IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 63,058

Third District Court Case No.: 81-1978

CONTINENTAL VIDEO CORPORATION, a Florida corporation,

Petitioner,

-vs-

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

Respondent.

RESPONSE BRIEF ON JURISDICTION

OF

HONEYWELL, INC.

PREDDY, KUTNER, & HARDY, P.A.
12th Floor, Concord Building
66 West Flagler Street
Miami, Florida 33130

By G. William Bissett
G. WILLIAM BISSETT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

I. INTRODUCTION

In this reply brief on the issue of whether conflict jurisdiction exists, the Petitioner, CONTINENTAL VIDEO CORPORATION, will be referred to as "VIDEO CORP." The Respondent, HONEYWELL, INC., will be referred to as "HONEYWELL." Wherever emphasis has been added by counsel it will be so noted. The symbol "A." will be utilized herein to denote reference to the Appendix which accompanies this brief.

II. STATEMENT OF THE CASE AND OF THE FACTS

HONEYWELL will accept VIDEO CORP.'s factual statement as being substantially accurate subject to the following additions:

1. The entire clause[1] which was contained in the contract between the parties appeared in conspicuous print on the front page of the document, was read and acknowledged as being understood by VIDEO CORP.'s president, and provided as follows:

> It is understood and agreed by the parties hereto that Contractor is not an insurer and that insurance, if any, covering personal injury and property loss or damage on Subscriber's premises shall be obtained by the Subscriber; that the Contractor is being paid for the installation and maintenance of a system designed to reduce certain risks of loss and that the amounts being charged by the Contractor are not sufficient to guarantee that no loss will occur; that 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. THE CONTRACTOR

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1. VIDEO CORP. failed to include in its factual statement that portion of the clause which we have emphasized. This oversight is important to correct, since the district court specifically emphasized this underlined portion in its opinion (A. 1 - 5).

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.

Since it is impractical and extremely difficult to fix actual damages which may arise due to the faulty operation of the system or failure of services provided, if, notwithstanding the above provisions, there should arise any liability on the part of the Contractor, such liability shall be limited to an amount equal to one half the annual service charge provided herein or $250, whichever is greater. This sum shall be complete and exclusive and shall be paid and received as liquidated damages and not as a penalty. In the event that the Subscriber wishes to increase the maximum amount of such liquidated damages, Subscriber may, as a matter of right, obtain from Contractor higher limits by paying an additional amount under a graduated scale of rates relating to the higher limits of liquidated damages.

Subscriber agrees to and shall indemnify and save harmless the Contractor, its employees and agents, for and against all third party claims, lawsuits and losses alleged to be caused by the improper operation of the system, whether due to defects in the system or acts or omissions of the Contractor in receiving and responding to alarm signals.

(A. 6-7).

2. A copy of the agreement reached between these two business entities was attached to VIDEO CORP.'s amended complaint and provided the basis for the motion to dismiss filed by HONEYWELL.

3. The alternate limitation of liability clause contained in the agreement between the parties provided that HONEYWELL's liability, if any, should arise, for property losses would be "limited to an amount equal to one-half the annual service charge provided herein or $250, whichever is greater." The annual service charge totalled $808.32. One-half the annual service would be $404.16, not $250 as VIDEO CORP. incorrectly asserts in its brief. Most importantly, the agreement provided that if VIDEO CORP. desired to increase the maximum limit on liability, it "may, as a matter of right, obtain from [HONEYWELL] higher limits by paying an additional amount under a graduated scale of rates relating to the higher limits."

4. Following extensive briefing of the question of the validity of such clauses in the context of burglary alarm contracts and following oral argument before the appellate court, the challenged decision was rendered (A. 1- 5). VIDEO CORP. moved for re-hearing, re-hearing en banc,and for certification to this Court (A. 8 - 12). Following replies by HONEY-WELL and consideration by the Third District, these requests were denied (A. 13 - 24, 25).

5. In hopes of obtaining a second review of their case by this Court, VIDEO CORP. timely filed a notice to invoke discretionary jurisdiction.

III. JURISDICTIONAL ISSUE

WHETHER THE DECISION SOUGHT TO BE REVIEWED EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THIS COURT OR OF ANOTHER DISTRICT COURT OF APPEAL?

