JOINT NEGLIGENCE THEORY OF CONTRACTUAL INDEMNITY: SHIELDING INDEMNITEES FOR CONCERTED ACTIONS

HENRY NORWOOD*

* Henry Norwood is an attorney with the national law firm, Kaufman Dolowich. He concentrates his practice in ERISA litigation and compliance, health care litigation and compliance, general liability litigation, and commercial litigation. He is admitted to practice in Florida, Maine, and Massachusetts. Mr. Norwood lives in the State of Maine with his wife and their daughter, where they enjoy the outdoors and spending time with family.

I. INTRODUCTION

The concept of transferring liability from one party to another exists in many different forms in Florida law.[1] Common law indemnity and vicarious liability impute liability from one party to another as a matter of law for equitable purposes.[2] Exculpatory clauses in contracts release one party from liability altogether, and contractual indemnity is an agreement by one party (the "indemnitor") to protect another party (the "indemnitee") from liability for actions arising under the contract.[3] Of these liability-transferring concepts, contractual indemnity depends on the contracting parties' negligence.[4] Florida courts analyzing contractual indemnity provisions have issued a line of cases holding that a party may be indemnified even when its negligence is combined with the negligence of the other contracting party, resulting in their joint negligence.[5]

Understanding the consequences of the different varieties of contractual indemnity provisions can help drafters make informed decisions as to which provision best suits their clients' needs.[6] A thorough review of the caselaw in Florida, regarding indemnity for joint negligence can help drafters include the necessary language, interpreted by Florida courts, to ensure the indemnity provisions are interpreted to their clients' advantage.[7]

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1. *See e.g.*, Goss v. Hum. Servs. Assoc., Inc., 79 So. 3d 127, 131 (Fla. 5th Dist. Ct. App. 2012); Houdaille Indus., Inc. v. Edwards, 374 So. 2d 490, 492 (Fla. 1979).

2. Am. Home Assurance Co. v. Nat'l R.R. Passenger Corp., 908 So. 2d 459, 467–68 (Fla. 2005) (per curium); K-Mart Corp. v. Chairs, Inc., 506 So. 2d 7, 9 (Fla. 5th Dist. Ct. App. 1987).

3. Raveson v. Walt Disney World Co., 793 So. 2d 1171, 1173 (Fla. 5th Dist. Ct. App. 2001); Dade Cnty. Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 643 (Fla. 1999); Claire's Boutiques, Inc. v. Locastro, 85 So. 3d 1192, 1198 (Fla. 4th Dist. Ct. App. 2012).

4. *See* Camp, Dresser & McKee, Inc. v. Paul N. Howard Co., 853 So. 2d 1072, 1077 (Fla. 5th Dist. Ct. App. 2003).

5. *See e.g.*, Leonard L. Farber Co., Inc. v. Jaksch, 335 So. 2d 847, 848 (Fla. 4th Dist. Ct. App. 1976); Gulfstream Park Racing Ass'n v. Gold Spur Stable, Inc., 820 So. 2d 957, 963 (Fla. 4th Dist. Ct. App. 2002); Marino v. Weiner, 415 So. 2d 149, 151 (Fla. 4th Dist. Ct. App. 1982); United Parcel Serv., Inc. v. Enf't Sec. Corp., 525 So. 2d 424, 425 (Fla. 1st Dist. Ct. App. 1987).

6. *See e.g.*, Univ. Plaza Shopping Ctr., Inc. v. Stewart, 272 So. 2d 507, 511 (Fla. 1973); Gencor Indus., Inc. v. Fireman's Fund Ins., 988 So. 2d 1206, 1207 (Fla. 5th Dist. Ct. App. 2008); Cox Cable Corp. v. Gulf Power Co., 591 So. 2d 627, 629 (Fla. 1992); Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equip., Co., 374 So. 2d 487, 489 (Fla. 1979); Acosta v. United Rentals (N. Am.), Inc., No. 8:12-CV-01530, 2013 WL 869520, at *4, *5 (M.D. Fla. Mar. 7, 2013).

7. *See e.g.*, *Univ. Plaza Shopping Ctr., Inc.*, 272 So. 2d at 511; *Gencor Indus., Inc.*, 988 So. 2d at 1208; *Cox Cable Corp.*, 591 So. 2d at 629; *Charles Poe Masonry, Inc.*, 374 So. 2d at 489; *Acosta*, 2013 WL 869520, at *4, *5.

II. CONTRACTUAL INDEMNITY

Contractual indemnity is a contractual agreement whereby one party (the "indemnitor") agrees to protect another party (the "indemnitee") from a loss or liability.[8] Contractual indemnity is its own cause of action in Florida.[9] The terms of the contract and the indemnity provision govern the scope of the indemnitor's obligation to indemnify the indemnitee.[10]

Florida courts have identified three varieties of contractual indemnity provisions: (1) provisions in which the indemnitee seeks indemnity from the indemnitor *for the indemnitor's negligence* or the negligence of some third party; (2) provisions in which the indemnitee seeks indemnity from the indemnitor *for the indemnitee's own negligence*; and (3) provisions in which the indemnitee seeks indemnity from the indemnitor *for the joint negligence of the indemnitee and the indemnitor*.[11]

A. *Distinguished from Common Law Indemnity*

Common law indemnity is a separate cause of action from contractual indemnity under Florida law.[12] Common law indemnity is a cause of action in equity arising from a special relationship between two parties by which one party, the indemnitee, is brought into a lawsuit based solely on its relationship with another party, the indemnitor.[13] Contractual indemnity is not an equitable cause of action and arises from the specific terms of an underlying contract, not involving special relationships.[14]

The Supreme Court of Florida, in *Houdaille Industries, Inc. v. Edwards*,[15] made clear that joint negligence has no place under common law indemnity and is, in fact, fatal to a claim for common law indemnity.[16] On the other hand, joint negligence is not fatal to a cause of action for contractual

8. *Dade Cnty. Sch. Bd.*, 731 So. 3d at 643.
9. *Id.* at 643–44.
10. *See Jaksch*, 335 So. 2d at 848; Camp, Dresser & McKee, Inc. v. Paul N. Howard Co., 853 So. 2d 1072, 1077 (Fla. 5th Dist. Ct. App. 2003).
11. Hillstone Rest. Grp., Inc. v. P.F. Chang's China Bistro, Inc., 144 So. 3d 679, 682 (Fla. 3d Dist. Ct. App. 2014); *Camp, Dresser & McKee, Inc.*, 853 So. 2d at 1077; *Jaksch*, 335 So. 2d at 848–49.
12. *See* Houdaille Indus., Inc. v. Edwards, 374 So. 2d 490, 492 n.2 (Fla. 1979).
13. *Id.* at 492–93.
14. *Camp, Dresser & McKee, Inc.*, 853 So. 2d at 1077.
15. 374 So. 2d 490 (Fla. 1979).
16. *Id.* at 493.

indemnity.[17] A cause of action for contractual indemnity may exist, depending on the terms of the contract, where the contracting parties are jointly negligent, or where either party is solely negligent.[18] Because contractual indemnity is a distinct cause of action from common law indemnity, and the two are subject to different legal rules under Florida law, this Article only discusses the contractual indemnity cause of action.[19]

B. *Distinguished from Exculpatory Clauses*

Although both are contractual in nature, contractual indemnity and exculpatory clauses have clear differences and are subject to different rules developed through caselaw in Florida.[20] Exculpatory clauses remove a party's right to bring a lawsuit against another party.[21] On the other hand, contractual indemnity clauses grant a party the right to seek reimbursement from another where that party is facing liability.[22] The two contractual clauses are distinct under Florida law, although they may result in the same ultimate conclusion.[23]

Sanislo v. Give Kids the World, Inc.[24] held that exculpatory clauses seeking to excuse a party for its misconduct are held to a different legal standard than contractual indemnity clauses seeking to indemnify a party for its misconduct.[25] The standards applicable to various indemnity agreements are discussed later in this Article.[26] Following the holding in *Sanislo*, exculpatory clauses that seek to exculpate a party for its misconduct are held to a less strict standard of interpretation than are contractual indemnity clauses that seek to indemnify a party for its own misconduct or for joint misconduct with another.[27]

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17. *See* Gulfstream Park Racing Ass'n v. Gold Spur Stable, Inc., 820 So. 2d 957, 962 (Fla. 4th Dist. Ct. App. 2002); Univ. Plaza Shopping Ctr., Inc. v. Stewart, 272 So. 2d 507, 511 (Fla. 1973).

18. Leonard L. Farber Co., Inc. v. Jaksch, 335 So. 2d 847, 848 (Fla. 4th Dist. Ct. App. 1976).

19. *See Houdaille Indus., Inc.*, 374 So. 2d at 492–93; *Camp, Dresser & McKee, Inc.*, 853 So. 2d at 1077; discussion *infra* Sections II.B–D, Parts III–VII.

20. Sanislo v. Give Kids the World, Inc., 157 So. 3d 256, 264, 266, 271 (Fla. 2015) (per curiam).

21. *Id.* at 265.

22. *Id.* at 264; First Baptist Church of Cape Coral, Inc. v. Compass Constr., Inc., 115 So. 3d 978, 986 (Fla. 2013).

23. *Sanislo*, 157 So. 3d at 265; O'Connell v. Walt Disney World Co., 413 So. 2d 444, 446 (Fla. 5th Dist. Ct. App. 1982).

24. 157 So. 3d 256 (Fla. 2015) (per curiam).

25. *Id.* at 261–62, 271.

26. *See* discussion *infra* Part III.

27. *Sanislo*,157 So. 3d at 271.

