FLC

FLORIDA LEAGUE OF CITIES

MANAGING AND TRANSFERRING RISK THROUGH EFFECTIVE CONTRACTING

HOLD HARMLESS AND INDEMNITY AGREEMENTS

When might a municipality require or request one?

- Private entity performing services for a municipality (security, janitorial, construction, running events).
- Allowing public to utilize municipal spaces.
- Management of municipal property (golf courses, aquatic centers).
- Inspection services.

HOLD HARMLESS AND INDEMNITY AGREEMENTS

What is Indemnity under the Common Law?

Indemnity is a longstanding common law principle that shifts liability to a tortfeasor from a party that is being sued for technical reasons despite its lack of negligence. In *Houdaille Industries, Inc. v. Edwards*, 374 So.2d 490 (Fla. 1979), the Florida Supreme Court defined indemnity as follows:

> Indemnity is a right which inures to one who discharges a duty owed by him, but which, as between himself and another, should have been discharged by the other and is allowable only where the Whole fault is in the one against whom indemnity is sought.
>
> It shifts the entire loss from one who, although without active negligence or fault, has been obligated to pay, because of some vicarious, constructive, derivative, or technical ability, to another who should bear the costs because it was the latter's wrongdoing for which the former is held liable.

The Court noted that there can be no indemnity between joint tortfeasors since the one seeking indemnity must be without fault. Accordingly, there can be no weighing of relative fault since the party seeking indemnity must be without any fault. The Houdaille court, which dealt solely with the concept of common law (rather than contractual) indemnity, determined that Florida Wire, the employer of a deceased employee, could not seek indemnity against the supplier of the product that allegedly caused the death because the employer was also alleged to have engaged in negligence which caused or contributed to the death. The employer, Florida Wire, importantly did not plead that its liability, if any, would be solely vicarious, constructive, derivative, or technical and would only be based upon the wrongdoing of the manufacturer, Houdaille.

HOLD HARMLESS AND INDEMNITY AGREEMENTS

What if, ultimately, no one is liable to the Plaintiff?

Oftentimes, common law indemnity is sought from another defendant early in a case in order to recoup litigation expenses and fees incurred by a party asserting that it is being sued solely for the negligence of another. Being sued, however, as a result of another's alleged negligence does not necessarily entitle one party to obtain indemnification from another under common law, even if the claims are pled against the indemnitor for vicarious or derivative liability only.

For instance, in *Amisub of Florida, Inc. v. Billington*, 560 S.2d 1271 (Fla. 3d DCA 1990), the plaintiff brought a medical malpractice claim against Dr. Billington and the hospital at which he worked, Amisub, solely under the doctrine of respondeat superior. The doctor's carrier refused to accept tender of the hospital's defense, and the case proceeded to trial with each defendant having separate counsel. Following a defense verdict on liability, the hospital sued Billington to recover fees and costs expended in its successful defense. The Third District entered summary judgment in favor of Dr. Billington, and the Third District, applying the common law indemnity definition of *Houdaille*, affirmed because common law indemnity only applies when a party is actually held liable because of the vicarious wrongdoing of another. Since both Billington and the hospital were not held liable by the jury, the concept of common law indemnity did not exist.

Common law indemnity is a limited concept, requiring that one party actual be held liable for the actions of another. Mere allegations are not sufficient.

CONTRACTUAL INDEMNITY

Given the limits of common law indemnity, contracting parties – both governmental and private alike – often seek contractual indemnification, requiring one to indemnify the other for fees and costs if required to defend a lawsuit, irrespective of whether there is an ultimate finding of fault or negligence.

