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IN THE SUPREME COURT OF FLORIDA
CASE NO. 77,247

COX CABLE CORPORATION,

Petitioner,

vs.

GULF POWER COMPANY,

Respondent.

PROCEEDING FROM THE DISTRICT COURT
OF APPEAL, FIRST DISTRICT, FOR
DISCRETIONARY REVIEW BY THE SUPREME COURT

REPLY BRIEF OF PETITIONER COX CABLE CORPORATION

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REPLY TO GULF POWER'S STATEMENT OF THE FACTS AND CASE

Gulf Power fails to clearly specify any areas of disagreement with Cox Cable's Statement of the Facts and Case, as required by Rule 9.210(c), Fla. R. App. P. Rather, Gulf Power substantially repeats facts stated by Cox Cable and argues only its biased conclusions from the facts. Those arguments have no proper place in this portion of Gulf Power's Answer Brief.

Moreover, Gulf Power's Statement is incorrect and potentially misleading in two significant respects. First, Gulf Power states that certain affidavits in the record, taken with the parties' agreement, "clearly demonstrated Cox's awareness of the potential problems with Michael Lewis' actions." (Answer Brief, p. 3.) There is absolutely no evidence that Cox Cable had any knowledge of Lewis prior to his accident. Gulf Power's assertion that Cox Cable had any "awareness" of potential problems with Lewis' actions is completely unsupported in the record.

Second, Gulf Power states that Judge Collier's final summary judgment "does not address [its] claim for contribution and obviously does not dispose of a cause of action that was neither argued nor mentioned in the judge's order (R. 216)." (Answer Brief, p. 4.) On the contrary, the judgment expressly states Judge Collier's intent to completely dispose of all of Gulf Power's claims. [R. 219] At the summary judgment hearing, the parties argued at length the question of whether Gulf Power sought contribution from Cox Cable. [T. 12; 15-16; 29]. The trial court entered its judgment with full knowledge of Gulf Power's arguments.

SUMMARY OF ARGUMENT

In this Reply Brief, Cox Cable will respond to Gulf Power's arguments in the order presented in the Answer Brief.

This Court has the authority to determine all of the issues raised in Cox Cable's Initial Brief. The Court has previously ruled that in reviewing a case in which conflict jurisdiction has been accepted, it may decide all contested issues raised by the parties. Gulf Power does not address those decisions, but relies instead on general principles regarding the exercise of conflict jurisdiction. All of the issues raised by Cox Cable have been fully briefed by the parties and, in the interests of judicial economy and fairness to the parties, the Court should determine all of the issues presented.

In Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Co., 374 So.2d 487 (Fla. 1979) and its progeny, well-defined forms of indemnification language have been held to meet the 'clear and unequivocal' standard adopted by this Court. Other than the decision of the court below, no Florida court has concluded that a less stringent degree of specificity is required in cases of joint negligence. On the contrary, the reported joint negligence cases, including those cited by Gulf Power, involve determinative language, the nature of which is absent from the agreement in this case. Even if a less stringent standard had been applied by some lower courts since Charles Poe, those cases would conflict with this Court's decisions and should be rejected.

Gulf Power's reliance on Florida Power & Light Co. v. Schauer, 374 So.2d 1159 (Fla. 4th DCA 1979) in support of its alleged contribution claim is misplaced. Schauer involved an allegation of joint liability, which is essential to a contribution claim and is lacking in this case. Here, Gulf Power's allegations negated any possible existence of joint liability. The trial court was well within its authority in disposing of Gulf Power's contentions in the final summary judgment.

Gulf Power relies on a misapplication of principles of contract interpretation to alter

the particular duty owed by Cox Cable under paragraph 9 which Gulf Power alleged was breached. These "simple rules" properly have no effect in this case, because no other provisions of the agreement expressly or impliedly modify the plain language of paragraph 9. Gulf Power acknowledges that the courts cannot rewrite the clear terms of the parties' agreement, yet seeks to have done indirectly what cannot be done directly.

Finally, Gulf Power advocates a restrictive interpretation of section 725.06, Florida Statutes, which would produce an unreasonable result in this case. The statute does not merely apply to agreements labeled as "construction" contracts; rather, the statute compels a determination of the substance of the agreement, and the parties' contract here contains significant construction provisions. In determining whether the parties fall within the statute's broad terms, the Court may interpret the statute beyond its literal terms if an irrational or unreasonable result would otherwise occur. The parties in this case are in all material respects the same as those enumerated in section 725.06 and, in logic and fairness, the statute should be applied to bar Gulf Power's indemnity claim.