C. *Vicarious Liability vs. Affirmative Misconduct*

Vicarious liability is also a separate legal concept from contractual indemnity.[28] Vicarious liability arises where the liability of one party is imputed to another party based on some relationship between the two parties.[29] Vicarious liability is based on the policy of shifting loss to a party in a better position to bear the financial burden of the loss.[30] Contractual indemnity, on the other hand, is not based on the relationship of the parties—aside from their contractual relationship—and the contract governs the scope of each party's liability, whereas the scope of a vicariously liable party is complete (the vicariously liable party is exposed to the same extent of liability as the active tortfeasor).[31]

D. *The Joint Negligence Theory of Contractual Indemnity*

The joint negligence indemnity provision was first recognized in Florida in *Leonard L. Farber Co., Inc. v. Jaksch*.[32] In *Jaksch*, a property owner leased its property to a commercial lessee for the purpose of operating a shopping mall.[33] A patron of the mall slipped and fell on a piece of sausage in one of the mall's common areas and brought suit against the property owner and the lessee for negligence.[34] The count against the property owner alleged that the owner failed to maintain the property in a reasonably safe condition.[35] The count against the lessee alleged that the lessee was negligent in its method of dispensing sausage samples.[36] The property owner brought a crossclaim for contractual indemnity against the lessee based on an indemnity provision in their lease agreement.[37] The agreement provided, in part, that the lessee shall indemnify the property owner for acts "occasioned wholly or in part by any act or omission of Lessee."[38] After both parties had settled with the original

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28. *See* Armiger v. Associated Outdoor Clubs, Inc., 48 So. 3d 864, 874–75 (Fla. 2d Dist. Ct. App. 2010).
29. Am. Home Assurance Co. v. Nat'l R.R. Passenger Corp., 908 So. 2d 459, 467–68 (Fla. 2005) (per curiam).
30. *Id.*
31. *Id.*; Camp, Dresser & McKee, Inc. v. Paul N. Howard Co., 853 So. 2d 1072, 1077 (Fla. 5th Dist. Ct. App. 2003).
32. 335 So. 2d 847, 848 (Fla. 4th Dist. Ct. App. 1976).
33. *Id.* at 847.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Jaksch*, 335 So. 2d at 847.
38. *Id.* at 847–48.

plaintiff, the trial court was left to adjudicate the crossclaim.[39] The trial court entered a judgment against the property owner, and the property owner appealed.[40] On appeal, the appellate court held that, based on the above-cited language in the indemnity provision, the provision did not provide that the lessee indemnify the owner solely for the owner's negligence, but it clearly did require the lessee indemnify the owner for lawsuits involving the lessee's joint negligence.[41] The appellate court reversed the trial court on these grounds and ordered that judgment be entered for the property owner based on the indemnity provision.[42]

In *Mitchell Maintenance Systems v. State Department of Transportation*,[43] the Florida Department of Transportation sought contractual indemnity from Mitchell Maintenance Systems, a company hired to maintain light poles throughout Florida's highways.[44] Mitchell was required to ensure the base of each light pole was securely underground in order to prevent a motorist from striking the base, which would be more harmful to the motorist than if the motorist were to strike the pole.[45] Soil erosion exposed the base of one such light pole, and a motorist drove into the base of the pole, dying as a result of the accident.[46] The estate of the deceased motorist brought a lawsuit against the Florida Department of Transportation ("Florida DOT") and Mitchell, both of which settled.[47] The Florida DOT then sought contractual indemnity from Mitchell based on a provision in its work order contract which provided, in part, that Mitchell would indemnify the Florida DOT against any claims "whether direct or indirect, and whether to any person or property to which DEPARTMENT or said parties may be subject."[48] The appellate court held that the provision did not provide for indemnity where the Florida DOT was solely at fault but did provide for indemnity in cases in which Mitchell and the Florida DOT were sued for their joint negligence in producing the harm.[49] The court went on to state: "[a]pplying this interpretation, indemnity is appropriate if there is any evidence from which the judge could conclude that Mitchell was negligent."[50] Because an employee of Mitchell had given

39. *Id.*
40. *Id.* at 847.
41. *Id.* at 848–49.
42. *Jaksch*, 335 So. 2d at 849.
43. 442 So. 2d 276 (Fla. 4th Dist. Ct. App. 1983).
44. *Id.* at 277.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Mitchell Maint. Sys.*, 442 So. 2d at 277.
49. *Id.* at 278.
50. *Id.*

testimony that they were required to notify the Florida DOT of soil erosion near light poles and because the Florida DOT introduced evidence they had not received any such notification, the appellate court held there was evidence of Mitchell's negligence, satisfying the joint negligence indemnity provision, and requiring a judgment in favor of the Florida DOT.[51]

The joint negligence theory of contractual indemnity has been applied by Florida courts in other cases, including *United Parcel Service, Inc. v. Enforcement Security Corp.*,[52] *Gulfstream Park Racing Ass'n, Inc. v. Gold Spur Stable, Inc.*,[53] and *Marino v. Weiner*.[54]

III. WHICH STANDARD APPLIES?

Depending on the scope of an indemnity agreement, the party seeking to enforce the agreement must meet a specific burden of proof regarding the contracting parties' intentions.[55] If the party seeking to enforce the agreement merely seeks to prove that the agreement provides indemnity for the indemnitor's negligence, the burden of proof is relatively low.[56] On the other hand, if the party seeking to enforce the agreement wants to prove the agreement provides indemnity even for the indemnitee's negligence or for the joint negligence between the indemnitee and the indemnitor, the burden of proof placed on the enforcing party is much higher.[57] Florida courts have imposed these varying standards as a matter of public policy.[58] Indemnity agreements that seek to provide indemnity even for the indemnitee's negligence are viewed with disfavor by Florida courts.[59]

A. *Reasonable Intent of the Parties Standard*

The least strict standard applicable to interpreting an indemnity agreement applies to provisions that obligate the indemnitor to indemnify the

51. *Id.*
52. 525 So. 2d 424, 425 (Fla. 1st Dist. Ct. App. 1987).
53. 820 So. 2d 957, 963 (Fla. 4th Dist. Ct. App. 2002).
54. 415 So. 2d 149, 151 (Fla. 4th Dist. Ct. App. 1982).
55. *See* Transp. Intern. Pool, Inc. v. Pat Salmon & Sons of Fla., Inc., 609 So. 2d 658, 660 (Fla. 4th Dist. Ct. App. 1992).
56. *Id.* at 661.
57. *Id.*
58. ATC Logistics Corp. v. Se. Toyota Distribs., LLC, 188 So. 3d 96, 100–01 (Fla. 1st Dist. Ct. App. 2016).
59. *Id.* at 99.

indemnitee for the indemnitor's negligence.[60] While Florida courts have yet to specify what this lesser standard entails, courts default to this standard when they determine that the stricter standard has yet to be met.[61] Indemnity agreements are governed by the same rules as contract law, so this lesser standard may be said to be the reasonable intent of the parties standard.[62] Thus, if the reasonable intent of the parties is to provide for indemnity of the indemnitee for the indemnitor's negligence, this lesser standard will be met, and the court will require indemnity under these circumstances.[63]

B. *Clear and Unequivocal Standard*

The strictest standard that applies to interpreting an indemnity agreement is the clear and unequivocal standard.[64] The clear and unequivocal standard states that an indemnitor will only be required to indemnify an indemnitee if the contract expresses this intention in clear and unequivocal terms.[65] The clear and unequivocal standard was first held to apply to indemnity contracts that purport to require indemnity for the indemnitee's negligence in *University Plaza Shopping Center, Inc. v. Stewart*.[66]

The *University Plaza* case arose between University Plaza (the landlord of a shopping center) and Stewart (a commercial tenant within that shopping center) when a gas line beneath Stewart's shop exploded, resulting in Stewart's death.[67] Stewart's estate sued University Plaza for his death, and University Plaza brought a claim against Stewart for contractual indemnity.[68] The indemnity clause between the parties, found in their lease agreement, provided

> Tenant shall indemnify and save harmless the Landlord from and against any and all claims for damages to goods, wares, merchandise and property in and about the demised premises and from and against any and all claims for any personal injury or loss of life in

60. *See Transp. Intern. Pool, Inc.*, 609 So. 2d at 660 (holding that the stricter "clear and unequivocal" standard does not apply to indemnity agreements purporting to indemnify the indemnitee for the indemnitor's negligence).

61. *Id.*

62. *See generally id.* at 660–61.

63. *See generally id.*

64. *See* Univ. Plaza Shopping Ctr., Inc. v. Stewart, 272 So. 2d 507, 509 (Fla. 1973).

65. *Id.*; *see also* Endurance Am. Specialty Ins. v. Liberty Mut. Ins., 34 F.4th 978, 987 (11th Cir. 2022).

66. 272 So. 2d 507, 509 (Fla. 1973).

67. *Id.* at 508.

68. *Id.*

> and about the demised premises.[69]

University Plaza admitted that the gas line at issue was not part of the leased premises, and the trial court entered summary judgment in favor of Stewart, holding the indemnity provision, as written, did not require Stewart to indemnify University Plaza for University Plaza's sole negligence.[70] University Plaza was responsible for maintaining the gas line, and the only issue before the Supreme Court of Florida was whether the trial court was correct in ruling that the indemnity language in the lease agreement was insufficient as a matter of law to require Stewart to indemnify University Plaza for its own negligence.[71] After reviewing how federal circuit courts and Florida state appellate courts dealt with this issue, the Court ultimately ruled that the clear and unequivocal standard must always be met to require indemnity for the indemnitee's negligent conduct.[72] Following the Supreme Court of Florida's ruling in *University Plaza*, an indemnitor will only be required to indemnify an indemnitee for the indemnitee's negligence if that intention is stated clearly and unequivocally in their agreement.[73]

The Supreme Court of Florida extended the clear and unequivocal standard to indemnity agreements for the joint negligence of the indemnitee and the indemnitor in *Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Co*.[74] *Charles Poe* involved a plaintiff who had fallen from a scaffold while working at a construction site.[75] The plaintiff sued the scaffold manufacturer, Spring Lock Scaffolding Rental Equipment Company, for his injuries.[76] While Spring Lock had indeed manufactured the scaffold, it had leased the scaffold to Charles Poe Masonry, Inc. for use in the construction project at which the plaintiff had been injured.[77] Spring Lock filed a third-party complaint against Charles Poe for, among other causes of action, contractual indemnity based on an indemnity provision between the two in the lease agreement for the scaffold.[78] The indemnity provision provided

> [Spring Lock] shall have no responsibility, direction or control over the manner of erection, maintenance, use or operation of said equipment by [Charles Poe]. [Charles Poe] assumes all

69. *Id.* at 508–09.
70. *Id.* at 509.
71. *Univ. Plaza Shopping Ctr., Inc.*, 272 So. 2d at 509.
72. *Id.* at 509–11.
73. *See id.* at 511.
74. 374 So. 2d 487, 489–90 (Fla. 1979).
75. *Id.* at 488.
76. *Id.*
77. *Id.*
78. *Id.*

> 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 [Spring Lock] harmless from all such claims.[79]

The Court ultimately held that this language did not meet the clear and unequivocal standard.[80]

The underlying conclusion from these cases is that an agreement for indemnity that protects an indemnitee against *its own* negligence or for the *joint negligence* of both the indemnitee and the indemnitor will only be upheld if the contract expresses, in clear and unequivocal terms, an intent to indemnify against the indemnitee's wrongful conduct.[81] A general indemnity provision indemnifying a party against "any and all claims" on its own is insufficient to meet the clear and unequivocal standard required to indemnify a party for the conduct of others.[82]

IV. LOOKING TO PRECEDENT TO CHOOSE AN INDEMNITY AGREEMENT WITH FORESIGHT

From the indemnitee's perspective, a provision that merely indemnifies an indemnitee for the negligence of the indemnitor is the weakest variety of indemnity because it requires the indemnitee to prove that it is being sued by the original plaintiff *exclusively* for the negligent actions of the indemnitor.[83] Indemnity provisions that indemnify an indemnitee even for its own negligence or for the joint negligence between the indemnitee and the indemnitor, are much stronger than the first variety because these provisions

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79. *Charles Poe Masonry, Inc.*, 374 So. 2d at 489.

