard as a third party tortfeasor. Seaboard filed a third party claim against the employer seeking contribution and indemnity. The claim for contribution was predicated upon a constitutional challenge of the section of the Workmen's Compensation Statute which exempted employers from contribution claims. This statutory provision had already

89. Id. at 723. The court reasoned as follows:
   The verdict rendered in the passenger's suit establishes that negligence of both drivers was active, and combined to proximately cause the injuries. This is so even though the duty of care placed on the driver of the taxicab was higher than that owed by the driver of the other car to the party injured . . . . There was no duty running to Aircraft from the driver of the other car, as there was to Aircraft from its own driver . . . .
   Id. (citations omitted).
90. 359 So. 2d 427 (Fla. 1978).
91. Ch. 17481 § 11, 1935 Fla. Laws 1462 (current version at FLA. STAT. § 440.11 (1979)).
   The section provided, in part: "(1) The liability of an employer prescribed in § 440.10 shall be exclusive and in place of all other liability of such employer to any third party tortfeasor and to the employee, . . . on account of such injury or death, . . . ." Id. § 11(1).
92. 359 So. 2d at 427-28.
been declared unconstitutional as applied to claims for indemnity brought by third party tortfeasors against employers. The court distinguished contribution from indemnity on the grounds that unlike indemnity, contribution “does not rest on the legal relationship between the tortfeasors”; it therefore rejected Seaboard’s contention that the section was unconstitutional as applied to contribution claims.

Seaboard’s indemnity claim was based upon its allegations that the employer was guilty of willful and wanton misconduct, while Seaboard was merely negligent. Seaboard argued, on equitable principles, that a negligent tortfeasor should be entitled to recover indemnity from a tortfeasor guilty of willful and wanton misconduct. As authority, Seaboard cited the Fourth District’s opinion in Stuart v. Hertz Corp., in which common law indemnity was allowed on principles of equity, even though the tortfeasor claiming indemnity had been negligent. The supreme court rejected this argument, observing that Stuart had been overruled. With respect to the contention that indemnity could be based on the difference between negligence and recklessness, the court stated that “[w]e have heretofore stated that we find no basis for applying different degrees of negligence in determining liability under such circumstances.”

The above holding in Seaboard is consistent with the reasoning and holding of Houdaille. The issue is therefore squarely settled in Florida consistently with the result reached in other jurisdictions.

2. Cases in Which Indemnity Remains Allowable After Houdaille

a. Intentional Misconduct by an Indemnitor as a Basis for Allowing Common Law Indemnity in Favor of a Tortfeasor Guilty of Only Ordinary Negligence

Intentional or criminal misconduct of a third person which intervenes between a defendant’s negligent act and an injury to another

94. 359 So. 2d at 429.
95. Id. at 428.
96. 302 So. 2d 187 (Fla. 4th Dist. Ct. App. 1974).
97. 359 So. 2d at 430.
98. Id.
will often be held to be a superseding cause which relieves the negligent defendant from liability. Special circumstances, however, may make the intentional or criminal misconduct reasonably foreseeable. In such cases, liability will still be imposed on the initial, negligent tortfeasor.

For example, it has been held that a party who negligently leaves keys in an automobile which is stolen may be held liable to a person injured by the thief's negligent operation of the automobile; a motel owner may be held liable to a guest injured by an intruder who entered because inadequate locks were used; a defendant who negligently installed a burglar alarm system may be held liable for losses caused by burglary; and a restaurant owner whose negligence created an unreasonable risk of fire may be held liable for injuries caused to its business invitees by the intentional misconduct of a person which caused the fire.

Furthermore, a special relationship may exist between parties which imposes a duty on one party to protect the other from the intentional or criminal misconduct of a third person. Under this principle of law, a restaurant owner may be held liable for negligently failing to protect one of its patrons from the intentional misconduct of another patron; an accounting firm which negligently provides accounting and auditing services to a hospital may be held liable for losses caused by embezzlement committed by the hospital's chief executive officer; and a common carrier which fails to warn its passenger of the danger of felonious attack at its destination terminal located in a high crime area will be subject to liability to its passenger who is assaulted at this location.

Should the negligent defendant in the above cases be allowed indemnity against the intentional wrongdoer in light of the holding in *Houdaille* denying indemnity to a tortfeasor who is at fault? Apart from the fact that allowing indemnity against the intentional wrongdoer in such cases is supported by eminent scholarly opinion and by the Restatement of Restitution, there are

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sound reasons to distinguish a claim of indemnity against an inten-
tional tortfeasor from a claim of indemnity against a negligent
tortfeasor.

On the scale of civil as well as criminal culpability, intentional
wrongdoing ranks highest. As a consequence, intentional wrongdo-
ing has been subjected to the severest of legal sanctions and has
been treated differently from negligent misconduct in a number of
significant ways. Thus, unlike a negligent defendant, an intentional
wrongdoer cannot raise the defense of contributory or comparative
negligence and in most jurisdictions he is liable for punitive as
well as compensatory damages. In doubtful cases, the courts are
inclined to trace the consequences of an intentional tortfeasor's
wrongful acts further under principles of proximate or legal causa-
tion than they would in the case of merely negligent acts.

A further distinction is made under principles of proximate or
legal causation between intentional and negligent conduct. Courts
often treat the intervening negligence of a third person as a fore-
seeable intervening cause which will not relieve an initially negli-
gent defendant from liability. Intervening criminal misconduct
of a third person, however, has often been regarded as an unfore-
seeable, supervening cause which will relieve an initially negligent
defendant from liability, absent special circumstances. Florida's contribution statute also recognizes a distinction between
negligence and intentional misconduct by denying contribution to
intentional tortfeasors. "There is no right of contribution in favor
of any tortfeasor who has intentionally (willfully or wantonly)
caused or contributed to the injury or wrongful death."

These principles suggest that a different result is justified when
common law indemnity is sought from an intentional tortfeasor
rather than one who is merely negligent. Allowing indemnity based
upon the disparity in fault between negligence and intentional mis-

108. Restatement of Restitution § 96 (1937).
109. See Deane v. Johnston, 104 So. 2d 3 (Fla. 1958).
110. W. Prosser, supra note 10, § 2.
111. W. Prosser, supra note 10, § 43.
112. W. Prosser, supra note 10, § 44.
1979); Gulfstar, Inc. v. Advance Mortgage Corp., 376 So. 2d 243 (Fla. 3d Dist. Ct. App.
1979).
114. See, e.g., Vining v. Avis Rent-A-Car Sys., Inc., 354 So. 2d 54 (Fla. 1977); Orkin
Exterminating Co. v. Culpepper, 367 So. 2d 1026 (Fla. 3d Dist. Ct. App. 1979). As the crime
rate increases, certain types of criminal conduct are daily becoming more foreseeable.
conduct involving serious wrongdoing is consistent with the varying treatment that these different kinds of conduct have received in the law of torts. It is also compatible with society's moral values and sense of justice.

As Professor Lowndes has forcefully stated:

If a defendant has intentionally injured the plaintiff . . . it is clearly socially desirable that he should suffer for his misconduct. The fact that the plaintiff has contributed to his own injury by negligently failing to safeguard his own interests is overborne by the public interest in discouraging conduct like that of the defendant . . . . It may be possible to repress malice or stimulate indifference by fear.\textsuperscript{116}

It would seem proper, therefore, to recognize a deterrence-based right of indemnity against an intentional wrongdoer, and to hold that in such a case the negligent tortfeasor is not limited to his right of contribution. The \textit{Houdaille} holding should not be applied to bar indemnity in this situation.

This analysis, however, requires a reexamination of the Florida Supreme Court's holding in \textit{Seaboard Coast Line Railroad v. Smith.}\textsuperscript{117} The Court there held that a negligent tortfeasor could not obtain common law indemnity from one guilty of recklessness or willful misconduct.\textsuperscript{118} Although recklessness generally involves a lesser degree of culpability than intentional misconduct, it also involves greater culpability than negligence. Unlike negligence, for example, recklessness will support a claim for punitive damages and will not be subject to the defense of contributory or comparative negligence.\textsuperscript{119} An argument can therefore be made that the holding in \textit{Seaboard} denying indemnity against a reckless tortfeasor should extend in principle to bar indemnity against an intentional tortfeasor guilty of serious wrongdoing.

Notwithstanding the similarities between recklessness and intentional misconduct, recklessness is nonetheless a form of unintentional conduct. It does not arouse the degree of social disapproval stimulated by intentional conduct involving serious wrongdoing. This distinction is sufficient to justify a different treatment of the two types of misconduct under common law indemnity.