While Florida law does allow, in certain circumstances, a party to be indemnified for its own negligence, that is disfavored. In *Cox Cable Corp. v. Gulf Power Co.*, 591 So.2d 627 (Fla.1992), Cox contracted with Gulf to attach its wires and appliances to Gulf's existing utility poles. Prior to allowing Cox to do, Gulf required Cox to sign a contract containing the following provision:

> Licensee [Cox] shall indemnify, protect and save the Licensor [GULF] forever harmless from and against any and all claims and demands for damages to property and injury or death to any persons including, but not restricted to, employees of Licensee and employees of any contractor or sub-contractor performing work for Licensee...which may arise out of or be caused by the erection, maintenance, presence, use or removal of said attachments.

When an employee of a cable installation contractor (hired by Cox) suffered electrical burns during an installation, he sued Gulf in negligence for failure to warn and Gulf, in turn, sued Cox for contractual indemnification. The district court of appeal, while recognizing that contracts purporting to indemnify a party for its own wrongful acts are viewed with disfavor, determined that the degree of specificity required for indemnification in cases of joint negligence was less stringent, and concluded that the contractual language was sufficient to sustain indemnification. The Florida Supreme Court, however, quashed the district court's opinion, finding that the above was insufficient to provide indemnification and that the trial court applied a less stringent standard to cases involving parties who are jointly liable.

WAIVER OF SOVEREIGN IMMUNITY

(1) In accordance with s. 13, Art. X of the State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity **for liability for torts**, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions **to recover damages in tort for money damages** against the state or its agencies or subdivisions **for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment** under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act.

(5)(a) The state and its agencies and subdivisions **shall be liable for tort** claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period before judgment. Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $200,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $300,000.

(19) Neither the state nor any agency or subdivision of the state waives any defense of sovereign immunity, or increases the limits of its liability, **upon entering into a contractual relationship with another agency or subdivision of the state. Such a contract must not contain any provision that requires one party to indemnify or insure the other party for the other party's negligence or to assume any liability for the other party's negligence. This does not preclude a party from requiring a nongovernmental entity to provide such indemnification or insurance**. The restrictions of this subsection do not prevent a regional water supply authority from indemnifying and assuming the liabilities of its member governments for obligations arising from past acts or omissions at or with property acquired from a member government by the authority and arising from the acts or omissions of the authority in performing activities contemplated by an interlocal agreement. Such indemnification may not be considered to increase or otherwise waive the limits of liability to third-party claimants established by this section.

SECTION 19 – INDEMNITY BETWEEN GOVERNMENTAL AGENCIES

- Mutual Aid between law enforcement.
- *Vogel v. City of Miami*. City of Miami sought assistance from Broward Sheriff's Office for law enforcement services before an expected unrest during Free Trade of the Americas hearing which took place in Miami.
- City of Miami argued that it was not responsible for actions of BSO employees since §768.28 waives liability only for officers, employees or agents of the entity. This issue is resolved by agency law, not sovereign immunity law.
- Mutual aid agreement provided, **"Each party engaging in any mutual cooperation and assistance, pursuant to this agreement, agrees to assume responsibility for the acts, omissions or conduct of such party's own employees while engaged in rendering such aid pursuant to this agreement, subject to the provisions of Section 768.28, Florida Statutes, where applicable. Nothing herein shall be deemed to waive any immunities granted pursuant to Section 768.28, Florida Statutes."**
- If BSO employees acted as agents of the City of Miami, the City of Miami could be called upon to answer for their tortious actions. Court noted that the agreement was valid because it did not require either agency to indemnify the other or to assume liability for the other's negligence.
- Any agreements between governmental entities should track Section 19.

CONTRACTING WITH PRIVATE ENTITIES – CAN MUNICIPALITY BE LIABLE FOR TORTIOUS ACTIONS OF NON-EMPLOYEES

- Private entities and their employees will seek to be deemed agents of the municipality. That way, the private entity has the benefit of the statutory cap, and its employees are immune from suit completely.

- Municipalities, depending on circumstances, may desire to have non-employees deemed their agents. If private entity is acting as an agent of the entity, coverage rates may be lower because of the statutory cap.

