O/a 9-2-83 017

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 63,058

Third District Case Number: 81-1978

CONTINENTAL VIDEO CORPORATION, a Florida corporation,

Petitioner,

vs.

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

Respondent.

AMICUS CURIAE BRIEF

OF

WELLS FARGO ALARM SERVICES

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INTRODUCTION

Leave has been granted for Wells Fargo Alarm Services to file this Amicus Curiae brief by this Court's order. Respondent HONEYWELL, Inc. will be referred to as Honeywell and Petitioner CONTINENTAL VIDEO CORPORATION will be referred to as Continental.

POINT ON APPEAL

THE DISTRICT COURT WAS CORRECT IN ENFORCING THE EXCULPATORY AND LIMITATION OF DAMAGES CLAUSES OF A CONTRACT FOR INSTALLATION AND MAINTENANCE OF A BURGLARY ALARM SYSTEM WHERE THE SUBSCRIBER TO THAT SYSTEM FAILED TO ALLEGE ANY INDEPENDENT TORT APART FROM A BREACH OF CONTRACT AND WHERE FLORIDA COURTS HAVE CONSISTENTLY RECOGNIZED THAT SUCH CLAUSES ARE NOT CONTRARY TO PUBLIC POLICY AND, THUS, VALID AND ENFORCEABLE.

ARGUMENT

I. INDEPENDENT TORT

The District Court was correct in dismissing the Plaintiff's complaint and enforcing the exculpatory and limitation of liability clauses contained within the subject contract where Continental made no allegations sufficient to constitute an independent tort action. Though Continental emphatically decries the decision below as "revolutionary, mind boggling and an affront to fundamental fairness", it conveniently ignores the basic, long-standing principal that "a mere breach of contract cannot be converted into a tort." 74 AM.JUR.2d. Tort §23 (1965). To base an action in tort, there must be a breach of duty apart from the non-performance of a contract. 74 AM.JUR.2d Tort §23 (1965). Honeywell has no duty to Continental as prescribed either by statute or decisional law, aside from that expressly delineated in the contract at hand. Further, and especially in light of the explicit language defining the scope and purpose of Honeywell's obligations, the legal relationship between Continental and Honeywell cannot be presumed to be special or extraordinary, thereby imposing a duty over and above the contractual duties assumed. By virtue of the contract in question, Honeywell assumed no fiduciary responsibilities, nor did it place itself in the position of a public agency or guarantor. Indeed, Honeywell scrupulously demarcated the scope of any obligation it assumed by the agreement and went on to explain what functions it was not assuming.

Plaintiff relies on the characterization of willful and wanton to "raise" Honeywell's actions from that of breach of contract to breach of a tort duty. Again, however, it is well settled that an action for breach of contract cannot be converted to one in tort merely by alleging that the commission of the breach was wantonly done. Gibson v. Greyhound Buslines, Inc., 409 F.Supp. 321, (M.D. Fla. 1976); American International Land Corporation v. Hanna, 323 So.2d 567 (Fla. 1976); Days v. Florida East Coast Railroad Co., 165 So.2d 434 (Fla. 3rd DCA 1964); Lewis v. Guthartz, 428 So.2d 222 (Fla. 1983). In Lewis, this Court held that even where a landlord flagrantly, unjustifiably and oppressively breached a contract and attempted to conceal this breach by a criminal act, tenants had to plead and prove that the landlord committed an independent tort in order to recover punitive damages. The Court concurred with the conclusion of the District Court that the tenants failed to allege or prove a tort was committed by the landlord which was distinguishable from or independent of his breach of contract:

> The fact that the landlord acted intentionally, willfully, and outrageously as to the breach of contract does not itself create a tort where a tort otherwise does not exist. Id. at 224.

The Court went on to emphatically reaffirm the well-settled rule that punitive damages are not recoverable in a breach of contract action, and stressed the important rationale of this rule of law:

> An unwillingness to introduce uncertainty and confusion into business transactions as well as the feeling that compensatory damages as substitute performance are an adequate remedy for an

aggrieved party to a breach of conduct. See Simpson, Punitive Damages for Breach of Contract, 20 Ohio State L.J., 284 (1959).

