

IN THE SUPREME COURT OF FLORIDA

PAUL N. HOWARD COMPANY, et al,

Defendants/Petitioners.

v.

CAMP, DRESSER & MCKEE, INC.,  
et al,

CASE NO. SC03-1825  
Fifth District Court of Appeal  
Case No. 5D01-2539

Plaintiffs/Respondents,  
\_\_\_\_\_ /

**DEFENDANT/PETITIONER PAUL N. HOWARD COMPANY'S  
AMENDED BRIEF IN SUPPORT OF PETITION TO INVOKE  
DISCRETIONARY JURISDICTION**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
STATEMENT OF THE CASE AND OF THE FACTS .....	1
SUMMARY OF ARGUMENT .....	1
ARGUMENT .....	.3
I. The opinion of the Fifth District Court of Appeal expressly and directly conflicts with decisions of this Court and of the Third and Fourth District Courts of Appeal as to the obligation of Howard to indemnify CDM for CDM’s own negligence .....	3
II. The opinion of the Fifth District Court of Appeal expressly and directly conflicts with this Court’s pronouncements in numerous cases that Appellate Courts must limit their consideration to matters properly preserved for appellate review .....	7
CERTIFICATE OF SERVICE .....	
..11	
CERTIFICATE OF COMPLIANCE	
APPENDIX “A”	

## TABLE OF AUTHORITIES

### CASES

<u>Camp, Dresser &amp; McKee, Inc. v. Paul N. Howard Co., Inc.,</u> 721 So.2d 1254(Fla. 5 <sup>th</sup> DCA 1998) . . . . .	2
<u>Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equip.Co.,</u> 374 So.2d 487 (Fla. 1979) . . . . .	4
<u>Commission on Ethics v. Barker,</u> 677 So.2d 254 (Fla. 1996) . . . . .	10
<u>Cox Cable Corp. v. Gulf Power Co.,</u> 591 So.2d 627 (Fla. 1992) . . . . .	5
<u>Dade County School Board v. Radio Station WQBA,</u> 731 So.2d 638 (Fla. 1999) . . . . .	8, 10
<u>Hull and Co. v. McGetrick,</u> 414 So.2d 243 (Fla. 3 <sup>rd</sup> DCA 1982) . . . . .	8-9
<u>North v. Ringling,</u> 7 So.2d 476 (Fla. 1940) . . . . .	8
<u>P.P. Partners, Ltd. v. J.J. Gumberg Co.,</u> 611 So.2d 55 (Fla. 3 <sup>rd</sup> DCA 1992) . . . . .	6
<u>Snowwhite Dust Control Serv., Inc. v. Becker,</u> 568 So.2d 110 (Fla. 4 <sup>th</sup> DCA 1990) . . . . .	6
<u>Westinghouse Elec. Corp. v. J.C. Penney Co.,</u> 166 So.2d 211 (Fla. 1 <sup>st</sup> DCA 1964) . . . . .	9

**FLORIDA CONSTITUTION**

Article V, Section 3(b)(3), Florida Constitution . . . . . 3

**RULES**

Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure . . . . . 3

## **STATEMENT OF THE CASE AND OF THE FACTS**

As this case and related cases have been the subject of eight appeals, the factual background and procedural history is extensive.<sup>1</sup> On September 23, 1982, Orange County, Florida contracted with Camp, Dresser & McKee, Inc. (“CDM”), for engineering and related services on its wastewater transmission line (“The Project”). On April 11, 1984, the County contracted with Paul N. Howard Company, Inc. (“HOWARD”) to build the Project. HOWARD’s surety, Insurance Company of North America (“INA”) provided a Performance Bond for the Project.

On November 2, 1984, Richard Eiler, an employee of a sub-subcontractor, was injured during construction and sued the County, HOWARD, CDM and others. All parties except CDM were properly dismissed from the litigation, and in February 1993, CDM settled with Eiler for approximately 3.55 million dollars.