ARGUMENT

I. THE COURT MAY RESOLVE ALL OF THE CONTESTED LEGAL ISSUES BETWEEN COX CABLE AND GULF POWER

Gulf Power's argument that the Court's review in this case is limited to the contractual indemnity issue is not well-founded. Gulf Power focuses solely on the grounds for exercise of conflict jurisdiction and incorrectly concludes that the scope of the Court's review includes only the issue giving rise to jurisdiction. Gulf Power apparently overlooks the substantial precedent of this Court, cited in Cox Cable's Initial Brief, establishing that the scope of the Court's review in a conflict case may include all contested issues which are raised and argued by the parties. Based on these decisions, Cox Cable requests the Court to determine all of the issues raised in this case, which have been fully briefed by the parties.

There is a distinction between the grounds for exercising conflict jurisdiction and the scope of the Court's review once it accepts conflict jurisdiction. This Court has previously decided that it has the authority to determine all contested issues raised and argued in a case in which jurisdiction is based upon a conflict of decisions. E.g., Kennedy v. Kennedy, 303 So.2d 629 (Fla. 1974); Friddle v. Seaboard Coast Line Railroad Co., 306 So.2d 97, 98 (Fla. 1974); Jacobson v. State, 476 So.2d 1282, 1285 (Fla. 1985); Savoie v. State, 422 So.2d 308, 310 (Fla. 1982). (Cited in Cox Cable's Initial Brief, p. 15 n. 5). Thus, it is not necessary to assert independent jurisdictional grounds over each issue to be decided by the Court.

Gulf Power cites no pertinent authority in support of its position. Gulf Power refers only to general caselaw discussing the grounds for conflict jurisdiction and erroneously assumes that the scope of the Court's review must be limited to the conflict issue. (Answer Brief, pp. 12-14.)

Consistent with its prior decisions, this Court has authority to determine all contested issues in this case. Cox Cable has shown that the decision of the court below

is contrary to established law and policy on all of the issues presented. These issues have been fully briefed by the parties, and, in the interests of judicial economy and fairness, the Court should determine all of the matters raised between the parties.

II. THE INDEMNITY CLAUSE BETWEEN GULF POWER AND COX CABLE IS NOT SUFFICIENT TO REQUIRE COX CABLE TO INDEMNIFY GULF POWER FOR GULF POWER'S OWN WRONGDOING

Gulf Power's indemnity claim cannot succeed under the legal standard adopted by this Court governing the enforceability of indemnity contracts. That standard requires that the parties' agreement clearly and unequivocally state that it provides indemnity for losses caused by Gulf Power's conduct. That critical language is missing from the agreement and neither Gulf Power's conclusory descriptions, nor other provisions of the agreement upon which it relies, can supply the essential terms necessary to support its indemnity claim.

The facts established in the record are not "materially different" from the cases cited by Cox Cable. (See, Answer Brief, p. 15.) Gulf Power necessarily bears some fault in causing Lewis' injuries under the circumstances of this case, because it could not, as a matter of law, have been held vicariously liable for the acts of Cox Cable. E.g., Horton v. Gulf Power Co., 401 So.2d 1384, 1386 n. 1 and 2 (Fla. 1st DCA), rev. denied, 411 So.2d 382 (1981); Pearson v. Harris, 449 So.2d 339, 343 (Fla. 1st DCA 1984). At best, Gulf Power may argue that the parties could be joint tortfeasors. However, in the absence of the requisite clear and unequivocal language, the indemnity provision is rendered unenforceable by any fault of Gulf Power. Hoskins v. Midland Insurance Co., 395 So.2d 1159, 1160 (Fla. 3d DCA), rev. denied, 407 So.2d 1104 (Fla. 1981).

The agreement in this case is similar, for example, to the contract in Leadership Housing Systems of Florida, Inc. v. T & S Electric, Inc., 384 So.2d 733 (Fla. 4th DCA 1980), cited in Cox Cable's Initial Brief at pp. 11 and 13. In Leadership Housing, the

owner and contractor on a construction project were found to be jointly negligent in causing injuries to the contractor's employee. Id. at 734. The indemnity clause required the contractor to indemnify the owner for damages due to or arising out of the contractor's performance of the contract. Id. The court denied the owner's indemnity claim against the contractor on the grounds that the contract did not clearly and expressly state that indemnity would include damages caused in whole or part by the owner's negligence. Id. In contrast, Gulf Power cites no case where language similar to the parties' agreement has been held sufficient to indemnify against another's wrongdoing.

