53,058

IN THE SUPREME COURT OF FLORIDA

CASE NO.

(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.	:

PETITIONER'S BRIEF ON JURISDICTION

RAY H. PEARSON
BRUCE A. CHRISTENSEN
FLOYD PEARSON STEWART RICHMAN
GREER & WEIL, P.A.
One Biscayne Tower
Twenty-Fifth Floor
Miami, Florida 33131-1868
Telephone: (305) 377-0241

Attorneys for Petitioner

TABLE OF CONTENTS

	Page
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	1
JURISDICTION	4
CONCLUSION	10
CERTIFICATE OF SERVICE	10

TABLE OF AUTHORITIES

	Page
Ace Formal Wear, Inc. v. Baker, 416 So. 2d 8 (Fla. 3d DCA 1982)	7
Balter v. Pan American Bank of Hialeah, 383 So. 2d 256 (Fla. 1980)	9
Corneli Seed Co. v. Ferguson, 64 So. 2d 162 (Fla. 1953)	9
Goyings v. Jack and Ruth Eckerd Foundation, 403 So. 2d 1144 (Fla. 2d DCA 1981)	9
Hutchison v. Tompkins, 259 So. 2d 129 (Fla. 1972)	10
Hyman v. Cohen, 73 So. 2d 393 (Fla. 1954)	10
Ivey Plants, Inc. v. FMC Corp., 282 So. 2d 205 (Fla. 4th DCA 1973), cert. denied 289 So. 2d 731 (Fla. 1974)	4, 7, 8
L. Luria & Son, Inc. v. Alarmtec Intern. Corp., 384 So. 2d 947 (4th DCA 1980)	7
McNorton v. Pan American Bank, 387 So. 2d 393 (Fla. 5th DCA 1980)	10
Nicholas v. Miami Burglar Alarm Co., Inc., 339 So. 2d 175 (Fla. 1976)	4, 5, 6
Nicholas v. Miami Burglar Alarm Co., Inc., 266 So. 2d 64 (Fla. 3d DCA 1972)	5
Nicholas v. Miami Burglar Alarm Co., Inc., 297 So. 2d 49 (Fla. 3d DCA 1974)	5
Sniffen v. Century National Bank of Broward, 375 So. 2d 892 (Fla. 4th DCA 1979)	4, 8
Wackenhut Protective Systems, Inc. v. Eterna of Miami, Inc., 375 So. 2d 352 (Fla. 3d DCA 1979)	6

CONSTITUTIONS

Fla. Const. Art. V, Sect. 3(b)(3)	4

INTRODUCTION

Jurisdiction is sought to review an Opinion of the District Court of Appeal, Third District, filed October 12, 1982. That Opinion, which included a special concurrence by Judge Schwartz, affirmed the trial court's dismissal with prejudice of Petitioner/Plaintiff's Amended Complaint. Petitioner/Plaintiff, Continental Video Corporation, will be referred to as "Continental," while Respondent/Defendant Honeywell, Inc. will be referred to as "Honeywell." References to the Appendix will be denoted by an "A" followed by a page citation.

STATEMENT OF THE CASE AND FACTS[1]

In August, 1980, Honeywell installed a "Central Station Burglar Alarm Service System" in Continental's store, pursuant to an Installation and Service Agreement (A. 12). The alarm system was designed to detect the entry of burglars into the video tape and equipment store and send a repeating signal upon such an entry to one of Honeywell's central monitoring stations. Upon receipt of an alarm signal, the contract required Honeywell to

> . . . make every reasonable effort to transmit the alarm promptly to the headquarters of the police; and [Honeywell] shall make a reasonable effort to notify [Continental Video] or his designated representative by telephone. . . .

When burglars broke into the Continental store in the early morning hours of March 6, 1981, they tripped the Honeywell alarm. The repeating alarm signal was received at Honeywell's monitoring room for more than two hours and ignored completely. In violation of its contractual undertaking, Honeywell did not inform the

---

[1]Since this case was determined upon a Motion to Dismiss, the facts are solely contained in the Amended Complaint. (A. 6-11)

police, Continental or take any other action to foil the burglary. Honeywell was still receiving the alarm when the police later in the morning of March 6, 1981, discovered the break-in and called both Honeywell and Continental.

In the three counts of the Amended Complaint, Continental alleged that Honeywell's flagrant failure to do anything upon receipt of the alarm signal was a breach of contract (Count I), constituted negligence that was a proximate cause of the loss (Count II), and was of such a reckless nature in complete disregard of the rights of the Plaintiff that it constituted gross negligence (Count III).