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<sup>1</sup> Orange County v., Paul N. Howard Co., 538 So. 2d 1272 (Fla. 5th DCA 1989); Eiler, et al. v. Camp, Dresser & McKee, Inc., 542 So. 2d 441 (Fla. 5th DCA 1989); Eiler, et al. v. Camp, Dresser & McKee, Inc., 583 So. 2d 1086 (Fla. 5th DCA 1991), rev. den. 592 So. 2d 680 (Fla. 1991); Eiler, et al. v. Camp, Dresser & McKee, Inc., 591 So. 2d 641 (Fla. 5th DCA 1992); Eiler, et al. v. Camp, Dresser & McKee, Inc., 594 So. 2d 753 (Fla. 5th DCA 1992); Paul N. Howard Co. v. Ed Waters & Sons Contracting Co., Inc., 688 So. 2d 933 (Fla. 5th DCA 1997); Paul N. Howard Co. v. Affholder, Inc., 701 So.2d 402(Fla.5thDCA 1997); and Camp, Dresser & McKee, Inc. v. Paul N. Howard Co., 721 So.2d 1254(Fla.5th DCA 1998).

Thereafter, on February 18, 1994, CDM sued HOWARD, its insurers and INA for indemnity under the following language of the General Contract:

**6.30.** ..., CONTRACTOR shall indemnify and hold harmless ... ENGINEER ... from and against all claims, damages, ... arising out of ...performance of the work, provided that any such claim, damage, (a) is attributable to bodily injury, . . . and (b) is caused in whole or part by any negligent act or omission of CONTRACTOR, .., regardless of whether or not it is caused in part by a party indemnified hereunder.

The General Contract further states in relevant part as follows:

**6.32.** The obligations of CONTRACTOR under paragraph 6.30 shall not extend to the liability of ENGINEER, . . . arising out of the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications.

In 1997, the trial court granted summary judgment in favor of HOWARD and INA, primarily on the bases that CDM's claim was barred by Section 725.06, Florida Statutes and CDM could not be held vicariously liable for the negligence of HOWARD. CDM appealed and the Fifth District Court reversed, holding that CDM's indemnity claim was not barred, and remanded the case for a determination of CDM's own negligence as a cause of Eiler's injury. Camp, Dresser & McKee, Inc. v. Paul N. Howard Co., Inc., 721 So.2d 1254(Fla. 5<sup>th</sup> DCA 1998) (hereinafter referred to as "CDM I").

On remand, the jury was charged with determining CDM's and HOWARD's respective negligence,<sup>2</sup> and the jury found that CDM was completely without fault for Eiler's injuries. The trial court again entered summary judgment in favor of HOWARD and INA, as CDM could not have been held vicariously liable for HOWARD's fault, and the jury's finding that CDM was without fault. From this summary judgment, CDM took the instant appeal. In its Opinion filed June 13, 2003 (hereinafter referred to as "CDM II"), the Fifth District Court reversed, and by Order dated September 10, 2003, denied all Motions for Rehearing.

### **SUMMARY OF ARGUMENT**

CDM II incorrectly concludes that the contractual indemnity provisions at issue clearly express an intent that CDM be indemnified for its own fault. The relevant provision merely provides that CDM's own fault will not bar CDM from asserting an indemnity claim. Further, CDM II contains an improper factual finding on the issue of reasonable notice to HOWARD on CDM's indemnity claim. This Court has jurisdiction pursuant to Article V, Section 3(b)(3) of the Florida Constitution and Rule 9.030(a)(2)(A)(iv) of the Florida Rules of Appellate Procedure.

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<sup>2</sup> On February 12, 2001, the trial court entered a bifurcation order, ruling that the issues of reasonable notice to Howard, meaningful opportunity to defend and damages would be preserved for "subsequent trial if necessary." R. 2656-2657.

## ARGUMENT

**I. The opinion of the Fifth District Court of Appeal expressly and directly conflicts with decisions of this Court and of the Third and Fourth District Courts of Appeal as to the obligation of Howard to indemnify CDM for CDM's own negligence.**

CDM II concludes that Paragraph 6.30 “clearly expresses the parties’ intent that CDM may be indemnified by Howard even if CDM is sued for its own wrongful conduct.” CDM II, p. 8. This interpretation of 6.30 directly conflicts with a decision of this Court and of other District Courts as it violates the well settled rule that contracts purporting to indemnify a party against its own negligence will be enforced only if they clearly express such an intent. Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equip.Co., 374 So.2d 487 (Fla. 1979).

Further, the CDM II opinion is internally inconsistent. Immediately after the Court’s conclusion above, the Court states:

. . .when reading Paragraph 6.30 and 6.32 together, it is even more clear that the intent of the parties was to indemnify CDM for any claims arising out of the negligence of Howard or its subcontractors even if CDM is also negligent. CDM II, p. 8 (emphasis added)

Here, CDM II correctly finds that for HOWARD to owe indemnity under 6.30, any claim must “arise out of the negligence of Howard or its subcontractors.” Thus, a claim arising out of CDM’s negligence is not covered by 6.30, despite the Court’s conclusion to the contrary.

