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In The Supreme Court of Florida

CASE NO. 90,018

LENNAR FLORIDA PARTNERS I, L.P.
and LENNAR FLORIDA LAND V Q.A., LTD.,

Petitioners,

v.

REWJB GAS INVESTMENTS, FS CONVENIENCE STORES, INC.,
REWJB GAS INVESTMENTS, and TONI GAS AND FOOD STORES INC.,

Respondents

ON DISCRETIONARY REVIEW FROM
THE THIRD DISTRICT COURT OF APPEAL

PETITIONERS' BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other authorities cited

SUMMARY OF ARGUMENT

The proceedings before this Court arise from a Third District decision which implicates language used in hundreds of thousands of documents throughout this country. The language is "notwithstanding anything to the contrary", a phrase used so commonly in legal drafting that it appears in virtually every type of legal instrument in this country, from the U.S. Constitution, to the Florida Constitution, to federal and state statutes, to court opinions, to wills, trusts, and contracts of every description. There are immaterial variations in the formatting of the phrase, but "notwithstanding" language has always and routinely been treated in the law as a plain designation of what clause or provision or law is to govern over all others in the event of conflict. The Third District's decision in this case, however, has determined that "notwithstanding" language does *not* resolve conflicts among provisions, and that such conflicts must be resolved by parol evidence — a decision surely destined to encourage a stampede of litigants if allowed to stand.

The particular "notwithstanding" language in this case is contained in the fourth paragraph of an agreement, and states: "Notwithstanding any conflicting or inconsistent provisions of the Leases or this Agreement, including specifically paragraph 3 , , . ." The Third District, in a majority opinion from which the Honorable James R. Jorgenson dissented, held that this "notwithstanding" language did not — despite explicitly saying so — resolve the conflict between the provisions of paragraphs 3 and 4, and that instead a jury must listen to parol evidence from the parties in order to determine which paragraph was intended to govern over the other.

We here submit that the Third District's decision portends widespread and wholly unnecessary confusion which can and should be averted by this Court. If "notwithstanding" language — previously unquestioned in its clarity in designating an override provision — is left vulnerable to

attack for ambiguity based on the Third District's ruling, it is clear that innumerable existing legal documents will be candidates for ambiguity litigation for years to come. Moreover, drafters of future legal documents are placed in jeopardy for use of "notwithstanding" language which is, at least presently, the very language prescribed by *form* books for practitioners.

In short, the Third District's decision is wrong and its potential for harm is great. "Notwithstanding" language is useful and perfectly simple; it has stood legal drafters in good stead for centuries. There is no point in destroying its utility now, and the Third District's decision should be reversed.

STATEMENT OF THE CASE AND FACTS

A. The legal dispute and trial court proceedings thereon

This case arose from a dispute over the legal effect of the phrase "notwithstanding any conflicting or inconsistent provisions" in an amendment to 22 commercial leases. (R. Vol. I, pp. 2-41) .[1] The amendment was a 1½ page document containing just five paragraphs, and it was the product of negotiation and agreement among the principals and lawyers of the commercial entities involved.' (R. Vol. XIII, p. 1027; T. Vol. X, pp. 503, 621-622; A. 1-3). The full provision containing the "notwithstanding" language in question is:

> **4. Notwithstanding any conflicting *or* inconsistent *provisions* of the Leases *or* this Agreement, including specifically paragraph 3 hereof,** the term of each of the Leases and all renewal terms shall automatically terminate at the date that is eighteen months after the date of this Amendment.

(R. Vol. I, p. 39; A. I). Paragraph 3 had amended the terms of the various leases such that they were to have certain initial terms with optional renewal periods for a potential total duration of 27 years. (R. Vol. I, p. 39; A. 1).[3]

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[1]All references to the record on appeal, which has been supplemented by the Third District to include material portions of the appellate file, appear as (R.___). All emphasis in this brief is supplied unless otherwise stated.

[2]A copy of the amendment is included in the Appendix hereto. (A. 1-3). References to the Appendix appear as (A.).

[3]The specific wording of paragraph 3 is: "The term of the Leases is amended so that each of the Leases shall have an initial seven (7) year term (beginning on the date of this Amendment), subject to four (4) options exercisable by the Assignee by notice to Lessor to extend said term for up to 5 years each, so that if all said options are fully exercised, the initial and all renewal terms will aggregate to 27 years from the date of this Amendment." (R. Vol. I, p. 39; A. 1).

Differences arose amongst the parties, and a declaratory judgment suit was filed by the lessees, Respondents herein. (R. Vol. I, pp. 2-41). The issue in the litigation was whether the provisions of paragraph 4 which followed the phrase "notwithstanding any conflicting or inconsistent provisions, including specifically paragraph 3 hereof," controlled over any inconsistent provisions, including those contained in paragraph 3. (R. Vol. VIII, p. 1019; A. 1)).