IV. ARGUMENT

THE DECISION SOUGHT TO BE REVIEWED DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH A DECISION OF THIS COURT OR OF ANOTHER DISTRICT COURT OF APPEAL.

Before dealing with the "four principal decisions" upon which VIDEO CORP. relies as a basis for invoking this Court's conflict jurisdiction, a short recap of the principles which this Court has established to govern that jurisdiction is in order. First and foremost is the principle that jurisdiction based on a purported conflict of decisions is an extremely limited grant of jurisdiction, one which must be sparingly exercised with strict regard for its singular, underlying purpose -- the maintenance of uniformity

in the decisions of the appellate courts of Florida on a particular point of law. A restricted view of the conflict jurisdiction conferred upon the supreme court by Article V is essential to maintaining the basic concept under our constitution that the district courts of appeal are courts of final appellate jurisdiction in the vast majority of cases. See, SANCHEZ vs. WIMPEY, 409 So.2d 20 (Fla. 1982); JENKINS vs. STATE, 385 So.2d 1356 (Fla. 1980); LAKE vs. LAKE, 103 So.2d 639 (Fla. 1958); ANSIN vs. THURSTON, 101 So.2d 808 (Fla. 1958).

The district courts of appeal were never intended to be intermediate appellate courts, simply "way stations" on a party's journey to the supreme court, or "merely intermediate resting places along an arduous and expensive pathway in the appellate process." KARLIN vs. CITY OF MIAMI BEACH, 113 So.2d 551 (Fla. 1959); LAKE vs. LAKE, 103 So.2d 639 (Fla. 1958). This Court recognized shortly after the creation of the district courts of appeal that:

> They are and were meant to be courts of final, appellate jurisdiction . . . If they are not considered and maintained as such the system will fail. Sustaining the dignity of decisions of the district courts of appeal must depend largely on the determination of the supreme court not to venture beyond the limitations of its own powers by arrogating to itself the right to delve into a decision of a district court of appeal primarily to decide whether or not the supreme court agrees with the district court of appeal about the disposition of a given case.
>
> It seems trite to remark that everyone concerned wishes to see justice done. It can be stated without hesitancy, qualification, or reservation, that every man is entitled to his day in court. . . . But he is not entitled to two appeals.
>
> The quality of justice may not be gauged by the treatment accorded one litigant without regard for his adversary. Justice should be done, but not overdone. When a party wins in the trial court he must be prepared to face his

> opponent in the appellate court, but if he succeeds there, he should not be compelled the second time to undergo the expense and delay of another review.

LAKE vs. LAKE, 103 So.2d at 642 (emphasis supplied) (citations omitted).

The limited jurisdiction conferred upon this Court by direct conflict has as its purpose the stabilizing of the law by correcting "real, live and vital" conflicts of opinion and authority "by a review of decisions which form patently irreconcilable precedents." This jurisdiction evinces a concern with decisions as precedent, as opposed to adjudication of the rights of particular litigants. NIELSEN vs. CITY OF SARASOTA, 117 So.2d 731 (Fla. 1960); ANSIN vs. THURSTON, 101 So.2d 808 (Fla. 1958). Accordingly, the critical inquiry is whether or not the decision under review, if left to stand as legal precedent, will cause confusion in the body of the law in this state. N & L AUTO PARTS CO. vs. DOMAN, 117 So.2d 410 (Fla. 1960).

Finally, the only type of decisional conflict which this Court has the constitutional power to review is a "direct" conflict. In the language of this Court, a "direct" conflict of decisions only arises where "the decisions [are] based practically on the same state of facts and announce antagonistic conclusions," or where "the allegedly conflicting cases are 'on all fours' factually in all material respects.[2]

Applying these various principles in analyzing the jurisdictional question in the case at bar, it becomes readily apparent that there is no "direct conflict" between the instant Third District decision and the four principal cases cited by VIDEO CORP. We shall now explain why.

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2. Quoting from ANSIN vs. THURSTON, 101 So.2d at 811, and FLORIDA POWER & LIGHT CO. vs. BELL, 113 So.2d 697, 698 (Fla. 1959), respectively.