\textsuperscript{116} Lowndes, \textit{Contributory Negligence}, 22 Geo. L.J. 674, 687 (1933-34).
\textsuperscript{117} 359 So. 2d 427 (Fla. 1978).
\textsuperscript{118} \textit{Id.} at 430.
\textsuperscript{119} See Deane v. Johnston, 104 So. 2d 3 (Fla. 1958); W. Prosser, \textit{supra} note 10, at 344.
b. Common Law Indemnity in Favor of an Innocent Party Held Liable for Acting at the Direction of Another

In the 1847 case of *Croom v. Swann*, the Florida Supreme Court stated, in dictum, that an agent held liable for making false representations as to the goods of his principal is entitled to indemnity from his principal if it can be shown that the principal deceived him, and that the agent acted in good faith reliance on the principal's orders or instructions. It is implicit in the court's dictum that the agent could recover indemnity from his principal only if the agent were unaware of the falsity of the representations.

This dictum in *Croom v. Swann* is consistent with a rule of indemnity followed in other jurisdictions and adopted in the Restatement of Restitution, which states:

A person who, at the direction of and on account of another, has done an authorized act because of which both are liable in tort, is entitled to indemnity from the other for expenditures properly made in the discharge of such liability, if he acted in reliance upon the lawfulness of the direction, and, as between the two, his reliance was justifiable.

In comment a of section 90 it is stated, in part, that "[r]eliance upon the lawfulness of the direction is essential to indemnity. It is not, however, a bar to indemnity that the person who acted was careless in relying upon the direction, nor is it essential that he should have believed that there was no doubt as to its lawfulness."

To what extent does the above rule of indemnity have validity in Florida after *Houdaille*? The holding in *Houdaille* that a tortfeasor who is at fault cannot obtain indemnity would appear to preclude indemnity in any case where the employee or agent was personally at fault in obeying his principal's directions.

On the other hand, where the agent or employee is not personally at fault in following his employer's directions, indemnity seems to be proper. For example, if the agent or employee follows his employer's instructions and trespasses upon the plaintiff's land under the reasonable belief that he is entitled to do so, or if he innocently converts the goods of another, the agent or employee's liability in these situations should be classified as "technical" or

120. 1 Fla. 211, 213 (1847).
121. Restatement of Restitution § 90 (1936).
122. Id. at § 90, Comment a (1937).
"constructive" liability within the meaning of the exception in Houdaille. The agent or employee should then be entitled to obtain indemnity from his employer.

The basic principles underlying the foregoing analysis are illustrated in the Florida statutory provision governing a sheriff's duties and responsibilities in levying upon property pursuant to a writ issued by a Florida court. Where there is a risk that the sheriff will be held liable for making wrongful levy, the sheriff, before making the levy, "may require the plaintiff suing out the writ to furnish a bond" to indemnify him against any damages that he may suffer as a result of making a wrongful levy.\textsuperscript{2} The rationale for allowing statutory indemnity for sheriffs should apply as well to an agent who is held liable without fault.

c. Common Law Indemnity in Favor of an Innocent Party Held Liable Because of a Relationship with Another

In Houdaille the Florida Supreme Court held that common law indemnity remains available to a party who is held liable solely upon principles of "vicarious, constructive, technical or derivative" liability. As clearly indicated in Houdaille, this means any liability which is imposed by law on one party because of his relationship with the actual wrongdoer.

This principle from Houdaille is consistent with earlier holdings which allowed indemnity to a party held liable for the negligence of another. An employer held liable under the doctrine of respondeat superior for the negligence of his employee has been held to be entitled to indemnity from his negligent employee.\textsuperscript{124} Moreover, it has been established that a defendant who has been held liable, without personal fault, to a business invitee for breach of a nondelegable duty to maintain his premises in a reasonably safe condition may recover indemnity against his negligent independent contractor hired to discharge the nondelegable duty.\textsuperscript{125}

\textsuperscript{123} FLA. STAT. § 30.30(1) (1979).


\textsuperscript{125} See Grand Union Co. v. Prudential Bldg. Maint. Corp., 226 So. 2d 117 (Fla. 3d Dist.
The breach of other implied or express contractual duties which result in vicarious tort liability will likewise support a claim for indemnity against the wrongdoer. For example, a private surgeon's allegation that a hospital breached its implied contractual duty to supply him with a qualified assistant physician was held to state a cause of action for common law indemnity for the resulting imposition of vicarious liability upon the private surgeon.126

d. Common Law Indemnity in Favor of an Innocent Party Held Strictly Liable for Injuries Caused by Defective Product Manufactured by Another

Products liability claims constitute a special class of cases in which duties arising from contractual relationships have been held to justify common law indemnity.127 It is now recognized in Florida and in other jurisdictions that a manufacturer, wholesaler, retailer or other supplier of a defective product can be held strictly liable for injuries caused by the defective product.128 This law of strict liability applies to cases in which, for example, a nonnegligent retailer is subject to strict liability for injuries caused to his purchaser by a defective product manufacturer and supplied by another. The retailer's liability constitutes a cause of action for indemnity against the manufacturer for breach of its duty to supply the retailer with a product reasonably safe for its intended purposes.129

The same result occurs when a manufacturer of a finished product is held strictly liable for injuries caused to a third person by a

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128. See West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976); Restatement (Second) Torts § 402A (1964).

defective component part that was purchased from a supplier and integrated into the finished product. Where the manufacturer is not himself negligent, he is entitled to recover indemnity from the party supplying the defective component part.\textsuperscript{130}

The \textit{Houdaille} decision does not change the availability of indemnity in these cases as long as the retailer, manufacturer or other party claiming indemnity has not been negligent or otherwise personally at fault in causing the injuries. As is made clear in \textit{Houdaille}, the strict liability that is imposed upon the retailer or manufacturer in the above examples is regarded by the court as "technical" or "constructive" liability.

A different situation may exist where the manufacturer's liability arises because of a defective component supplied by another and incorporated into the product which is subsequently sold to one injured by the defect. In such a case, depending upon the particular circumstances, the manufacturer may have a right of indemnification against its supplier. In that case, a manufacturer who is held liable for a breach of an implied warranty of fitness could be without fault insofar as its relationship with the supplier of the component part is concerned and may be permitted to seek indemnification from the supplier.\textsuperscript{131}

There will be a different result, however, if the retailer or other party claiming indemnity against a manufacturer is himself negligent in causing the third person's injuries, or is vicariously responsible for the negligence of another person which contributed to causing such injuries.\textsuperscript{132}

e. Common Law Indemnity in Favor of a Party Held Vicariously Liable Under the Dangerous Instrumentality Doctrine

A noncontractual duty between an indemnitor and an indemnitee may also serve as a basis for allowing common law indemnity. Florida's dangerous instrumentality doctrine, for example, makes the owner of an automobile vicariously liable for damages caused by the negligence of a person using the automobile with his con-

\begin{footnotes}
\item[131] 374 So. 2d at 493-94 n.3 (citation omitted).
\item[132] See Dura Corp. v. Wallace, 297 So. 2d 619 (Fla. 3d Dist. Ct. App. 1974).
\end{footnotes}
sent. Under the holding in *Houdaille*, a tortfeasor held vicariously liable for plaintiff's damages may recover indemnity from the actual wrongdoer. This is consistent with previous cases holding that the owner of an automobile held vicariously liable under the dangerous instrumentality doctrine may obtain indemnity from a negligent driver using the car with the owner's consent.\(^3\)

The rule of *Houdaille* is also consistent with earlier holdings that an owner of an automobile who either loans or leases it to an employer whose employee then negligently injures a third party is entitled to indemnity from the employer because the negligence of the employee is imputed to the employer. This imputation of negligence for indemnity purposes is in accord with the general rule that an employee's negligence will be imputed to his employer where the rights of third persons are involved.\(^4\)

The foregoing principles of common law indemnity arising from the dangerous instrumentality doctrine are subject to modification by automobile lease provisions regarding liability insurance. Where the lessor agrees in the lease to provide liability insurance coverage, neither the lessor nor its insurer has a right of indemnity against the lessee.\(^5\) But if the lessor is held liable under the dangerous instrumentality doctrine for more than the amount of insur-

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136. See Hertz Corp. v. Ralph M. Parsons Co., 419 F.2d 783 (5th Cir. 1969).