Cross-motions for summary judgment were filed seeking a judicial determination as to the legal effect of the "notwithstanding" language in the amendment, but the motions were denied by the trial judge who decided that a jury should determine the parties' intent as to the term of the leases on the basis of parol evidence. (R. Vol. I, p. 177; Vol. II, pp. 345-346). Thus, although all parties had initially considered the issue a legal one for resolution by the court, the trial judge's ruling that a jury must decide it resulted in a trial of over a week in which numerous witnesses and hundreds of pages of documentary exhibits were presented by the parties as a basis for their conflicting arguments over what they had intended by their contract. (R Vol. VIII, pp. 1-200; Vol. IX, pp. 201-400; Vol. X, pp. 401-600; Vol. XI, pp. 601-800; Vol. XII, pp. 801-1000; Vol. XIII, pp. 1001-1200; Vol. XIV, pp. 1201-1238).

Ultimately, the case was submitted to the jury, whose findings gave effect to paragraph 3 rather than paragraph 4 of the amendment (R. Vol. III, pp. 457-454), and the trial court entered judgment based on the jury's findings. (R. Vol. III, pp. 590-591). Petitioners appealed contending that the trial judge should have entered summary judgment confirming the 18-month lease termination date of paragraph 4 because the "notwithstanding" language in the parties' agreement made it perfectly clear which of the conflicting paragraphs was to govern over the other. (R Vol. III, pp. 541-545).

B. The Third District's majority opinion

The Third District majority rejected Petitioners' argument and affirmed, holding that the "notwithstanding any conflicting or inconsistent provisions . . . including specifically paragraph 3" language in paragraph 4 of the amendment did not — despite explicitly saying so — operate to override inconsistent provisions, including paragraph 3. (R. Vol. XIII, pp. 10181023). Rather, the majority concluded, the discrepancies between paragraphs 3 and 4 presented an "irreconcilable conflict" (R. Vol. XIII, p. 1019) and a "paradigmatic 'ambiguity' " (R. Vol. XIII, p. 102 1) as to which paragraph was to prevail. The court decided that the trial judge had been correct in ruling that the issue of which paragraph was to prevail could be resolved only by presenting parol evidence to a jury about what the parties meant and intended. (R. Vol. XIII, pp. 1021-1023).[4]

C. Judge Jorgenson's dissent

Believing that the admission of parol evidence was error, Judge Jorgenson dissented. (R. Vol. XIII, pp. 10241027). His dissenting opinion pointed out that the "irreconcilable conflict" described in the majority opinion was explicitly resolved in the amendment itself: "[Any conflict [between paragraphs 3 and 4] is resolved through the concise wording of paragraph four." (R. Vol. XIII, p. 1024). Judge Jorgenson also noted that these were commercially sophisticated parties with extensive experience in real estate transactions and represented by counsel. (R. Vol. XIII, p. 1027). Thus, their selection of specific contractual language could only be deemed to have served their purposes as known to them at the time:

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[4] A copy of the Third District's opinion — now appearing in the official reporter as *Land O'Sun Realty v. REWJB* Gas *Inv.*, 685 So. 2d 870 (Fla. 3d DCA 1996) — is enclosed in the Appendix hereto. (A. 4-8).

> All of the parties involved in this transaction were knowledgeable and sophisticated when it came to drafting real estate leases. Intense negotiations between corporations and partnerships were involved; all parties were represented by counsel. This was not an adhesion contract signed by naive players under duress. **Both paragraphs were** there for purposes ***that*** **served all parties at the time. The wording of paragraph four is articulate, concise, and unambiguous as to *what* is intended. *Paragraph*** four ***clearly*** **and *expressly* incorporates paragraph three, and we should *honor* the intent** of the parties and **their freedom to *contract*.**

(R. Vol. XIII, p. 1027). Finally, Judge Jorgenson's dissent pointed out that the majority's decision was an unwarranted deviation from existing Florida precedent on "notwithstanding" language, which uniformly recognized such language as a plain directive as to the controlling among conflicting provisions, *citing* KRC Enterprises, *Inc. v. Soderquist*, 553 So. 2d 760 (Fla. 2d DCA 1989); *Grier v.* M.H.C. *Realty* Corp., 274 So. 2d 21 (Fla. 4th DCA 1973); and *Quiring v. Plackard*, 412 So. 2d 415 (Fla. 3d DCA 1982). (R. Vol. XIII, p. 1026). These decisions are discussed in the argument section below.

D. This Court's acceptance of jurisdiction

Petitioners timely filed their notice to invoke this Court's discretionary jurisdiction on grounds of express and direct conflict, and, after the parties' jurisdictional briefing had been submitted, this Court accepted jurisdiction by order dated July 10, 1997.

ARGUMENT

FLORIDA LAW HAS, UNTIL NOW, CORRECTLY GIVEN EFFECT TO "NOTWITHSTANDING" LANGUAGE AS AN UNAMBIGUOUS DESIGNATION OF PREDOMINANCE AMONG CONFLICTING PROVISIONS, AND THE THIRD DISTRICT'S RULING TO THE CONTRARY IN THIS CASE SHOULD BE REVERSED

The subject "notwithstanding" language clearly and unambiguously designated which of conflicting provisions in the parties' contract was to govern, Consequently, no parol evidence was required to resolve the conflict among provisions, and the Third District erroneously held otherwise. The Third District's decision also represents a counter-productive deviation from established Florida law on this subject which serves no purpose and should be corrected by this Court.