Gulf Power makes two principal arguments in support of its indemnity claim: Gulf Power first argues that language of the parties' agreement, taken as a whole, satisfies the 'clear and unequivocal' standard. (Answer Brief, pp. 15-16.) However, there is nothing in the contract which manifests Cox Cable's clear and unequivocal intent to indemnify Gulf Power for the consequences of Gulf Power's own wrongdoing. The provisions cited by Gulf Power (Answer Brief, pp. 16-18) were considered by the trial court [T. 20-21] and Cox Cable (Initial Brief, p. 14), but they do not alter paragraph 10 which includes indemnity only for incidents caused solely by Cox Cable. The parties' agreement must be strictly construed against providing indemnity to Gulf Power, see United Parcel Service of America, Inc. v. Enforcement Security Corp., 525 So.2d 424, 425 (Fla. 1st DCA 1987), rev. denied, 525 So.2d 878 (Fla. 1988), and these provisions do not save the otherwise insufficient language of paragraph 10.

Language such as "complete" or "full" indemnification are equivocal terms of no greater effect than providing indemnity for "any and all claims," which this Court has held insufficient to indemnify another from the consequences of his own conduct. University Plaza Shopping Center, Inc. v. Stewart, 272 So.2d 507, 511 (Fla. 1973); see also, cases cited by Cox Cable, Initial Brief, pp. 13-14. There can be no presumption that Cox Cable

intended to assume liability for Gulf Power's negligence unless there is explicit reference to Gulf Power's negligence in the contract. Gulf Oil Corp. v. Atlantic Coast Line Railroad Co., 196 So.2d 456, 459 (Fla. 2d DCA), cert. denied, 201 So.2d 89 (Fla. 1967). Likewise, the requirement that Cox Cable maintain liability insurance on the project does not enlarge the scope of the indemnity provision. In University Plaza, this Court held that liability insurance coverage does not extend beyond the indemnitor's contractual indemnity obligation. 272 So.2d at 512. See also, Jackson v. Florida Weathermakers, Inc., 55 So.2d 575, 579 (Fla. 1951) (liability insurance clause does not compel indemnity absent clear and unequivocal language).

Gulf Power implies that greater latitude should be given in applying the 'clear and unequivocal' standard here because Cox Cable is "obviously knowledgeable and sophisticated in its business dealing." (Answer Brief, p. 16) However, the decisions of this Court and the district courts of appeal apply the same requirements regardless of the identity of the parties. Nor does University Plaza merely require some subjective understanding between the parties (Answer Brief, p. 18); rather, a clear, objective statement of intent is necessary. If the parties intended for Cox Cable to indemnify Gulf Power for its own negligence (c.f., Answer Brief, p. 18), that language must appear in the contract. C.f., BPS Guard Services, Inc. v. Gulf Power Co., 488 So.2d 638, 639 n. 2 (Fla. 1st DCA 1986).

Gulf Power's second principal argument contends that lower court opinions after Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Co., 374 So. 2d 487 (Fla. 1979), apply a more permissive standard when interpreting indemnity clauses between joint tortfeasors. (Answer Brief, pp. 18-19) Yet, no case has been cited by Gulf Power nor found by Cox Cable (other than the decision below) which makes that claim. Even if a more permissive standard had been applied by the lower courts, those decisions would be in conflict with this Court's clear mandate in Charles Poe Masonry

and University Plaza and should be rejected.

The agreement in this case contains none of the determinative language found sufficient in the cases cited by Gulf Power. (Answer Brief, pp. 19-22) Indemnity is not provided for claims caused "wholly or in part" by Gulf Power nor for claims 'except those caused solely' by Gulf Power. The provision in Leonard L. Farber Co. v. Jaksch, 335 So.2d 847 (Fla. 4th DCA 1976) was approved by this Court in Charles Poe Masonry solely because it indemnified for losses caused "wholly or in part" by the indemnitee, 374 So.2d at 489 (emphasis by this Court), which manifests clear and unequivocal intent to indemnify where both parties are at fault. See also, Marino v. Weiner, 415 So.2d 149, 151 (Fla. 4th DCA 1982). Contrary to Gulf Power's statement (Answer Brief, p. 19), the court in Farber clearly did not consider an insurance clause in construing the indemnity provision; the insurance clause was addressed, as an entirely separate issue, only because the court found the indemnity provision enforceable and breach of the insurance clause therefore became a viable claim. 335 So.2d at 849.

