



# Legal ALERT!

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Thomas B. Cronmiller  
585.295.4424  
[tcronmiller@hblaw.com](mailto:tcronmiller@hblaw.com)

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## New York's Highest Court Permits Vicariously Liable Owner to Shift Entire Loss to Contractor under Common Law Indemnification.

In *Cunha v. City of New York*, Plaintiff Severino Cunha, a laborer employed by JLJ Enterprises, Inc. ("JLJ"), the prime contractor of a project, alleged that he sustained personal injuries during reconstruction of a roadway when a trench partially collapsed on him. Plaintiff was instructed by JLJ to go into the trench and dig by hand when it was determined by the City of New York ("NYC") and others that the use of machinery was not feasible given the proximity of telephone and utility lines. The trench was not protected by any shoring or sheeting and collapsed, causing injury to Cunha. NYC also hired HAKS Engineers, PC ("HAKS"), as the engineering inspector to ensure that JLJ's work conformed to plans and specifications. NYC's contract with HAKS required the engineer to indemnify and hold NYC harmless for all claims "arising out of the negligent performance of services, including professional services, or caused by any error, omission or negligent act of the Engineer, or anyone employed by the Engineer in the performance of this Contract."

Cunha sued NYC alleging various Labor Law violations. NYC brought a third-party action against HAKS for contractual and common-law indemnification. On the eve of trial, NYC conceded liability under Labor Law §241(6), admitting that inadequate shoring of the trench violated the Industrial Code, and settled with Cunha for \$1.2 million (NYC would pay \$800,000 of the settlement; HAKS would pay \$400,000). The third-party action proceeded to trial to determine the liability of HAKS to NYC.

At the end of a four-day trial, Supreme Court denied NYC's motion for a directed verdict, and asked the jury to determine if HAKS had been negligent, and if so to apportion its share of liability. The jury found HAKS was negligent, that HAKS' negligence was a substantial factor in causing the accident, and that HAKS was 40% at fault.

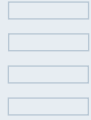
The Appellate Division, Second Department reversed the portion of the judgment limiting indemnification to 40%, and ruled HAKS 100% responsible for the damages that Cunha recovered from NYC. The Appellate Division determined that the trial court properly submitted the question of HAKS' negligence to the jury, but erred in asking the jury to assign a percentage of fault to HAKS.

The Appellate Division found: "...where, as here, an owner or general contractor is only held vicariously liable for violating the provisions of the Labor Law, that owner or general contractor is entitled to full common-law indemnification from the party actually responsible for the incident....In other words, the principles of common-law indemnification allow the party held vicariously liable to shift the entire burden of the loss to the actual wrongdoer."

On appeal to New York's Highest Court, HAKS argued that the Appellate Division erred in concluding that NYC was only vicariously liable. HAKS contended that NYC was unable to recover 100% common law indemnification from HAKS because NYC had voluntarily conceded liability to Cunha pursuant to Labor Law §241(6) without any determination having

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been made by a judge or jury that a violation occurred, classifying its liability as purely vicarious, and making a voluntary settlement payment to Cunha to secure its release, and when HAKS was adjudged to be only 40% at fault by the jury. HAKS also argued that NYC was entitled, at most, "to partial contractual indemnification for the 40% of damages that arose out of ... HAKS' negligence."

The Court of Appeals agreed with the Second Department, determining that an owner that is held strictly liable under the Labor Law is entitled to "...full indemnification from the party wholly at fault..." While the duty imposed by §241 may not be delegated, the burden may be shifted to the party actually responsible for the accident, either by way of a claim for apportionment of damages, or by contractual language requiring indemnification.

Moreover, New York's Highest Court reiterated that a party may settle and then seek indemnification from the party responsible for the wrongdoing as long as the settling party shows that it may not be held liable in any degree. The Court of Appeals found that the issue of NYC's active negligence was already determined by an earlier order of the Supreme Court dated April 3, 2006 which dismissed plaintiff's Labor Law §200 claim against NYC. Furthermore, during trial, HAKS conceded that NYC's active negligence was not at issue; it neither objected to nor disagreed with the Court's statements that NYC did not have any negligence and that NYC's only responsibility was pursuant to Labor Law §241(6).

In its appeal, HAKS also raised the issue of the potential liability of other parties relying on the Court's decision in *Frank v Meadowlakes Dev. Corp.* 6 N.Y.3d 687 (2006). In *Frank*, the Court held that CPLR Article 16 limited the amount that can be recovered in indemnity when a tortfeasor's liability is 50% or less. In that case, the injured plaintiff sued the owner of the job-site and the general contractor. Because the claim arose before the 1996 amendment to Workers Compensation Law §11, the owner thereafter brought a third-party action for indemnification against plaintiff's employer. At trial, the jury apportioned fault in the amount of 10% to plaintiff, 10% to plaintiff's employer and 80% to the general contractor. The court also directed a verdict against the owner and the general contractor based upon a violation of Labor Law §240(1). Plaintiff settled with the owner for \$1.4 million and with the general contractor for \$300,000.

The owner moved for common-law indemnification against the employer for 100% of its settlement liability. Plaintiff's employer appealed arguing, as relevant to this appeal, that because it was found only 10% at fault, it should be liable to the owner for only its proportionate share of negligence. The Appellate Division agreed, finding that the owner was not entitled to 100% recovery. In doing so, the Court held that the savings provision of CPLR §1602(2)(iv) applied and that recovery from Plaintiff's employer, as a party found 10% liable, was limited to its proportionate share with respect to non-economic damages.

The Court of Appeals distinguished *Cunha* from the *Frank* case in that no Article 16 issue existed inasmuch as no other tortfeasor could be found liable for Cunha's injuries. A likely interpretation of the jury's verdict is that the jury allocated culpability to Cunha's employer but here, JLJ's fault was irrelevant and should not have been before the jury. Plaintiff did not sustain a grave injury and thus, plaintiff's employer was not subject to the action. To the extent the jury may have considered Cunha himself at fault, his negligence must be excluded because he, like JLJ, cannot be an indemnitor. It is unlikely that the jury allocated active fault to NYC, but the burden was on HAKS to clarify it, by proposing an appropriate question to the jury. Once HAKS was found to be negligent - and since HAKS was the only possible negligent party to the lawsuit - NYC was entitled to 100% indemnification from HAKS. ■

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