- *Lovelace v. G4S Secure Solutions, Inc.*, 320 So.3d 178 (Fla. 4th DCA 2021). In that case, G4S and Broward County contracted for security services at the Broward County Government Center. Lovelace fell on plexiglass lying on the ground outside of the building and claimed that G4S was negligent in failing to detect and remove it. G4S moved for summary judgment claimed sovereign immunity.

ARTICLE 5. INDEMNIFICATION
G4S shall at all times hereafter indemnify, hold harmless and defend County and all of County's current and former (limited to the term of this Agreement) officers, agents, servants, and employees (collectively, "Indemnified Party") from and against any and all causes of action, demands, claims, losses, liabilities and expenditures of any kind, including reasonable attorneys' fees, court costs, and expenses (collectively, a "Claim"), raised or asserted by any person or entity not a party to this Agreement, which Claim is caused or alleged to be caused, in whole or in part, by any intentional, reckless or negligent act or omission of G4S, its current or former officers, employees, agents, or servants, arising from, relating to, or in connection with this Agreement....

ARTICLE 6. INSURANCE
6.1 G4S shall maintain, at its sole expense and at all times during the term of this Agreement (unless a different time period is otherwise stated herein), at least the minimum insurance coverage designated in Exhibit G [$1,000,000] in accordance with the terms and conditions stated in this Article.
....
9.6 **Independent Contractor**. G4S is an independent contractor under this Agreement. In providing Services under this Agreement, neither G4S nor its agents shall act as officers, employees, or agents of County ....

G4S AGREED THAT IT WAS INDEPENDENT, DOES THAT END THE ANALYSIS?

A security guard from G4S, working on the date of the incident, testified that she worked alongside Broward County's security guards and that she supplemented the Broward County's own security team assigned to the Broward Government Center. The full staff consisted of one person at the front desk, two people watching security cameras, two people performing perimeter checks, one person inside the government center, one person outside, one person in the garage, and one person in the back of the building. Additionally, there would be two supervisors from the county. This security guard testified that she reported to the supervisors from Broward County and did not report to anybody from G4S.

Security was responsible for checking the perimeter of the Broward Government Center. According to the security guard, it was the policy of Broward County to check the perimeter once an hour.

The trial court found that G4S was an agent of Broward County. The trial court concluded that although there was language in the agreement seemingly to avoid an agency relationship, the "other provisions and evidence establish that Broward County has a degree of control over G4S's operations that creates an agency relationship." The trial court relied on the following provisions that demonstrated Broward County's extensive control: Broward County's control of hiring, removal, and training of G4S employees, the requirement to follow Broward County's standard operating procedures, Broward County's unilateral right to change the scope of services, and Broward County's right to audit the records of G4S.

The trial court concluded that G4S was entitled to sovereign immunity under section 768.28(9)(a), Florida Statutes.

- To avoid having a private entity's employees deemed the employee of the municipality, do not agree to and do not in fact exercise control over them. The nature of the relationship controls over the contractual label.
- Factors courts look at: hiring/firing, making schedules, detailing direction of work, authority to assign employees to tasks, supervising employees, establishing criteria for employment, and generally retaining control over operations.

NASO V. HALL, *338 So.3d 238 (Fla. 4th DCA 2022)*

- 768.28(9) or 768.28(5)
- 5 – limits judgment to 200/300
- 9 – provides absolute immunity to individuals where individual ***did not*** act in bad faith, with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights or safety.
- 9 – provides absolute immunity to entity where the individual ***does*** act in bad faith, with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights or safety.

In *Naso*, G4S guard Hall directed an elderly man not to use a bus bench because the terminal was closed. Elderly man was later observed on camera with an assailant, but Hall did not intervene because his job was to observe and report. The assailant knocked the elderly man to the ground, and caused fatal injuries. His estate sued Hall, G4S and Broward County for negligent security.

Section 768.28(9)(a) extends to certain private entities that are involved in contractual relationships such that they are deemed agents of the state. This turns on the degree of control retained or exercised by the state agency.

Court affirmed limited sovereign immunity for G4S, limiting damages to cap.