137. In *Houdaille*, the Florida Supreme Court stated that common law indemnity shifts the entire loss "to another who should bear the costs because it was the latter's wrongdoing for which the former is held liable." 374 So. 2d at 493. An argument can be made that this language excludes indemnity in favor of an automobile owner against an employer to whom the car was leased or loaned whose employee negligently injures another, since the employer was not personally at fault. However, such an argument does not appear to be sound. The problem addressed in *Houdaille* was whether a party at fault could recover common law indemnity, not whether a party not personally at fault could be liable for indemnity. The holdings in Hutchins v. Frank E. Campbell, Inc., 123 So. 2d 273 (Fla. 2d Dist. Ct. App. 1960) and Hertz Corp. v. Ralph M. Parsons Co., 419 F.2d 783 (5th Cir. 1969) are sound and *Houdaille* should not be interpreted as modifying them.

ance agreed to be provided, then the lessor is entitled to indemnity for the excess from the lessee.\textsuperscript{139}

On the other hand, if the lessee agrees to maintain its own liability insurance policy and to further indemnify the lessor against all claims arising out of the use of the vehicle, then the lessor will be entitled to full contractual indemnity against the lessee and its insurer. This is so even where the vehicle is negligently driven by an employee of a sublessee who was covered under the lessor's own policy of insurance.\textsuperscript{140}

In situations involving lessors and lessees, the Supreme Court of Florida has made it abundantly clear that as long as the injured party is protected as required by law from injuries caused by a rented vehicle, the parties to the rental transaction are free to agree by contract to place the burden of loss where they desire.\textsuperscript{141}

III. CONTRACTUAL INDEMNITY AGAINST TORT CLAIMS

Common law indemnity forms only one part of Florida's law of tort indemnity. A significant number of tort indemnity claims arise under indemnity agreements between the indemnitor and the indemnitee. It is therefore important to understand the principles of law governing indemnity agreements.

A. Principles of Construction

The principal object of the construction of an indemnity contract is to ascertain the intention of the parties and to effectuate that intention consistently with legal principles.\textsuperscript{142} Unless a contrary result is dictated by some requirement of law, the parties are free to allocate between themselves the risks of loss incident to


their business transactions.\textsuperscript{143}

In most cases, an express contract of indemnity will be in writing and the intention of the parties will be determined by interpreting the written instrument.\textsuperscript{144} The construction of the written contract will ordinarily be a question of a law to be decided by the court. In such cases the issue may often be determined by summary judgment.\textsuperscript{145} In construing the language of a written contract providing indemnity, the indemnity provisions will be construed most strongly against the party who drafted it.\textsuperscript{146}

When a noninsurance indemnity agreement is reasonably susceptible to two interpretations, one of which will provide indemnity and one of which will deny it, there is a division of opinion as to the proper rule of construction. The Third District Court of Appeal held in \textit{Maule Industries, Inc. v. Central Digging & Contracting Corp.}\textsuperscript{147} that the contract must be interpreted to provide indemnity. The third district relied upon the Florida Supreme Court case of \textit{Da Costa v. General Guaranty Insurance Co.}\textsuperscript{148} which involved an insurance contract, and upon the Fifth Circuit Court of Appeals decision in \textit{Lake v. Fidelity & Deposit Co.},\textsuperscript{149} which in turn relied upon \textit{Da Costa}. The third district, therefore, will apply the same principle of construction to a noninsurance contract of indemnity as it will to an insurance contract of indemnity.

However, the Second District Court of Appeal held in \textit{Sol Walker & Co. v. Seaboard Coast Line Railroad}\textsuperscript{150} that where a noninsurance indemnity agreement is included in a contract, the main purpose of which is not indemnity, an ambiguous indemnity


\textsuperscript{144} Fla. Stat. \$ 725.01 (1979) requires "any special promise to answer for the debt, default or miscarriage of another person or . . . any agreement that is not to be performed within the space of 1 year from the making thereof" to be in writing and signed by the person to be charged with the promise. An indemnitee should comply with this statute to avoid an indemnitor's contention that an oral indemnity agreement is unenforceable as violative of the statute. See 72 Am. Jur. 2d Statute of Frauds §§ 19, 22, 237 (1974) for a discussion of the application of the above statute of frauds to indemnity and insurance contracts.


\textsuperscript{147} 323 So. 2d 631, 632-33 (Fla. 3d Dist. Ct. App. 1975).

\textsuperscript{148} 226 So. 2d 104 (Fla. 1969).

\textsuperscript{149} 430 F.2d 1261 (5th Cir. 1970).

\textsuperscript{150} 362 So. 2d 45, 48 (Fla. 2d Dist. Ct. App. 1978).
clause must be construed strictly against the indemnitee. The court in Sol Walker relied upon the Fifth Circuit case of Thomas v. Atlantic Coast Line Railroad,151 which did not rely upon any Florida cases in reaching the above result. The Thomas case involved a claim of indemnity by a railroad company against its lessee. It was contended that the indemnity provision in question was intended to apply to cases of willful or wanton misconduct.152

The rule adopted by the Third District Court of Appeal in Maule Industries, Inc., is the sounder rule. An indemnity agreement that is reasonably susceptible to two interpretations should be construed using the same principles in both insurance and non-insurance indemnity agreements. No justification for inconsistent principles of construction in the two situations is persuasive.

While the above principles of construction of indemnification contracts may be determinative in a given case, they will merely serve as aids to the construction of the agreement, not as a substitute for it. The construction process as a whole is an effort to determine the intent of the parties. A recent interesting example of this process can be found in Misener Marine Construction Co. v. Southport Marine, Inc.153 In that case, a contractor (Misener) and a subcontractor (Southport) entered into a contract in which Southport agreed to indemnify Misener against "all claims . . . based upon or arising out of damages or injury to persons . . . sustained in connection with the performance of this Subcontract."154 Misener furnished an employee to Southport under its contract with Southport, which called for Misener to furnish a barge, a concrete truck with an operator, and a tug boat with an operator. This loaned employee, who was the operator of the concrete truck, was injured while operating a winch on the barge provided by Misener. The employee sued both Misener and Southport, alleging negligence in failing to provide a safe place to work and in failing to keep the winch in proper repair, and also alleging strict liability in failing to provide a seaworthy vessel.155 Both Misener and Southport filed cross claims for indemnity. The employee's claims were settled, with both Misener and Southport contributing one-half of the settlement and both reserved the right to prosecute

151. 201 F.2d 167 (5th Cir. 1953).
152. Id. at 169.
154. Id. at 758.
155. Id.
their cross claims for indemnity.\textsuperscript{166}

In rejecting Misener's claim for contractual indemnity, the court held as follows:

The obvious and logical intent of the indemnity clause was to have Southport reimburse Misener for any loss sustained by Misener where injury to person or property arose out of duties to be performed by Southport. . . . Thus, the only reasonable interpretation of the subcontract as a whole would be that Southport was not to be responsible for loss occurring to Misener from Misener's duty under the lease clause.\textsuperscript{167}

The reach of the indemnity agreement was limited to the court's narrow interpretation of the intent of the parties.

1. \textit{Intentional or Reckless Conduct}

An important question to be determined in construing an indemnity agreement is whether the indemnity agreement is valid. For reasons of public policy, one cannot be indemnified against his own intentional, illegal, or immoral conduct.\textsuperscript{168} Moreover, a tort-feasor cannot be indemnified against his own reckless, willful, or wanton conduct.

In \textit{Thomas v. Atlantic Coast Line Railroad},\textsuperscript{169} the plaintiff Thomas alleged that the defendant Atlantic Coast Line Railroad Company had set fire in a "willful, wanton and reckless" manner to a pile of debris which was in close proximity to a building occupied by Thomas. The plaintiff's building was located adjacent to a railroad track and was leased from the railroad company.\textsuperscript{160} The lease agreement between Thomas and the railroad company required Thomas to indemnify the railroad company against any claim for damage to the building and its contents caused by the negligence of the railroad company or otherwise. The railroad company contended that this indemnity provision was intended to include acts of willful and wanton misconduct as well as acts of ordinary negligence. The court rejected this contention and held that

\textsuperscript{156} id.
\textsuperscript{157} id.
\textsuperscript{159} 201 F.2d 167 (5th Cir. 1953) (applying Florida law).
\textsuperscript{160} id. at 168.
even if the parties intended reckless conduct to be included within the indemnity provision, it would be illegal as applied to such conduct because of the public policy prohibition of a party’s indemnification against his own willful, wanton or reckless misconduct.\textsuperscript{161} The indemnity clause also served as an ill-disguised exculpatory clause, excusing the lessor for his negligence to his lessee.