80. *See id.*

81. *See, e.g.*, Univ. Plaza Shopping Ctr., Inc. v. Stewart, 272 So. 2d 507, 511 (Fla. 1973); Gencor Indus., Inc. v. Fireman's Fund Ins., 988 So. 2d 1206, 1208–09 (Fla. 5th Dist. Ct. App. 2008); Cox Cable Corp. v. Gulf Power Co., 591 So. 2d 627, 629 (Fla. 1992); *Charles Poe Masonry Inc.*, 374 So. 2d at 489–90; Acosta v. United Rentals (N. Am.), Inc., No. 8:12-CV-01530, 2013 WL 869520, at *4–5 (M.D. Fla. Mar. 7, 2013).

82. Camp, Dresser & McKee, Inc. v. Paul N. Howard Co., 853 So. 2d 1072, 1077 (Fla. 5th Dist. Ct. App. 2003).

83. *Compare* Transp. Intern. Pool, Inc. v. Pat Salmon & Sons of Fla., Inc., 609 So. 2d 658, 660 (Fla. 4th Dist. Ct. App. 1992) (holding that the indemnity provision that indemnified the indemnitee for the negligence of the indemnitor was valid because there was no evidence of the indemnitee's negligence), *and* Mitchell Maint. Sys. v. State Dep't of Transp., 442 So. 2d 276, 278 (Fla. 4th Dist. Ct. App. 1983) (holding that the indemnitee was entitled to indemnification because there was evidence that the indemnitor was negligent), *with* Leonard L. Farber Co. v. Jaksch, 335 So. 2d 847, 848–49 (Fla. 4th Dist. Ct. App. 1976) (holding that the language of the indemnification agreement was "sufficiently 'clear and unequivocal'" to find that the indemnitor must indemnify the indemnitee for their joint liability).

allow the indemnitee to receive indemnity even if the plaintiff is suing them for the plaintiff's negligent conduct.[84] Because these provisions could require an indemnitor to pay in situations in which the indemnitor bears no fault at all, Florida courts have strictly required very specific language for these provisions to be upheld.[85] This is the reasoning behind the clear and unequivocal standard.[86]

Because indemnity agreements have the potential of shifting partly or entirely the liability of one party to a separate party, the interpretation of the agreements is hotly contested in Florida courts.[87] The best practice to avoid an adverse interpretation of an indemnity agreement by a court is to review the Florida caselaw interpreting past indemnity agreements in drafting one's indemnity agreement to incorporate language which has either required or prohibited indemnity for joint negligence.[88]

A. *Joint Indemnity Language Favored by Florida Courts*

As a basic rule of contract law, courts must interpret a contract provision in accordance with the intent of the parties to that provision.[89] This rule applies to indemnity provisions.[90] When interpreting an indemnity provision, the court must determine whether the parties intended to require indemnity for only the indemnitor's negligence, for the indemnitee's

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84. *Compare Jaksch*, 335 So. 2d at 848–49 (holding that the language of the indemnification agreement was "sufficiently 'clear and unequivocal'" to find that the indemnitor must indemnify the indemnitee for their joint liability), *with Transp. Intern. Pool, Inc.*, 609 So. 2d at 660 (holding that the indemnity provision that indemnified the indemnitee for the negligence of the indemnitor was valid because there was no evidence of the indemnitee's negligence), *and Mitchell Maint. Sys.*, 442 So. 2d at 278 (holding that the indemnitee was entitled to indemnification because there was evidence that the indemnitor was negligent).

85. *See* ATC Logistics Corp. v. Se. Toyota Distribs., LLC, 188 So. 3d 96, 100–01 (Fla. 1st Dist. Ct. App. 2016); *Charles Poe Masonry, Inc.*, 374 So. 2d at 489–90.

86. *See ATC Logistics Corp.*, 188 So. 3d at 100–01; *Charles Poe Masonry, Inc.*, 374 So. 2d at 489–90.

87. *See generally, e.g.*, *Jaksch*, 335 So. 2d at 847–48; Marino v. Weiner, 415 So. 2d 149, 150 (Fla. 4th Dist. Ct. App. 1982); *Charles Poe Masonry, Inc.*, 374 So. 2d at 489; *Mitchell Maint. Sys.*, 442 So. 2d at 277; *Transp. Intern. Pool, Inc.*, 609 So. 2d at 660–61; *ATC Logistics Corp.*, 188 So. 3d at 98.

88. *See generally, e.g.*, *Jaksch*, 335 So. 2d at 847–48; *Marino*, 415 So. 2d at 150; *Charles Poe Masonry, Inc.*, 374 So. 2d at 489; *Mitchell Maint. Sys.*, 442 So. 2d at 277; *Transp. Intern. Pool, Inc.*, 609 So. 2d at 660–61.

89. *See ATC Logistics Corp.*, 188 So. 3d at 102 (citing Univ. Plaza Shopping Ctr., Inc. v. Stewart, 272 So. 2d 507, 511 (Fla. 1973)).

90. *Id.*

negligence, or for the joint negligence of the indemnitor and the indemnitee.[91] To determine the parties' intentions regarding an indemnity provision, Florida courts have ruled that certain key terms in the provision reveal an intent to require indemnity for joint negligence.[92]

1. Key Term: "Wholly or in Part"

In *Jaksch*, the language "wholly or in part" in the indemnity provision was crucial to the court's determination that the provision required indemnity for joint negligence.[93] The facts of *Jaksch* were discussed in a previous section.[94] The pertinent language in the *Jaksch* contract stated that the lessee shall indemnify the property owner for acts "occasioned wholly or in part by any act or omission of Lessee."[95] In the court's words,

> The question then is whether the language, ' . . . occasioned wholly in part by any act or omission of Lessee, . . .' is sufficiently 'clear and unequivocal' to make the Lessee liable to indemnify Lessor for their joint liability . . . . We believe that it is.[96]

The *Jaksch* case was the first case holding that the "wholly or in part" language indicates an intent to provide for indemnity in cases involving joint negligence.[97] Most, if not all, courts after *Jaksch* have cited the case in support of holding that the "wholly or in part" language provides indemnity for joint negligence.[98]

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91. *Id.* at 100–01 (citing *Charles Poe Masonry, Inc.*, 374 So. 2d at 489).

92. *See e.g.*, *Jaksch*, 335 So. 2d at 848–49; *Marino*, 415 So. 2d at 151.

93. *Jaksch*, 335 So. 2d at 848–49; *see also* Gibbs v. Air Can., 810 F.2d 1529, 1536–37 (11th Cir. 1987). In *Gibbs*, the federal Eleventh Circuit, applying Florida law, read similar "in whole or in part" language in a provision that limited the applicable indemnity provision such that it would not provide indemnity for joint negligence. *Gibbs*, 810 F.2d at 1536–37. The Eleventh Circuit was thus interpreting the "in whole or in part" language in the same manner as courts, such as *Jaksch*, interpreted the language, but the Eleventh Circuit was dealing with this language in a limitation of liability clause—not in an indemnity clause—so the impact of the language was different. *Id.*

94. *See supra* Section II.D.

95. *Jaksch*, 335 So. 2d at 848.

96. *Id.* at 848.

97. *See id.* at 848–49.

98. *See, e.g.*, Gulfstream Park Racing Ass'n v. Gold Spur Stable, Inc., 820 So. 2d 957, 963 (Fla. 4th Dist. Ct. App. 2002); Marino v. Weiner, 415 So. 2d 149, 151 (Fla. 4th Dist. Ct. App. 1982); Mitchell Maint. Sys. v. State Dep't of Transp., 442 So. 2d 276, 278 (Fla. 4th Dist. Ct. App. 1983).

Following the ruling in *Jaksch*, the next case to address the "wholly or in part" language was *Marino v. Weiner*.[99] This case involved a slip and fall caused by a puddle of water at a discotheque, allegedly due to a leaking air conditioning unit installed on the roof of the building.[100] The plaintiff sued the lessor of the building for negligence, and the lessor then brought a third-party claim against the lessee of the building for contractual indemnity.[101] The indemnity provision stated, in pertinent part: "Lessee shall indemnify Lessor and save harmless from suits . . . arising from or out of any occurrence in, upon, at or from the Demised Premises . . . or *occasioned wholly or in part by any act or omission of Lessee* . . . ."[102] Relying on the decision in *Jaksch*, the court held that the "wholly or in part" language of the indemnity provision provided for indemnity where the parties were jointly negligent, but not where the indemnitee was solely negligent.[103] The appellate court sent the case back to the trial court for a jury to determine whether the slip and fall was caused by the joint negligence of the parties (in which case the lessor would be entitled to indemnity) or if the slip and fall was caused by the sole negligence of the lessor (in which case the lessor would not be entitled to indemnity).[104]

The court in *Gulfstream Park Racing Ass'n, Inc. v. Gold Spur Stable, Inc.*[105] ruled consistently with *Jaksch*, *Marino*, and *Mitchell* that the language "wholly or in part" in an indemnity agreement expressed a clear and unequivocal intent to provide indemnity for the joint negligence of the contracting parties.[106] Specifically, the indemnity provision in *Gulfstream Park* provided

> [t]rainer hereby agrees to indemnify, hold harmless and defen[d] Gulfstream and its officers, directors, agents, representatives, employees, successors and assigns from any claims, losses, liabilities or demands whatsoever, including claims for medical and hospital bills, resulting from or arising directly or indirectly from the acts or omissions of Trainer and its agents, servants, employees, owners or invitees, in whole or in part, from or . . . in connection with Trainer's activities at Gulfstream Park.[107]

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99. 415 So. 2d 149, 150 (Fla. 4th Dist. Ct. App. 1982).
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 151 (citing Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equip. Co., 374 So. 2d 487, 489 (Fla. 1979)).
104. *Marino*, 415 So. 2d at 151.
105. 820 So. 2d 957 (Fla. 4th Dist. Ct. App. 2002).
106. *Id.* at 963.
107. *Id.* at 961–62. Of note, the court also analyzed this provision in conjunction with two other contract provisions: a provision limiting the indemnity provision and a provision

This provision serves as an adequate model of an indemnity provision covering joint negligence.[108]

2. Key Term: "Regardless"

Another key term that can be added to an indemnity provision to support an obligation in a joint negligence scenario is "regardless."[109] Language taken from a disputed provision in *Camp, Dresser & McKee, Inc. v. Paul N. Howard Co.*[110] stated: "[indemnitor] shall indemnify and hold harmless [indemnitee] . . . from and against any and all claims, damages, losses, and expenses . . . regardless of whether or not it is caused in whole or in part by a party indemnified hereunder."[111] Interpreting this provision, the Florida Fifth District Court of Appeal concluded "this provision clearly expresses the parties' intent that [indemnitee] may be indemnified by [indemnitor] even if [indemnitee] is sued for its wrongful conduct."[112] The court here went beyond joint negligence and ruled that this provision required indemnity even for the indemnitee's sole negligence.[113] It is clear, however, that the court was also interpreting this provision as requiring indemnity for the joint negligence of the indemnitee based on the fact that, in support of its ruling, the court exclusively cited cases in which indemnity was found under a joint negligence theory.[114]

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regarding the general responsibilities of the parties. *Id.* The court held that these provisions supported its ruling that the indemnity provision covered the joint negligence of the parties. *Id.* at 962.