Court determined that G4S was not entitled to absolute immunity because it is a corporation. Its employees, not having engaged in malicious conduct through, would have absolute immunity. **Section 9 does not apply to corporations.**

SOVEREIGN IMMUNITY WAIVED FOR TORTS, NOT CONTRACTS

American Home Assur Co. v. National Railroad Passenger Corp., 908 So.2d 459 (Fla. 2005)

An 82-ton combustion turbine engine was damaged in a train collision after the hauler rig carrying the turbine became immobilized on a railroad crossing. Kissimmee Utility Authority, a governmental entity, was one of the defendants. KUA entered into an indemnity agreement with a private entity, and argued that the indemnity provision is void and unenforceable because KUA could not waive sovereign immunity beyond that authorized in §768.28. CSX and Amtrak argued that a dispute over an indemnity provision is a matter of contract, not tort law, and thus KUA had unlimited liability.

The indemnity provision in the crossing agreement contract between KUA and CSX provides that KUA "assumes all liability for, and releases and agrees to defend, indemnify, protect and save [CSX] harmless" for all loss of or damage to property of CSX or third parties at the crossing or adjacent to it, all loss and *473 damage on account of injury to or death of any person on the crossing, and all claims and liabilities for such loss and damage.

GIVEN THAT KISSIMMEE UTILITY AUTHORITY, A MUNICIPAL AGENCY UNDER FLORIDA LAW, AGREED BY CONTRACT TO INDEMNIFY A PRIVATE PARTY, IS THE AGREEMENT CONTROLLED BY THE RESTRICTIONS ON WAIVER OF SOVEREIGN IMMUNITY FOUND IN FLORIDA STATUTE § 768.28?

By its plain language, section 768.28 only applies to "actions at law against the state or any of its agencies or subdivisions to recover damages in tort." The indemnification provision at issue here is based on a contract between KUA and CSX. KUA entered into the crossing agreement with CSX, whereby CSX granted KUA a license to construct, use, and maintain a private road grade crossing over CSX's railroad tracks. For KUA, this crossing agreement ensured that there would be vehicular and pedestrian access to the power plant site. In return for receiving the license, KUA agreed to "defend, indemnify, protect, and save [CSX] harmless from and against [designated losses and casualties]." Based on the definition of the term "Railroad" in the agreement, KUA also agreed to defend and indemnify "any other company ... whose property [at the crossing] may be leased or operated by [CSX]" and "any parent, subsidiary or affiliated system companies of [CSX]." In the indemnification provision, KUA specifically recognized that the use of "[CSX's] property, tracks, and right-of-way involves increased risks" and agreed to defend and indemnify CSX "as further consideration for the grant of this crossing right." **Thus, we conclude that the statutory provision governing tort recovery actions is not applicable here and answer the second certified question in the negative.**

LESSONS OF KUA

- Municipalities should, when possible, not enter into any unlimited indemnity agreements with private entities. Doing so could create unlimited and uncapped liability for any tortious conduct for which the municipality may be liable.

- There may be situations where a municipality must agree to indemnify a private party. It may require access across train tracks. It may be in an emergency situation. If this occurs, protections should be made against accepting unlimited liability.

- Indemnity provision could invoke the statutory limits of §768.28, and accept indemnity only up through and including the sovereign immunity limits.

- If accepting indemnity up to a sum certain, specify whether that includes the costs of defense and attorney's fees of the party to be indemnified.

- If the municipality must enter into a contract requiring it to indemnify a private entity, the municipality should procure separate and adequate insurance coverage to cover all potential risks associated with the scope of the contract.

FDOT V. SCHWERFRINGAUS, *188 So.3d 840 (Fla. 2006)*

Estate sued for death in a railroad crossing accident. Sued railroad and FDOT. Following a settlement with the Estate, Court entered judgment requiring FDOT to indemnify railroad in the amount of $502,462.22.