2. \textit{Indemnitee’s Negligence and Strict Liability}

Although one may not contract for indemnity against his own intentional or reckless misconduct, one may contract for indemnity against one’s own negligence or strict liability if the contract meets certain requirements, even though such conduct will bar the right to common law indemnity under \textit{Houdaille}. In \textit{Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Co.},\textsuperscript{162} it was alleged that the plaintiff, Arthur Lott, was injured when he fell from a scaffold on a construction site. Spring Lock had manufactured the scaffold and had leased it to the subcontractor (Poe), which assembled it and used it on the construction project. Poe agreed in the lease to maintain and use the scaffold in a reasonable manner and to indemnify Spring Lock against any claim arising out of the “erection and maintenance, use or possession of said equipment.”\textsuperscript{163}

Lott sued Spring Lock on theories of negligence, breach of implied warranty and strict liability. Spring Lock filed a third party complaint against Poe for common law and contractual indemnity, and also filed claims against the general contractor and the property owner for common law indemnity.\textsuperscript{164} The Florida Supreme Court held that there was no basis for Spring Lock’s claims of common law indemnity for the reasons express in \textit{Houdaille}.\textsuperscript{165}

The court then turned its attention to Spring Lock’s claim against Poe for contractual indemnity. Observing that “contracts of indemnification which attempt to indemnify a party against its own wrongful acts are viewed in Florida with disfavor,”\textsuperscript{166} the court

\begin{itemize}
\item\textsuperscript{161} \textit{Id.} at 169-70.
\item\textsuperscript{162} 374 So. 2d 487 (Fla. 1979). For a very good discussion of cases involving attempts by suppliers to obtain contractual indemnity against their own tortious conduct, see \textit{Murray, Indemnifying Suppliers Against Their Own Wrongs—Risk Allocation of Products Liability}, 9 \textit{U.C.C. L. Jour.} 203 (1977).
\item\textsuperscript{163} 374 So. 2d at 489.
\item\textsuperscript{164} \textit{Id.} at 488.
\item\textsuperscript{165} \textit{Id.} at 489.
\item\textsuperscript{166} \textit{Id.}
reaffirmed its earlier holding in *University Plaza Shopping Center, Inc. v. Stewart* and held that a contract of indemnification will not be construed to include indemnity against the indemnitee's own negligence unless this intent is expressed in "clear and unequivocal terms." 

In *University Plaza*, this principle of construction was applied to preclude a landlord's claim of indemnity against a tenant who agreed to indemnify his landlord against "any and all claims for any personal injury or loss of life in and about the demised premises." The landlord-indemnitee was allegedly solely negligent in causing the death sued upon in *University Plaza*. The court left open the question of whether general language of indemnity such as that provided by the lessee could justify indemnity where the loss resulted from the joint negligence of the indemnitee and indemnitor.

Relying on *Leonard L. Farber Co., Inc. v. Jaksch*, the Third District Court of Appeal in *Spring Lock* spoke to the question left open in *University Plaza*, and held that the general language of indemnity contained in the lease between Spring Lock and Poe provided indemnity for damages caused by the joint negligence of Poe and Spring Lock. The Florida Supreme Court reversed, holding that an indemnification agreement will not be construed to indemnify an indemnitee against his own negligence, whether it be sole or joint with that of the indemnitor, unless the intent to provide such indemnity is expressed in clear and unequivocal terms in the indemnification agreement.

The court held the following provision in the agreement between Poe and Spring Lock to be decisive: "The LESSEE assumes all responsibility for claims asserted by any person whatever growing out of the erection and maintenance, use or possession of said equipment, and agrees to hold the COMPANY harmless from all such claims." With respect to this language, the court stated:

The underscored provision employs exactly the sort of "general terms" which we held in *University Plaza* do not disclose an in-
tention to indemnify for consequences arising from the wrongful acts of the indemnitee. The language of the lease agreement demonstrates nothing more than an undertaking by Poe to hold Spring Lock harmless from any vicarious liability which might result from Poe's erection, maintenance or use of the scaffold. It does not envision indemnity for Spring Lock's affirmative misconduct, whether in connection with design and manufacture or erection, maintenance and use of the scaffold. . . .

We are not unmindful of the fact that the majority in University Plaza limited its holding to instances where liability is based solely on the fault of the indemnitee. However, the public policy underlying that decision applies with equal force here, that is, to instances where the indemnitor and indemnitee are jointly liable. Under classical principles of indemnity, courts of law rightfully frown upon the underwriting of wrongful conduct, whether it stands alone or is accompanied by other wrongful acts. . . . Hence we extend the holding in University Plaza to cases where the indemnitor and indemnitee are jointly liable. 175

The court's opinion does not specifically mention Spring Lock's claim against Poe for indemnity based on Spring Lock's liability for its alleged breach of warranty and for strict liability. 176 It seems clear, however, that the court intended to include claims based upon breach of warranty and strict liability within the words "affirmative misconduct." This conclusion is supported by the holding in the case, which denied Spring Lock's claim for contractual indemnity against its own breach of warranty and strict liability. Moreover, the court's construction of the general language of indemnity in the lease between Spring Lock and Poe as demonstrating "nothing more than an undertaking by Poe to hold Spring Lock harmless from any vicarious liability" and as not including "indemnity for Spring Lock's affirmative misconduct" seems clearly to include breach of warranty or strict liability within the term "affirmative misconduct." Therefore, the First District Court of Appeal's holding in W.R. Fairchild Construction Co. v. Fairchild-Florida Construction Co., 177 that general language of indemnity is sufficient to provide indemnity against an indemnitee's strict liability, appears to have been overruled by Spring Lock.

In Spring Lock, the Florida Supreme Court distinguished Leo-

175. Id. at 489-90 (citation omitted).
176. Id. at 488.
177. 369 So. 2d 653 (Fla. 1st Dist. Ct. App. 1979).
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nard L. Farber Co. v. Jaksch and approved its holding. In that case the lease provided that "Lessee shall indemnify LESSOR and save it harmless from suits . . . occasioned wholly or in part by any act or omission of Lessee . . . ." The Spring Lock court stated that the "in part" language manifested the lessee's clear and unequivocal intent to indemnify the lessor in cases where both the lessor and the lessee were at fault in causing the injury. This reasoning raises questions as to what kind of language will satisfy the requirement that an intent to indemnify against one's own negligence or strict liability be expressed in "clear and unequivocal terms."

The lessee in Leonard L. Farber Co. argued that the "in part" language meant any negligence of the lessee, together with the negligence of a third person, and did not include the negligence of the lessor. Therefore, the lessee contended, there was no clear and unequivocal expression of an intent to indemnify the lessor when its negligence joined with that of the lessee in causing the injury. If the indemnity provision had only used the "in part" language quoted above, the lessee's contention would seem to be very persuasive. There was, however, an addendum to the lease provision in question, which stated that: "Anything contained in Paragraph 37 hereof to the contrary notwithstanding, Lessor shall not be relieved of any liability resulting solely from the negligence of Lessor or of its agents or employees." This language, when added to the "in part" language referred to above, lends some support for finding an intent that the lessor be indemnified by the lessee from losses resulting from the joint negligence of the lessor and the lessee.

The Florida Supreme Court's approval in Spring Lock of Leonard L. Farber Co. makes it abundantly clear that language of indemnity can satisfy the requirement that an intent to indemnify against one's own negligence or strict liability be expressed in clear and unequivocal terms even if it does not use the words "indemnitee's negligence or strict liability" or "joint negligence or strict liability of the indemnitee and the indemnitor."

There is some question raised by the Florida Supreme Court's express approval of the result in Leonard L. Farber Co. as to whether it is easier to satisfy the clear and unequivocal terms re-

178. 335 So. 2d at 847-48.
179. Id. at 848 (emphasis added).
180. Id.
quirement when the indemnitee is seeking indemnity against his joint negligence or joint strict liability rather than his sole negligence or sole strict liability. Support for such a distinction might be found in the First District Court of Appeal decision in *City of Jacksonville v. Franco.* 181 This case held that an indemnity provision did not sufficiently express a clear and unequivocal intent to indemnify against the indemnitee's sole negligence but did sufficiently express a clear and unequivocal intent to indemnify him against his contributing negligence. 182 Since the reasons for adopting the "clear and unequivocal terms" requirement are less compelling where joint negligence or strict liability is involved, a more relaxed standard of construction with regard to this situation could be justified. 183 *Spring Lock,* however, does not appear to recognize such a distinction.

The "clear and unequivocal terms" requirement discussed in *Spring Lock* has been applied in a number of cases to deny indemnity against an indemnitee's own negligence. It has been held that an indemnification agreement providing indemnity against "any and all claims for any personal injury or loss of life in and about the demised premises;" 184 "all liability . . . imposed by law . . . on account of any such loss, damage, or injury;" 185 "shall and will at all times indemnify and save harmless . . . and will pay and discharge all loss;" 186 or "any liabilities whatsoever" 187 will be construed as insufficient to show a clear and unequivocal intent to provide indemnity against an indemnitee's own negligence.

Similarly, a contract of indemnity which provides that the indemnitor agrees to indemnify the indemnitee against "all losses and all claims, demands, payments, suits, actions, recoveries, and judgments of every nature and description brought . . . by reason

182. Id. at 211-12.
183. General language of indemnity was held to sufficiently support an indemnitee's claim of indemnity against its joint negligence in *Mutual Employees Trademart, Inc. v. Armour Serv., Inc.,* 170 So. 2d 64 (Fla. 3d Dist. Ct. App. 1964). This case seems inconsistent with *Spring Lock,* however, and is probably no longer valid.
186. Gulf Oil Corp. v. Atlantic Coast Line R.R., 196 So. 2d 456, 457 (Fla. 2d Dist. Ct. App.), cert. denied, 201 So. 2d 893 (Fla. 1967).
of any act or omission of the said contractor, his agent, or any em-
ployee in the execution of the work in consequence of any negli-
gence or carelessness in guarding same” will not be construed to
provide indemnity against an indemnitee’s own negligence.\(^{188}\)

The simple lesson for the draftsman who wishes to be sure that
an indemnitee will be indemnified against his own negligence or
strict liability, whether sole or joint, is to use the words “negli-
gence” or “strict liability” when expressing the desired intent.\(^{189}\)

C. Abandonment or Other Termination of a Written
Indemnification Agreement

The parties to an indemnification agreement may, of course, mu-
tually agree to terminate the agreement. They may also abandon
the agreement by their conduct. In *Sinclair Refining Co. v. Butler*,\(^{190}\) the Third District Court of Appeal held that evidence of a
course of conduct by the parties over a period in excess of thirty
years supported a jury finding that the parties had abandoned the
written agreements between themselves, including the convenants
of indemnity.