It is precisely this confusion and uncertainty which the contract in question is fashioned to avoid. Owing to the very purpose of an alarm system, as well as the diverse and varied inventories maintained by even one business it is employed to protect, the compensatory scheme set forth in the contract is the only viable method of conducting this type of transaction. It should be noted (as will be stressed later) that the damages provided by this contract also include the undeterminable other instances where Continental's property was safeguarded.

Even in those cases where a statute prescribes the use of reasonable care in the conduct of business of a certain industry, such a statutory scheme does not give rise to an independent tort action. In Gibson v. Greyhound Buslines, Inc., 409 F.Supp. 321 (M.D. Fla. 1976) the Plaintiff brought an action against Greyhound for intentional infliction of emotional distress arising from an operator's failure to deliver a racoon which had bitten the Plaintiff, to a health department laboratory for rabies testing. Florida Statute §677.7-309(1) expressly provided that: "A carrier who issues a bill of lading . . . must exercise the degree of care in relation to the goods which a reasonably careful man would exercise under like circumstances". Nonetheless, the Court held that the duty of due care grew out of the contract of carriage and the breach of that duty gave rise to an action for breach of contract only. Once again, the Court held that an

action for breach of contract cannot be converted to one in tort merely by alleging that it was wantonly done. Id. at 325.

Most recently, this Court in Southern Bell Telephone & Telegraph Company v. Donald Havft, (Fla. 1983), Case No. 61,224, F.L.W., June 17, 1983 at 208 reiterated the rule that in order for punitive damages to be recoverable in a breach of contract case, the breach must be attended by some additional wrongful conduct amounting to an independent tort. [citing Lewis v. Guthartz, 428 So.2d 222 (Fla. 1982) with approval]. As in the instant case, the mere recitation of "willful, wanton" rhetoric cannot transform an action sounding in contract to one in tort where no duty apart from that created by contract exists.

II. FREEDOM TO CONTRACT

The fundamental issue to be confronted by this Court is whether a sufficiently compelling public policy exists so as to require this court to invade the parties common law right of freedom to contract. Historically, such an intrusion has been characterized as an extraordinary, final recourse:

> People should be entitled to contract on their own terms without the indulgence of paternalism by courts in the alleviation of one side or another from the effects of a bad bargain. Also they should be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side. It is only where it turns out that one side or the other is to be penalized by the enforcement of the terms of a contract so unconscionable that no decent, fairminded person would view the ensuing result without being possessed of a profound sense of injustice, that equity will deny the use of its good offices in the enforcement of such unconscionability.

Carlson v. Hamilton, 332 P.2d 989 as quoted in 14 Williston on Contracts §1632 (3rd Ed.) and approved by Mississippi v. Cromwell, 91 U.S. 643 (1876); Hume v. U.S., 132 U.S. 406 (1889); Randolph v. Quidnick, 135 U.S. 457 (1890); Dalzell v. Dueber Watch-Case, 149 U.S. 315 (1893) and others.

And, as has been chronicled in treatises such as Williston on Contracts:

> Freedom of contract has been regarded as part of the common law heritage. Absent mistake, fraud or duress, parties who have made a contract are bound thereby although it may be unwise and even foolish.

§1632 p. 50 (3rd Ed.).

Here, the contract in question was freely and openly entered into. The complaint is completely absent of any assertions of fraud, duress, or mistake and must therefore be viewed as a contract between two willing parties, both of whom were aware of the contents of the agreement. Thus, the standard to be applied in reviewing the subject contract is predicated on the presumption that it is valid as written unless (1) some compelling public policy reason exists to compel a court of equity to intervene and restrict the parties' freedom of contract; or (2) the court finds that the terms so shock the court's conscience that the contract is unconscionable. The mere fact that application of the contract terms gives an advantage or "better deal" to one party over the other is not dispositive; an individual must be left free to strike their own bargains, good or bad, without the interference of the courts.