A claim cannot arise from CDM's own negligence and also satisfy the condition that it arise from HOWARD's negligence. The purpose of the "in part" language cannot be interpreted to indemnify CDM for its own fault, as such a claim could never arise from the negligence of HOWARD or its subcontractors. Rather, the purpose of the subject language is only to protect CDM's right to indemnity for damages attributable to a claim arising from HOWARD's negligence when CDM is also at fault. Without the "in part" language, CDM's own negligence would completely bar indemnity from HOWARD. Cox Cable Corp. v. Gulf Power Co., 591 So.2d 627 (Fla. 1992). At a minimum, 6.30 does not "clearly express the intent" to indemnify CDM for its own negligence.

This Court in Charles Poe, addressed the extent to which the indemnity contract must clearly express the intent to indemnify a party for its own negligence. In that case, a worker sued a scaffolding manufacturer for injuries suffered while utilizing scaffolding equipment. The manufacturer then sued the subcontractor based on an indemnity agreement, which in pertinent part, stated:

The [subcontractor] **assumes all responsibility** for claims asserted by any person whatever growing out of the erection and maintenance, use or possession of said equipment, agrees to **hold the [manufacturer] harmless** from all such claims. 374 So.2d at 49 (emphasis added).

Based on the language of the indemnity provision, the subcontractor was responsible for **all claims** regardless of whose negligence formed the basis for the claim. Nevertheless, this Court found the clause to be **insufficient** to require the subcontractor to indemnify the manufacturer for the manufacturer's own negligence. 6.30 is more restrictive than the Charles Poe provision as **a claim must arise from the negligence of HOWARD or its subcontractors** for HOWARD to owe indemnity to CDM, yet the CDM II Court found that 6.30 clearly expresses an intent that HOWARD indemnify CDM even if CDM is sued for its own wrongful conduct.

Moreover, CDM II expressly and directly conflicts with the following decisions: Snowwhite Dust Control Serv., Inc. v. Becker, 568 So.2d 110 (Fla. 4<sup>th</sup> DCA 1990); and P.P. Partners, Ltd. v. J.J. Gumberg Co., 611 So.2d 55 (Fla. 3<sup>rd</sup> DCA 1992).

In Snowwhite, Winn-Dixie was sued by a slip-and-fall plaintiff, and brought a claim for indemnification under a service contract with Snowwhite, asserting that the indemnity clause required Snowwhite to indemnify Winn-Dixie for its own negligence.

The clause, in pertinent part, stated as follows:

...[Snowwhite] agrees to indemnify and hold [Winn-Dixie] harmless from any claim or loss arising in any manner out of the presence or activity of [Snowwhite] ... notwithstanding such accident or damage may have been caused in whole or part ... negligence of [Winn-Dixie]. 568 So.2d at 111.

Despite stating that Snowwhite would indemnify Winn-Dixie for Winn-Dixie's negligence, the Fourth District Court found that "the terms of this indemnity provision **are not sufficiently clear or specific** to require indemnification for Winn-Dixie's sole negligence... ." 568 So.2d at 111 (emphasis added). The CDM II Court reached a conclusion that expressly conflicts with Snowwhite, as it found that virtually identical language **was sufficiently clear** to require HOWARD to indemnify CDM for CDM's sole negligence. CDM II, p.8.

In P.P. Partners, the plaintiff sued the Owner of a shopping center for injuries related to an incident at the center. The management agreement between the Owner and the Manager of the center contained the following indemnity provision:

The owner...agrees...(a) to save [manager] harmless from all damage suits in connection with the management of the ... property and from injury suffered by any employee or other person... . 611 So.2d at 56.

Also named as a defendant in the personal injury litigation, the Manager claimed indemnity from the Owner pursuant to the indemnity provision. The Third District Court held that the clause was **insufficient** to provide indemnity to the Manager for its own fault, despite the language by which the Owner agreed to indemnify the Manager even from suits related to "management" of the property. Thus, CDM II's ruling that 6.30 clearly expresses an intent to indemnify CDM for its own fault cannot

be reconciled with this Court's holding in Charles Poe, or with the holdings of other District Courts in Snowwhite and P.P. Partners.