We shall begin with the most obvious ground for a finding of no direct conflict. That is, of the four cases relied upon by VIDEO CORP., only one even involved an action against a company which allegedly failed to perform services under a contract for the installation, monitoring, or maintenance of a burglary alarm system, NICHOLAS vs. MIAMI BURGLAR ALARM CO., INC., 339 So.2d 175 (Fla. 1976). However, this Court in NICHOLAS had before it and rendered a decision only on two issues: (i) whether the act of a third party criminal committing the burglary was an independent and unforseeable intervening cause breaking the chain of causation; and (ii) whether the trial court correctly directed a verdict on the issue of punitive damages. Clearly, a decision on those issues creates no conflict "on the same point of law" with the point of law involved in the case at bar. There was absolutely no discussion by this Court in NICHOLAS of the legal principles applicable to the issue in the case at bar.[3]

In addition, the clause contained in the NICHOLAS contract was markedly different. It did not provide for a total exculpation from risk of property loss. It contained only a liquidated damages clause ("liability hereunder shall be . . . fixed at the sum of twenty-five dollars"). Here, we had an agreement between two business entities to shift the total risk of property loss to VIDEO CORP.'s insurer. Alternately, the agreement here provided for a limitation of HONEYWELL's maximum liability, which maximum amount could be increased as a matter of right according to a graduated scale

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3. VIDEO CORP. ingeneously tries to establish conflict by quoting from an opinion from an earlier appearance of the case in the Third District, NICHOLAS vs. MIAMI BURGLAR ALARM CO., 266 So.2d 64 (Fla. 3d DCA 1972). Such an attempt is inappropriate, since, at best, all it shows is an intra district conflict, which is to be resolved by en banc procedures. See generally, IN RE RULE 9.331, ETC., 416 So.2d 1127 (Fla. 1982).

of rates ("such liability shall be limited to").[4] As the district court obviously felt, VIDEO CORP. cannot be heard to complain now because it failed to take advantage of this right granted under the contract.

The other three decisions cited by VIDEO CORP. dealt with entirely different factual situations, and therefore cannot create any "direct" conflict. Any practitioner in this state, when researching the law on the validity of contractual liability limitations in the context of actions against burglar alarm companies will look to the decisions in the case sub judice, in ACE FORMAL WEAR, INC. v. BAKER PROTECTIVE SERVICES, INC., 416 So.2d 8 (Fla. 3d DCA 1982), and in L. LURIA & SONS, INC. v. ALARMTEC INTERNATIONAL CORP., 384 So.2d 947 (Fla. 4th DCA 1980),[5] not to the decisions in IVEY PLANTS, INC. v. FMC CORPORATION, 282 So.2d 205 (Fla. 4th DCA 1973), in SNIFFEN v. CENTURY NATIONAL BANK OF BROWARD, 375 So.2d 892 (Fla. 4th DCA 1979), or in GOYINGS v. JACK AND RUTH ECKERD FOUNDATION, 403 So.2d 1144 (Fla. 5th DCA 1981).

Comparison of the language found in the decisions cited by the Third District in the instant case with the broad language found in the cases cited by VIDEO CORP., reveals that VIDEO CORP. is simply trying to com-

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4. Courts across this country recognize the importance of the legal distinction between liquidated damages clauses and limitation of liability clauses contained in burglar alarm contracts. VALLANCE & COMPANY v. DeANDA, 595 S.W.2d 587 (Tex.App. 1980); CENTRAL ALARM OF TUSCON v. GANEM, 116 Ariz. 74, 567 P.2d 1203 (App. 1977), adopted in Florida in L. LURIA & SONS, INC. vs. ALARMTEC INTERNATIONAL, 384 So.2d 947 (Fla. 4th DCA 1980). See generally, ANNOT., Validity Construction, and Effect of Limited Liability or Stipulated Damages Clauses in Fire or Burglar Alarm Service Contract, 42 A.L.R.2d 591 (1955).