The contract terms at issue, which are set forth in their entirety in the Respondents answer brief on the merits, provide for both a complete exculpation of liability by Honeywell and a limitation on liability or liquidated damages clause. Both are clearly and plainly set forth in the contract.

III. EXCULPATORY CLAUSE

Florida courts have consistently recognized that a party may legally exempt or exculpate themselves from liability for acts of their own negligence. The only requirement that the courts have established is that such contract terms be clear and unequivocal. (See cases cited in Respondent's Answer Brief on the Merits at pp. 19-20.) It cannot reasonably be argued that the exculpation clause in this case is anything but clearly presented and unequivocal in its terms. The simple straight-forward language "speaks for itself":

> (T)hat the Contractor is not assuming responsibility for any losses which may occur even if due to Contractor's negligent performance or failure to perform any obligation under this Agreement.

It is difficult to envision a clearer, less equivocal manner by which to define the scope of liability assumed by agreements. This requirement having been fully met, the exculpation clause must be enforced unless found to be against public policy or unconscionable.

IV. LIMITATION OF LIABILITY

The question of whether the second clause operates as a limitation of liability or as a liquidated damages clause has been well presented in the respondent's brief so as to need little elaboration here. It is necessary only to add the following quotations from legal scholars to complement that presentation:

> Contractual limitation of liability to an agreed maximum must be distinguished from a penalty or liquidated damages . . . . The limitation of liability is not a penalty in that:
>
> a) it does not normally operate in terrorem to induce proper performance;
>
> b) nor is it of the nature of liquidated damages since it does not purport to be a pre-estimate of probable damages resulting from a breach.

Williston on Contracts, §781A (3rd Ed.); see also Nestor v. Western Union Co., 309 U.S. 582 (1940).

> An agreement limiting the amount of damages recoverable for breach is not an agreement to pay either liquidated damages or a penalty. . . . Such a contract . . . does not purport to make an estimate of the harm caused by a breach; nor is its purpose to operate in terrorem to induce performance.

Restatement of Contracts §339, (comment g) (1932).

As will be shown, whether the court interpretes the second clause as a limitation of liability or as a liquidated damages clause, it is valid and binding on the parties and no grounds exist, public policy or otherwise, which requires the Court's intervention. A limitation of liability sets a maximum amount of recovery in the event of a breach and proof of damages, up to

that limit, is required before recovery can be had. The contract in question is clear in providing for a "whichever is greater" option for the amount of damages. Thus, proof of actual damages is required in order to recover up to the maximum of either $250 or $404.16, there being no fixed sum which would be awarded to Continental upon proof of a breach by Honeywell. This scheme could not reasonably be interpreted as designed to stimulate performance or act "in terrorem", and is, in actuality, representative of a limitation of liability provision.

V. PUBLIC POLICY

A court will not intercede into an otherwise valid contract arrangement simply because one party has become disillusioned with their agreement. Because of the strong public policy behind freedom to contract, an equally strong public policy must exist which motivates such intervention. Therefore, a limitation of liability will be enforced by the courts unless it is adverse to established public policy or unconscionable:

> Public policy may forbid the enforcement of penalties against a defendant; but it does not forbid the enforcement of a limitation in his favor.

5 Corbin on Contracts §1068 (3rd Ed. 1961).

When determining whether a compelling public policy exists which will allow the court to invade the parties' freedom to contract, the court must look to legislation and prior court decisions which establish the public policy to be protected. Patently, the interests involved here are not similar to those

compelling and fundamental societal concerns which have been the subject of such legislation and judicial decision. Historically, such interests as shelter, transportation, an open market for trade, corruption free legislation and creditors' rights have been the focal points of the public policy imprimatur. This is evidenced by the numerous landlord-tenant acts, common carrier duty standards, anti-trust laws, lobbying regulations, banking, and usury statutes.

A comprehensive review of those public policy interests so recognized by the courts and legislature does not include the type of "interest" which is the subject of the instant contract. Honeywell agreed to supply a deterence against theft by installing an alarm system for Continental. Both parties agreed and understood that the alarm system was not guaranteed to prevent crime but to deter its occasion and, under optimum conditions, detect a break-in and summon police in order to capture the intruders.