**II. The opinion of the Fifth District Court of Appeal expressly and directly conflicts with this Court's pronouncements in numerous cases that Appellate Courts limit their consideration to matters properly preserved for appellate review.**

Appellate Courts should consider only those issues properly before them and should not rule on issues raised for the first time on appeal. Dade County Sch. Bd. v. Radio Sta. WQBA, 731 So.2d 638 (Fla. 1999); North v. Ringling, 7 So.2d 476 (Fla. 1940). The CDM II Court exceeded the proper scope of appellate review by determining the sufficiency of the notice provided by CDM to HOWARD, as it related to HOWARD's opportunity to appear and defend CDM's indemnity claim.

In February 2001, the trial court granted HOWARD's Motion to Bifurcate, ruling that liability would be tried first and that "Issues of notice and damages will be tried in a subsequent trial if necessary." R. 2656-2657). Thus, the issue of reasonable notice was not tried to the jury, was not part of the jury's verdict, was not argued by the successful Movants in their post-trial Motions for Summary Judgment, and was neither a basis for the trial court's ruling, nor mentioned in the Order granting summary judgment to HOWARD and INA, which CDM appealed. Nevertheless, the CDM II Court improperly addressed the issue of notice, and drew a specific conclusion based

on its analysis of certain facts in the record (“...Howard was given adequate sufficient notice of the suit.”) CDM II, p. 10-12.

It is well settled that an indemnitor is bound by a settlement or judgment against an indemnitee, when the indemnitor has been provided with **timely notice** and an **opportunity to appear and defend**. Hull and Co. v. McGetrick, 414 So.2d 243 (Fla. 3<sup>rd</sup> DCA 1982); Westinghouse Elec. Corp. v. J.C. Penney Co., 166 So.2d 211 (Fla. 1<sup>st</sup> DCA 1964). After acknowledging the applicable law on page ten of its Opinion, the CDM II Court resolved this **factual** issue in favor of CDM, **despite the trial court’s decision to defer ruling on this factual issue**, and CDM’s failure to properly preserve the issue for appellate review.

Although CDM filed a Motion for Summary Judgment on the Issue of Notice and Damages R. 2591-2628), the trial court (never ruled on that Motion or) the issues raised in it. Moreover, CDM neither requested a ruling on its Motion for Summary Judgment nor challenged the trial court’s decision to defer the notice issue for later determination. As the notice issue was not properly preserved for appellate review, the CDM II Court should not have considered it or made a determination as to the adequacy of the notice provided by CDM to HOWARD on its claim for indemnity.

Furthermore, by opining as to the adequacy of the notice, the CDM II Court sat as the finder of fact, precluding consideration by the jury of this factual issue. After

the trial court ordered bifurcation, none of the parties engaged in discovery, or presented evidence at trial as to notice. Moreover, the CDM II Court's factual finding that HOWARD was given sufficient notice of CDM's indemnity claim, prevents the parties from engaging in further discovery or presenting evidence, and usurps the fact finding role of the jury.

In Dade County, this Court stated the general rule that a claim not raised before the trial court will not be considered on appeal. 731 So.2d at 644. Although the issue of notice was raised at the trial level, neither the trial court nor the jury made a determination as to sufficiency of notice. This Court has further stated that a party cannot argue on appeal matters which were not properly excepted to or challenged below, and thus not preserved. Commission on Ethics v. Barker, 677 So.2d 254 (Fla. 1996). CDM failed to preserve the issue of notice for appellate review by failing either to request a ruling on its Motion for Summary Judgment on the Issues of Notice and Damages, or to object to the trial court's deferral of the notice issue for a subsequent trial.

In direct and express conflict with numerous decisions of this Court, the Fifth District Court of Appeal made a factual determination that the notice of CDM's indemnity claim provided by CDM to HOWARD was adequate. Thus, the Fifth

District Court improperly considered and ruled on a factual issue not properly preserved for its review.

### **CONCLUSION**

This Court should take jurisdiction of this case to resolve the express and direct conflicts between the Fifth District Court of Appeal's Opinion and decisions of the Florida Supreme Court and other District Courts of Appeal on the same issues of law.

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this \_\_\_\_\_ day of April, 2004, to:

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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the Brief In Support of Petition to Invoke Discretionary Jurisdiction has been prepared using Times New Roman, 14-point font, in compliance with Florida Rules of Appellate Procedure 9.210(a)(2).

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