O/a 9-2-83

IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,058

(Third District Court Case No. 81-1978)

CONTINENTAL VIDEO CORPORATION,
a Florida corporation,

Petitioner,

vs.

HONEYWELL, INC., a foreign
corporation, d/b/a HONEYWELL
PROTECTIVE SERVICES,

Respondent.

BRIEF OF AMICUS CURIAE

JEWELERS MUTUAL INSURANCE COMPANY

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I N T R O D U C T I O N

Petitioner/Plaintiff, CONTINENTAL VIDEO CORPORATION, will be referred to as "CONTINENTAL", while Respondent/Defendant, HONEYWELL, INC., will be referred to as "HONEYWELL".

STATEMENT OF THE CASE AND FACTS

Amicus Curiae, JEWELERS MUTUAL INSURANCE COMPANY, adopts the Statement Of The Case And Facts as set forth in Petitioner's Brief On The Merits.

POINT ON APPEAL

WHETHER THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN HOLDING THAT NO DEFENSES EXIST TO ENFORCEMENT OF EXCULPATORY AND LIQUIDATED DAMAGES CLAUSES WHICH PURPORT TO BAR LIABILITY FOR BREACH OF CONTRACT, NEGLIGENCE AND GROSS NEGLIGENCE.

ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT NO DEFENSES EXIST TO ENFORCEMENT OF EXCULPATORY CLAUSES WHICH PURPORT TO BAR LIABILITY FOR BREACH OF CONTRACT, NEGLIGENCE AND GROSS NEGLIGENCE.

The thrust of HONEYWELL's position is that regardless of the circumstances preceding the signing of the contract with the subscriber, and regardless of the nature of HONEYWELL's performance under the contract, HONEYWELL is either not liable to the subscriber, or is liable up to the nominal amount specified in the contract. HONEYWELL's position is predicated on paragraph 7 of its Installation and Service Agreement. Based thereon, HONEYWELL maintains that the trial Judge did not err when dismissing the Amended Complaint with prejudice without hearing any facts concerning the claims in Plaintiff's Amended Complaint that paragraph 7 is in fact a penalty and unenforceable because it does not provide just compensation in the event of injury, whether the waiver of liability is invalid because it is an adhesion contract due to the inequality of bargaining power between the parties which would make the terms illusory, or without hearing any facts concerning allegations that HONEYWELL's breach was knowing, intentional, in reckless disregard of Plaintiff's rights, or was grossly, wantonly or willfully negligent.

A. EXCULPATORY CLAUSE

HONEYWELL contends that the exculpatory clause in its contract does not make the contract illusory, unconscionable, or a contract of adhesion. In its Brief, HONEYWELL cites cases wherein the Courts rule that the exculpatory clause did not render the contract to be unconscionable, illusory, or a contract of adhesion. However, in each of those cases cited by HONEYWELL, wherein the issues of adhesion, inequality of bargaining power and unconscionability were raised, the ruling was made based on the evidence. In the case at bar, the trial court ruled on a Motion to Dismiss based on the four corners of the Complaint, without hearing any evidence. The trial court's ruling really means that regardless of the evidence, an exculpatory clause is valid and enforceable, even if it renders the contract to be a contract of adhesion due to the inequality of bargaining power between the parties, or that the enforcement of it renders the contract illusory. Such holding is contrary to the settled law in this State and in other States.

In Ivey Plants, Inc. vs. F.M.C. Corporation, 282 So.2d 205 (Fla. 4th DCA 1973) Cert. denied, 289 So.2d 731 (Fla. 1974), the court stated that:

> "No clear cut rule can be adduced from the various decisions of the courts of this state or our sister states as to the circumstances when exculpatory clauses will not be enforced. Public policy as well as the relationship of the parties to each other have been considered as significant determining factors. For example, where the relative bargaining power of the contracting parties is not equal and the clause seeks to exempt from liability for negligence the party who occupies a superior

> bargaining position, enforcement of the exculpatory clause has been denied... Ascertaining the relative bargaining positions of the contracting parties requires a consideration of material issues of fact, which, of necessity, would preclude the entry of summary judgment."