A. Florida case law has heretofore correctly given effect to "notwithstanding" language as a clear designation of predominance

Before the Third District's decision here, Florida case law routinely and uniformly treated the phrase "notwithstanding anything to the contrary" as plainly signalling the dominant among conflicting clauses. KRC *Enterprises v. Soderquist*, 553 So. 2d 760 (Fla. 2d DCA 1989); *Quiring v. Plackard*, 412 So. 2d 415 (Fla. 3d DCA 1982); *Grier v.* M.H.C. Realty *Corp.*, 274 So. 2d 2 1 (Fla. 4th DCA 1973). The details of these cases are addressed briefly below, but the point is the same in each, to wit, that where parties provide in an agreement that a certain provision will govern notwithstanding anything else to the contrary in the agreement, they have clearly and directly (a) recognized that there are or may be conflicting provisions within the agreement, and (b) identified which one is to govern if conflicts do arise.

KRC Enterprises, for example, involved conflicting provisions in a contemporaneously executed note and mortgage. The note had an automatic acceleration clause which provided that

upon default the unpaid principal and accrued interest would "forthwith become due and payable notwithstanding their tender." 553 So. 2d at 761. The mortgage, on the other hand, had a provision which indicated that acceleration was not automatic, but rather could occur, alternatively, at the *option* of the mortgagee:

> In the event that any of the sums of money herein referred to shall not be promptly and fully paid on or before the due date . . . the aggregate sum mentioned in said promissory note shall become due and payable forthwith or thereafter at the option of the Mortgagee as fully and completely as if the said aggregate sum of said promissory note was originally stipulated to be paid on such day, **anything in said promissory *note* or herein to the contrary notwithstanding.**

553 So. 2d at 761 (court's emphasis). The issue in the case was whether the acceleration occurred automatically on the default date ***under*** the ***note*** provision, or whether ***under*** the mortgage ***provision*** it occurred at a later date because the mortgagee had not exercised its option to accelerate. The Second District noted the general rule that two documents executed simultaneously are to be read and construed together, and then ruled on the legal effect of the "notwithstanding" language:

> Here, the note contained an automatic acceleration clause, ***but the*** mortgage **contained an acceleration clause *and* specifically *provided that* "anything in said promissory note or herein to *the* contrary notwithstanding." *Thus, the* mortgage, providing for acceleration at the mortgagee's option, prevails over the language in the note.**

553 So. 2d at 761. The provisions in the KRC Enterprises documents were obviously incompatible because a mortgage indebtedness cannot both (a) accelerate automatically upon default, **and** (b) accelerate only at the option of the mortgagee. The incompatibility of the provisions was, however, correctly deemed irrelevant by the Second District because the "notwithstanding" language was clearly intended to — and clearly did — signal which of the inconsistent clauses was to govern.

The conflict in the KRC Enterprises documents is identical in practical effect to that presented here. A lease term may not be both 'twenty-seven years' and 'eighteen months' in length at the same time. However, where "notwithstanding any conflicting or inconsistent" language has been included, as KRC *Enterprises* held, clear directions have been provided by the parties as to which of conflicting provisions is to govern.

The Fourth District's decision in *Grier v. M.H.C.* Realty, *supra*, reached the same conclusion as did *KRC Enterprises*. That is, the *Grier* court also ruled that "notwithstanding" language is clear in signalling which among conflicting provisions will govern, stating:

> There does not appear to be any genuine issue of fact with regard to the acceleration rights of the plaintiff. When these two instruments are construed together, as they should be . . . *it* seems clear ***the* provision of *the* mortgage *controls* the provision of the *note relative* to *acceleration since* the mortgage *specifically provides* 'anything in suid note or *herein* to the *contrary* notwithstanding.'**

274 So. 2d at 22.

The Third District's own prior decision in *Quiring v. Plackard, supra,* gave exactly the same effect to "notwithstanding" language as did the *KRC Enterprises* and *Grier* decisions, holding that use of parol evidence to explain or vary conflicting terms in a mortgage was prohibited because a "notwithstanding" clause itself resolved the conflict between provisions:

> Paragraph eleven of the mortgage, which specifically provides that the acceleration clause controls **"anything to *the contrary in* said *promissory note or* herein to the *contrary* notwithstanding" *resolves any*** conflict between the two provisions and **manifests the predominance** of the acceleration clause over the discount clause. **Accordingly, use of *parol* evidence to explain *or vary the terms of the mortgage was prohibited[.]***

412 So. 2d at 417.

B. The Third District's decision in this case is an aberration which can only generate confusion and should be reversed

The Third District's decision in this case stands alone in holding that an agreement using this very commonly used "notwithstanding" phrase to resolve conflicts is ambiguous — or that it may be deemed ambiguous if the phrase nullifies other conflicting provisions in the contract.[5] The Third District's decision, however, disregarded existing Florida law and disregarded the fact that the use of "notwithstanding" language by contracting parties demonstrates their anticipation of conflicts among their contract's provisions and their pre-arranged conflict resolution.