> The contractor does not make any representation or warranty, including any implied warranty of merchantability or fitness, that the system or service supplied may not be compromised or that the system or services will in all cases provide the protection for which it is intended.

The clause was included on the first page of the contract and was set in the same print as the remainder of the contract. Consequently, there is no need for this Court to adopt the role of "paternal overseer" and usurp the freedom to contract of business concerns who have knowingly bargained for their own needs and purposes.

The Restatement of Contracts 2nd §179 provides the following guidelines to aid the court in identifying interests of public policy.

> A public policy against the enforcement of promises or other terms may be derived by the court from
>
> (a) legislation relevant to such a policy, or
>
> (b) the need to protect some aspect of the public welfare, as is the case for the judicial policies against, for example,
>
> (i) restraint of trade;
>
> (ii) impairment of family relations;
>
> (iii) interference with other protected interests.

As has been held numerous times in cases across the United States, no public policy exists which will compel the courts to intrude on parties' freedom to contract for alarm services. First Financial Insurance Co. v. Purolator Security, Inc., 388 N.E.2d 17 (Ill. 1st DCA 1979); (also see the extensive list of cases cited at page 41 of the respondent's answer brief on the merits). Thus, the public policy supporting freedom to contract must be considered paramount in examining the limitation/exclusion clauses presented here:

> If there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have the paramount public policy to consider, that you are not lightly to interfere with this freedom of contract.

Baltimore & O.S.R.R. Co. v. Voight, 176 U.S. 498 (1900); 14 Williston on Contracts, §1630 (3d ed.). (emphasis added).

VI. UNCONSCIONABILITY

The only other ground upon which courts have invalidated contract terms is also inapplicable here. In order for a contract term to be deemed "unconscionable", the consequences of its enforcement must be far more heinous than a greater benefit to one party than the other. An oft-quoted phrase describes an unconscionable term as being "such as no man in his senses, and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." Restatement of Contracts 2nd, §208(b) quoting Hume v. U.S., 132 U.S. 406 (1889) quoting Earl of Chesterfield v. Janssen, 28 Eng. Rep. 82, 100 (Ch. 1750).

The initial factor which must be present in order to support a finding of unconscionability is the existence of inequality in bargaining power. For example, the "stronger" party is able to demand the better of the bargain because the "weaker" party has a vital need for the contractual goods or services and cannot obtain them elsewhere on more equal terms. However, inequality in bargaining power does not in and of itself make a contract unconscionable:

> A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party.

Restatement of Contracts 2nd §208(d).

Therefore, more is needed than unequal bargaining power and that more has as its foundation the same basic public policy interests which have previously been discussed. Starting from the fact that these terms are valid simply because the parties agreed to them, the court must then be motivated to protect some elemental need of one of the parties which could not be satisfied by the bargain. The fact that one party does not like, at some future time, the way the parties apportioned liability under the contract is simply not enough to allow the court to intervene and undermine both parties' freedom to contract:

> The concept of unconscionability was developed to prevent unjust enforcement of onerous contractual terms which one party is able to impose on another because of significant disparity in bargaining powers; however, absent strong law or transgression of strong public policy, parties to contract are basically free to make whatever agreement they wish, no matter how unwise it might appear to third party.

U.S. v. Bedford, 491 F.Supp. 851 (S.D.N.Y. 1980) (emphasis added).

Again, there are none of the public policy factors present in this situation which justifies the courts' intervention. As a guideline of what additional factors that must be present in addition to unequal bargaining power, the Restatement of Contracts 2nd has set forth the following:

> 1) belief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract;
>
> 2) knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract;

> 3) knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors.

Id. at §208(d).

In light of the fact that both parties to the contract are corporations, indicating some level of business accumen, an assertion that an unequal bargaining position existed is untenable.