An indemnitor, however, who executes an indemnity agreement
on behalf of a principal and in favor of a surety cannot unilaterally
terminate his obligations under the indemnity agreement. Al-
though the indemnitor’s motive for undertaking the indemnity ob-
ligation may no longer exist, he still remains liable under the terms
of the indemnity agreement.\(^{191}\)

IV. STATUTES AFFECTING INDEMNITY

The principles of contractual and common law indemnity dis-
cussed in the preceding two sections of this article are subject, of
course, to statutory modification. The Florida legislature has en-
acted several statutes affecting the right to obtain indemnity
against liability for tort claims. These statutes must be examined
to determine whether they affect a claim for indemnity against tort


\(^{189}\) *See, e.g.*, Old Dominion Iron & Steel Corp. v. Maryland Cas. Co., 374 So. 2d 57 (Fla. 1st Dist. Ct. App. 1979).

\(^{190}\) See 172 So. 2d 499 (Fla. 3d Dist. Ct. App. 1965).

liability.

A. Construction Contracts

Indemnity agreements contained in construction contracts must comply with the requirements of section 725.06, Florida Statutes. This statute states that a construction contract which provides indemnity is not enforceable unless the contract contains a monetary limitation on the amount of indemnity and the indemnitee gives specific consideration for the indemnity.

This statutory provision was recently applied in the case of A-T-O, Inc. v. Garcia to invalidate an indemnity provision printed on the reverse side of a receipt issued in connection with the lease of a portable mobile scaffold for construction work. This receipt purported to require the lessee to indemnify the lessor against the consequences of the lessor's own negligence. The indemnity provision contained neither a monetary limitation nor gave any specific consideration for the indemnification. In Maule Industries, Inc. v. Central Rigging & Contracting Corp., however, the Third District Court of Appeal found that the statute had been complied with and that the indemnity agreement was valid. The Florida Supreme Court decision in Spring Lock did not mention the statute.

B. Indemnity of Corporate Officers, Directors, Employees and Agents

A corporate officer, director, employee or agent may become sub-

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192. (1979). The entire section is as follows:

Any portion of any agreement or contract for, or in connection with, any construction, alteration, repair, or demolition of a building, structure, appurtenance, or appliance, including moving and excavating connected with it, or any guarantee of, or in connection with, any of them, between an owner of real property and an architect, engineer, general contractor, subcontractor, sub-subcontractor, or materialman, or between any combination thereof, wherein any party referred to herein obtains indemnification from liability for damages to persons or property caused in whole or in part by any act, omission, or default of that party arising from the contract or its performance shall be void and unenforceable unless:

(1) The contract contains a monetary limitation on the extent of the indemnification and shall be a part of the project specifications or bid documents, if any, or

(2) The person indemnified by the contract gives a specific consideration to the indemnitor for the indemnification that shall be provided for in his contract and section of the project specifications or bid documents, if any.

FLA. STAT. § 725.06 (1979).

194. Id. at 536.
ject to tort as well as to other liability for his actions in representing the corporation. The corporation may wish to indemnify its officers, directors, employees and agents against such liability, including the attorney's fees and costs incurred in defending such actions. Such corporate indemnity agreements must comply with the extensive provisions of section 607.014, Florida Statutes. 198

A corporation may indemnify a director, officer, employee or agent for expenses, judgments, fines or settlements only if the person acted in "good faith" and in a manner reasonably believed to be in the best interest of the corporation. In a criminal action, indemnity will only be allowed if the person had no reasonable cause to believe that his conduct was unlawful. The court in which the action against the corporate director, officer, employee or agent was brought must approve any corporate indemnity for the person's adjudicated negligence or misconduct. The statute also prohibits a corporation from providing indemnification against "gross negligence" or "willful misconduct." 197

C. Landlord and Tenant

With respect to residential tenancies governed by the Florida Residential Landlord and Tenant Act, 198 no indemnity agreement will be valid if its violates the provisions of section 83.47 of this act, which prohibits the enforcement of any clause in a rental agreement which limits a landlord's liability to the tenant, or vice versa. 199

D. Suits for Indemnity and Contribution Against the State, Its Agencies or Subdivisions

A private defendant sued by an injured person may wish to as-

198. FLA. STAT. §§ 83.40-.63 (1979).
199. FLA. STAT. § 83.47 (1979) provides:

(1) A provision in a rental agreement is void and unenforceable to the extent that it:

(a) Purports to waive or preclude the rights, remedies, or requirements set forth in this part.

(b) Purports to limit or preclude any liability of the landlord to the tenant or of the tenant to the landlord, arising under law.

(2) If such a void and unenforceable provision is included in a rental agreement entered into, extended, or renewed after the effective date of this part and either party suffers actual damages as a result of the inclusion, the aggrieved party may recover those damages sustained after the effective date of this part.
sert a claim for tort indemnity or contribution against the state or its agencies or subdivisions. If so, the defendant must comply with the requirements of the legislative enactment which waives the state's right of sovereign immunity for tort claims against the state, its agencies or subdivisions.\textsuperscript{200} The Florida Supreme Court has held that this statute applies to indemnity actions based on the tortious conduct of the state, its agencies or subdivisions.\textsuperscript{201} As the court stated, "Actions for contribution or indemnity grounded on the tortious conduct of the state or its agencies and subdivisions are no less tort claims for purposes of section 768.28 than direct actions."\textsuperscript{202}

V. INDEMNITEE'S ATTORNEY'S FEES AND COSTS

A. Attorney's Fees and Costs as Part of Indemnitee's Damages

In Fontainebleau Hotel Corp. v. Postol, which involved a claim for common law indemnity, the Third District Court of Appeal quoted with approval the following rule:

As a general rule an indemnitee is entitled to recover, as a part of the damages, reasonable attorney's fees, and reasonable and proper legal costs and expenses, which he is compelled to pay as a result of suits by or against him in reference to the matter against which he is indemnified . . . .\textsuperscript{203}

Postol was applied to a contractual indemnity claim in Thomas

\textsuperscript{200} F.L.A. STAT. § 768.28 (1979). Before one may sue the state or one of its agencies or subdivisions, one must present the claim in writing to the agency or subdivision and also, except when the claim is against a municipality, to the Department of Insurance. After the denial of the claim by either the agency or by the Department of Insurance, the claimant may file the action in court. If neither the agency nor the department responds to the claim within six months, the claim is deemed denied. Id. at § 768.28(6). It is important to note that the four-year statute of limitations begins to run from the time that the claim "accrues" and does not appear to be tolled by the filing of the claim with the appropriate state agency or subdivision. It is only tolled by "filing a complaint in the court of appropriate jurisdiction." Id. at § 768.28(11).

\textsuperscript{201} Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1022 (Fla. 1979). Contractual indemnity actions against the state may be subject to the doctrine of sovereign immunity. See Circuit Court v. Department of Natural Resources, 339 So. 2d 1113, 1116 (Fla. 1976); Venezia A., Inc. v. Askew, 363 So. 2d 367 (Fla. 1st Dist. Ct. App. 1978); State ex rel. Div. of Administration v. Oliff, 350 So. 2d 484 (Fla. 1st Dist. Ct. App. 1977).

\textsuperscript{202} Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1022 (Fla. 1979).

Awning & Tent Co. v. Toby's Twelfth Cafeteria, Inc.204 Thomas Awning extended this rule to include the indemnitee's reasonable attorney's fees and costs incurred in successfully defending against the injured person's appeal from a summary judgment in favor of the indemnitee.

The lease in Thomas Awning provided that Toby's Cafeteria, Inc. agreed to hold lessor Thomas Awning "harmless from any loss or claims for damages and/or injuries while leased merchandise is in the possession of" lessee Toby's Cafeteria, Inc.205 There was no express mention of attorney's fees and costs in the indemnity agreement. The court held that Thomas Awning was entitled to recover its attorney's fees and costs involved in the successful defense at both the trial and appellate levels of the suit brought against it by the injured person. This holding was based on the reasoning in the Postol case that an indemnitee's damages include its attorney's fees and costs expended in defending the action against it.206

This reasoning is sound. In its second amended complaint which was dismissed by the trial court, however, Thomas Awning further claimed the right to recover attorney's fees and costs incurred as a result of the institution of the indemnity action itself. The district court did not explicitly state whether this latter claim was proper. It simply cited the above-quoted language in Postol and reversed the dismissal of the second amended complaint, creating the clear impression that such attorney's fees and costs are recoverable.