In City of Jacksonville v. Franco, 361 So.2d 209 (Fla. 1st DCA), cert. dismissed, 367 So.2d 1122 (Fla. 1978),[1] the indemnity provision specifically excluded indemnification for claims caused by the sole fault of the indemnitee (railroad) unrelated to the city's interconnection. Id. at 211. Gulf Power omits that determinative language in its quotation from the case (Answer Brief, pp. 19-20). In quoting from United Parcel Service (Answer Brief, p. 21), Gulf Power fails to highlight the essential language emphasized by that court, i.e., excluding losses caused by the indemnitee's sole negligence. Id. at 425. In Mitchell Maintenance Systems v. State, Department of Transportation, 442 So.2d 276, 277 (Fla. 4th DCA 1983), and R.C.A. Corp. v. Pennwalt Corp., 577 So.2d 620, 621 (Fla. 3d DCA 1991), the contract in each case likewise excluded claims caused by the indemnitee's

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[1] Cited by Gulf Power as Seaboard Coastline Railroad Co. v. City of Jacksonville, (Answer Brief, p. 19).

sole negligence.

This Court should maintain the 'clear and unequivocal' standard in all cases, to ensure the certainty and stability of agreements where indemnity language may be employed. To apply a lesser standard in joint negligence cases would be inimical to the policies observed by the Court in University Plaza and Charles Poe Masonry. Under existing law, there is nothing in the agreement in this case which clearly and unequivocally compels Cox Cable to indemnify Gulf Power, even if the parties had jointly caused Lewis' injuries.

III. GULF POWER'S ALLEGATION OF NEGLIGENCE FAILED TO RAISE A CLAIM FOR CONTRIBUTION AGAINST COX CABLE

The decision in Florida Power & Light Co. v. Schauer, 374 So.2d 1159 (Fla. 4th DCA 1979) is inapposite and does not support Gulf Power's contention that it sufficiently pled a contribution claim. (Answer Brief, pp. 23-24). In Schauer, the third-party plaintiff sought both common-law indemnity and contribution. Id. at 1160. The third-party complaint included an allegation that the third-party defendant was liable for all or part of the third-party plaintiff's liability. Id. That allegation is plainly consistent with and establishes the basis for joint liability necessary for a contribution claim. There is no indication that a separate allegation that the third-party defendant was the "sole proximate cause" of the plaintiff's injuries had any bearing on the sufficiency of the contribution claim; indeed, such an allegation is supportive of a common-law indemnity claim. Here, Gulf Power made no allegation of joint liability and, in fact, alleged exactly the opposite: that Cox Cable was solely liable for Lewis' damages. Due to the fundamental distinctions between these cases, Schauer is not persuasive.

The trial court's authority in determining summary judgment issues and allowing amendments to pleadings is germane because it is reasonable to conclude that Judge Collier did not believe Gulf Power sought contribution in this case. As Gulf Power

concedes, the point was argued by the parties at the summary judgment hearing (Answer Brief, p. 30). The trial court entered its order disposing entirely of Gulf Power's third-party complaint with full knowledge of Gulf Power's position. No evidence was necessary to support Cox Cable's argument.

The decision in Dean Co. v. U. S. Home Corp., 523 So.2d 1152 (Fla. 2d DCA 1987), enforcing 485 So.2d 438 (Fla. 2d DCA 1986), rev. denied, 528 So.2d 1184 (Fla. 1988) underscores significant limitations on amending pleadings and asserting new legal theories late in the litigation process. Dorset House Association, Inc. v. Dorset, Inc., 371 So.2d 541 (Fla. 3d DCA 1979) does not universally hold that summary judgment cannot be granted if the claimant has any possible unpled cause of action. (See Answer Brief, p. 25.) The determination of whether to allow amendments to the pleadings rests in the sound discretion of the trial court and the ability to grant leave to amend diminishes as the litigation enters its final stages. (See, Initial Brief, p. 23.) Gulf Power's effort to distinguish Bernard Marko & Associates, Inc. v. Steele, 230 So.2d 42 (Fla. 3d DCA 1970) (Answer Brief, p. 26) begs the question of whether it sufficiently pled a contribution claim in the third-party complaint.

The "special caution" exercised by courts in granting summary judgment in negligence cases is not pertinent. (See, Answer Brief, p. 26.) Those cases reflect judicial reluctance to intrude upon issues for the trier of fact, such as the exercise of reasonable care. That admonition is not applicable here, because Cox Cable did not seek summary judgment on any substantive negligence issues.

