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' REPLY BRIEF ON THE MERITS

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REPLY TO RESPONDENTS' ANSWER BRIEF

A. "Notwithstanding" language is a simple and useful drafting tool which should continue to be given effect where it unambiguously designates the predominant among conflicting provisions

In these proceedings, we urge that "notwithstanding anything to the contrary" language should continue to be given its plain effect in designating which among conflicting provisions is to govern. The proposition is simple enough, and conflicting provisions in documents exist frequently enough, and "notwithstanding" language solves the conflicts easily enough, that it is readily understandable why "notwithstanding" has been left alone to do its job for centuries.

Respondents, however, have insisted in their answer brief that "notwithstanding" may not be used to select among conflicting provisions because, Respondents say (on their own authority), a more important rule of contract construction requires that "all provisions of a contract must be given some meaning and effect[.]" (Respondents Answer Brief, p. 1). Respondents' statement of the rule, however, is self-evidently overbroad and entirely disregards the very qualification to the rule that matters here. Specifically, there are contracts — like the parties' contract here — that contain conflicting or repugnant provisions which simply cannot be reconciled.

Thus, to cite one of this Court's decisions articulating the actual rule, while "a contract should be considered as a whole in determining the intention of the parties", conflicting provisions within the whole present an obvious problem such that "if clauses in a contract appear to contradict each other, they must be given such an interpretation and construction as will reconcile them ***if*** **possible."** *Triple* E *Development* Co. *v. Floridagold* Citrus Corp., 51 So. 2d 435, 438 (Fla, 195 1). Respondents themselves have cited this language in their answer brief although they

resolutely ignore the critical "if ***possible***" qualifier throughout, and similarly ignore the fact that impossibility of reconciliation does not *ipso* facto equal ambiguity.

It is precisely this problem of conflicting provisions which are not possible to reconcile that presents the critical issue in this case and which makes this case of importance to this Court. The fact is that irreconcilably conflicting clauses do exist in innumerable contracts and, as pointed out in our initial brief, in statutes, wills, trust investments, etc., as well. The question is how to determine which of conflicting or 'mutually repugnant' provisions is to govern.'

We submit that the contract or instrument itself should be allowed to designate the governing among conflicting provisions where it does so unambiguously with "notwithstanding" language. Respondents, on the other hand, urge that contracts which contain conflicting, mutually repugnant clauses *cannot* internally resolve the conflict — with a "notwithstanding" designation or otherwise — and instead ***must*** be deemed ambiguous so that a jury must be assembled to listen to the parties' parole evidence versions of how they came to contract and what they now say they intended their contract to mean.

Respondents' position, however, ignores the firmly established starting point for any contract construction case. "Begin at the beginning", as the Red King said in Alice. The first thing

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'We note in this regard that Respondents — in seeking to have paragraph 3 apply — argue again and again that the ***whole*** contract must be considered and every provision given effect. But their position violates that very precept. Giving effect to paragraph 3 nullifies paragraph 4 altogether, in direct contravention of what Respondents contend the rules are — although Respondents are seemingly not troubled by that illogic. The fact is that there are some contracts where one provision will be in and another will be out — the only question is which one. As we argue in text, *infra*, if the contract specifically says which provision is to be in notwithstanding the other, the contract should be master — not the decision of a jury in an already overburdened judicial system based on the parties' after-the-fact parole contentions about which provision was intended to be in, and which out.

to look at in contract construction is the contract language itself — if it is unambiguous, the court need go no further. To finish out the Red King's directions: "Begin at the beginning, go through to the end, and then stop." In the case of unambiguous contract language, the court can stop with the contract itself and the court system and the citizens serving as jurors need not be burdened with having trials about what parties say they intended their contracting documents to mean.

Thus, while Respondents' brief reiterates throughout the proposition that the parties' intent is of paramount importance in the task of contract construction, where the language of a contract is unambiguous no construction of the contract is necessary at all to determine the parties' intent. See, *e.g., Robbinson* v. Central Properties, Inc., 468 So. 2d 986 (Fla. 1985).