The Third District seems to have reached its decision because of discomfort with its inability to ascertain from the contract language a satisfactory explanation as to why two such inconsistent provisions — paragraph 3 (providing a 27 year lease term) and paragraph 4 (providing an 18 month lease termination date) — were included together in the lease amendment. There is no legal support, however, for the conclusion that the inconsistency between the two — however

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[5]The Third District's opinion reads as if it is ruling that the ambiguity which necessitates resort to parol evidence arises from the fact that the provisions of paragraph 4 and those of paragraph 3 are in conflict — "mutually repugnant" as the opinion puts it. When so read, the opinion indicates a broad holding that writings which contain conflicting, "mutually repugnant" clauses are ambiguous *per* se, despite "notwithstanding" language which was included to resolve the conflict.

Another possible reading of the opinion is that it is creating a heretofore unrecognized sub-category of conflicts that will always require parol explanation even though unambiguously resolved by "notwithstanding" language, i.e., those which, if read as written, have the effect of rendering some clause in the contract superfluous or a nullity. The only indication in the opinion that it may be intending to create such a sub-category is the reference to the rule of construction that contracts should, when possible, be interpreted to give effect to all provisions. The irony of that reference is that the outcome dictated by the Third District's decision itself violated that rule by giving no effect at all to the "notwithstanding" clause. Read either way, however, the opinion requires that an *unambiguous* "notwithstanding" clause be disregarded, and thus runs afoul of the most fundamental contract rule of all — that clearly-worded agreements will simply be enforced as written without resort to the rules of construction developed only to resolve *ambiguities*. See, e.g., *Robbinson v. Central* Properties, Inc., 468 So. 2d 986 (Fla. 1985).

seemingly inexplicable to outsiders to the contract — could only be resolved by parol evidence. The language of the amendment showed that the parties were well aware of the inconsistency, and that they had made specific provision for resolving it by stating — quite simply and directly — "notwithstanding any conflicting or inconsistent provisions including specifically paragraph 3 . . . the term of the Leases shall , . , terminate . . , etc." (R. Vol. I, p. 39). As Judge Jorgenson's dissent pointed out, the "irreconcilable conflict" described by the Third District majority is explicitly resolved in parties' agreement itself: "Any conflict [between paragraphs 3 and 4] is resolved through the concise wording of paragraph four." (R. Vol. XIII, p. 1024).

It is not for courts or juries to try to create more sensible or more meaningful contracts than those reached by parties bargaining on an equal basis. Commercial parties, like those involved here, may have any number of unstated purposes for what they do and for why their contracts are worded in particular ways. Absent ambiguity, however, contracts require no interpretation and should simply be enforced as written. The bewilderment or curiosity of outsiders — including courts — as to why parties would unambiguously pen mutually inconsistent clauses provides no legal basis for interfering via parol inquiries to seek to fathom why the inconsistencies were included in the first place.

> **Courts are without *power to* make *contracts* for parties, or to rewrite, alter or change the same when** made, but have and possess the power of interpretation according to established rules. **It is not within our jurisdiction to pass *upon* the wisdom or folly of. . . contracts . . . but this right will be left to the parties and will be held *void only* when *made* in derogation of some *well* recognized principle of law.**

Pierce *v. Isaac,* 184 So. 509,512 (Fla. 1938) ("It is very probable that members of this Court would hesitate to pay an additional sum of $20,000 for practically the same service [as was] provided for

in the first contract, but these matters must address themselves to the sound judgment and conclusions of the [parties] transacting the business."). See *also*, e.g., *Travers v.* Stevens, 145 So. 85 1, 855 (Fla. 1933) ("[W]ith the wisdom or folly of contracts the courts have no concern"); Mitchell *v. Mason*, 61 So. 579, 590 (Fla. 1913) (same); *Florida Ass'n v. Stevens*, 55 So. 981, 983 (Fla. 1911) (same).

C. "Notwithstanding" language has been a drafting staple in every legal context for centuries, and the Third District's decision should not be permitted to create chaos over it now

"Notwithstanding any other/conflicting/contrary provisions" language has been a fundamental tool in legal drafting in this country throughout its history and it appears in virtually every context, from framing constitutions, to drafting legislation, to writing court opinions, to preparing contracts, wills and trusts. Never has the language been deemed anything other than the clearest and easiest way to express what clause (or law or provision) should govern over others in case of conflict. The Third District's holding to the contrary in this case is just wrong, and it bears the potential for causing untold amounts of completely unnecessary litigation. We review below the variety of documents in which "notwithstanding" language has been used as a matter of routine, all of which will be called into question if the Third District decision is allowed to stand.