FDOT appealed judgment. 1936 Agreement allowed the State Road Department, as licensee, to construct and maintain a road over the railroad tracks owned by CSX predecessor. "The State Road Department will indemnify and save harmless [CSX Predecessor] from and against all loss, damage or expense arising or growing of the construction, condition, maintenance, alteration or removal of the highway hereinabove described."

Second Certified Question: IS DOT'S LIABILITY UNDER THE CROSSING AGREEMENT LIMITED BY SECTION 768.28(5), FLORIDA STATUTES (2002)?

However, we have previously held that the liability limits of section 768.28 do not apply to non-tort claims. This holding is supported by the principle that "statutes purporting to waive sovereign immunity must be clear and unequivocal." Waiver cannot be found by inference or implication, and statutes waiving sovereign immunity must be strictly construed. Id. Here, the plain language of this subsection indicates that it applies only to tort claims. § 768.28(5), Fla. Stat. (Explaining that state agencies and subdivisions "shall be liable for tort claims in the same manner and to the same extent as a private individual," but placing limits on that liability) (emphasis added). Even section 768.28(1), which establishes the limited waiver of sovereign immunity, states that it only applies to causes of action seeking "to recover damages in tort." Am. Home, 908 So.2d at 474. We hereby reaffirm that section 768.28(5) applies only to tort actions, and we answer the second certified question in the negative.

SAMPLE MUNICIPAL INDEMNITY CLAUSE

A. Contractor shall defend at its expense, pay on behalf of, hold harmless and indemnify the City, its officers, employees, agents, elected and appointed officials and volunteers (collectively, "Indemnified Parties") from and against any and all claims, demands, liens, liabilities, penalties, fines, fees, judgments, losses and damages (collectively, "Claims"), whether or not a lawsuit is filed, including, but not limited to Claims for damage to property or bodily or personal injuries, including death at any time resulting therefrom, sustained by any persons or entities; and costs, expenses and attorneys' and experts' fees at trial and on appeal, which Claims are alleged or claimed to have arisen out of or in connection with, in whole or in part, directly or indirectly:

(i) The performance of this Agreement (including any amendments thereto) by Contractor, its employees, agents, representatives or subcontractors; or (ii) The failure of Contractor, its employees, agents, representatives or subcontractors to comply and conform with applicable Laws (as defined herein); or (iii) Any negligent act or omission of the Contractor, its employees, agents, representatives, or subcontractors, **whether or not such negligence is claimed to be either solely that of the Contractor, its employees, agents, representatives or subcontractors, or to be in conjunction with the claimed negligence of others, including that of any of the Indemnified Parties;** or (iv) Any reckless or intentional wrongful act or omission of the Contractor, its employees, agents, representatives, or subcontractors; or (v) Contractor's failure to maintain, preserve, retain, produce, or protect records in accordance with this Agreement and applicable Laws (including but not limited to Florida laws regarding public records).

B. The provisions of this paragraph are independent of, and will not be limited by, any insurance required to be obtained by Contractor pursuant to this Agreement or otherwise obtained by Contractor, and the provisions of this paragraph survive the expiration or earlier termination of this Agreement with respect to any claims or liability arising in connection with any event occurring prior to such expiration or termination.

OTHER CONSIDERATIONS

1. Required provision about duty to adhere to public record law and management of such records after the termination of the contract. §119.0701(2), F.S.

2. Cyber Liability issues and Data Privacy Risks. Consider a provision that expressly creates a duty to inform city about any Data Breach Incidents and a duty to assume responsibility for providing any mandatory Breach Notification requirements arising from a Data Breach Incident to the extent required by law. §501.171, F.S.

3. Additional Insured Status. Include a covenant asking to add the municipality as an Additional Insured. Receipt of a "Certificate of Insurance" does not always guarantee this step. A party's failure to perform this step once made part of the agreement may itself be a breach of the vendor's obligations.