108. *See Gulfstream Park*, 820 So. 2d at 961–62.

109. *See* Camp, Dresser & McKee, Inc. v. Paul N. Howard, Co., 853 So. 2d 1072, 1077 (Fla. 5th Dist. Ct. App. 2003).

110. 853 So. 2d 1072, 1076 (Fla. 5th Dist. Ct. App. 2003).

111. *Id.* at 1076.

112. *Id.* at 1078.

113. *See id.*

114. *See id.*; Gulfstream Park Racing Ass'n v. Gold Spur Stable, Inc., 820 So. 2d 957, 963 (Fla. 4th Dist. Ct. App. 2002); Marino v. Weiner, 415 So. 2d 149, 151 (Fla. 4th Dist. Ct. App. 1982); Leonard L. Farber Co. v. Jaksch, 335 So. 2d 847, 848 (Fla. 4th Dist. Ct. App. 1976).

3. Key Term: "Except Due to the Sole Negligence" of the Indemnitee

Other courts have held that the words "joint negligence" need not necessarily be included in an indemnity provision to find indemnity for joint negligence.[115]

The Third District Court of Appeal held as such in *R.C.A. Corp. v. Pennwalt Corp.*[116] In *R.C.A.*, the indemnity provision at issue read: "*except to the extent that any such injury or damage is due solely and directly to RCA's negligence*, [Pennwalt] shall indemnify RCA against any loss, claim, damages, liability, expense . . . and cause of action, whatsoever, arising out of any act or omission."[117] The court held that the exception at the beginning of the provision—excepting indemnity where the indemnitee was solely negligent—implied the contractors intended indemnity to be required where the parties were jointly negligent.[118] The *R.C.A.* court thus held that an indemnity provision that states indemnity is required "*except to the extent that* . . . [the] *damage is due solely* . . . *to* [the indemnitee's] *negligence*" is sufficient to require indemnity for joint negligence.[119]

In *United Parcel Service of America, Inc. v. Enforcement Security Corp.*,[120] the Florida First District Court of Appeal also approved similar language supporting indemnity for joint negligence.[121] On appeal from an adverse summary judgment ruling, the third-party plaintiff (indemnitee) argued that its contract with the third-party defendant (indemnitor) required indemnity even for the third-party defendant's negligence.[122] The indemnity provision stated that the indemnitor was to indemnify the indemnitee, "except from and against all losses, damages, expense, etc., as set forth hereinabove, arising out of the sole negligence of [indemnitee]."[123] Citing *Mitchell* in support of its reasoning, the court held this language was sufficient to require indemnity for joint negligence, overturning the ruling by the trial court on the indemnitor's motion for summary judgment.[124]

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115. R.C.A. Corp. v. Pennwalt Corp., 577 So. 2d 620, 622 (Fla. 3d Dist. Ct. App. 1991).
116. 577 So. 2d 620 (Fla. 3d Dist. Ct. App. 1991).
117. *Id.* at 621.
118. *Id.* at 621, 622.
119. *Id.* at 621, 622.
120. 525 So. 2d 424 (Fla. 1st Dist. Ct. App. 1987).
121. *Id.* at 425–26.
122. *Id.* at 425.
123. *Id.*
124. *Id.* at 425–26.

The First District Court of Appeal ruled along the same lines in *State Department of Transportation v. V.E. Whitehurst & Sons, Inc.*[125] Procedurally, the third-party plaintiff's third-party complaint, alleging contractual indemnity against the third-party defendant, was dismissed by the trial court on the argument that the indemnity language at issue failed to clearly and unequivocally display an intent to provide for indemnity to the third-party plaintiff even for its negligent acts.[126] On appeal, the appellate court reversed the dismissal, holding that the presence of the language "[indemnitor] will [not] be liable under this section for damages directly caused or resulting from the sole negligence of the [indemnitee]," expressed a clear and unequivocal intent to provide for indemnity of the third-party plaintiff where the parties were jointly negligent.[127]

4. Key Term: "Joint Negligence"

The Middle District of Florida has reasoned that the absence of any language in an indemnity provision specifically dealing with the joint negligence of the contracting parties means that the parties did not intend to provide indemnity for actions in which the indemnitee and the indemnitor, or a third party are jointly liable.[128] The pertinent language in the indemnity clause at issue in *Acosta v. United Rentals (North America), Inc.*,[129] was the limitation on the full indemnity clause, which read: "HOWEVER, CUSTOMER SHALL NOT BE OBLIGATED TO INDEMNIFY UNITED FOR THAT PART OF ANY LOSS, DAMAGE OR LIABILITY CAUSED SOLELY BY THE INTENTIONAL MISCONDUCT OR SOLE NEGLIGENCE OF UNITED."[130] United Rentals, the indemnitee, argued that Acosta was required to indemnify them for negligent acts to which they contributed but for which they were not the sole cause.[131] United Rentals based this argument on the fact that the limitation provision only limited Acosta's indemnity requirements in situations where United Rentals was the "sole" cause and, absent this situation, Acosta was required to indemnify

125. 636 So. 2d 101, 104–05 (Fla. 1st Dist. Ct. App. 1994).
126. *Id.* at 103–04.
127. *Id.* at 103–04, 105.
128. Acosta v. United Rentals (N. Am.), Inc., No. 8:12-CV-01530, 2013 WL 869520, at *5 (M.D. Fla. Mar. 7, 2013).
129. 2013 WL 869520 (M.D. Fla. Mar. 7, 2013).
130. *Id.* at *5. The initial portion of the indemnity clause required Acosta to indemnify United Rentals for "ANY AND ALL LIABILITY, CLAIMS, LOSS, DAMAGE OR COSTS . . . ." *Id.* at *1.
131. *Id.* at *3, *5.

United Rentals for any and all other claims.[132] The Middle District explained that because this provision did not "speak to joint negligence between Acosta and United," the provision did not meet the clear and unequivocal standard, and the court could not interpret the provision as providing indemnity under a joint negligence theory.[133]

The *Acosta* case is notable because it signals to drafters that courts may be reluctant to infer an obligation to indemnify based on joint negligence without some direct language regarding joint negligence.[134] Provisions that Florida courts have interpreted as requiring indemnity for joint negligence include terms such as "in part" or "joint," both of which were absent from the provision in *Acosta*.[135] While it is unclear whether these terms would have been sufficient for the Middle District to interpret this contract to require joint negligence indemnity, the terms would have moved this provision closer to the provisions in cases such as *Jaksch* and *Gulfstream Park*, giving the Middle District precedent to interpret joint negligence indemnity into this contract and increasing the likelihood of such a ruling.[136] Greater specificity on joint negligence language in contracts is the primary takeaway from the *Acosta* case.[137]

One year after the *Acosta* case, the Middle District of Florida was again faced with indemnitee language similar to "except due to the sole

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132. *See id.* at *5.

133. *Acosta*, 2013 WL 869520, at *5 (citing Cox Cable Corp. v. Gulf Power Co., 591 So. 2d 627, 629 (Fla. 1992)).

134. *See id.* at *1, *5.

135. *See id.* at *5; Gulfstream Park Racing Ass'n v. Gold Spur Stable, Inc., 820 So. 2d 957, 961–62 (Fla. 4th Dist. Ct. App. 2002); Leonard L. Farber Co. v. Jaksch, 335 So. 2d 847, 847–48 (Fla. 4th Dist. Ct. App. 1976); Church & Tower of Fla, Inc. v. Bellsouth Telecomms., Inc., 936 So. 2d 40, 41 (Fla. 3d Dist. Ct. App. 2006).

136. *Compare Acosta*, 2013 WL 869520, at *1 (considering a contractual provision which did not include the terms "in part" or "joint"), *with Gulfstream Park*, 820 So. 2d at 961–62 (considering a contractual provision that included the term "in part"), *and Jaksch*, 335 So. 2d at 847–48 (considering a contractual provision that included the term "in part"), *and Church & Tower*, 936 So. 2d at 41 (considering a contractual provision that included the term "joint").

137. *See Acosta*, 2013 WL 869520, at *5; *but see* Fla. Farm Bureau Cas. Co. v. Batton, 444 So. 2d 1128, 1129, 1130 (Fla. 4th Dist. Ct. App. 1984). In *Batton*, the Fourth District Court of Appeal analyzed an indemnity provision similar to the provision in *Acosta*, as the provision pertained to the contribution claim before the court. *Id.* at 1129. The provision in *Batton* stated in part: "[t]he contractor agrees to indemnify and save harmless, the purchaser . . . from and against all loss or expense . . . except only such injury or damage as shall have been occasioned by the sole negligence of the purchaser." *Id.* Although the indemnity provision was not the focus of the court, it did note that this provision would provide for indemnity for joint negligence, while at the same time noting that "the enforcement of the indemnity agreement is a separate issue to be litigated," beyond the scope of the court's opinion. *Id.* at 1130.

negligence."[138] *White Springs Agricultural Chemicals, Inc. v. Gaffin Industrial Services, Inc.*,[139] decided in 2014, was a wrongful death action in which one named defendant, the indemnitee, brought a claim against another named defendant, the indemnitor, seeking contractual indemnity.[140] The indemnity provision between the two defendants stated, in relevant part: "[indemnitor] shall indemnify and hold harmless [indemnitee], its affiliates, employees and agents against all claims . . . unless it results from the sole negligence or willful misconduct of [indemnitee]."[141] The Middle District Court made clear that the language "unless it results from the sole negligence" of the indemnitee, required the indemnitor to provide indemnity for the indemnitee where the two were jointly negligent.[142] The Middle District did not mention *Acosta* in its holding on the indemnity language, but instead cited to *United Parcel* from the Florida First District Court of Appeal in support of its holding that the "unless it results from the sole negligence" of the indemnitee language mandates indemnity for joint negligence.[143]

Mitchell Maintenance Systems is a Florida Fourth District Court of Appeal indemnity case.[144] The facts of *Mitchell* were discussed earlier in this Article.[145] Of importance in this case is the language in the indemnity agreement, which stated,

> Contractor covenants and agrees that it will indemnify and hold harmless Department . . . from any claim . . . arising out of any act, action, neglect or omission by Contractor during the performance of the contract, whether direct or indirect . . . except that neither Contractor nor any of its sub-contractors will be liable under this section for damages arising out of injury or damage to persons or property directly caused or resulting from the sole negligence of Department . . . .[146]

Relying on the language "except" and "sole negligence," the court ruled that this provision expressed the clear and unequivocal intent of the parties that the

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138. White Springs Agric. Chem., Inc. v. Gaffin Indus. Servs., Inc., No. 11-cv-998, 2014 WL 905577, *6 (M.D. Fla. 2014).

139. No. 11-cv-998, 2014 WL 905577 (M.D. Fla. 2014).

140. *Id.* at *1, *2.