1. Both the United States Constitution and the Florida Constitution utilize "notwithstanding" language to designate predominance

The Supremacy Clause of United States Constitution itself uses "notwithstanding" language for the very purpose of establishing the supremacy of the United States Constitution and laws:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; ***and*** the Judges **in every state *shall* be bound thereby, anything in the Constitution *or Laws of any* State to the contrary notwithstanding.**

U.S. **CONST.** art. VI, cl. 2. The United States Supreme Court has emphasized the "notwithstanding" language in the Supremacy Clause as the clear and unequivocal signal of dominance. See *Testa v. Katt*, 330 U.S. 386 (1947). Referring to its own decision of almost a century before in *Claflin v. Houseman*, 93 US. 130 (1876) which "repudiated the assumption that federal laws can be considered by the states as though they were laws emanating from a foreign sovereign," the *Testa* Court stated:

> Its teaching is that the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, **'anything *in* the *Constitution* or *Laws* of *any* State to the *contrary notwithstanding*.'**

Testa, ***330*** U.S. at 391.

Florida's Constitution also uses "notwithstanding" language to resolve conflicts known to exist or contemplated to arise. For example, Fla. Const., art. V, §12(h) on judicial discipline, removal, and retirement provides: "Notwithstanding any of the foregoing provisions of this section, if the person who is the subject of proceedings by the judicial qualifications commission is a justice of the supreme court of Florida all justices of such court shall be disqualified with respect to all proceedings therein concerning such person. . , ." Another example is found in article V, § 16, which states: "Notwithstanding any other provision of the constitution, the duties of the clerk of the circuit court may be divided by special or general law between two officers, one serving as clerk of court and one serving as ex officio clerk of the board of county commissioners, [etc.] ."

2. "Notwithstanding" language is used over 400 times in the current Florida statutes

"Notwithstanding" clauses also appear more than 400 times in the present version of Florida's statutes.[6] For example, one of the provisions in the Uniform Commercial Code as adopted in Florida instructs that "Notwithstanding any provisions to the contrary in any of the following Florida Statutes, the remedies provided by such statutes shall not restrict the remedies otherwise available to a secured party under this code . . . ." §671.304, Fla. Stat.

Another example is found in the statute which exempts teaching hospitals from joint and several liability apportionment of damages by identical "notwithstanding" clauses contained in §766.112 and §768.81(6):

> **Notwithstanding anything in *the law to the contrary*,** in an action for damages for personal injury or wrongful death arising out of medical malpractice, whether in contact or in tort, when an apportionment of damages pursuant to this section is attributed to a teaching hospital as defined in s. 408.07, the court shall enter judgment against the teaching hospital on the basis of such party's percentage fault and not on the basis for the doctrine of joint and several liability.

8766.112, Fla. Stat. and §768.81(6), Fla. Stat.

Another example is found in a provision of the Florida Insurance Code designed to ensure the predominance of the insurance statutes over any conflicting provisions which insurance companies might include within their insurance policies:

> Any insurance contract delivered or issued for delivery in this state covering a subject or subjects of insurance resident, located, or to be performed in this state, which subjects, pursuant to the provisions of

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[6] A list of the statutory provisions in which "notwithstanding" clauses appear is included in the Appendix hereto. (A. 9-12). The list was generated by Lexis searches. Search of LEXIS, Florida Library, FLCODE File (September 3, 1997) (searches for: (1) notwithstanding /10 contrary; (2) notwithstanding /10 conflict!; and (3) notwithstanding /10 inconsistent).

> this code, the insurer may not lawfully insure under such a contract, shall be cancellable at any time by the insurer, ***any*** **provision of the contract to the contrary notwithstanding.**

§627.418(2), Fla. Stat.

A final example is found in a provision of Florida's probate statute which, interestingly, uses the "notwithstanding" language to ensure the predominance of trust instrument provisions over contrary provisions of the probate code:

> (1) A trust shall be administered with due regard to the respective interests of income beneficiaries and remaindermen. A trust is so administered with respect to the allocation of receipts and expenditures if a receipt is credited, or an expenditure is charged, to income or principal, or partially to each:
>
> (a) In accordance with the terms of the trust instrument, **notwithstanding contrary *provisions* of this chapter.**

9738.02, Fla. Stat.

3. Florida legal form manuals routinely use "notwithstanding" language in forrn contracts and instruments

"Notwithstanding" language also routinely appears in Florida Jur Forms, a publication which contains form documents, instruments, and contracts to aid Florida practitioners. For example, the language is used in the Fla Jur Forms: Estate Planning volume for, e.g., various provisions in trust instruments and agreements, including §34: 124, a sample power of revocation: "Notwithstanding anything to the contrary, the trust shall be revocable at any time during the trustor's lifetime by . . ."; §34:126, Section IX, which is a perpetuities savings clause in a general form for joint revocable trusts: "Notwithstanding anything to the contrary, the trust created by this agreement shall cease and terminate 2 1 years after the death of the last survivor . . ."; and §34:161,

Section IX, a limitation of powers clause in a form irrevocable life insurance trust: "Notwithstanding any other provision of this agreement, no power exercisable by trustee shall be construed as to enable dealing with or disposing of the trust principal for less than adequate considerations."