Attempting to avoid any liability for its own fundamental breach of contract and negligence, Honeywell moved to dismiss the Amended Complaint raising essentially affirmative defenses. (A. 13) The motion was predicated on certain provisions of the parties' contract which Honeywell claimed released it from any liability. Paragraph 7 of the Installation and Service Agreement is a purported exculpatory clause:

> It is understood and agreed by the parties hereto that Contractor [Honeywell] is not an insuror and that insurance, if any, covering personal injury and property loss or damage on Subscriber's [Continental] 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 guaranty 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.

As to this exculpatory clause, the Amended Complaint in paragraph 12 stated:

> The purported waiver of liability in paragraph "7" of Exhibit "A" is invalid, void and unenforceable because it is an adhesion contract due to the inequality of bargaining power between the parties, it would make the terms of the contract illusory and it is against public policy.

In moving to dismiss the Amended Complaint, Honeywell stated that the purported exculpatory clause "unequivocally expresses the intention of the parties such that the Defendant, Honeywell, is relieved of any and all liability." Honeywell's motion ignored Plaintiff's allegation that the clause was unenforceable because of its adhesion nature due to the inequality of bargaining power between the parties, or that the enforcement of it would render the contract illusory.

The same paragraph of the Installation and Service Agreement also contains a purported liquidated damages clause:

> 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 $250.00, whichever is greater.

Likewise, as to this clause, the Amended Complaint in paragraph 10 alleged that the same is in fact a penalty and unenforceable because it does not provide just compensation in the event of injury. Honeywell's Motion to Dismiss also ignored those allegations and stated that the liquidated damages clause would limit any liability to below the jurisdictional level of the Circuit Court.

After receiving memoranda and oral argument, the acting Circuit Judge dismissed the Amended Complaint with prejudice holding the clauses valid and enforceable.

Despite the factual issues raised in the Amended Complaint as to the validity of the purported exculpatory and liquidated damages clauses, the trial court thus held both clauses to be valid and enforceable.

The Opinion of the Third District (A. 1-5) upheld the use of the exculpatory and liquidated damages clauses to affirm the trial court's dismissal with prejudice, barring the action as a matter of law. In a specially concurring opinion Judge Schwartz expressed his view that the Court's approval of the absolute bar of the exculpatory clause directly conflicts with the holdings in Ivey Plants, Inc. v. FMC Corp., 282 So. 2d 205 (Fla. 4th DCA 1973), cert. denied 289 So. 2d 731 (Fla. 1974) and Sniffen v. Century National Bank of Broward, 375 So. 2d 892 (Fla. 4th DCA 1979). Petitioner will show conflict with other decisions as well.

JURISDICTION

Jurisdiction of this Court to determine the case on the merits is based upon the direct conflict of four principal decisions and others with that of the District Court in this case. Fla. Const. Art. V, Sect. 3(b)(3). As detailed below each of these conflicting decisions have determined that contractual exculpatory clauses and liquidated damages provisions, such as the ones here, are not bars as a matter of law to claims for damages based upon breach of contract, negligence and gross negligence.[2]

First and foremost of those decisions with which the Third District's Opinion is in direct conflict is the decision of this Court in Nicholas v. Miami Burglar Alarm Co., Inc., 339 So. 2d 175 (Fla. 1976). Nicholas is factually almost identical to this case. Mr. Nicholas was the owner of a tobacco warehouse who brought suit against a burglar alarm company alleging breach of contract, breach of warranty, negligence and seeking punitive damages. His claim arose when his warehouse was

---

[2] The Amended Complaint contains allegations which, if treated by the trial judge as true, should have precluded the dismissal of the Amended Complaint because they raise issues concerning the validity of the purported exculpatory clause which must be resolved by the jury.

burglarized resulting in the alarm company receiving a signal[3] and then failing to inform the police or Mr. Nicholas. Notably the contract in the Nicholas case (A. 15-16) contained an exculpatory clause essentially identical to the one here.[4] The Nicholas Complaint (A. 17-21) alleged the exculpatory provision was null and void.

The Nicholas case visited the District Court twice before being reviewed in full by the Florida Supreme Court.[5] It its first Nicholas decision the District Court reversed, in part, the dismissal of the complaint with prejudice by the trial judge holding that the damages limitation provision in the burglar alarm contract presented factual questions as to whether the clause was valid or unenforceable, and, thus, could not be determined on a motion to dismiss.[6]

The remaining portion of this Nicholas decision affirmed the trial court's dismissal of certain Counts of the complaint based upon the theory that the burglary was an intervening criminal act which broke the chain of causation such that the negligence of the burglar alarm company was not the proximate cause of the damage.