The inequality of bargaining power of the parties has provided a basis by which courts of other States have refused to enforce exculpatory clauses in contracts where there is an inequality of bargaining power. See, College Mobile Home Park & Sales, Inc. v. Hoffmann, 241 N.W. 2d 174 (Wis. 1976), Danna v. Con Edison Co., Inc., 337 NYS 2d 722 (Civ. Ct. NY 1972), Cardona v. Eden Realty Co., 288 A.2d 34 (NJ App. 1972), Hy-Grade Oil Co. v. New Jersey Bank, 350 A.2d 279 (NJ App. 1975), Phillips Home Furnishings, Inc. v. Continental Bank, 331 A.2d 840 (Pa. Super. 1974), and Weaver v. American Oil Company, 276 N.E. 2d 144 (Ind. 1971).

If HONEYWELL's position is accepted, then HONEYWELL would have the right to require the subscriber to make the monthly payments specified in the contract, while at the same time, HONEYWELL would be relieved of any liability for breach of the contract, even an intentional breach or a breach showing a reckless disregard for the rights of the subscriber. HONEYWELL could then require the subscriber to make monthly payments under a contract requiring HONEYWELL to provide guard response, while at the same time decide not even to hire any guards. In fact, HONEYWELL could require the subscriber to make monthly payments under the contract, and at the same time, knowingly allow its employees not to perform

the duties specified in the contract. Just as the court stated in Ivey Plants, supra, that "to read [the exculpatory clause] as Defendant suggests would result in Plaintiff being bound to pay the rental under the terms of the lease yet the Defendant would not be bound to perform its obligations under the terms of the lease", to read the exculpatory clause in the HONEYWELL contract, as HONEYWELL suggests, would result in CONTINENTAL VIDEO being forced to pay the monthly payments under the terms of the lease, yet HONEYWELL would not be bound to perform its obligations under the terms of the lease. HONEYWELL's contractual obligation "to make every reasonable effort to transmit the alarm properly" is rendered meaningless if the exculpatory clause absolves it from liability from failing to do so. What is the point of paying for burglar alarm protection, if HONEYWELL's obligation to respond to a burglar alarm signal cannot be enforced, and is therefore non-existent? Every HONEYWELL subscriber, although paying for burglar alarm protection, would be vulnerable to a decision by HONEYWELL and its employees to recklessly ignore an alarm signal in total disregard of the possible consequences. As is evident from the foregoing set of facts, HONEYWELL's position as regards the exculpatory clause alleviating all of its liability for failure to perform, is unreasonable, and is inconsistent with the law announced in numerous decisions in this State. See Ivey Plants, supra, Goyings v. Jack & Ruth Eckerd Foundation, 403 So.2d 144 (Fla. 2d DCA 1981); Sniffen v. Century National Bank of Broward, 375 So.2d 892 (Fla. 4th DCA 1979).

B. LIQUIDATED DAMAGES CLAUSE

HONEYWELL has contended that the contractual clause in question, paragraph 7 of the installation and service agreement, is a valid, liquidated damage provision, and not a penalty, and therefore, the trial court properly granted the Motion to Dismiss the Amended Complaint. The basic fallacy with HONEYWELL's contention is succintly stated in Nicholas v. Miami Burglar Alarm Co., Inc., 266 So.2d 64 (Fla. 3d DCA 1972), wherein the court said:

> "It is true that whether a sum specified in a contract represents a penalty or liquidated damages is a matter of law for the determination by the court. Smith v. Newell, supra. Nevertheless, it is clear that a proper determination of this question cannot be made solely from examining the Complaint." 266 So.2d at 66.