5. See also, HUGHES vs. SECURITY ENGINEERING, INC., 406 So.2d 1225 (Fla. 4th DCA 1981) (while admittedly of no precedential value, this decision affirmed the dismissal of a complaint in a burglar alarm case "on the authority of" L. LURIA).

pare apples to oranges.[6] The decisions in Florida dealing with situations involving actions against burglar alarm companies, and the rulings upon the validity of the contract limitations on liability for property losses, are entirely consistent. Such cases are not controlled by the decision in IVEY PLANTS, which expressly pointed out that the defendant/lessor there was alleged to have had a monopoly on the leasing of the defective equipment, which was used to wax oranges [205 So.2d at 208 - 9, fn. 4]. No such allegations of monopoly have been (nor could they be) made in the case at bar (A. 26-32). Nor are the safety deposit box cases, like SNIFFEN, applicable here.[7] The case law throughout this country on the particular point of law involved makes it clear that different considerations apply when analyzing contracts involving the installation and monitoring of alarms. Accordingly, those Florida decisions involving different factual situations, which require analysis of different considerations, cannot be said to create any direct conflict. Close analysis of the cases cited by the Third District in the instant decision make this point clear.

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6. As Justice Thornal stated years ago in WARD vs. BASKIN, 94 So.2d 859 (Fla. 1957):

> A judicial opinion should be evaluated as a precedent in the light of the factual situation that gives rise to the opinion. The law is not a mathematically exact science. A perfectly sound principle as applied to one set of facts might be entirely inappropriate when a factual variant is introduced [94 So.2d at 860].

7. On this point, Judge Barkdull stated in the ACE FORMAL WEAR case that:

> We also find the safety deposit box cases, which are single purpose contracts, not to be applicable in the instant case, SNIFFEN vs. CENTURY NATIONAL BANK OF BROWARD,. . ..

416 So.2d at 9 (emphasis supplied). Indeed, in SNIFFEN Judge Schwartz conceded the validity of such clauses in some situations when he stated: "[w]hatever the possible effect of the exculpatory clause in other situations in which it may well be validly applied . . .(e.s.)" [375 So.2d at 893].

The final case cited by VIDEO CORP., GOYINGS, is likewise inapplicable, and thus incapable of generating any direct conflict. The court in GOYINGS never reached the issue involved here, since it concluded "that the language in the [exculpatory] clause was ineffective because it did not explicitly state that the camp would be absolved from liability for injuries resulting from its negligence." [403 So.2d at 1146]. Indeed, the GOYINGS court recognized the general rule upholding exculpatory clauses (and even cited to the decision in L. LURIA), but held the general rule inapplicable due to ambiguity of the language used in the challenged clause.

In sum, HONEYWELL would submit that the decision below was correctly decided under the well-established principles of law specifically applicable to the factual situation alleged. None of the decisions cited by VIDEO CORP. as being in conflict meet the narrow definition of "direct conflict" enunciated by this Court. Purely and simply, VIDEO CORP. is seeking an impermissible second review. In this regard, the observation made by Justice Thornal in his dissenting opinion in GIBSON v. MALONEY, 231 So.2d 823 (Fla. 1970), provides an appropriate closing:

> The situation today is such that an attorney in Florida almost has a DUTY to his client to seek "conflict certiorari" in this Court if he loses in the District Court of Appeal. We are rapidly approaching the much decried allowance of "two appeals," which concerned the framers of our amended juridical article when it was drafted in 1956.

GIBSON vs. MALONEY, 231 So.2d at 833 (Fla. 1970) (Thornal, J. dissenting).

V. CONCLUSION

Respondent HONEYWELL would respectfully submit that discretionary jurisdiction to review the instant decision is patently absent. The decision below does not expressly and directly conflict with any other Florida appellate

decision "based practically on the same state of facts" and involving the identical point of law. The decision brought up for review does not form a "patently irreconcilable precedent" with those decisions urged by Petitioner VIDEO CORP. as generating conflict.

There being no express and direct conflict with a decision of this Court or of another district court of appeal, this Court is without jurisdiction. Accordingly, the notice to invoke discretionary jurisdiction is unfounded and review should be denied.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail this 7th day of February, 1983 to:

BRUCE A. CHRISTENSEN, ESQUIRE
Floyd, Pearson, Stewart, Richman, et al.
One Biscayne Tower
25th Floor
Miami, Florida

PREDDY, KUTNER, & HARDY, P.A.
12th Floor, Concord Building
66 West Flagler Street
Miami, Florida 33130

By G. William Bissett
G. WILLIAM BISSETT