There is language in the quoted portion of the Postol case which supports the proposition that an indemnitee who sues the indemnitor may recover his attorney's fees and costs incurred in that suit. In Postol, the court stated that an indemnitee can recover attorney's fees and costs "which he is compelled to pay as a result of suits by or against him in reference to the matter against which he is indemnified."207 A suit brought by an indemnitee could include a suit brought by the indemnitee against the indemnitor to recover indemnity. It most likely, however, refers to actions brought by the indemnitee against the injured third party, such as an action for a

204. 204 So. 2d 756 (Fla. 3d Dist. Ct. App. 1967). This decision was disapproved on other grounds in University Plaza Shopping Center, Inc. v. Stewart, 272 So. 2d 507, 512 (Fla. 1973). See also Morse Auto Rentals, Inc. v. Dunes Enterprises, Inc., 198 So. 2d 652 (Fla. 3d Dist. Ct. App. 1967).
205. 204 So. 2d at 757.
206. Id.
207. 142 So. 2d at 300 (emphasis added).
declaratory judgment.

An examination of the indemnity provision in *Thomas Awning* reveals that it confers indemnity against "any loss or claims for damages." Attorney's fees and costs expended in defending against "any loss or claims for damages" fit properly into the indemnitee's damages which result from the occurrence of the incident giving rise to the right to indemnity. However, attorney's fees and costs expended in enforcing the indemnity contract are not "in reference" to the "loss or claims for damages" but rather result from the enforcement of the contractual indemnity provision itself. Therefore, unless there is a further provision that grants the indemnitee the right to recover attorney's fees and costs incurred in enforcing the indemnity provision, then such fees and costs should not be recoverable. A federal case, applying Florida law, has reached this conclusion.208

If the foregoing analysis is correct, it throws doubt upon the validity of the decision in *Brown v. Financial Indemnity Co.*209 In that case, the Financial Indemnity Company sued the defendants in county court to recover under an indemnification agreement. The county court granted a judgment on the pleadings, thus denying the indemnity claim. The indemnitee appealed the county court's decision to the circuit court, which reversed the county court's holding and further held that the indemnitee was entitled to recover its attorney's fees for the appeal, if the indemnitee should prevail on the merits in the trial court.210 The indemnitors appealed the circuit court's order to the Fourth District Court of Appeal.

The indemnitors contended that since the indemnification agreement did not specifically provide for attorney's fees incurred on appeal, they were not recoverable. As support, the indemnitors cited cases which held that unless a statute or promissory note specifically provides for attorney's fees incurred on appeal, such attorney's fees are not recoverable.211 The court rejected this contention on the ground that *Postol* and *Thomas Awning* had determined that attorney's fees and costs are part of an indemnitee's damages.212 The difficulty with this reasoning is that it interprets the

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210. Id. at 1273.
211. Id.
212. Id. at 1274.
language in Postol to include the indemnitee’s attorney’s fees incurred in enforcing the indemnification agreement as a part of the indemnitee’s damages.\textsuperscript{213}

B. \textit{Procedural Effect of the Principle that an Indemnitee’s Attorney’s Fees and Costs are Part of His Damages in an Indemnity Action}

The principle that the attorney’s fees and costs incurred in defending an injured third party’s claim against an indemnitee are part of the indemnitee’s damages has procedural as well as substantive consequences. It has been held in nonindemnity contract cases that a provision entitling the prevailing party to recover attorney’s fees incurred in enforcing the contract establishes the right to recover attorney’s fees as part of the prevailing party’s damages. Where a jury trial has been demanded, the jury must determine attorney’s fees as it would determine any other element of damages.\textsuperscript{214} If the party entitled to recover attorney’s fees incurred in enforcing a contract fails to produce evidence to the jury on the issue of fees, he waives his right to attorney’s fees.\textsuperscript{215} This rule would apply in a nonjury trial when attorney’s fees and costs are to be determined by the judge as trier of fact of an element of damages.\textsuperscript{216}

The same result should follow in trials upon claims for indemnity. Since an indemnitee’s attorney’s fees and costs incurred in defending the third party’s claim are a part of his damages, the evidence on this issue must be presented to the trier of fact or the right to recover such attorney’s fees and costs will be waived. It may be to the mutual advantage of the parties, however, to stipulate that this issue be resolved by the judge in a subsequent non-jury hearing after the jury or nonjury trial has been concluded.

The rule that the trier of fact shall determine the issue of the reasonable attorney’s fees and costs which an indemnitee is enti-

\textsuperscript{213} \textit{Fla. Stat.} § 59.46 (1979) provides that a statute or contract providing for payment of attorney’s fees shall be construed to include attorney’s fees incurred on appeal. This applies only to contracts entered into after October 1, 1977, unless a contrary intent is expressed.


\textsuperscript{216} If the indemnitee fails to present evidence of attorney’s fees and costs in his case-in-chief in a non jury trial, he may file a motion within 10 days after the judgment is entered to allow presentation of such evidence. \textit{See} \textit{Fla. R. Civ. P.} 1.530(a), (b).
ttled to recover in an indemnity action cannot be subverted by inserting a clause into the indemnity agreement which requires the trier of fact to accept the indemnitee's evidence on the issue. In *Sork v. United Benefit Fire Insurance Co.*, the court held that an indemnity clause that provided, in part, that "all vouchers or agreements for expenses or liabilities incurred by the surety in good faith . . . including attorneys' fees . . . shall be accepted as conclusive evidence" was invalid as contrary to public policy. Moreover, it was also held in *Sork* that the reasonableness of the attorney's fees cannot be decided by summary judgment based upon affidavits; the trier of fact must decide this issue.

C. Indemnitee's Right to Attorney's Fees and Costs After Settlement or Successful Defense

An indemnitee may settle with the third party and obtain a dismissal of the action with prejudice, in favor of both indemnitee and indemnitor. In such a case, the indemnitee has a right to recover attorney's fees and costs in defending the action up to the point of its dismissal, unless the indemnitor and the indemnitee agree to the contrary.

An indemnitee who refuses to settle the third party's action and elects to defend the action may also recover reasonable attorney's fees and costs incurred in a successful defense. This is true whether the indemnitee's right to indemnity is based upon contractual or common law indemnity. An indemnitee claiming indemnity under an indemnification agreement will only be entitled to recover attorney's fees and costs in successfully defending a third party's claim, however, if the third party's claim is covered by the indemnification agreement.

In *J. A. Jones Construction Co. v. Zack Co.*, a hurricane damaged the roof and siding of an airplane hangar which had been constructed by a subcontractor. The contract contained a provision in which the subcontractor agreed to indemnify the general contrac-

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217. 161 So. 2d 54 (Fla. 3d Dist. Ct. App. 1964).
218. *Id.* at 56.
219. *Id.*
224. *Id.* at 447.
tor against claims "arising from accidents" which occurred "in connection with the subcontractor's work." The owner of the hangar filed an action against the general contractor for the damage, alleging that the subcontractor's negligence had caused it. The general contractor successfully defended the owner's action and then sued the subcontractor under the indemnification provision quoted above to recover its attorney's fees and costs. The court held that the damage caused by the hurricane was an "accidental happening" within the meaning of the indemnification provision and therefore the general contractor was entitled to recover its attorney's fees and costs.

In *Stephens v. Chevron Oil Co.*, a claimant sued a contractor in connection with work being performed by a subcontractor. It was alleged that the claimant's injuries were caused by the sole negligence of the contractor. The contractor successfully defended this claim and then sued the subcontractor to recover its attorney's fees and costs under an indemnification agreement. In this agreement, the subcontractor had agreed to indemnify the contractor against losses arising in connection with work performed by the subcontractor. The Fifth Circuit held that the contractor was entitled to recover its attorney's fees and costs under the indemnification agreement because the third party's claim arose in connection with the subcontractor's work. The court reached this result even though it recognized that no right to indemnity would have been allowed if the contractor had been negligent because the "clear and unequivocal terms" requirement of Florida law had not been met.