> When a contract is clear and unambiguous, ***the*** actual language used ***in*** the contract ***is*** the best evidence of the intent of the parties, and the plain meaning of that language controls,

Maher v. *Schumacher*, 605 So. 2d 481,482 (Fla. 3d DCA 1992). "It is firmly established law that the **intent of the parties *to an unambiguous* written *contract* must be determined from *the writing* itself."** Bailey v. *Royal* Air Services, Inc., 519 So. 2d 1120, 1122 (Fla. 2d DCA 1988). "In the absence of ambiguity, **the *parties'* intent must be discerned from the four corners of the document."** Richter v. Richter, 666 So. 2d 559,561 (Fla. 4th DCA 1995). *See* also, e.g., In *re Estate* of Frances *L. Barry v. Lieberman*, 689 So. 2d 1186 (Fla. 4th DCA 1997); *Misala,* Inc. v. Eagles, 662 So. 2d 1389 (Fla. 4th DCA 1995); *U.S.* on *behalf* of *Small* Business Administration v. South *Atlantic* Production *Credit* ASSOC., 606 So. 2d 691 (Fla. 1st DCA 1992); *Acceleration National* Service *Corp.* v. *Brickell* Financial Services Motor Club, Inc., 541 So. 2d 738 (Fla. 3d DCA 1989), rev. denied, 548 So. 2d 662 (Fla. 1989); *Jaar* v. *University* of *Mimi,* 474 So. 2d 239 (Fla. 3d DCA 1985), rev. denied, 484 So. 2d (Fla. 1986).

In this case, the parties' contract consisted of just five paragraphs. Paragraphs 3 and 4 were conflicting and 'mutually repugnant', but paragraph 4 began by stating: "Notwithstanding any conflicting or inconsistent provisions of the Leases or this Agreement, *including specifically paragraph* 3 . . ." and then sets out its specifications. This contract language very clearly and very simply and very specifically acknowledges the parties' awareness that the contract included conflicting provisions, and just as clearly, simply, and specifically designates which of the conflicting provisions was to govern. Since there is nothing whatsoever that is ambiguous about the contract language, the starting point is — under the rules of construction — also the ending point and the involvement of the court system should stop there, leaving the parties to their unambiguous agreement.

Bottom line, the only 'problem' with the contract here is not any ambiguity but that it is puzzling to outsiders. Anyone — if forced to consider the question — would find it puzzling for parties to say in paragraph 3 that lease terms will be amended to last up to 27 years, and in paragraph 4 say that notwithstanding paragraph 3 the leases will terminate in 18 months. But the fact that a contract is puzzling or peculiar is not, as Respondents argue, what triggers the need for construction. The only characteristic that will trigger construction is ambiguity. As Judge Jorgenson pointed out in his dissent from the Third District majority opinion, while the conflicting provisions may indeed seem peculiar to outsiders: "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." 685 So. 2d at 874.[2]

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[2]Interestingly, while Respondents have now advanced long explanations as to how it was always really intended that paragraph 3 govern over paragraph 4, that was not what Respondents told the bankruptcy court — in a disclosure statement signed and submitted by Respondents before this suit was ever filed — in which they stated:

> The very underpinning of contract law is the desire to bring certainty to commercial transactions. The contract between the parties is controlling . . . and courts cannot impose duties upon contracting parties different from the terms agreed upon. * * * The parties selected the language of the contract. Finding it to be clear and unambiguous, we have no right-nor did the lower court-to give it a meaning other than that expressed in it. To hold otherwise would be to do violence to the most fundamental principle of contracts.

Institutional & Supermarket Equipment, Inc. *v.* C *&* S Refrigeration, Inc., 609 So. 2d 66 (Fla. 4th DCA 1992). See *generally* Restatement (Second) of Contracts $203, cmt. c, (1979) (parties are free to make agreements which seem unreasonable to others).