When the Florida Supreme Court later heard Nicholas v. Miami Burglar Alarm, 339 So.2d 175 (Fla. 1976), it ruled that a burglar alarm company, under contract to monitor an alarm system, may be liable for a loss in a burglary if its negligence was the proximate cause of the loss. The Court's ruling was made despite the presence of a clause in the contract almost identical to paragraph 7 of HONEYWELL's Installation and Service Agreement, and the Third District Court of Appeal's decision that the exculpatory clause did not bar the action. Certainly, if the Florida Supreme Court had been of the opinion that the clause was a liquidated damage provision, it would have concluded the action, and not remanded the case for further proceedings. The Supreme Court's remanding the case without enforcing the liquidated damage provision was consistent with settled Florida case law. Hutchinson v. Thompkins,

259 So.2d 129 (Fla. 1972); Stenor, Inc. v. Lester, 58 So.2d 673 (Fla. 1951); Pembroke v. Candill, 160 Fla. 948, 37 So.2d 538 (1948); Smith v. Newell, 37 Fla. 147, 20 So. 249 (1896). As those cases hold, all attempts to enforce limitation of liability/liquidated damage provisions raise the question of whether they in fact are penalties. The question of whether or not a liquidated damage provision is a penalty, in turn gives rise to the following material issues of fact: were the actual damages contemplated by the parties reasonably susceptible of ascertainment; is the liquidated or stipulated sum disproportionate to the actual damages; is the liquidated amount just compensation for the actual loss. While the eventual determination of whether a liquidated damage provision constitutes a penalty is a question of law for the court to decide, the decision requires a factual basis which cannot be determined fully by reading the four corners of the Complaint.

C. GROSS, WANTON OR WILLFUL NEGLIGENCE; RECKLESS DISREGARD OF PLAINTIFF'S RIGHT

Included in the Amended Complaint of CONTINENTAL VIDEO, is a Count alleging that HONEYWELL's acts were done knowingly and intentionally, constituted reckless disregard of Plaintiff's rights, and were gross, wanton and willful negligence. In spite of the foregoing allegations, the trial court dismissed the Amended Complaint with prejudice, and thereby held that the clause in question applies to exclude liability for intentional acts, for reckless acts, and for gross, wanton and willful negligence.

In general, and on the basis of common experience as to

what is intended, or of public policy to discourage aggravated wrongs, an attempted exemption from liability for gross, wanton or willful negligence is unforceable. Restatement of Contract 2d §195; Prosser, Law of Torts, 3rd Edition §67. Also, the express terms of the clause must be applicable to the particular misconduct of the Defendant. Prosser, supra. Based on these general principles, numerous cases have held that a contractual clause limiting liability is not applicable and not valid to acts of gross, wanton or willful negligence. Thomas v. Atlantic Coast Line Railroad Co., 201 F.2d 167 (5th Cir. 1953); Ringling Bros. Barnum & Bailey Circus Shows v. Olivera, 119 F.2d 584 (9th Cir. 1941) [both Thomas and Ringling applied Florida law]; Dilks v. Flor Chevrolet, Inc., 192 A.2d 682 (Pa. 1963); Kuzmiak v. Brookchester, 33 NJ Super 575 (App. Div. 1955).

The principle of law that a party cannot exclude or limit his liability for acts of gross negligence has been applied to prevent burglar alarm companies from excluding or limiting their liability upon a showing of gross negligence. Douglas W. Randall, Inc. v. AFA Protective Systems, 516 F.Supp. 1122 (E.D. Pennsylvania 1981); Factory Ins. Assoc. v. American District Telegraph Co., 277 So.2d 569 (Fla. 3rd DCA) cert. den. 284 So.2d 392 (Fla. 1973); Nicholas v. Miami Burglar Alarm Co., 266 So.2d 64 (Fla. 3d DCA 1972); Morgan Co. v. Minnesota Mining and Manufacturing Co., 246 N.W.2d 443 (Minn. 1976).