**D. Indemnitee Has No Right to Attorney's Fees and Costs of Defending Claims Not Covered in the Indemnity Agreement or When Indemnity Is Precluded by Public Policy**

Where the indemnification agreement is construed as not covering a claim against the indemnitor, the indemnitee will, of course, be denied any recovery against the indemnitor for attorney's fees

225. Id.
226. Id. at 448.
227. Id. at 449.
228. 517 F.2d 1123 (5th Cir. 1975).
229. Id. at 1124.
230. Id. at 1125.
and costs incurred in defending the third party's claim. 231
Moreover, in Cohen v. Commodore Plaza at Century 21 Condo-
minium Association 232 it was held that a condominium association
was not liable for attorney's fees expended by a developer-lessee in
its successful defense of a federal action brought by individual con-
donium unit owners to invalidate a lease between the developer
and the condominium association. The indemnification agreement
sought to be enforced was contained in the lease attacked in the
federal action as violating the federal anti-trust laws. The court
held that the interests of the individual condominium unit owners
were aligned with those of the condominium association. There-
fore, the strong public policy in favor of encouraging filing of pri-
VITE. PLEADING THE RIGHT TO INDEMNITY

A cause of action for indemnity must be pled in accordance with
the requirements of the rules of procedure which govern civil ac-
tions generally. 234 If the indemnity action is based upon a written
agreement, the agreement should be attached to the complaint. 235
If the indemnitee is asserting indemnity in a cross claim or in a
third party complaint filed in the action brought against the in-
demnitee by a third person, the indemnitee will not be bound by
an adversary's allegations describing his conduct. If the complaint
for indemnity is properly pled, the right to indemnity will be de-
termined by the proof as to those allegations at trial. 236 If, how-

231. See Misener Marine Constr. Co. v. Southport Marine, Inc., 377 So. 2d 757 (Fla. 2d
Dist. Ct. App. 1979); See also Davis v. Air Tech. Indus., Inc., 148 Cal. Rptr. 419 (1978), in
which the court stated that: "Accordingly, in ordinary products liability cases, a manufac-
turer is not liable for attorney's fees incurred by an indemnified party solely in defense of
alleged wrongdoing on its part. Since Davis defended exclusively against allegations of his
own negligence, he is not entitled to recover attorney's fees." Id. at 421-22 (footnotes
omitted).
232. 368 So. 2d 613 (Fla. 3d Dist. Ct. App. 1979).
233. Id. at 614.
234. See FLA. R. CIV. P. 1.110.
235. FLA. R. CIV. P. 1.130.
236. See American Home Assurance Co. v. City of Opa Locka, 368 So. 2d 416 (Fla. 3d
Dist. Ct. App. 1979); Barnett Bank v. Mutual of Omaha Ins. Co., 354 So. 2d 114 (Fla. 3d
Dist. Ct. App. 1978); First Church of Christ Scientist v. City of St. Petersburg, 344 So. 2d
1302 (Fla. 2d Dist. Ct. App. 1977); Insurance Co. of North America v. King, 340 So. 2d 1175
(Fla. 4th Dist. Ct. App. 1976); Bodin Apparel, Inc. v. Superior Steam Serv., Inc., 328 So. 2d
ever, the indemnitee fails to allege an ultimate fact necessary to support his claim for indemnity or pleads facts which are inconsistent with his right to indemnity, his claim is subject to dismissal.

VII. THIRD PARTY PRACTICE AND THE EFFECT OF A JUDGMENT OR SETTLEMENT IN THE THIRD PARTY'S SUIT

Although a cause of action for indemnity does not generally accrue for purposes of the statute of limitations until the indemnitee has paid or otherwise satisfied the third party's claim, the rules of third party practice allow an indemnity action to be accelerated to permit the third party's claim and the indemnitee's claim to be resolved in one suit.

The indemnitee may therefore file a cross claim against the indemnitor if both the indemnitor and the indemnitee have been joined as defendants in the third party's suit against them. If the indemnitor has not been joined in the third party's action as a party defendant, the indemnitee may implead the indemnitor as a third party defendant in the action. The advantage to the indemnitee of asserting his claim for indemnity in the third party's action is that his liability and his right to indemnity will be resolved in one suit instead of two. He may then arrange to levy upon the indemnitor or to assign his claim in discharge of his liability to the judgment creditor, thereby avoiding impairment of his own estate or insurance coverage.

The indemnitee, however, may be unable or unwilling to implead the indemnitor in the primary action. If such is the case, the indemnitee should consider whether it is allowable to "vouch in" the indemnitor. This simply means that the indemnitee may give the

240. Fla. R. Civ. P. 1.170(g).
indemnitor reasonable notice of the pendency of the third party's suit and request the indemnitor to defend the suit. After doing that, any judgment entered against the indemnitee (absent fraud or collusion) will be res judicata as to the indemnitor. In the subsequent indemnity action, therefore, the indemnitee will then only have to prove the remaining issues necessary to establish his right to indemnity. In addition to the common law doctrine allowing an indemnitee to "vouch in" the indemnitor, the Uniform Commercial Code provides for such a procedure between buyers and sellers.

If the indemnitee does not implead the indemnitor or give him notice of the pendency of the suit and request him to defend it, then the judgment in the primary action will not bind the non-party indemnitor through res judicata. The indemnitee will be required in his subsequent indemnity action to prove his actual liability to the third party.

A. Effect of a Settlement of the Primary Claim Upon a Subsequent Indemnity Action

Instead of litigating his liability to the primary claimant, the indemnitee may wish to settle. Where the indemnitee gives the indemnitor reasonable notice of the pendency of the suit and requests him to defend it, but the indemnitor refuses to do so, the indemnitee may establish his liability to the third party in his action for indemnity by proving his potential liability to the third party and the reasonableness of the settlement.

However, where the indemnitee settles the third party's action without having previously "vouched in" or notified the indemnitor, evidence of the reasonableness of the settlement will be inadmissi-


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...ble to prove the indemnitee’s liability to the third party. Also, where the indemnitee has impleaded the indemnitor in the primary action and has thereafter settled with the plaintiff without the indemnitor’s approval and without first tendering him the defense of the action in exchange for a “hold harmless” agreement, the indemnitee will be required to prove his actual liability to the third party in order to establish his right to indemnity. Where, on the other hand, the indemnitee’s tender of the defense of the suit to the indemnitor in exchange for a “hold harmless” agreement is refused by the indemnitor, the indemnitee may settle with the plaintiff and will be allowed in the subsequent indemnity action to prove his liability to the plaintiff by showing his potential liability to the plaintiff and the reasonableness of the settlement.

B. Res Judicata Effect of a Judgment in a Primary Action When the Co-Party Indemnitor and Indemnitee Did Not Litigate Issues of Indemnity

The indemnitee and the indemnitor who have been made party defendants in an action brought by the primary claimant may defend the basic claim together without litigating the issue of indemnity between themselves. In such a case, a question may arise as to what effect a judgment rendered in the third party’s action against them will have on a subsequent indemnity action between them. In Universal Underwriters Insurance Co. v. Ford Motor Co., Universal Underwriters sought indemnity from Ford on the theory of breach of implied warranty. In a previous action, Universal Underwriter’s insured had been sued by a person injured by a motor vehicle owned and operated by the insured’s employee and purchased by the insured from Ford. The insured was sued for either negligently failing to discover a defect in the brakes of the vehicle or for negligently failing to repair the brakes after discovery of the defect. The jury entered a general verdict against the insured, finding negligence. Ford was also a defendant in this action on the theory of negligent manufacture of the brakes, but was found not liable for negligence. No indemnity claim was asserted against Ford.

246. Id. at 1042-43. But see Morris v. Federated Mut. Ins. Co., 497 F.2d 538 (5th Cir. 1974), in which the court stated, “The absence of any such Voucher/Notice puts a heavy burden of evidentiary proof on one asserting the (i) existence of serious exposure to substantial liability and (ii) the reasonableness of the settlement.” Id. at 543.
248. Id. at 1043.
in the third party action.250

The issue of whether the insured's negligence was active or passive in character and the issue of whether Ford breached its implied warranty to the insured were not litigated between Ford and its co-defendant, the insured in the original tort action. The court in Universal Underwriters held that since these issues were not litigated in the original action, the judgment entered therein did not bar litigation of these issues in a subsequent indemnity action, even though the general jury verdict in favor of the plaintiff had established negligence of some kind on the part of the insured.251

A different result might be reached in the above case under the reasoning in Billman v. Nova Products, Inc.,252 discussed below, if the jury specifically finds that the indemnitee is guilty of conduct which disqualifies him from receiving indemnity, even though the issue has not been litigated between the indemnitee and the indemnitor in the original tort action.