MUNICIPALITIES PROTECTING ITSELF WHEN ALLOWING GOVERNMENTAL FACILITIES TO BE UTILIZED

Governmental entities typically allow the public to use a wide array of facilities and parks, which are usually provided free of charge, such as passive parks and playgrounds, funded by grants and taxpayer dollars. There are also facilities that government have made available to the public contingent upon rental, payment of fees, and the entry into a contractual agreement.

Many municipalities have renovated or constructed new city halls, police departments and other government buildings, many of which are equipped with meeting rooms, banquet halls and even theaters with technological capabilities of hosting theater productions and concerts. Some have exclusive catering contracts with city vendors, and others allow use of the renter's caterer, and for the consumption of alcoholic beverages on the premises.

When allowing the public to rent a city facility, special attention must be paid to the intended occupation, use of outside vendors, and capacities to insure that the entity does not become liable for the negligent acts or omissions of the renter or the renter's vendors.

Any time a government facility, no matter how well-maintained, is used or occupied for an event, accidental injuries may occur, and municipalities should take necessary steps to shift liability to those hosting an event.

RENTER OF FACILITY'S NEGLIGENCE OR CONDITION ON THE PREMISES?

Under Florida common law, government generally cannot simply delegate away all liability for dangerous conditions on public premises through a written agreement with a renter. Furthermore, liability to an injured party often cannot be contracted away by having a third party vendor, such as a maintenance or cleaning company, maintain the premises.

Example: Injury occurred because party renting facility dragged an extension cord into an area intended for pedestrians. Renter presumably negligent.

Example: Injury occurred because City failed to maintain gap between carpeting and flooring, creating a trip hazard. City presumably negligent.

NON-DELEGABLE DUTIES

Under Florida's common law, the owner of a premises has a legal duty to maintain that premises in a reasonably safe condition. That duty is nondelegable, which simply means that a premises owner may not escape that duty by hiring an independent contractor to perform that nondelegable duty. So, for example, if a patron in a rented municipal meeting room is injured by slipping on a foreign substance, the premises owner may not insulate itself from liability to the injured party simply because it hired a cleaning company to maintain the floors.

The concepts of nondelegable duty and vicarious liability, as several appellate courts have noted, are frequently confused and often conflated. A cause of action for vicarious liability and for the breach of a non-delegable duty have different legal rationales. Vicarious liability is an indirect liability, whereby an employee's negligence may be imputed to the employer. The vicariously liable party has not breached any duty to the plaintiff, but is liable based solely on the legal imputation of responsibility for another party's tortious acts.

Liability for breach of a nondelegable duty, however, arises from direct, not imputed, liability. Stated another way, the party subject to the nondelegable duty is directly liable for the breach of that duty, and the assignment of liability based on the tortious acts of another is not considered. *Jauma v. City of Hialeah*,758 So.2d 696, 698 (Fla. 3d DCA 2000)(holding that city had a nondelegable duty to maintain its sidewalks in a reasonably safe condition, and City would not be insulated if negligence of third party contractor caused the dangerous condition).

RISK INCREASES ANY TIME A FACILITY IS OCCUPIED, BUT GOVERNMENT HAS TO MAKE SURE INCOME DERIVED FROM RENTAL/USE OUTWEIGHS RISK

- When governmental entities are providing access to public spaces, and at the same time contracting out services to keep and maintain the public space, special attention should be made to have that third party vendor procure, obtain and provide proof of adequate insurance coverage for the governmental entity, naming the governmental entity as an additional insured.

- Indemnity provision to renters should state that the renter has fully inspected the premises and accepts them as is, and that the renter agrees to indemnify the governmental entity for any injuries or damages occasioned by the condition of the premises.

- In addition, it should be specified that the renter's coverage for any accidents, injurie or damages occasioned by use of the premises, including those arising from the condition of the premises, whether the defects are patent or latent, shall be primary and not excess over any other insurance coverage the governmental entity may have for accidental injuries sustained in the venue or public space.