Similarly, the Fla Jur Forms: Legal and Business volume has model forms for various commercial transactions utilizing "notwithstanding" language. Examples are the form for a distributorship agreement found at §42:25: "Notwithstanding anything in this agreement to the contrary, seller shall have the right to amend, modify, or change this agreement [in case of changes in law or circumstances beyond seller's control.]" And, in §42:30, which is a form for a non-exclusive dealing agreement: "In any event and notwithstanding anything in this agreement to the contrary, manufacturer's liability under any warranty shall be discharged by replacing or repairing any part or parts that prove to be defective . . . ."

The Fla Jur Forms: Contracts volume is also replete with "notwithstanding" clauses included in various types of form agreements. A form indemnification agreement appearing in §24:20 provides: "Notwithstanding any other provisions of this Indemnity or the Loan Documents, the indemnified parties agree that any liability of the Borrower shall be asserted only against the interests of the Borrower on the Project . . . ." Or, in the §26.41 default provision contained in a form for a structured settlement agreement: "In addition, claimant may exercise any other rights which claimant may have in law or equity against defendant and insurer by reason of such default. Notwithstanding the foregoing, the claimant shall not have any rights . . . greater than a general creditor."

4. **"Notwithstanding" language also appears throughout Florida case law**

Florida case law also contains examples in which "notwithstanding" language has appeared in various types of legal writings.[7] A review of these cases shows that Florida courts routinely use "notwithstanding" language in writing opinions, and equally routinely give effect to "notwithstanding" language in contracts and statutes.

In *Nussdorf v.* State, 495 So. 2d 819 (Fla. 4th DCA 1981), for example, the Fourth District used "notwithstanding" language to signal the supremacy of Eighth Amendment protections over conflicting state statutory provisions:

> It has been held that the death penalty is an excessive penalty for a sexual offender who as such did not take a human life, and therefore unconstitutional pursuant to the Eighth Amendment. [Cites omitted]. Thus sexual battery is not a capital offense in Florida, **notwithstanding *that contrary language* is found *in* the statutory *section* applied in the instant case, *section* 794.011(2), *Florida* Statutes (1983).**

495 So. 2d at 819-820.

In *Kaufman v.* Mutual of *Omaha Insurance* Co., 681 So. 2d 747 (Fla. 3d DCA 1996), the Third District gave automatic override effect to one of the provisions in the Florida Insurance Code which states that the Code's provisions shall be read into health insurance contracts in this state, notwithstanding contrary provisions in such contracts which some insurers may insert:

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[7] *See, e.g., Thompson v.* State, 1997 WL 311858 (Fla. June 12, 1997); *Jansen* Properties of Florida, Inc. *v.* Real Estate Associates, Ltd., VI, 674 So. 2d 210 (Fla. 4th DCA 1996); *Vetrick v. Hollander,* 566 So. 2d 844 (Fla. 4th DCA 1990); *Florida Power &* Light Co. *v.* Beard, 626 So. 2d 660 (Fla. 1993); *Weiman v. McHaffie,* 470 So. 2d 682 (Fla. 1985); B*enson* v. First Trust *&* Savings Bank, 142 So. 887 (Fla. 1932); *Isignia Homes,* Inc. *v. Hinden,* 675 So. 2d 673 (Fla. 4th DCA 1996); *Zolonz v. Zolonz,* 659 So. 2d 451 (Fla. 4th DCA 1995); Goodman *v.* Goodman, 290 So. 2d 552 (Fla. 1st DCA 1973), cert. denied, 292 So. 2d 19 (Fla. 1974); *National* Union Fire Insurance Co. *v. Westinghouse* Electric *Supply* Co., 206 So. 2d 60 (Fla. 3d DCA 1968).

> If any insurer writes or issues in this state any health insurance contract, as contemplated by this chapter, and the form of such contract is not authorized by or in conformity with the provisions of this chapter, the contract shall nevertheless be a valid and binding contract of the insurer, and **shall be construed as though its *terms* and *provisions* were in *conformity* with those required by this chapter, any provision in the contract notwithstanding.** (court's emphasis).

681 So. 2d at 749.

Also, in Insignia Homes, Inc. *v. Hinden*, 675 So. 2d 673 (Fla. 4th DCA 1996), the Fourth District required the parties to arbitrate certain claims because their contract included a provision that: **"Anything to the contrary notwithstanding, *Buyer* agrees with *Seller that (a) all claims,* disputes and other matters *in* contention between Buyer and *Seller* under this Agreement,** or arising out of or relating to the subject matter of this Agreement **. . . *shall* be submitted *for* arbitration** to the American Arbitration Association . . . ." 675 So. 2d at 674.

5. Other jurisdictions have had equally little difficulty in treating "notwithstanding" as a clear designation of the controlling among conflicting concepts or provisions

Courts throughout the country have also generally found "notwithstanding" language to be plain and clear as a designator of the dominant among conflicting provisions. To avoid undue protraction of this brief, we set out here but a few of the many examples.