Even were Continental presumed to be the "weaker party," it would be unreasonable to assert that it did not receive substantial benefits from the contract. The purpose of the contract was to provide alarm protection against burglaries. This benefit was provided when Honeywell installed the system. It is impossible to even guess at the total benefit actually bestowed upon Continental as there is no way of knowing when, if, or how many thefts were deterred by the alarm system. And, assuming Honeywell did nothing after installing the alarm system, Continental still received the substantial benefit of deterrence to theft that the very presence of the system provided. There is absolutely no basis upon which to conclude that Continental was uanble to protect its interests in the contract. The language of the contract is plain and straightforward, especially when viewed in the business context in which it was entered into:

> The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect.

Restatement of Contracts 2nd §208(a).

The provisions of the contract are clear. Honeywell was not to be an insurer. The limitation on liability and the opportunity to exchange an increased level of liability for an increased premium, are unambiguous and definitively presented. This being the case, this Court has no basis for altering the contractual terms.

VII. LIQUIDATED DAMAGES

Should the court conclude that the second clause is a liquidated damage clause and not a limitation on liability, it should still enforce the clause as valid and not a penalty. This point was well established in respondent's answer brief on the merits and will not be elaborated upon. However, should the court, acting in equity, be inclined to set aside the amount of damages as a forfeiture, it must be considered that no true forfeiture will occur and the purpose of preventing unjust enrichment through equitable proceedings do not apply.

In all the cases where a court has interceded to set aside a liquidated damage figure, that amount has been grossly greater than the actual amount of damages incurred at the time of breach. Therefore, a forfeiture of the excess would occur if the court did not act. No cases have been found, and certainly none cited by the petitioner in its reply brief (Footnote 13, at p. 13) where a court has acted in equity when the liquidated amount was less than the actual damages at the time of breach. Should such a situation arise, the liquidated damage clause, while valid,

also serves as a limitation on liability and a different standard is applied before the court will act:

> A term that fixes as damages an amount that is unreasonably small does not come within the rule stated in this section, (equitable intervention) but a court may refuse to enforce it as unconscionable under the rule stated in §208.

Restatement of Contracts 2nd §356 (Comment d) (emphasis added).

Therefore, as this contract has established a liquidated amount which is less than the actual amount of damages, the Court is not properly called upon to equitably intervene to avoid forfeiture as none could exist. Instead, the previously discussed unconscionability standard must be applied which directs the validity and enforceability of this clause. (Discussion of unconscionability at pgs. 13-16).

CONCLUSION

The duties assumed by Honeywell arise exclusively out of the contract and no independent tort has been nor could be alleged by Continental. Mere allegations of willful and wanton behavior are insufficient to convert a breach of contract into a separate tort.

The parties to this contract freely and openly agreed to its terms. Therefore, following the paramount public policy of freedom to contract, the exculpation from liability clause is valid. There being no countervailing public policy against such term and no grounds by which the court can find the clause unconscionable, it must be enforced. In the alternative, the subsequent term,

whether viewed as a limitation of liability or as liquidated damages, is also valid and there exists no equitable reason for the court to intervene.

Thus, the District Court's decision properly upheld the trial court's dismissal with prejudice and should be approved.

CERTIFICATE OF SERVICE

WE HERBY CERTIFY that a true and correct copy of the foregoing was mailed this 22nd day of July, 1983 to: BRUCE A. CHRISTENSEN, ESQUIRE, Floyd, Pearson, Stewart, Richman, Greer, & Weil, P.A., Attorneys for Petitioner, One Biscayne Tower, 25th Floor, Miami, Florida 33131, G. WILLIAM BISSETT, ESQUIRE, Preddy, Kutner, & Hardy, P.A., Attorneys for Respondent, 12th Floor, Concord Building, 66 West Flagler Street, Miami, Florida 33130, HENRY L. SMYLER, ESQUIRE, Attorney for Alarm Association of Florida, 9200 South Dadeland Boulevard, Suite 520, Miami, Florida 33156, and LAWRENCE A. FULLER, ESQUIRE, Fuller and Feingold, P.A., Attorney for Jewelers Mutual, 1111 Lincoln Road Mall, Penthouse 802, Flagship Bank Building, Miami Beach, Florida 33139.

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