141. *Id.* at *3.

142. *Id.* at *7 (citing United Parcel Serv., Inc. v. Enf't Sec. Corp., 525 So. 2d 424, 426 (Fla. 1st Dist. Ct. App. 1987)).

143. *Id.*

144. Mitchell Maint. Sys. v. State Dep't of Transp., 442 So. 2d 276, 277 (Fla. 4th Dist. Ct. App. 1983).

145. *See supra* Section II.D.

146. *Mitchell Maint. Sys.*, 442 So. 2d at 277.

contractor indemnify the Department where the parties were jointly negligent, despite the absence of any language regarding joint negligence.[147] The court reasoned that the exception in the provision stating that indemnity would not apply to the sole negligence of the indemnitee, implied that the provision would apply under circumstances where the indemnitor was negligent or where the parties were jointly negligent.[148]

The conflicting opinions by *Acosta* and *Mitchell* on the possibility that indemnity for joint negligence may be implied in the absence of any express language of "joint negligence," makes predicting how the Florida courts would rule on such indemnity provisions difficult.[149] Thus, drafters should not leave room for judges to choose between the authority of *Acosta* and the authority of *Mitchell*, but should instead insert express language into their indemnity provisions regarding indemnity for joint negligence.[150]

B. *Joint Negligence Indemnity Based on Specific Conduct*

City of Jacksonville v. Franco[151] involved a collision between a motor vehicle and a train operating in the City of Jacksonville ("City").[152] The estate of the motor vehicle driver sued the train owner/operator, Seaboard, as well as the City.[153] The City was responsible, pursuant to a contract with Seaboard, for operating a traffic signal preceding the train tracks that gave motorists enough time to stop for an oncoming train or to proceed across the tracks.[154] Seaboard maintained its responsibility to operate its railroad warning signals, pursuant to the same contract.[155] Further, the contract allowed the City to install an interconnection system, syncing the operation of the railroad signal with the traffic signal, but it was revealed that a City engineer had removed this interconnection system prior to the collision at issue in the case.[156]

147. *See id.* at 278.
148. *See id.*
149. *Compare id.* (holding that the intent to indemnify for joint negligence may be inferred in the absence of language that clearly states that intent), *with* Acosta v. United Rentals (N. Am.), Inc., No. 8:12-CV-01530, 2013 WL 869520, at *5 (M.D. Fla. Mar. 7, 2013) (holding that the intent to indemnify for joint negligence may not be inferred in the absence of language that clearly states that intent).
150. *See generally Mitchell Maint. Sys.*, 442 So. 2d at 278; *Acosta*, 2013 WL 869520, at *5.
151. 361 So. 2d 209 (Fla. 1st Dist. Ct. App. 1978).
152. *Id.* at 210.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Franco*, 361 So. 2d at 210–11.

Seaboard filed a third-party claim against the City for contractual indemnity.[157] The indemnity language at issue stated

> Railroad shall have *no responsibility or liability* for any loss of life or injury to person, or loss of or damage to property, growing out of or arising from the irregular operation of the traffic signals of County and/or the railroad train approach warning signals *resulting from or in any manner attributable to the interconnection of County's traffic signals* with the said railroad train approach warning signals, and County insofar as it lawfully may, agrees to indemnify and save Railroad harmless from *all such loss*, injury or damage; PROVIDED, HOWEVER, AND IT IS DISTINCTLY UNDERSTOOD AND AGREED that the provisions of this article shall have no application to any loss, injury or damage growing out of or resulting from the failure or improper operation of the railroad train approach warning signals when such failure or improper operation is not attributable to the presence or existence of County's interconnection with the warning signals of the Railroad; *it being the intention of the parties* that Railroad shall have and assume the same responsibilities and obligations with respect to the railroad train approach warning signals and the operation thereof that it had prior to the installation of the interconnection of County's traffic signals with said railroad train approach warning signals and no others, and that County shall have and assume sole responsibility for its interconnection with the said railroad train approach warning signal and the operation or functioning *thereof*.[158]

On the plaintiff's main claim against Seaboard and the City, a jury ultimately entered a verdict in favor of the plaintiff, charging the City with ninety percent of the negligence for the collision, charging Seaboard with eight percent of the negligence, and charging the plaintiff with two percent of the negligence.[159] The only question remaining was whether Seaboard was entitled to indemnity from the City.[160]

In regard to Seaboard's third-party claim for indemnity against the City, the jury held that Seaboard was not entitled to full indemnity from the City, but was entitled to be indemnified to the extent that the City was itself negligent—the jury essentially treated the indemnity provision as a provision that only provides indemnity for the City's negligence.[161] On appeal, the First

157. *Id.* at 210, 211.
158. *Id.* at 211 (emphasis added).
159. *Id.*
160. *Id.*
161. *Franco*, 361 So. 2d at 211.

District Court of Appeal held that, while the indemnity provision did not require the City to indemnify the railroad for the railroad's sole negligence, the provision did require the City to indemnify the railroad for damages arising from the operation of the traffic signals, but not from the operation of the railroad signals.[162] While at first glance it may appear as though the court interpreted the provision as though it only required the City to indemnify Seaboard for the City's negligence, the court's discussion of the jury's decision to charge Seaboard with eight percent of the negligence for the collision reveals the court actually interpreted this provision as a joint indemnity provision.[163] Specifically, the court reasoned

> Thus, it is that if the jury concluded that Seaboard was, in the degree of negligence assigned to it, derelict in not taking some action to require the City to conform to its contract and to keep the City's warning interconnect system in operational order, or because of some other kindred type logic, we note that such nonaction related to, and was directly attributable to, the failure of the City to maintain the interconnect warning system in accordance with its contract. This tragedy was a direct outgrowth of the action of the city engineer in disconnecting from the City's traffic control box the interconnect warning system and the failure of the City over a period of years to cause the same to be reconnected.[164]

The First District judge reasoned that, because the record is clear that the cause of this collision was the removal of the interconnect warning system by the City engineer, and because the jury still assigned eight percent of the fault for this collision to Seaboard, the jury must have come to the conclusion that Seaboard was somehow negligent in connection with the interconnect warning system.[165] Responsibility for the interconnect warning system was placed on the City pursuant to the contract, so the question which the court was left to

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162. *Id.* at 211–12.
163. *Id.* at 212.
164. *Id.*
165. *Id.* at 210–11. In discussing the alleged cause of this collision, the court stated

> The record reveals . . . [s]ome years before this tragic accident, a city engineer decided to disconnect this interconnect system located within the traffic control box owned by the City and such system was not thereafter reconnected. This action was known by other responsible traffic engineers of the City and County. When this accident occurred, the railroad crossing was protected by flashing lights, warning bells and gates, all in conformity with maximum safety regulations. All such safety warning signals were operating in proper fashion. The record further reflects that the train had its headlights on and its whistle was blowing. The speed of the train was within the range set for that area.

Franco, 361 So. 2d at 210–11.

grapple with was whether Seaboard was entitled to indemnity from the City even if its own negligence contributed to the failure/removal of the interconnect warning system.[166] Looking to the language of the contract provision, the court reasoned that the provision would not require indemnity for Seaboard's "sole" negligence, but it would provide indemnity for Seaboard's "contributing negligence, if any there be."[167] On this basis, the First District Court of Appeal reversed the decision of the trial court and ordered the City to indemnify Seaboard for the entire amount of the verdict.[168]

There are notable differences between the joint indemnity language used in the contract in *Franco* and the joint indemnity language used in other cases.[169] First, in the provision in *Franco*, the drafters of the provision chose to apportion liability for specific actions that would be undertaken by the parties, pursuant to the contract.[170] This differs from the more all-encompassing scope of the joint indemnity provisions seen in other cases.[171] Second, the provision in *Franco* lacks the "in part" language, which has been a cornerstone in other cases in which courts have found joint indemnity to exist.[172] The First District Court of Appeal did apply the "clear and unequivocal language" standard to the clause in *Franco*, as has been held to apply to joint indemnity clauses in other cases.[173] Notably, the court here was faced with a unique situation that does not feature in the other joint indemnity cases: this court was faced with a jury verdict assigning fault to the indemnitee, while at the same time being faced with a court record establishing that the cause of the collision was the responsibility of the indemnitor pursuant to the contract between the indemnitee and the indemnitor.[174] It is unclear exactly why the court did not conclude that this provision would indemnify Seaboard even for its own negligence, solely in regard to the interconnection warning system, but perhaps the court found the contract language insufficiently direct for such a holding and opted instead to remedy the unique

166. *Id.* at 211, 212.
167. *Id.* at 212.
168. *Id.*
169. *See Franco*, 361 So. 2d at 211; Gulfstream Park Racing Ass'n v. Gold Spur Stable, Inc., 820 So. 2d 957, 961–62 (Fla. 4th Dist. Ct. App. 2002); Leonard L. Farber Co. v. Jaksch, 335 So. 2d 847, 847–48 (Fla. 4th Dist. Ct. App. 1976); Church & Tower of Fla., Inc. v. Bellsouth Telecomms., Inc., 936 So. 2d 40, 41 (Fla. 3d Dist. Ct. App. 2006).
170. *Franco*, 361 So. 2d at 211.
171. *Gulfstream Park Racing Ass'n*, 820 So. 2d at 961–62; *Jaksch*, 335 So. 2d at 847–48; *Church & Tower of Fla., Inc.*, 936 So. 2d at 41.
172. *Franco*, 361 So. 2d at 211; *Gulfstream Park Racing Ass'n*, 820 So. 2d at 963; *Jaksch*, 335 So. 2d at 847; *Church & Tower of Fla., Inc.*, 936 So. 2d at 41.
173. *Franco*, 361 So. 2d at 211–12; *Gulfstream Park Racing Ass'n*, 820 So. 2d at 962; *Jaksch*, 335 So. 2d at 848; *Church & Tower of Fla., Inc.*, 936 So. 2d at 41.
174. *Franco*, 361 So. 2d at 210–11, 211–12.

situation in this case by holding that the clause provided for indemnity where the parties were jointly negligent in regard to the interconnection warning system.[175] While the clause in *Franco* did ultimately provide joint indemnity and provides support for a joint indemnity provision that assigns fault to parties more specifically by action under the contract, utilizing the "in part" language of other joint indemnity cases would likely increase the likelihood of success regarding joint indemnity contracts.[176]

C. *Joint Negligence Indemnity Language Disfavored by Florida Courts*

1. General Language Always Disfavored

The indemnity language at issue in *Charles Poe Masonry, Inc.* demonstrates the common mistake made by drafters, when attempting to preclude any possible claim, by using broad language in their indemnity provisions, such as "any and all claims," or simply "all claims."[177] As mentioned previously, the language at issue in *Charles Poe Masonry, Inc.*, was as follows: "[Charles Poe] 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 [Spring Lock] harmless from all such claims."[178] The Supreme Court of Florida rejected the "general terms" of this provision, declining to hold that this clause could provide indemnity for the joint negligence of the parties.[179] The Court instead held that the proper interpretation of clauses which use general language, is that these clauses merely require the indemnitor to indemnify the indemnitee when the indemnitee is exposed to any claim based on vicarious liability, but indemnity is not required when the indemnitee is exposed to claims based on its own affirmative misconduct.[180]

Over a decade later, the Supreme Court of Florida would reinforce the ruling in *Charles Poe Masonry* along the same reasoning.[181] The overly general "any and all claims" language was at play yet again in *Cox Cable*

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175. *Id.* at 211–12.