In State *v.* Christianson, 55 N.W.2d 20 (Wis. 1952), for example, the Wisconsin Supreme Court had occasion to comment on the plain effect of "notwithstanding language" when interpreting a statute on state employee retirement benefits enacted when a variety of prior acts relating to that subject were being merged:

> The provision for the payment of the one hundred eighty monthly guaranteed annuity payments was in the last enactment of the legislature during 1947 concerned with this subject. ***In* view of *that***

> fact, and because there was necessarily some confusion in the merging of the various plans by different acts of the legislature, the opening words of sec. 66.906(3) are significant. Those words are the following: "Notwithstanding any other provision of sections 66.90 to 66.919, any participant employee * * * may elect * * *." Also it seems under the circumstances that special significance must be given to the words "with a guarantee of one hundred eighty monthly payments." The word "notwithstanding" is defined in Webster's dictionay to mean "without prevention or obstruction from or by" and also to mean "in spite of."
>
> What was the intention of the legislature by its last act of the session upon the subject? With full knowledge that several acts had been adopted and that there was more than a possibility that all of the sections would not be in harmony, it declared it to be its intent that in spite of anything to the contrary in its prior enactments, and without prevention or obstruction by any prior enactment not in harmony therewith, it wished to guarantee an annuity for a period of one hundred eighty months to the participating employee[.].

55 N.W.2d at 23-24.

The Washington Supreme Court was faced with a similar statutory interpretation issue in connection with a Washington statute on the sale of public property, and found the use of "notwithstanding" language pivotal in overriding contrary statutory provisions:

> RCW 39.33.010 commences with the phrase 'Notwithstanding any provision of law to the contrary.' This is significant. Notwithstanding means 'without prevention or obstruction from or by, in spite of' Merriam-Webster Third Int'l Dictionary (1964) [.] . . . This signifies the legislature declared its intent that despite any enactment to the contrary, and without prevention or obstruction by any prior act, the intergovernmental disposal of property must be preceded by the required superior court decree.

Davis v. County of King, 468 P.2d 679,680 (Wash. 1970).

The Supreme Court of Ohio gave identical significance to "notwithstanding" language in State ex. rel. Cavmean v. Board of Education of Hardin County, 165 N.E.2d 918 (Ohio 1960):

> **The salient difference between the statute involved in the Van Wye case and that in the case presently before us lies in the first sentence of Section 3311.261, Revised Code which provided: 'Notwithstanding sections 33 11.22, 33 11.23, and 33 11.26 of the Revised** Code, until January 1, 1959 * * *.' This language did not appear in the statute involved in the Van Wye case.
>
> 'Notwithstanding' is defined in Webster's New International Dictionary (2 Ed.) as a meaning 'without prevention or obstruction from or by; in spite of.' [cite omitted].
>
> **It is axiomatic in statutory construction that words are not inserted into an act without some purpose. *The* General Assembly enacted Sections** 33 11.26 and 33 11.261, Revised Code, at the same time. **With full knowledge that these acts had been adopted and that conflicts might arise thereunder, the General Assembly inserted the word 'notwithstanding and by so doing clearly indicated its intent that proceedings under Section 33 *11.261,* Revised Code, should take precedence over pending proceedings *previously* instituted under the other enumerated sections.**

165 N.E.2d at 923-924.

And, as a final example, the following comments from the Supreme Court of New Hampshire underscore the plain effect of "notwithstanding" provisions:

> At the outset, it is important to note that Laws 1983, 469.32, II, by its express terms, applies to sweepstakes revenue. **Moreover, use of the introductory *clause* "notwithstanding any *other* provision of *law*" in *Laws* 1983, 469.32, *II,* *evinces* a legislative intent to suspend RSA *284:21-j (Supp.* 1983).**
>
> ***In* this jurisdiction, the *words* of a statute *are* interpreted according to their plain and *ordinary* meaning. RSA 2 *1:2. The plain* meaning *of the* word "notwithstanding" *is* "without prevention or obstruction from or** by" or "***in* spite** of." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY **1545 (1961).** *In applying* **the definition** *of* **"notwithstanding" to the provision at issue, it becomes apparent that the legislature, in recognition that *Laws* 1983, 469:32, *II* conflicted with RSA *284:21-j (Supp.* 1983) also dealing with the distribution** *of* **sweepstakes revenue, inserted the phrase to express its intent *that***

Laws 1983, 469:32, **II** *was* **to take** *precedence over* **RSA** *284:2* **1** *-j* ***(Supp.* 1983).**

King v. Sununu, 490 A.2d 796,800 (N.H. 1985).[8]

D. The Third District's decision has cast purposeless doubt on time-honored language, and should be reversed before its potential for creating chaos is realized

Given the widespread use of "notwithstanding" clauses, the confusion and resulting increase in litigation which will inevitably be generated by the Third District's decision should be averted with a reversal of the decision by this Court. Under the prior — and uniform — Florida decisions, drafters of legal instruments were able to utilize "notwithstanding anything to the contrary" language to designate an override clause that would — because of its clear and unambiguous nature — operate automatically, with no possibility that parol evidence squabbles would be permitted to vary