MUTUAL INDEMNIFICATION

When contracting for services, it is common for both contracting parties to request mutual indemnification. That means the party causing the harm will be held responsible, and neither will be held technically or derivatively liable for acts of negligence not caused by it, or its employees.

COMMON LAW INDEMNITY

Whenever a business or private person seeks to use a governmental facility, the contracting parties typically seek to include an indemnity or mutual indemnity clause within the agreement. Depending on the nature of the event, use, and whether the renter is a private citizen or a private corporation, consideration must be given to whether to require insurance and the type of indemnity agreement to utilize. Typically, for small pavilion rentals by a private citizen for an event such as a child's birthday, it is not feasible to require the procurement of insurance. For corporate or larger gatherings, however, it is advisable.

Indemnity is a longstanding common law principle that shifts liability to a tortfeasor from a party that is being sued for technical reasons despite its lack of negligence. In Houdaille Industries, Inc. v,Edwards,374 So 2d 29 490 (Fla. 1979), the Florida Supreme Court defined indemnity as follows:

> Indemnity is a right which insures to one who discharges a duty owed by him, but which, as between himself and another, should have been discharged by the other and is allowable only where the Whole fault is the one against whom the indemnity is sought. It shifts the entire loss rom one who, although without active negligence or fault, has been obligated to pay, because of some vicarious, constructive, derivative, or technical ability, to another who should bear the costs because it was the latter's wrongdoing for which the former is held liable.

The Court noted that there can be no indemnity between joint tortfeasors since the one seeking indemnity must be without fault. Accordingly, there can be no weighing of relative fault the since the party seeking indemnity must be without fault.

Since common law indemnity requires one party to be without any fault, it is a difficult concept to apply.

For instance, in case where Customer rents a banquet facility, and is obligated to inspect the premises before permitting guests. Someone trips on a loose floorboard. Argument can be made that both the Customer and the Municipality have some degree of negligence.

CONTRACTUAL INDEMNITY

In the context of renting out government facilities, a plaintiff's theory of negligence could be based upon vicarious liability, a nondelegable duty, or even a theory that the premises user and premises owner are joint tortfeasors. For example, a renter could set up a facility that channels pedestrian traffic over an area where the municipality would not normally have people walk, thus creating an issue as to whether either the municipality, the renter, or both, owed a duty to inspect and maintain those areas so that they would be safe for pedestrians.

Given the prospects of potentially joint liability, and the limits of common law indemnity, both governmental and private alike often seek contractual indemnification, requiring one to indemnify the other for damages, as well as fees and costs required to defend a lawsuit, irrespective of whether there is an ultimate finding of fault or negligence.

TERMS TO INCLUDE IN A RENTAL AGREEMENT WITH A PRIVATE PERSON OR ENTITY

While, like in any building rental, there are an array of standard terms to include, including forum election clauses, choice of laws, and numerous representations and warranties, a municipality allowing use of its facilities should be sure to consider the following:

1. Insurance. As stated above, not all renters and events may require insurance, for any large rentals of ballrooms, sporting fields or large meeting rooms, it is advisable to require the licensee to furnish to the municipality with a certificate of liability insurance endorsed to include tort and contractual liability. The municipality should require that it be named as an additional insured, and that it receive a Certificate of Insurance, making the renter's coverage the primary insurance for any potential liability situation that may arise.

2. Damage to property. The renter should assume full responsibility to pay all costs associated with the repairs required to anydamaged municipal facilities or property arising out of the renter's use, regardless of the nature or cause. It is advisable to havea pre-engagement and post-engagement inspection checklist, and require a security deposit.

3. Security. Depending on the nature of the activity, and considering whether alcohol will be served, the renter should be responsible to for the security of its patrons. The Agreement should specify that the municipality does not assume responsibility for safetyand security for the event even if off duty police officers of the municipality are utilized.

4. Subcontracting. No subcontracting of services should be permitted without approval of the municipality. The municipality should have advance knowledge and information as to any entity or individuals that may be involved in setup, clean up, security or supplying of food and materials.