---

3 Because the burglars cut the phone wires the company received a "trouble signal" not an alarm.

4 The Nicholas contract contained this clause:

> It is agreed by and between the parties hereto that the Contractor is not an insurer, and that the payments herein named are based solely upon the value of the service in the operation of the system described, and in the case of failure to perform such service, and a resulting loss, its liability hereunder shall be limited and fixed at the sum of twenty-five dollars as liquidated damages and not as a penalty, and this liability shall be exclusive, and in no case shall it exceed the amount recieved by us for installation.

5 These District Court decisions are reported at 266 So. 2d 64 (Fla. 3d DCA 1972) and 297 So. 2d 49 (Fla. 3d DCA 1974).

6 This Court reasoned as follows:

* * *

> . . . It is true that whether a sum specified in a contract represents a penalty or liquidated damages is a matter of law for determination by the court. . . . Nevertheless, it is clear that a proper determination of this question cannot be made solely from examining the complaint.

Id. at 66-67 (citations omitted).

The short second decision in Nicholas, affirmed the directed verdict of the trial court on remand of one count of the complaint concerning gross negligence inasmuch as the trial court determined that the Plaintiff had failed to prove the same. In dissent Judge Haverfield noted:

> [I] f as a matter of law the defendant burglar alarm company was under no duty to do anything in the instant case (which I believe is the real result of the majority opinion), then plaintiff-appellant is paying for protection which in reality he simply is not receiving.

297 So. 2d at 50.

This Court in reversing noted its agreement with Judge Haverfield and held:

> We hold a burglar alarm company under contract to monitor an alarm system may be negligent for failure to inform the police or the warehouse owner of a trouble signal which its employees had received.

339 So. 2d at 177.

This Court did not alter the original District Court holding that the trial court could not determine the validity of the damages limitation upon a motion to dismiss. Of course, had this Court determined the contractual provision limited or barred liability as a matter of law, the holding in this case, it would not and could not have remanded for jury trial.[7]

Unquestionably the decision below is in direct conflict with that of this Court in Nicholas.[8]

---

[7] As Justice Adkins noted in his separate opinion in Nicholas, the Supreme Court was reviewing the whole case, including what the District Court did on its first visit there, since no conflict may have existed after the first decision by the District Court. 339 So. 2d at 179.

[8] On the authority of Nicholas the Third District affirmed per curiam a trial court judgment holding another similar liability limitation clause in a burglar alarm contract invalid and awarding damages. Wackenhut Protective Systems, Inc. v. Eterna of Miami, Inc., 375 So. 2d 352 (Fla. 3d DCA 1979). It was not until the decision in Ace Formal Wear, Inc. v. Baker, 416 So. 2d 8 (Fla. 3d DCA 1982) that the Third District changed its position and held such a clause to be a bar to the action. That decision was found by Judge Schwartz to be "indistinguishable" from this case causing him to concur "without enthusiasm" here.

The second case which directly conflicts with the Opinion below is Ivey Plants, Inc. v. FMC Corporation, 282 So. 2d 205 (4th DCA Fla. 1973). There the Fourth District reversed a summary judgment based upon an exculpatory clause in a lease. The District Court held that there existed substantial fact issues as to the relative bargaining power of the contracting parties, directly affecting the enforceability of the clause. The Court stated:

> 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 relationships 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 the superior bargaining position, enforcement of the exculpatory has been denied. (Citations omitted.)

Id. at 208.

The court then ruled:

> 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.

Id. at 209.

Unquestionably, in this case the allegations of paragraph 12 of the Amended Complaint, which directly affect the enforceability of the purported waiver of liability provisions of the exculpatory clause, create issues of fact for the jury's consideration which should ultimately determine the enforceability of that clause.[9]

---

[9] Notably, the case of L. Luria & Son, Inc. v. Alarmtec Intern. Corp., 384 So. 2d 947 (4th DCA 1980), relied upon by both the trial court and District Court below, does not address at all the question of unequal bargaining power as an avoidance of an exculpatory clause. The Complaint in Luria did not contain allegations concerning the inequality of bargaining power, nor was leave to amend sought. Thus the Fourth District Court of Appeals had no reason to address that issue, which clearly from the Ivey Plants decision that Court regards as material to the enforceability of such a clause.

Viewing the exculpatory clause as a bar to the action, as did the District Court in this case, renders the contract illusory, excusing Honeywell of performance of its primary contractual obligation — monitoring the alarm and acting upon any signals. The Fourth District in the Ivey Plants case stated that the exculpatory clause could not operate as a bar to the maintenance of an action because that would render the contract lacking both mutuality of obligation and mutuality of remedy. This precise problem was discussed in a footnote to its decision:

> 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. Rhetorically, how could defendant be made to perform if liability for non-performance were limited. And even if it be contended that there is mutuality of obligation but merely there is lacking mutuality of remedy without affecting the reciprocal obligation of the parties, an examination of the "remedy" available to plaintiff suggests it is somewhat nonexistent and beyond "the bounds of reasonableness and fairness." See, Bacon v. Karr, Fla. App. 1962, 139 So. 2d 166.