176. *Id.*; *Gulfstream Park Racing Ass'n*, 820 So. 2d at 961–62; *Jaksch*, 335 So. 2d at 847–48; *Church & Tower of Fla., Inc.*, 936 So. 2d at 41.

177. Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equip. Co., 374 So. 2d 487, 489 (Fla. 1979); *see also* Univ. Plaza Shopping Ctr., Inc. v. Stewart, 272 So. 2d 507, 508, 511 (Fla. 1973); On Target, Inc. v. Allstate Floridian Ins., 23 So. 3d 180, 184–85 (Fla. 2d Dist. Ct. App. 2009).

178. *Charles Poe Masonry, Inc.*, 374 So. 2d at 489.

179. *Id.*

180. *Id.*

181. Cox Cable Corp. v. Gulf Power Co., 591 So. 2d 627, 629 (Fla. 1992).

Corp. v. Gulf Power Co.[182] The case was appealed to an appellate court, which granted summary judgment, holding the general "any and all" language was sufficient to impose indemnity for joint acts of negligence.[183] The Supreme Court of Florida rejected this argument and reversed the appellate court; citing to *Charles Poe Masonry* and *University Plaza Shopping Center v. Stewart*, the Court reaffirmed the rule that the clear and unequivocal standard applied to impose a requirement of indemnity for joint negligence.[184]

The United States District Court for the Middle District of Florida in *Bankers Insurance v. American Team Managers, Inc.*,[185] quickly dismissed any notion that the indemnity clause at issue could provide indemnity for joint acts of negligence.[186] The clause read: "The General Agent [ATM] agrees to indemnify and hold the Company [Bankers] . . . harmless against and in respect to any and all claim . . . demands, actions, proceedings, liability, losses, damages, judgments, costs and expenses, including . . . which arise, directly or indirectly out of any act or omission of the General Agent . . . ."[187] The Middle District distinguished the clause in this case from the clauses in *Jaksch* and *Gulfstream Park*, and held that this language was not sufficiently clear to provide indemnity for the negligence of both parties jointly.[188]

Florida state courts have also rejected the overly broad "any and all" language in indemnity agreements seeking to cover the joint negligence of the parties in *Florida Power & Light Co. v. Elmore*,[189] *H & H Painting & Waterproofing Co. v. Mechanic Masters, Inc.*,[190] and *Church & Tower of Florida, Inc. v. Bellsouth Telecommunications, Inc.*[191] This language is employed often but should be avoided by drafters attempting to provide for indemnity for joint negligence due to the long line of precedent rejecting the overly-broad language.[192]

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182. *Id.*
183. *Id.* at 628.
184. *Id.* at 629.
185. No. 10-cv-2650, 2012 WL 2179117 (M.D. Fla. June 13, 2012).
186. *Id.* at 4.
187. *Id.*
188. *Id.*
189. 189 So. 2d 522, 523 (Fla. 3d Dist. Ct. App. 1966).
190. 923 So. 2d 1227, 1229 (Fla. 4th Dist. Ct. App. 2006).
191. 936 So. 2d 40, 41 (Fla. 3d Dist. Ct. App. 2006).
192. *See e.g., Elmore*, 189 So. 2d at 522; *H & H Painting*, 923 So. 2d at 1227; *Church & Tower of Fla., Inc.*, 936 So. 2d at 41.

2. Language Providing for Indemnity for the Negligence of the Indemnitor

Language in an indemnity agreement stating that the indemnitor will provide indemnity for the indemnitor's own negligence, would not support an interpretation that the agreement provides indemnity for the joint negligence of the parties.[193] This was the situation in *Royal Palm Hotel Property, LLC v. Deutsche Lufthansa Aktiengesellschaft, Inc.*[194] Factually, this case arose when an airline employee, staying at a hotel, attempted to open a hotel window, resulting in the window falling out of its frame and striking another patron.[195] The patron sued the airline and the hotel alleging negligence.[196] The airline filed a crossclaim against the hotel, asserting a claim for contractual indemnity pursuant to an agreement between the two.[197] The agreement stated: "[t]he Hotel agrees to indemnify and hold [airline] harmless from all liabilities, including damage to property or injury or death of persons, including [airline] property and [airline] personnel that may result from the negligence or wilful [sic] misconduct of the Hotel."[198] Reviewing this language, the Third District Court of Appeal concluded that the agreement failed to meet the clear and unequivocal standard to support an interpretation that the hotel indemnify the airline for any of the airline's negligence.[199] The court specifically noted that the language "that may result from the negligence . . . of the Hotel" was particularly fatal to an interpretation that the airline should be indemnified for its own negligence, given that the provision only specified that it applied to the negligence of the hotel.[200]

Royal Palm Hotel Property, LLC further supports the notion that parties intending to provide for a specific type of indemnity should expressly state the type of indemnity they desire.[201] A provision stating one type of indemnity (i.e., indemnity for the negligence of the indemnitor) will not be read to imply that other types of indemnity subject to a strict interpretation standard (indemnity for joint negligence or indemnity for the indemnitee's

193. Royal Palm Hotel Prop., LLC v. Deutsche Lufthansa Aktiengesellschaft, Inc., 133 So. 3d 1108, 1111 (Fla. 3d Dist. Ct. App. 2014).
194. 133 So. 3d 1108 (Fla. 3d Dist. Ct. App. 2014).
195. *Id.* 1109.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Royal Palm Hotel Prop., LLC*, at 1111.
200. *Id.*
201. *Id.*

sole negligence, both of which are subject to the clear and unequivocal standard) may also have been intended by the contracting parties.[202]

D. *Location of the Indemnity Language*

While the "wholly or in part" language first encountered in *Jaksch* has been generally accepted by Florida courts as establishing a right to indemnity for the joint negligence of the parties, the language must be properly placed in the contract as a whole.[203] In *ATC Logistics Corp. v. Southeast Toyota Distributors, LLC*,[204] the First District Court of Appeal acknowledged it was faced with a similar, but different indemnity provision as that faced by the Fourth District Court of Appeal in *Jaksch*.[205] The provision at issue in this case read

> INDEMNIFICATION BY CARRIER
>
> (a) ATC shall indemnify and hold harmless SET from and against any and all losses, liabilities, damages, costs, fines, expenses, deficiencies, taxes and reasonable fees and expenses of counsel and agents, including any costs incurred in enforcing this Agreement, that SET may sustain, suffer or incur arising from (i) Carrier's failure or alleged failure to comply, *in whole or in part*, with any of its obligations hereunder . . . (iv) any claims by any third person with respect to death, injury or property damage caused by the maintenance or operation of any Car Carrier or the loading, transportation or unloading of Vehicles on or from a Car Carrier . . . .[206]

The issue in this case was whether the indemnity agreement required ATC to indemnify SET even for SET's own negligence or for the joint negligence of SET and another.[207] Factually, this case involved a security guard who was injured on the premises, thus implicating subsection (iv) of the indemnity agreement.[208] Subsection (i) of the agreement, pertaining to the

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202. *Id.*
203. ATC Logistics Corp. v. Se. Toyota Distribs., LLC, 188 So. 3d 96, 102 (Fla. 1st Dist. Ct. App. 2016).
204. 188 So. 3d 96 (Fla. 1st Dist. Ct. App. 2016).
205. *Id.* at 101.
206. *Id.* at 98.
207. *Id.*
208. *Id.* at 97–98, 102.

Carrier's failure to abide by its obligations under the contract, did not apply under the factual scenario presented in the case.[209]

The First District began its analysis by concluding that the "any and all" language under section (a) of the provision was insufficient, on its own, to require ATC to indemnify SET for SET's own negligence, pursuant to the Supreme Court of Florida's holding in *University Plaza Shopping Center, Inc.* discussed above.[210] The court then moved on to the possibility that the provision may require indemnity in circumstances of joint negligence.[211] Noticing the familiar "in whole or in part" language in the provision at issue, the court questioned whether it should follow the holding of the Fourth District in *Jaksch* and interpret the provision as requiring indemnity in circumstances of joint negligence.[212] While the court, as well as the parties, were in agreement that subsection (i) would provide indemnity for SET's joint negligence based on the holding in *Jaksch*, ATC argued, and the court ultimately agreed, that the "in whole or in part" language of subsection (i) could not be interpreted as also applying to subsection (iv), the provision at issue in the case.[213] Under this reasoning, the court both affirmed the validity of the "in whole or in part" language addressed by the holding of *Jaksch*, while also denying indemnity based on the joint negligence theory of indemnity because the necessary language was not placed in the correct provision.[214] As the court in *ATC* briefly mentioned however, separate provisions in a contract may be read in conjunction to support an interpretation that indemnity for joint negligence was intended by the parties to the contract.[215] This was the situation in *Camp, Dresser & McKee, Inc. v. Paul N. Howard Co.*[216]

E. *Interpreting Multiple Clauses in Conjunction*

Counsel advocating both for or against an obligation to indemnify will often argue that the applicable indemnity provision does not exist in a vacuum, but instead must be read in conjunction with other, related clauses in the

209. *ATC Logistics Corp.*, 188 So. 3d at 97–98, 102.

210. *Id.* at 99, 100; Univ. Plaza Shopping Ctr., Inc. v. Stewart, 272 So. 2d 507, 509, 511 (Fla. 1973).

211. *ATC Logistics Corp.*, 188 So. 3d at 100. The court cites to the *Charles Poe Masonry* case, acknowledging the holding that the same "clear and unequivocal" standard that applies to provisions indemnifying a party for its own negligence, has been held to apply to provisions indemnifying a party for joint negligence. *Id.* at 100–101.

212. *Id.* at 101.

213. *Id.* at 102.

214. *Id.* at 102–103.

215. *ATC Logistics Corp.*, 188 So. 3d at 102.