B. Courts are not required, as Respondents suggest, to rewrite unambiguous contracts that seem to be foolish or to make no sense

Respondents' brief suggests the addition of a new rule to the initial step in contract construction to accompany the determination of whether the contract language is unambiguous. Respondents would like courts also to consider whether an unambiguous contract seems to the court — when viewed as a whole — to make good sense and to provide a satisfying reason for why the parties have contracted as they have. Thus, if a contract's provisions are perfectly unambiguous but seem foolish or inexplicable or puzzling to the court — as where one conflicting provision nullifies

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> The restructured Fogg Family Leases will have an initial 7-year term, with four 5-year renewal options, but are subject to termination 18 months after the Effective Date. *The* Purchaser **[Respondent *REWJB]* anticipates *that* the lessors and the relevant mortgagee will *begin* negotiations regarding the defaulted mortgages during this period, and that this *18-month* termination *provision* will be *removed* in *connection* therewith. There can be no *assurance,* however, that this *assumption will prove to be correct.***

(R. Vol. VII, pp. 85 1-875 at p. 872).

another — then the court should go beyond the unambiguous contract language and proclaim that there is an ambiguity, even if there isn't one, simply because of the seeming foolishness of the parties' agreement.

Respondents have thus argued that the courts in this case properly followed that route and properly concluded that when viewed as a whole "the entire contract made no sense." (Respondents' Brief, p. 16) . Respondents insist that the courts below properly considered a series of querys about the parties' subjective intentions in writing a patently clear contract:

> As the Third District asked, why would anyone amend what had been long term leases by adding the 27 year lease provision in paragraph 3 and then completely nullify that provision with paragraph 4?
>
> If paragraph 4 completely overrides paragraph 3, as Lennar contends, what is the purpose of paragraph 3?
>
> Why would anyone insert paragraph 3 and paragraph 4 in the same document at the same time?
>
> What did the parties intend the entire contract to mean?
>
> Because these questions could not be answered from the face of the contract, the Third District contended that the trial court properly allowed the jury to consider parole evidence.

(Respondents' Brief, p. 16). These remarks delineate new and heretofore irrelevant subjects for judicial inquiry. According to Respondents, a court must preliminarily examine the language of a contract not — as under previously established law-just to determine if it is unambiguous, but to determine whether it is unambiguous and whether the contract as a whole seems wise or foolish to outsiders to the contract.

This Court, however, has long since made it clear that the courts very definitely will not undertake the 'foolishness' inquiry Respondents are suggesting: " [W]ith the wisdom or folly of

contracts the courts have no concern." *Travers v.* Stevens, 145 So. 851, 855 (Fla. 1933). See *also,* e.g., *Voelker v.* Combined *Insurance* Company of America, 73 So. 2d 403 (Fla. 1954); *Walgreen* Company *v. Habitat Development* Corp., 655 So. 2d 164 (Fla. 3d DCA 1995). Or, as the Second District once put it:

> [W] hen the terms of a voluntary contract are clear and unambiguous . . . the contracting parties are bound by those terms, and a ***court*** is powerless to rewrite the contract to make it more reasonable or ***advantageous*** for one of the contracting ***parties.***

Emergency Associates of *Tampa,* P.A. *v. Sassano, 664 So.* 2d 1000, 1003 (Fla. 2d DCA 1995).

C. Neither are courts required to consider parole testimony about 'side deals' not included in parties' unambiguous contracts

Respondents have another rationale for the new, intrusive responsibility they propose to foist on the court system — that it would be unfair not to take into consideration a side understanding they had which was left unstated in their contract. This suggestion too flies in the face of established tenets of Florida contract law, and the facts of this case illustrate perfectly why the courts are not willing to consider ex post facto parole expanations as to 'side' or 'true' understandings at odds with unambiguous contract provisions,

At some point in time — undisputedly after extended negotiations and with advice of counsel — Respondents sat down to the contracting table, and read the proposed five-paragraph agreement, including paragraph 4 which stated: "Notwithstanding any conflicting or inconsistent provisions of the Leases or this Agreement, including specifically paragraph 3 hereof, the term 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). If — as Respondents now contend — their ***real***

intent was that paragraph 3 was to control notwithstanding any conflicting provisions of the agreement including paragraph 4, then Respondents should have changed the wording then and there. Or, if there was some kind of 'side deal' which was intended to qualify the stated supremacy of paragraph 4, then Respondents should have said so, then and there. Instead, they signed an agreement which very clearly: (a) included paragraph 3, and (b) without qualification or explanation, provided that paragraph 4 would control over paragraph 3.