Id. at p. 208 n. 2.

That an exculpatory clause cannot alleviate all liability to perform and still leave a valid contract is the heart of the decision in Sniffen v. Century National Bank of Broward, 375 So. 2d 892 (Fla. 4th DCA 1979), which case, along with Ivey Plants, Judge Schwartz stated directly conflicted with the decision below. In Sniffen, a bank had raised an exculpatory clause in its safety deposit box contract to obtain a dismissal of the complaint with prejudice where the plaintiff alleged that the bank had breached its contract and committed acts of negligence by allowing unauthorized persons into his safety deposit box. The Court held that the exculpatory clause could not so employed:

> [A] n acceptance of the bank's position in this case would render the agreement between the parties entirely nugatory. If a safety deposit customer cannot enforce the bank's undertaking to preclude unauthorized persons from entry to his box — which is the very heart of the relationship and the only

> real reason that such a facility is used at all [citation omitted] —it is obvious that he will have received nothing whatever in return for his rental fee. The authorities are unanimous in indicating that no such drastic effect may properly be attributed to contractual provisions such as those involved here.

(Citations omitted.) Id. at 894.

This Court has uniformly held that a party cannot exculpate itself from liability for failure to perform a specific contractual undertaking. Allowance of such clauses would render the contract illusory and lacking mutuality of obligation. Corneli Seed Co. v. Ferguson, 64 So. 2d 162 (Fla. 1953); Balter v. Pan American Bank of Hialeah, 383 So. 2d 256 (Fla. 1980). In this case, Honeywell undertook the obligation upon receipt of an alarm signal to inform the police and Continental. If the exculpatory clause bars any action, it removes the only purpose of the agreement. The decision below is in direct conflict with each of these decisions.

Another decision in conflict with that below is Goyings v. Jack and Ruth Eckerd Foundation, 403 So. 2d 1144 (Fla. 2d DCA 1981). There a summer camp had undertaken a contractual obligation to take "reasonable precautions . . . to assure the safety and good health" of the Goyings child. In the same sentence it attempted to exculpate itself from liability for injury, illness or death. The Second District Court reversed the summary judgment for the camp. In doing so it reasoned:

> By their own choice of language, appellees agreed to take reasonable precautions to assure Leigh Anne's safety. This duty to undertake reasonable care expressed in the first part of the provision would be rendered meaningless if the exculpatory clause absolved appellees from liability.

Id. at 1146.

In this case the alternative ruling that the liquidated damages provision is valid and enforceable, is likewise in conflict with various decisions of this Court. Paragraph 10 of the Amended Complaint alleges that this provision "is in fact a penalty and is unenforceable because it does not provide just compensation in the event of injury and because the actual damage as sustained by plaintiff are readily

ascertainable." The decisions of this Court and others are well-settled that where damages for breach of contract are readily ascertainable at the time the contract was drawn, a purported liquidated damages clause that does not provide just compensation in the event of breach is a penalty and unenforceable. Hutchison v. Tompkins, 259 So. 2d 129 (Fla. 1972); Hyman v. Cohen, 73 So. 2d 393 (Fla. 1954); McNorton v. Pan American Bank, 387 So. 2d 393 (Fla. 5th DCA 1980).[10] Direct conflict exists with these cases.

CONCLUSION

By precluding Petitioner from offering proof of the invalidity of the exculpatory and liquidated damages clauses, holding them enforceable as a matter of law, the District Court has engendered conflict with several decisions of this Court and other district courts as well as long established equitable defenses to such clauses. Because of such conflict, jurisdiction to determine this case on the merits exists.

FLOYD PEARSON STEWART RICHMAN GREER & WEIL, P.A.
One Biscayne Tower, 25th Floor
Miami, Florida 33131-1868
Telephone: (305) 377-0241

By _____
Ray H. Pearson

By _____
Bruce A. Christensen

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 14 day of January, 1983 to: L. Norton Preddy, Esquire, Preddy, Kutner and Hardy, P.A., 66 West Flagler Street, 12th Floor, Miami, Florida 33130.

By _____
Bruce A. Christensen

---

[10] Here it required no great stretch of the mind to ascertain the damages which would occur in the event Honeywell failed to relay an alarm to the police. At the time of entering into the contract, it should have been apparent to both parties that a failure by Honeywell could result in the loss of the entire inventory of Continental. Most clearly, such a loss would exceed the $250.00 liquidated damages provision.