Gulf Power's suggestion of evidence it would offer at trial (Answer Brief, p. 28) contains matters outside the record, is improper and should not be considered by the Court. There is no evidence in the record to show what "common knowledge" existed regarding Lewis or what Burnup & Sims' plans were for Lewis' continued employment. Most importantly, there is no evidence that Cox Cable had knowledge of either of these

asserted "facts."

In arguing that Cox Cable was at fault in causing Lewis' injuries, Gulf Power misstates the basis of its duty to warn. (Answer Brief, pp. 28-29) Gulf Power's independent duty arises from its superior knowledge of dangers faced by cable workers, [R. 103]; Lewis v. Gulf Power Co., 501 So.2d 5, 8 (Fla. 1st DCA), rev. denied, 508 So.2d 14 (Fla. 1987), and was not based upon Cox Cable's obligations under the parties' agreement. Cox Cable's duty did not extend to assuring the experience of Lewis, as Gulf Power suggests, and nothing in the performance of the agreement could have relieved Gulf Power of its duty to warn.

IV. THE APPELLATE COURT MISAPPLIED BASIC RULES OF CONTRACT CONSTRUCTION AND ALTERED COX CABLE'S OBLIGATIONS UNDER PARAGRAPH 9

Cox Cable does not ask the Court to ignore any properly applied rule of contract interpretation. Cox Cable does seek to have the Court fairly interpret Gulf Power's third-party complaint and its allegation that Cox Cable breached paragraph 9 of the parties' agreement. Under no reasonable reading of paragraph 9, with due consideration for the remainder of the contract, can Cox Cable be found to have breached that provision.

No 'rule of construction' should be applied to alter otherwise clear and unambiguous language of a contract. Gulf Power concedes that where the meaning of a contract is clear under ordinary rules of English, a court is powerless to rewrite the clear and unambiguous terms of the contract. (Answer Brief, p. 31). Yet, that is precisely the result reached by the decision below, achieving indirectly what cannot be done directly. Gulf Power specifically alleged that Cox Cable breached paragraph 9 by "failing to utilize employees and contractors who were experienced in working with and around energized electrical conductors." [R. 5] The court below concluded that,

> In light of the other provisions in the contract relating to Cox's responsibilities for injuries to parties working on the lines, a

> fact finder can reasonably infer that Cox not only had a duty to hire experienced contractors, but Cox also had a duty to make all reasonable efforts to correct or to warn all parties when they became aware of deficiencies in the practices employed by their contractor or that their contractor was utilizing inexperienced employees in an inherently dangerous situation.

Gulf Power Co. v. Cox Cable Corp., 570 So.2d 379, 382 (Fla. 1st DCA 1990) (footnote omitted). However, those 'other' provisions do not affect Cox Cable's duties under paragraph 9 and the court's reliance upon them substantially exceeds the allegations of the third-party complaint.

Gulf Power argues that all provisions of the contract must be construed together. (Answer Brief, pp. 31-33.) However, there is no other provision of the agreement which expressly or by implication alters the plain language of paragraph 9. Gulf Power refers to other duties assumed by Cox Cable (Answer Brief, pp. 33-34), but none of these duties has any affect on the duty to utilize experienced employees and contractors. While Cox Cable may have had other independent duties under the agreement, Gulf Power alleged only that Cox Cable's duty under paragraph 9 was breached in a very specific manner. Any resort to avowed "long established rules of contract construction" is nothing more than an artifice to use paragraph 9 as a vehicle for other claims under the contract.

Gulf Power misperceives Cox Cable's citation to Shafer & Miller v. Miami Heart Institute, Inc., 237 So.2d 310 (Fla. 3d DCA 1970). (Answer Brief, p. 33) Cox Cable relies upon that case for the clearly stated proposition that where determination of liability depends upon the legal effect of a written contract, the issue is one of law only and ordinarily determinable by summary judgment. Id. at 311; (See Initial Brief, p. 17.) Whether the trial judge in that case considered facts outside the contract is impertinent and has no bearing on that rule of law.

Cox Cable does not seek to avoid liability on the grounds that it delegated responsibility to an independent contractor. (See Answer Brief, pp. 34-35.) Cox Cable

does contend, however, that paragraph 9 required it to hire an experienced contractor and that Cox Cable fulfilled that obligation by hiring Burnup & Sims. That is the extent of the claim pled by Gulf Power and that is the only breach of contract issue properly before this Court.