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'Other examples include In Re: Gulf Oil/Cities Service Tender Offer Litigation, 725 F. Supp. 712, 729-730 (S.D.N.Y. 1989) ('notwithstanding' means 'take[s] precedence over' and thus negates any contrary provision of the agreement); Missouri *Pacific Railroad* Co. *v.* Rental *Storage &* Transit Co,, 524 S.W.2d 898, 908 (MO. App. 1975) (where contract provided for indemnification 'notwithstanding any possible negligence' on the railroad's part, the court properly construed the covenant of indemnity to include losses caused by the railroad's own negligence) ; *Maniace v.* Commerce Bunk of *Kansas* City, 1993 WL 761987 (W.D. MO. Dec. 10, 1993), *aff'd,* 40 F.3d 264 (8th Cir. 1994), cert. *denied,* 5 14 U.S. 1111 (1995); (the phrase 'anything herein contained to the contrary notwithstanding' in one paragraph of a trust agreement limited the powers granted to the trustee in other conflicting paragraphs). See *also,* e.g., King *v. Sununu,* 490 A.2d 796 (N.H. 1985); *Burns v.* Miller, 733 P.2d 522 (Wash. 1987); Williamson *v. Schmid,* 229 S.E.2d 400 (Ga. 1976); Davis *v. County* of *King,* 468 P.2d 679 (Wash. 1970); The odore Roosevelt *Agency, Inc. v. General Motors* Acceptance Corp., 398 P.2d 965 (Colo. 1965); State *v. Christiansen,* 55 N.W.2d 20 (Wis. 1952); Premiere Cur Rental, *Inc. v.* Government Employees Insurance Co., 637 N.Y.S.2d 177 (N.Y. App. 1996); *Parkville* Benefit Assessment *Special Road* District *v.* Platte *County,* 906 S.W.2d 766 (MO. App. 1995); Wilshire Insurance Co. *v.* Home Insurance Co., 880 P.2d 1148 (Ariz. App. 1994); *City* of *Seattle v. Ballsmider,* 856 P.2d 1113 (Wash. App. 1993); *White v.* American *Republic Insurance Co., 799* S.W.2d 183 (MO. App. 1990); American *Family Insurance Co, v. Village* Pontiac-GMC, Inc., 538 N.E.2d 859 (Ill. App. 1989); *Elliott v. Sears, Roebuck & Co.,* 527 N.E.2d 574 (Ill. App. 1988); Board of Education of *Maple* Heights *City School District v. Maple* Heights Teachers Assoc., 322 N.E.2d 154 (Ohio App. 1973); *Dinkler* v. Jenkins, 163 S.E.2d 443 (Ga. App. 1968).

or nullify the contractual designation as to primacy. The Third District's contrary decision has now cast doubt on the automatic effectiveness of "notwithstanding" language in a manner which disserves the bench, bar, and public in this state.

We submit that the better course is to continue to give "notwithstanding" language its automatic override effect.[9] It does so simply and directly enough, and it is easily understood. Inconsistencies which parties have drafted into their contracts with "notwithstanding" clauses included to resolve them should be left as the parties' business alone, and not converted into puzzle-solving problems for the already overburdened courts. In sum, the conflict which brought this case before this Court should be resolved in favor of the previously existing law, and the Third District's decision should be reversed.

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[9]The result we have requested does not, as Respondents have erroneously suggested in their jurisdictional brief, result in creation of a new and unique "*per se*" rule automatically dictating the outcome of any dispute over "notwithstanding" language in whatever context. All established rules of contract construction remain available where applicable. Thus, for example, if giving effect to a "notwithstanding" clause will produce an unconscionable result, or disadvantage the lesser of parties of unequal bargaining power, or condone a fraud, courts remain free to apply well-established principles of contract law or of equity to nullify the clause. Or, if a "notwithstanding" clause does create an ambiguity — as, for example, if there were competing "notwithstanding" clauses — then, of course, ambiguity principles of construction remain available to the courts. In short, Respondents' purported "per se" rule fears are simply unfounded.

CONCLUSION

Based on the foregoing facts and authorities, Petitioners respectfully submit that the decision of the Third District Court of Appeal should be reversed with directions that the case be remanded to the trial court for entry of final summary judgment declaring that the term of the parties' leases is that set out in paragraph 4 of the parties' Amendment to the leases.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Petitioners' Brief on the Merits was mailed this 3rd day of September, 1997 to: JOSEPH DEMARIA, ESQUIRE, Tew & Beasley, Counsel for Respondents, 201 South Biscayne Boulevard, Miami Center, Suite 2600, Miami, Florida 33 13 1-4336; CURTIS S. CARLSON, ESQUIRE, Carlson & Bales, Counsel for Land O'Sun Realty, Ltd., et al., 2770 First Union Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131; and CHARLES R. GARDNER, ESQUIRE, Gardner, Shelfer, Duggar & Bist, P.A., Counsel for The Real Property, Probate and Trust Law Section of The Florida Bar, 1300 Thomaswood Drive, Tallahassee, Florida 323 12.

Elizabeth C. Romo