216. 853 So. 2d 1072, 1076 (Fla. 5th Dist. Ct. App. 2003).

contract.[217] The related provisions of a contract that tend to be argued as related to the indemnity provisions are the Limitation of Liability and the Rights and Responsibilities provisions.[218]

Camp, Dresser & McKee, Inc. was an indemnity case before the Fifth District Court of Appeal involving two contract provisions pertaining to indemnity:

> 6.30. To the fullest extent permitted by law, CONTRACTOR [Howard] shall indemnify and hold harmless OWNER [Orange County] and ENGINEER [CDM] and their agents and employees from and against all claims, damages, losses, and expenses including but not limited to attorneys' fees arising out of or resulting from the performance of the work, provided that any such claim, damage, loss or expense (a) is attributable to bodily injury, sickness, disease or death . . . and (b) is caused in whole or part by any negligent act or omission of CONTRACTOR [Howard], any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder.
>
> . . .
>
> 6.32. The obligations of CONTRACTOR [Howard] under paragraph 6.30 shall not extend to the liability of ENGINEER [CDM], his agents or employees arising out of the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications.[219]

The *Camp, Dresser & McKee, Inc.* case centered around a construction project in which CDM was hired to provide engineering work on the project and Howard was hired as the contractor on the project.[220] A subcontractor of Howard received an electric shock when a crane being used

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217. Gibbs v. Air Can., 810 F.2d 1529, 1536 (11th Cir. 1987); Container Corp. of Am. v. Seaboard Coast Line R.R., 401 So. 2d 936, 937 (Fla. 1st Dist. Ct. App. 1981).

218. *See Camp, Dresser & McKee Inc.*, 853 So. 2d at 1076, 1078 (reading limitation of liability provision in conjunction with indemnity provision); *Gibbs*, 810 F.2d at 1536 (reading limitation of liability provision in conjunction with indemnity provision); Gulfstream Park Racing Ass'n v. Gold Spur Stable, Inc., 820 So. 2d 957, 961–62 (Fla. 4th Dist. Ct. App. 2002) (reading limitation of liability provision and rights and responsibilities provisions in conjunction with indemnity provision); *Container Corp. of Am.*, 401 So. 2d at 937 (reading rights and responsibilities provision in conjunction with indemnity provision).

219. *Camp, Dresser & McKee Inc.*, 853 So. 2d at 1076.

220. *Id.* at 1075.

came into contact with a power line, arcing electricity from the line to the crane and then into the subcontractor.[221] The subcontractor sued CDM and that suit eventually settled.[222] CDM filed a separate claim for contractual indemnity against Howard.[223] On an appeal from the trial court's order granting Howard's summary judgment motion, CDM argued it was entitled to contractual indemnity from Howard even for its own negligence.[224]

The Fifth District Court of Appeal first held that the indemnity provision at issue (provision 6.30) clearly expressed the intention of the parties to obligate Howard to indemnify CDM even for its own negligence.[225] The court found persuasive the language "any such claim . . . regardless of whether or not it is caused in part by a party indemnified hereunder."[226] The court went on to note that provision 6.32, when read in tandem with provision 6.30, provides additional clarity that provision 6.30 was intended to require indemnity even if CDM was solely or partially at fault.[227] Provision 6.32 limited the scope of Howard's indemnity obligation under 6.30 by providing that Howard was not required to indemnify CDM specifically for its approval/preparation of designs, drawings, etc.[228] The court reasoned that if Howard were not obligated to indemnify CDM for its own negligence under 6.30 in the first place, 6.32 would have no reason to exist since 6.32 is limiting Howard's indemnity obligations regarding CDM's negligence specifically.[229]

While *Camp, Dresser & McKee, Inc.* dealt with an indemnity provision being interpreted in conjunction with a limitation/clarification provision, the court in *Container Corp. of America v. Seaboard Coast Line Railroad Co.*[230] interpreted the indemnity provision in its case in conjunction with the general rights and responsibilities provisions of the contract.[231] The factual background of *Container Corp. of America* was as follows: Seaboard operated trains, which served Container Corp.[232] An employee of Seaboard was injured when he tripped and fell over a piece of rail sticking out of a side track used by Seaboard's trains.[233] The employee sued Seaboard for

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221. *Id.*
222. *Id.*
223. *Id.*
224. *Camp, Dresser & McKee Inc.*, 853 So. 2d at 1076–77.
225. *Id.* at 1077, 1078.
226. *Id.* at 1076, 1077, 1078.
227. *Id.* at 1078.
228. *Id.* at 1076, 1078.
229. *Camp, Dresser & McKee Inc.*, 853 So. 2d at 1078.
230. 401 So. 2d 936 (Fla. 1st Dist. Ct. App. 1981).
231. *Id.* at 937.
232. *Id.*
233. *Id.*

negligence and Seaboard sued Container Corp. for indemnity pursuant to its contract with Container Corp.[234]

The indemnity clause in Container Corp.'s contract provided,

> [Container] will indemnify and hold [Seaboard] harmless for loss, damage or injury from any act or omission of [Container], his employees or agents, to the person or property of the parties hereto and their employees, and to the person or property of any other person or corporation, while on our about the track, and *if any claim or liability other than from fire shall arise from the joint or concurring negligence of both parties hereto, it shall be borne by them equally*.[235]

Relying on the language "and *if any claim or liability . . . shall arise from the joint or concurring negligence of both parties hereto, it shall be borne by them equally*," Container Corp. argued that it should only be liable for its proportional share of liability to the employee since its negligence, as well as the negligence of Seaboard, jointly caused the employee's damages.[236] The First District Court of Appeal rejected this argument, beginning its rationale by examining the rights and responsibilities sections of the contract.[237] The contract first provided that Container Corp. had assumed "the duty of maintaining said trackage in safe condition . . . the duty of keeping the right of way adjacent . . . clean and free of all . . . objects which may be hazardous or dangerous to those engaged in the operation of" the trains operated by Seaboard.[238] The court explained that Container Corp. agreed to undertake responsibility for the track—the exact area where the harm had occurred—and agreed to indemnify Seaboard if any third party was harmed on the track.[239] The court then dismissed Container Corp.'s argument regarding the joint negligence limitation, reasoning that the only allegation in the employee's complaint pertained to the debris on the track—an allegation that fell directly within Container Corp.'s responsibilities under the contract—and, therefore, there was no allegation in the complaint by which Seaboard could have been jointly negligent (such as a separate allegation regarding Seaboard's operation of its trains).[240] The court thus held that Container Corp. was required to indemnify Seaboard for the full amount of any damages recovered by the

234. *Id.*
235. *Container Corp. of Am.*, 401 So. 2d at 937 (brackets in original).
236. *Id.*
237. *Id.*
238. *Id.* (internal quotation marks omitted).
239. *Id.*
240. *Container Corp. of Am.*, 401 So. 2d at 937.

employee since the contract provided for indemnity and the indemnity provision would not be limited under these circumstances because the employee's allegations pertained exclusively to Container Corp.'s responsibilities under the contract.[241]

Camp, Dresser & McKee, Inc. and *Container Corp. of America* provide contract drafters an additional tool to increase or decrease the likelihood that a court will interpret an indemnity provision to require indemnity for the joint negligence of the indemnitee.[242] Using a separate provision in a contract to either limit, or possibly even expand an existing indemnity provision can be used to specify the obligations of the parties and should be interpreted by the court in connection with any other indemnity provisions.[243]

Of brief mention, language found in addendum to the primary contract at issue may provide relevant language to the indemnity provision in the primary contract.[244] Addendums can be used by drafters to clarify, limit, or expand on an indemnity agreement, which may support or negate an intent to provide for indemnity for joint negligence.[245] For example, an addendum may qualify an indemnity provision by stating that the indemnity provision will not apply where the act or omission resulting in harm was solely caused from the negligence of the indemnitee.[246] This addendum language would likely support a holding in favor of joint negligence, assuming the indemnity provision itself contained sufficient language to indicate an intent to indemnify the indemnitee where the indemnitee was jointly negligent with the indemnitor or some third party in producing the harm.[247]

V. PROCEDURE

Whether joint negligence exists—that is, whether each contracting party had committed negligence—is generally a question of fact for the jury to determine.[248] On the other hand, the interpretation of a contract is generally

241. *Id.*

242. *Id.*; *Camp, Dresser & McKee*, 853 So. 2d at 1078.

243. *Camp Dresser & McKee*, 853 So. 2d at 1078; *Container Corp.*, 401 So. 3d at 937.

244. Leonard L. Farber Co. v. Jaksch, 335 So. 2d 847, 848 (Fla. 4th Dist. Ct. App. 1976).

245. *Id.*

246. *Id.*

247. *Id.* at 848–849.

248. Gulfstream Park Racing Ass'n v. Gold Spur Stable, Inc., 820 So. 2d 957, 962 (Fla. 4th Dist. Ct. App. 2002); Marino v. Weiner, 415 So. 2d 149, 151 (Fla. 4th Dist. Ct. App. 1982). It is possible for the parties to stipulate that each was jointly negligent in producing the harm at issue. *Jaksch*, 335 So. 2d at 848. This would leave the court to determine whether

a question of law for the judge to determine.[249] This generally results in the need for a jury trial when reaching an ultimate determination as to whether joint or sole negligence existed, but the question of whether an indemnity contract provides for indemnity in the case of joint negligence to begin with, is often ruled on by the judge prior to trial.[250] An indemnity provision is to be interpreted in favor of the indemnitor where the contract as a whole does not have indemnity as its primary purpose.[251]

Claims for contractual indemnity are normally brought by a defendant in the main action (the indemnitee) and either another defendant already named in the main action or against a third party who has not been brought into the case (the indemnitor).[252] Where the indemnitor is already a defendant in the main action, the indemnitee will state his/her contractual indemnity claim through a crossclaim.[253] Where the indemnitor is not a defendant in the main action, the indemnitee will state his/her contractual indemnitee claim through a third party complaint.[254] A complaint for contractual indemnity may, but is not required to be, filed after a judgment in the main action against the indemnitee.[255]

An important defense that is commonly raised to contractual indemnity claims where both the indemnitee and the indemnitor are named defendants in the main action, is that the indemnity provision does not apply because the plaintiff has sued the indemnitee for his/her own negligence, not for the negligence of the indemnitor or for the joint negligence of the indemnitor.[256] This defense could only be attempted where the indemnity provision in the contract does not provide indemnity for the indemnitee's sole negligence—the provision only provides indemnity for the negligence of the indemnitor or for the joint negligence of the indemnitee and the indemnitor.[257] Essentially, the indemnitor is arguing that, because the indemnity provision

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the contract at issue would provide for indemnity for the stipulated joint negligence of the parties, forgoing the need for a jury. *Id.* at 848–849.

249. Jackson v. Shakespeare Found., Inc., 108 So. 3d 587, 593 (Fla. 2013).

250. *See Marino*, 415 So. 2d at 151.

251. Barton-Malow Co. v. Grunau Co., 835 So. 2d 1164, 1166 (Fla. 2d Dist. Ct. App. 2002).

252. *See e.g., Jaksch*, 335 So. 2d at 847; Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equip. Co., 374 So. 2d 487, 488 (Fla. 1979).

253. *See e.g., Jaksch*, 335 So. 2d at 847.

254. *See Charles Poe Masonry, Inc.*, 374 So. 2d at 488.

255. BP Prods. N. Am., Inc. v. Giant Oil, Inc., 545 F. Supp. 2d 1257, 1260–61 (M.D. Fla. 2008).

256. White Springs Agric. Chems., Inc. v. Gaffin Indus. Servs., Inc., No. 11-cv-998, 2014 WL 905577, at *6 (M.D. Fla. Mar. 7, 2014); *see also* Guerrero v. City of Coral Gables, No. 21-cv-21122, 2021 WL 6062724, *2–4 (S.D. Fla. 2021).