C. Effect on Rights of Original Claimant Where Indemnitee and Indemnitor Litigate Indemnity Issues in Third Party's Action

Where the issue of breach of implied warranty is litigated between the indemnitor and the indemnitee in the principal tort action, it has been held that the judgment rendered on the cross claim will not only conclusively resolve the issue of indemnity, but will also bind the original claimant. In Billman, the injured plaintiff sued a retailer for breach of implied warranty. The retailer impleaded the manufacturer and alleged breach of implied warranty. The plaintiff obtained a judgment of $26,000.00 against the retailer, and the retailer received a judgment over against the manufacturer in the same amount. The plaintiff then refused to accept payment of his judgment against the retailer and sued the manufacturer for breach of implied warranty.253 The First District Court of Appeal held that his suit was barred by the doctrine of collateral estoppel and stated:

In cases involving the relationship of indemnitor and indemnitee, liability of more than one party is dependent upon identical issues. In such situations, when the complaining party has a full

250. Id. at 758.
251. Id. at 759.
252. 328 So. 2d 244 (Fla. 1st Dist. Ct. App. 1976).
253. Id. at 244-46.
opportunity to litigate these issues against one of the parties, and has obtained a favorable judgment, he is not permitted to relitigate the same issues in a new action against the other party.\textsuperscript{254}

The court in \textit{Billman} further held that the retailer and the manufacturer (indemnitee and indemnitor) were not joint tortfeasors for purposes of the rule which allows a plaintiff to obtain a judgment against one joint tortfeasor, refuse satisfaction of the judgment, and then attempt to obtain a higher judgment against the other tortfeasor in a subsequent action.\textsuperscript{255} On this point, the court in \textit{Billman} relied upon the holding in \textit{Phillips v. Hall}\textsuperscript{256} that where the plaintiff who sues an employer based upon his vicarious liability for the negligence of his employee and recovers a judgment against him is barred by res judicata from bringing a subsequent suit against the employee for the same injuries arising from the same accident.

\textbf{VIII. Statute of Limitations for Indemnity Claims}

An action for indemnity based upon a written indemnification agreement must generally be brought within five years after the commencement of the cause of action,\textsuperscript{257} and other claims for indemnity must be brought within four years from the date of accrual of the cause of action.\textsuperscript{258} If the claim for indemnity is against the state, its agencies or subdivisions, the party claiming indemnity must additionally comply with section 768.28(6), Florida Statutes,\textsuperscript{259} by presenting his claim in writing to the appropriate agency and, except for a claim against a municipality, to the Department of Insurance within three years after the claim accrues. As previously noted, this statute applies to actions for indemnity grounded on the tortious conduct of a Florida governmental entity.\textsuperscript{260}

Since the statute of limitations begins to run when the cause of action for indemnity accrues, it is important to know when this occurs. In \textit{Mims Crane Service, Inc. v. Insley Manufacturing
Corp.,\(^{261}\) the Second District Court of Appeal held that a cause of action for indemnity accrues when the litigation against the indemnitee "has ended or the liability, if any, has been settled or discharged by payment." In one of the patterns covered by the *Mims* test, the indemnitee has been held liable to an injured third person. In this case, the cause of action for indemnity arises when the indemnitee pays or otherwise satisfies the judgment or debt.\(^{262}\) The other situation to which *Mims* would apply is where the indemnitee is successful in defending the third party's claim against him, and is entitled to recover indemnity for his reasonable attorney's fees and costs. In this case, the cause of action arises when the third party's litigation has ended.\(^{263}\) In *Continental Casualty Co. v. Florida Power & Light Co.*,\(^{264}\) the court held, in allowing the indemnity claim, that the third party's action against Florida Power and Light Company had ended when the jury rendered its verdict, since no appeal was taken, and that Florida Power's cause of action for indemnity to recover attorney's fees and costs in defending the action accrued at that time.\(^{265}\)

Further amplification on this issue can be found in *Employers' Fire Insurance Co. v. Continental Insurance Co.*\(^{266}\) In this case, the trial judge entered his findings in a nonjury trial in the trial court's minute book, but he did not enter a formal final judgment from which an appeal could have been taken until eleven months later. The court held that the statute of limitations on the contract claim asserted in the action began to run when the minute book entry was made.\(^{267}\)

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263. 226 So. 2d at 840.
265. *Id.* at 59.
266. 326 So. 2d 177 (Fla. 1976).
267. *Id.* at 181. In its opinion the court stated as follows:

Statutes of limitations are enacted to bar claims which have been dormant for a number of years and which have not been enforced by persons entitled to enforcement. To allow that time period to be expanded by the interval between a final adjudication of liability containing all of the information necessary to establish the enforceable right, and the court's execution of a formal piece of paper called final judgment, would be to extend the statutes unnecessarily by nonuniform lengths of time.

*Id.* (footnote omitted).
IX. Conclusion

Common law indemnity developed in large part as an exception to the common law rule which denied the right of contribution between joint tortfeasors. The common law rejection of contribution between joint tortfeasors became an integral part of the common law system which generally predicated liability on the basis of fault. The main principles of this system as applied to unintentional conduct included the doctrine that a defendant would only be liable if negligent and that a plaintiff would be barred from recovery if contributorily negligent. The rule against contribution among joint tortfeasors was consistent with this system of liability based on fault and was a less significant, but still necessary, part of it.

In cases where a defendant who was not personally at fault was held liable in tort for a plaintiff's injuries under a rule of law making the defendant legally responsible for the torts of another, common law indemnity could be awarded without fear of contravening the fault principle underlying the no contribution rule. Where joint tortfeasors were at fault, however, an express exception to the no contribution rule had to be recognized in order to allow the less culpable tortfeasor to shift his loss to the more culpable tortfeasor. Numerous bases for allowing indemnity in these circumstances can be found in different jurisdictions. The principal factors used to allow common law indemnity as an exception to the no contribution rule were (1) the existence of a duty owing to the indemnitee from the indemnitor based on some relationship between the parties that pre-existed the third party's injury, (2) the presence of justifiable reliance in the circumstances of the case, or (3) the distinction between active and passive negligence.

When Florida adopted a comparative negligence rule in place of a contributory negligence rule and then shortly thereafter adopted a Uniform Contribution Among Joint Tortfeasors Act allowing contribution among joint tortfeasors on a comparative fault basis, the justification ended for allowing exceptions to achieve transfer in lieu of contribution where both tortfeasors were at fault. The Houdaille decision quite logically abolishes common law indemnity in Florida in cases where the party claiming indemnity is at fault.

An exception to the rule in Houdaille should be allowed in favor of a tortfeasor guilty of ordinary negligence who is held liable for
damages caused by a co-tortfeasor guilty of intentional wrongdoing. In this situation, the substantial disparity in the culpability of the two parties, together with the strong moral and social policies of deterring and punishing intentional misconduct, justify the allowance of indemnity against the intentional tortfeasor. In other situations, however, common law indemnity should only be allowed, as held in Houdaille, to a party who is not personally at fault but is held liable for a third person's injuries by some rule of vicarious, derivative, constructive or technical liability.

Common law indemnity, however, forms only one part of Florida's law of indemnity. Florida has recognized the rule that as long as public policy is not violated, parties are free to allocate among themselves their respective risks of liability by entering into indemnification agreements. In the Spring Lock case, the Florida Supreme Court held that although Florida allows a party to contract for indemnity against his own negligence or strict liability, he must use "clear and unequivocal" language to evidence his intent, whether the indemnitee's liability derives from his sole negligence, his joint negligence with the indemnitor or his strict liability.

The right to receive indemnity against tort claims in Florida has been modified in some cases by statute. Statutes have been passed which affect the right to tort indemnity in cases involving construction contracts, corporate indemnity agreements, residential leases and suits against the state, its agencies and subdivisions.

In cases both of contractual and common law indemnity, the indemnitee who prevails is entitled to recover the reasonable attorney's fees and costs incurred in defending the injured person's suit against him as an element of his damages. He may assert his claim for indemnity either in an independent action or in the original action against him by way of cross claim or third party complaint against the indemnitor. The advantage of asserting his claim in the original action is that his liability to the primary claimant and his right to indemnity will be resolved in one action. If he elects not to implead the indemnitor in the original action, the indemnitee should consider "vouching in" the indemnitor by giving him reasonable notice of the third person's suit and requesting him to defend the action. If the indemnitee does this, the indemnitor will be bound in a subsequent indemnity action by the judgment entered in the original suit as if he had been a party insofar as the judgment establishes the indemnitee's liability to the third person. And, if such notice is given and the request to defend is made, an indemnitee who settles the original action against him
will be allowed to satisfy his burden of proving his liability to the primary claimant in his later suit for indemnity by proving his potential liability to the third person and the reasonableness of the settlement.

Where the indemnitee has been held liable to the injured third person the statute of limitation on his claim for indemnity will generally begin to run when he pays or otherwise satisfies the liability. Where he has successfully defended the injured third person's suit and wishes to seek indemnity for the reasonable attorney's fees and costs incurred in successfully defending the action, the statute of limitation will generally begin to run when the injured third person's litigation has ended.

The past decade has been marked by dynamic developments in the law of indemnity in Florida. This has been fundamentally due to the substantial economic consequences which are clearly at stake in the formulation of legal principles governing the allocation of millions of dollars of tort liability among defendants. Parallel developments in the related areas of contributory negligence and contribution among joint tortfeasors have also had a significant impact on the changing law of tort indemnity. The decisions of the Florida Supreme Court in the Houdaille and Spring Lock cases marked a major milestone in the advance toward clarity and predictability in this vital area of law. The present existence of substantial questions which remain unanswered, however, assures continued progress toward a coherent and equitable body of tort indemnity law in Florida.