HONEYWELL's argument that the holding in Randall was limited to a showing of willful and wanton negligence, and not

gross negligence, is incorrect. Similarly, HONEYWELL's argument that the decision in Randall "was grounded upon interpretation of the alarm contract, not upon public policy" is totally incorrect. The court in Randall ruled as follows:

> "Under Pennsylvania law, exculpatory clauses to contracts relieving a party from liability for negligence are valid. Dilks v. Flohr Chevrolet, Inc. 411 Pa. 425, 192 A.2d 682 (1963). Such clauses, however, will be strictly construed against the party who seeks to limit its liability. Fidelity Leasing Corp. v. Dun & Bradstreet, Inc. 494 F. Supp. 786 (E.D.Pa. 1980); Richard's 5&10, Inc. v. Brooks Harvey Realty Investors, 264 Pa.Super. 384,399 A.2d 1103 (1979). The exculpatory clause in this action limits the defendant's liability only with respect to acts of negligence, and not for acts of gross negligence. Since the jury found that the defendant was grossly negligent, the exculpatory clause does not limit the defendant's liability to the plaintiff. Fidelity Leasing, supra. The defendant is therefore liable to the plaintiff for $14,330.00, the entire amount of damages awarded by the jury."
> 516 F.Supp. at 1127.

HONEYWELL's argument that, "even assuming arguendo that the exculpatory clause could not be held applicable to allegations of a gross breach, then the limitation of liability clause would apply" is totally incorrect. In Factory Ins., Randall, Morgan Co., and Nicholas, it was held that even a limitation of liability clause would not limit liability upon a showing of gross, willful or wanton negligence.

HONEYWELL's general proposition that a party may limit his liability for acts of gross, wanton or willful negligence is

inconsistent with established case law. Equally inconsistent with established case law, is HONEYWELL's contention that the clause in question should be broadly construed to apply to acts of not only simple negligence, but also acts of gross, wanton, or willful negligence. The clause in question makes no reference to gross, wanton or willful negligence. Yet HONEYWELL contends that the exculpatory clause should be broadly construed to extend two acts of gross, wanton and willful negligence. HONEYWELL argues on page 19 of its Answer Brief that a party to a contract should be able to legally exculpate itself from the consequences of its own negligence. However, the effect of the trial court's dismissal of the Amended Complaint with prejudice, is not only to exculpate HONEYWELL from the consequences of its own simple negligence, but also to exculpate HONEYWELL from the consequences of its intentionally wrongful acts, gross, willful and wanton negligence, and reckless disregard of Plaintiff's rights. Based on the settled case law, the clause in question should not be given a broad construction, but rather should be given a strict construction, and hence, would be inapplicable to limit liability for the extreme forms of misconduct alleged in the Complaint. See Fuentes v. Owen, 310 So.2d 458 (Fla. 3d DCA 1975).

The trial court's upholding of the liquidated damage provision in spite of the allegation that HONEYWELL's acts was the legal cause of CONTINENTAL VIDEO's loss and that HONEYWELL's acts constituted reckless disregard of Plaintiff's rights, were

made knowingly and intentionally, and constituted gross, wanton, and willful negligence, was reversible error.

CONCLUSION

JEWELERS MUTUAL INSURANCE COMPANY concurs with the statements in the Conclusion to CONTINENTAL VIDEO's Reply Brief, that a burglar alarm contract should be governed by the same law that applies to any other contract, that exculpatory clauses should be avoidable on proper proof, that liquidated damage clauses should be held to be penalties on proper proof, and that such clauses should be strictly construed and not applicable upon a showing of gross, willful or wanton negligence, reckless disregard for the rights of the subscriber, or intentional misconduct.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF AMICUS CURIAE JEWELERS MUTUAL INSURANCE COMPANY was on this 22nd day of July, 1983, mailed to:

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