257. *White Springs Agric. Chems., Inc.*, 2014 WL 905577, at *3, 6.

only imposes a duty to indemnify on the indemnitor where the indemnitee is not solely negligent and because the plaintiff's complaint in the main action alleges misconduct exclusively against the indemnitee (in the counts alleged against the indemnitee), the indemnity provision in the contract does not apply because of the plaintiff's characterization of the indemnitee's wrongdoing.[258] This defense has been rejected by Florida courts.[259] Courts have held that it is not the characterization by the plaintiff of the indemnitee's misconduct, but instead the courts will look at the facts of the case, including discovery conducted in the case, to determine if an indemnity provision may apply to the circumstances.[260] Despite the adverse caselaw on this defense, it may still be argued by counsel for the indemnitor, but the precedent cited should result in courts looking to the facts of the underlying case to determine if an indemnity provision applies, instead of looking to the plaintiff's characterizations in his/her complaint.[261]

VI. SAMPLE CONTRACTUAL INDEMNITY LANGUAGE FOR THE JOINT NEGLIGENCE OF THE INDEMNITEE

Caselaw in Florida provides numerous examples of indemnity contract language that has been held to require indemnity for joint negligence.[262] These examples are useful to draft indemnity provisions using language that has been approved by Florida courts.[263] The following examples are indemnity provisions from four cases in which each court held that

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258. *Id.* at *6.

259. CSX Transp., Inc. v. Becker Sand & Gravel Co., 576 So. 2d 902, 904 (Fla. 1st Dist. Ct. App. 1991); Am. Home Assurance Co. v. City of Opa Locka, 368 So. 2d 416, 419 (Fla. 3d Dist. Ct. App. 1979); *White Springs Agric. Chems., Inc.*, 2014 WL 905577, at *7; *see also* Metro. Dade County v. Fla. Aviation Fueling, Inc., 578 So. 2d 296, 299 (Fla. 3d Dist. Ct. App. 1991) (per curiam).

260. *CSX Transp., Inc.*, 576 So. 2d at 904; *Am. Home Assurance Co.*, 368 So. 2d at 419; *White Springs Agric. Chems., Inc.*, 2014 WL 905577, at *7; *see also Metro. Dade County.*, 578 So. 2d at 299.

261. *CSX Transp., Inc.*, 576 So. 2d at 904; *Am. Home Assurance Co.*, 368 So. 2d at 419; *White Springs Agric. Chem., Inc.*, 2014 WL 905577, at *7; *see also Metro. Dade County.*, 578 So. 2d at 299.

262. *See e.g.*, Leonard L. Farber Co. v. Jaksch, 335 So. 2d 847, 848–49 (Fla. 4th Dist. Ct. App. 1976); Church & Tower of Fla., Inc. v. Bellsouth Telecomms., Inc., 936 So. 2d 40, 41 (Fla. 3d Dist. Ct. App. 2006); Marino v. Weiner, 415 So. 2d 149, 151 (Fla. 4th Dist. Ct. App. 1982); Mitchell Maint. Sys. v. State Dep't of Transp., 442 So. 2d 276, 277 (Fla. 4th Dist. Ct. App. 1983).

263. *See Jaksch*, 335 So. 2d at 848–49; Camp, Dresser & McKee, Inc. v. Paul N. Howard Co., 853 So. 2d 1072, 1078 (Fla. 5th Dist. Ct. App. 2003); R.C.A. Corp. v. Pennwalt Corp., 577 So. 2d 620, 621 (Fla. 3d Dist. Ct. App. 1991); City of Jacksonville v. Franco, 361 So. 2d 209, 211–12 (Fla. 1st Dist. Ct. App. 1978).

indemnity for joint negligence was required.[264] Each provision features different key language essential in each judge's ruling that joint negligence indemnity was required.[265]

The *Jaksch* case demonstrates the importance of the "wholly or in part" language in indemnity provisions.[266] This was the first case to approve the "wholly or in part" language and this key language has been approved more frequently in subsequent cases than any other key language, making it particularly useful for drafters.[267] The indemnity provision reads,

> [Indemnitor] shall indemnify [indemnitee] and save it harmless from suits, actions damages, liability and expense in connection with loss of life, bodily or personal injury or property damage arising from or out of any occurrence [arising under this contract], or occasioned wholly or in part by any act or omission of [indemnitor]; its agents, contractors, employees, servants, invitees, licensees . . . . [Notwithstanding the indemnity provision above] [indemnitee] shall not be relieved of any liability resulting solely from the negligence of [indemnitee] or of its agents or employees.[268]

The *Camp, Dresser & McKee, Inc.* case, in addition to the "in whole or in part" language, also features the "regardless of whether or not [the negligence] is caused by [the indemnitee]" language.[269] *Camp, Dresser & McKee, Inc.* is the only appellate-level case in which this language has been tested, but the Fifth District Court of Appeal made clear that this language does clearly and unequivocally reveal an intent to provide indemnity for joint negligence.[270] The indemnity provision in *Camp, Dresser & McKee, Inc.* stated

> To the fullest extent permitted by law, [indemnitor] shall indemnify and hold harmless [indemnitee] and their agents and employees from and against all claims, damages, losses, and expenses including but not limited to attorneys' fees arising out of or resulting from the performance of the work, provided that any such claim, damage, loss or expense (a) is attributable to bodily injury, sickness,

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264. *See Jaksch*, 335 So. 2d at 848–49; *Camp, Dresser & McKee, Inc.*, 853 So. 2d at 1078; *R.C.A. Corp.*, 577 So. 2d at 621; *Franco*, 361 So. 2d at 211–12.

265. *See Jaksch*, 335 So. 2d at 848–49; *Camp, Dresser & McKee, Inc.*, 853 So. 2d at 1078; *R.C.A. Corp.*, 577 So. 2d at 621; *Franco*, 361 So. 2d at 211–12.

266. *Jaksch*, 335 So. 2d at 847–49.

267. *See e.g.*, *Church & Tower of Fla., Inc.*, 936 So. 2d at 41; *Marino*, 415 So. 2d at 151; *Mitchell Maint. Sys.*, 442 So. 2d at 277.

268. *Jaksch*, 335 So. 2d at 847–48.

269. *Camp Dresser & McKee, Inc.*, 853 So. 2d at 1076, 1077.

270. *Id.* at 1078.

> disease or death . . . and (b) is caused in whole or part by any negligent act or omission of [indemnitor] anyone directly or indirectly employed by any of them or anyone for whose acts [they] may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder.[271]

The *R.C.A. Corp.* case featured the "except due to the sole negligence of the indemnitee" language approved by the Third District Court of Appeal as requiring indemnity for joint negligence.[272] This language implies joint negligence is covered within its scope by exclusively limiting its scope to situations where the indemnitee is solely negligent.[273] Despite merely implying coverage for joint negligence, this language has also been approved by the First and Fourth District Courts of Appeal, as well as the federal Middle District of Florida.[274] The indemnity contract in the *R.C.A. Corp.* case provided

> [Indemnitor] shall take all necessary precautions to prevent the occurrence of any injury (including death) *to any person*, or any damage to any property, arising out of any acts or omissions of such agents, employees, or subcontractors, *and except to the extent that any such injury or damage is due solely and directly to [indemnitee's] negligence*, shall indemnify [indemnitee] against any loss, claim, damages, liability, expense (including reasonable attorneys' fees) and cause of action, whatsoever, arising out of any act or omission of the [indemnitor], its agents, employees or subcontractors . . . .[275]

When drafters intend to provide for indemnity for the parties' joint negligence regarding certain actions under the contract, but not for other actions under the contract, the *Franco* case provides a good model.[276] The First District Court of Appeal approved the indemnity provision as covering the joint negligence of the parties.[277] The provision in *Franco* read

> Railroad shall have *no responsibility or liability* for any loss of life or injury to person, or loss of or damage to property, growing out of or arising from the irregular operation of the traffic signals of

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271. *Id.* at 1078.
272. *R.C.A. Corp.*, 577 So. 2d at 621, 622.
273. *Id.* at 622.
274. Acosta v. United Rentals (N. Am.) Inc., No. 8:12-CV-01530, 2013 WL 869520, at *5 (M.D. Fla. Mar. 7, 2013).
275. *R.C.A. Corp.*, 577 So. 2d at 621.
276. *Franco*, 361 So. 2d at 211–212.
277. *Id.* at 212.

> County and/or the railroad train approach warning signals *resulting from or in any manner attributable to the interconnection of County's traffic signals* with the said railroad train approach warning signals, and County insofar as it lawfully may, agrees to indemnify and save Railroad harmless from *all such loss*, injury or damage; PROVIDED, HOWEVER, AND IT IS DISTINCTLY UNDERSTOOD AND AGREED that the provisions of this article shall have no application to any loss, injury or damage growing out of or resulting from the failure or improper operation of the railroad train approach warning signals when such failure or improper operation is not attributable to the presence or existence of County's interconnection with the warning signals of the Railroad; *it being the intention of the parties* that Railroad shall have and assume the same responsibilities and obligations with respect to the railroad train approach warning signals and the operation thereof that it had prior to the installation of the interconnection of County's traffic signals with said railroad train approach warning signals and no others, and that County shall have and assume sole responsibility for its interconnection with the said railroad train approach warning signal and the operation or functioning thereof.[278]

This sample can be useful to customize a contract such that a certain degree of indemnity applies to one action under the contract, whereas a separate degree of indemnity applies to another action, as the parties see fit.[279]

VII. CONCLUSION

A client's litigation outlook can differ dramatically depending on whether a contractual provision requires indemnity only for the indemnitor's negligence, for the joint negligence of the parties, or even the negligence of the indemnitee.[280] Indemnity for the parties' joint negligence is the most recent variety of contractual indemnity recognized by Florida courts and, although it is held to the same interpretation standard as indemnity provisions covering the indemnitee's sole negligence, the contract language approved for these types of indemnity differs.[281] By understanding the rules applicable to and the language approved for contractual indemnity for joint negligence,

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278. *Id.* at 211.

279. *Id.* at 211–12.

280. *Compare Charles Poe Masonry, Inc.*, 374 So. 2d at 489–90, *with R.C.A. Corp.*, 577 So. 2d at 622.

281. *See e.g.*, *Jaksch*, 335 So. 2d at 848–49; *Camp, Dresser & McKee, Inc.*, 853 So. 2d at 1078; *R.C.A. Corp.*, 577 So .2d at 621; *Franco*, 361 So. 2d at 211–12.

drafters can employ or avoid this language in their own contracts to better serve their clients' intentions.[282]

282. *See e.g.*, Transp. Intern. Pool, Inc. v. Pat Salmon & Sons of Fla., Inc., 609 So. 2d 658, 660 (Fla. 4th Dist. Ct. App. 1992).