The plain requirements of paragraph 9 do not support Gulf Power's suggestion that Cox Cable breached the contract because Lewis was not experienced in working with and around energized electrical conductors. (Answer Brief, p. 35.) Lewis was not Cox Cable's employee; he was an employee of Burnup & Sims. [R. 1] No reasonable interpretation of paragraph 9 extends Cox Cable's obligation to ensuring the experience of each of Burnup & Sims' employees.

Gulf Power fairly concedes that point in its statement that: "[w]hile a reading of paragraph (9) in isolation might support Cox Cable's contention that it did not breach the contract, a reading of the remainder of the contract demands a different result." (Answer Brief, p. 35.) Gulf Power's claim does not, however, simply involve a broad question of whether Cox Cable breached the contract. It involves the very specific question of whether Cox Cable breached paragraph 9 by failing to utilize employees and contractors experienced in working with and around energized electrical conductors. To that question, the undisputed evidence of record compels the answer "no."

V. THE APPELLATE COURT ERRED IN HOLDING THAT SECTION 725.06, FLORIDA STATUTES, DOES NOT APPLY TO GULF POWER'S INDEMNITY CLAIM

Gulf Power does not dispute the fact that its agreement does not satisfy the requirements of section 725.06, Florida Statutes. (See, Answer Brief, p. 38.) Therefore, the only question before the Court is whether that statute applies to the agreement.

Gulf Power advocates an unfounded restriction of the statute to "construction" contracts. (Answer Brief, pp. 38 and 40.) The plain language of section 725.06 belies

that interpretation. The statute applies to "[a]ny portion of any agreement . . . in connection with, any construction . . . of a structure, appurtenance, or appliance . . . ." (Emphasis supplied.) These unfettered terms must be given their full and complete meaning; application of the statute is not determined by a label arbitrarily accorded to an agreement, but by the substance of the agreement. Thus, in A-T-O, Inc. v. Garcia, 374 So.2d 533, 536 (Fla. 3d DCA 1979), the statute was applied to a delivery receipt for a leased mobile scaffold.

Gulf Power overlooks significant aspects of the parties' agreement in dismissing the contract as a "licensing agreement." Cox Cable has shown the substantial construction phase of the parties' agreement (Initial Brief, p. 26-27), during which Lewis' injuries occurred. That portion of the agreement is 'in connection with the construction of [Cox Cable's] appliances' and falls within the literal terms of the statute. A different result might be obtained if the injury had occurred after the construction phase, during which Cox Cable was only leasing Gulf Power's poles. However, that is not the case and the statute must govern the construction aspects of the agreement.

Gulf Power next argues that the statute does not apply to contracts not involving an owner of real property. (Answer Brief, p. 39.) However, the legislature's use of the term "owner of real property" should not be read to preclude the statute's application to Gulf Power as owner of the property (i.e., poles) where the attachment of Cox Cable's appliances occurred. There is no evidence that any purported legislative intent would be defeated by that construction, as Gulf Power suggests. (Answer Brief, p. 39.) This Court must reject any literal interpretation of the statute that leads to an unreasonable or ridiculous result. See, City of Boca Raton v. Gidman, 440 So.2d 1277, 1281 (Fla. 1983). Under Gulf Power's conception, the statute would not apply to agreements by long-term lessees or management companies, for example, because they technically are not owners of real property. Such an unreasonable application of the statute should not be upheld,

given the apparent remedial purpose in its enactment.

The principle of "expressio unius est exclusio alterius" also has no application in this case. Its application depends on the particular circumstances and whether the conclusion it suggests is warranted under a given statute. United States v. Castro, 837 F.2d 441, 443 n. 2 (11th Cir. 1988). "Expressio unius" is not a rule of law and does not apply, for example, where the legislative history and context of the statute are contrary to such a restrictive reading. Id. at 442-43. In this case, there is no indication from the language or context of section 725.06 that the legislature intended a strict and literal reading of the list of enumerated persons. Cox Cable urges an application of the statute under circumstances which satisfy all apparent purposes of the statute and no rational reason exists to preclude its application here.

CONCLUSION

For the reasons set forth herein and in its Initial Brief, Cox Cable respectfully requests the Court to reverse the decision of the court below and remand this case for affirmance of the trial court's final summary judgment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to J. Nixon Daniel, Esq., Beggs & Lane, Post Office Box 12950, Pensacola, Florida 32576-2950, on this 18th day of September, 1991.

Mark E. Holcomb
ATTORNEY