5. Limitation of Liability for Equipment Failure. Some governmental venues include theaters, or other facilities requiring powerand utilities, which may cause a disruption or hardship to the event should those facilities fail. A rental agreement should express that liability is not assumed for any costs or damages sustained by the renter due to power failure, equipment failure or service interruptions involving utilities.

MATTERS TO CONSIDER BEYOND A STANDARD INDEMNITY CLAUSE

1. Broad definition of time. Many indemnity provisions limit indemnity to injuries occurring during the third party use of the facility, or the term of the agreement. An indemnity clause should be drafted broadly so as to include injuries that may occur even beyond the term of the agreement or use. For example, a renter could leave behind a dangerous condition, not necessarily visible to the municipality (grease on the floor from cooking) which may cause an accidental injury days after the rental. In circumstances such as this, the indemnity provision should be drafted broadly enough to include any events which arise out of the renter's use, including those that occur after the physical use.

2. Selection of Counsel. Many fine insurance defense attorneys are not familiar with various aspects of defending governmental entities, including the application of §768.28, Florida Statutes, or the distinctions between planning-level and operational functions. In addition, many insurance companies place too many discovery limitations and restrictions upon their approved counsel. In order to insure that the entity is properly represented, an indemnification clause should not only shift defense fees and costs to the other side, but specifically state that the municipality shall be permitted to select itsown counsel.

3. Alcohol Consumption. Any time alcohol is served, there are an array of statutes and additional liability issues to consider, including additional security, and competent identification checks. Section 768.125, Florida Statutes, imposes liability on those who furnish or sell alcohol willingly to a person not of lawful drinking age, or to a person habitually addicted to alcohol. Any person or contractor dispensing alcoholic beverages on city property should maintain the necessary licenses. In addition, in order to avoid liability, city employees should refrain from dispensing alcohol, and the decision to serve or not serve beverages should be left to the discretion of the contractor. Any contractors shall be expressly identified as independent contractors, and not as employees or partners of the municipality.

SAMPLE INDEMNIFICATION PROVISION

A. Contractor shall defend at its expense, pay on behalf of, hold harmless and indemnify the City, its officers, employees, agents, elected and appointed officials and volunteers (collectively, "Indemnified Parties") from and against any and all claims, demands, liens, liabilities, penalties, fines, fees, judgments, losses and damages (collectively, "Claims"), whether or not a lawsuit is filed, including, but not limited to Claims for damage to property or bodily or personal injuries, including death at any time resulting therefrom, sustained by any persons or entities; and costs, expenses and attorneys' and experts' fees at trial and on appeal, which Claims are alleged or claimed to have arisen out of or in connection with, in whole or in part, directly or indirectly:

(i) The performance of this Agreement (including any amendments thereto) by Contractor, its employees, agents, representatives or subcontractors; or

(ii) The failure of Contractor, its employees, agents, representatives or subcontractors to comply and conform with applicable Laws (as defined herein); or

(iii) Any negligent act or omission of the Contractor, its employees, agents, representatives, or subcontractors, whether or not such negligence is claimed to be either solely that of the Contractor, its employees, agents, representatives or subcontractors, or to be in conjunction with the claimed negligence of others, including that of any of the Indemnified Parties; or

(iv) Any reckless or intentional wrongful act or omission of the Contractor, its employees, agents, representatives, or subcontractors; or

(v) Contractor's failure to maintain, preserve, retain, produce, or protect records in accordance with this Agreement and applicable Laws (including but not limited to Florida laws regarding public records).

B. The provisions of this paragraph are independent of, and will not be limited by, any insurance required to be obtained by Contractor pursuant to this Agreement or otherwise obtained by Contractor, and the provisions of this paragraph survive the expiration or earlier termination of this Agreement with respect to any claims or liability arising in connection with any event occurring prior to such expiration or termination.

QUESTIONS?

Thank you!

Scott D. Alexander, Partner,
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