Having signed that unambiguous declaration, Respondents nonetheless now urge that it was appropriate to insist that what they "really" meant was something else, and that it was accordingly perfectly reasonable to require a jury to listen to evidence for over a week and the Third District and this Court to give full attention and consideration to their present, lengthy parole explanations[3] as to how they never really intended that paragraph 4 would be given effect over paragraph 3 — even though they unambiguously said it would. But the language they chose and assented to was unambiguous, so Respondents have no entitlement to impose on the courts or the jury the task of considering these 'true' (but unstated) intentions in order to vary the terms of their own perfectly clearly-worded contract. See, *e.g., Mandell v. Fortenberry*, 290 So. 2d 3, 7 (Fla. 1974) (there is a presumption that parties signing legal documents "mean what they say" and "should be bound by their covenants"); *Sabin v. Lowe's* of Florida, Inc., 404 So. 2d 772, 773 (Fla. 5th DCA 1981) (a parry has a duty to learn and know the contents of a proposed contract before he signs and delivers it and is presumed to know and understand its contents, terms and conditions, especially where the contract is not long or involved and clearly worded).

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[3]See note 2, *supra.*

As the Fourth District stated recently in rejecting a similar suggestion that parole evidence should be received to explain the 'true consideration' for a contract notwithstanding unambiguous contract language:

> We also reject the applicability of law allowing parole evidence to demonstrate the "true consideration" for an agreement. [cites omitted]. The "true consideration" exception is only applicable to clarify an ambiguous document. * * * Recognizing a "true consideration" exception to every motive that may prompt one to execute a document would truly be an exception that swallows the rule.

In *re Estate* of Frances L. *Barry v. Lieberman,* 689 So. 2d 1186, 1188 (Fla. 4th DCA 1997).

D. The potential for increased litigation under Respondents' new rules is very real

If, under Respondents' approach, all that parties need do to get a parole evidence trial about their no longer desirable contracts is to say: "I know what my contract clearly says, but I really meant something different" — then the floodgates problem is obvious. And that is precisely what Respondents propose.

Respondents downplay the increased litigation that will ensue if parties are not bound by their "notwithstanding" designations by implying that the conflicting provisions in this contract are rare or unique: "Most draftsmen would not include provisions like paragraphs 3 and 4 in the same document at the same time." (Respondents' Brief, p. 24). In fact, however, such a conflict in provisions is fairly typical. The very conflict cases cited in our initial brief — KRC Enterprises, Inc. *v. Soderquist,* 5.53 So. 2d 760 (Fla. 2d DCA 1989) and *Grier v. M.H.C. Realty Corp., 274 So.* 2d 21 (Fla. 4th DCA 1973) are good examples.

Each case addressed a mortgage and note containing mutually repugnant provisions as to acceleration of a mortgage indebtedness: one providing for automatic acceleration on default and the other for acceleration solely at the option of the mortgagee. Clearly acceleration may not occur both automatically and solely at the option of the mortgagee at the same time, just as a lease term may not be 27 years and 18 months at the same time; in each example, one provision must govern to the exclusion and complete nullification of the other. This is exactly where parties can use — and have for years used — "notwithstanding" language to select which clause is to be given effect and which is to be nullified: "[I] t seems clear the mortgage provision controls the note provision relative to acceleration **since *the* mortgage specifically *provides* 'anything' in said note or *herein to* the *contrary* notwithstanding."** *Grier, supra,* **274 So.** 2d at 22.

E. "Notwithstanding" is urged here only as a useful drafting tool — not a cure-all for any and all ambiguities

Respondents make the straw man argument that we are suggesting a 'per se' rule that mere use of the word "notwithstanding" in a contract by itself precludes any further inquiry and any use of contract rules of construction. We suggest no such rule.

We have merely pointed out that the Third District's decision in this case held that a clear and unambiguous "notwithstanding" designation of the governing of conflicting contract provisions is ineffective to accomplish the designation. The Third District's decision indicates that where two provisions conflict — are mutually repugnant — such that one or the other can be given no effect, then the mutual repugnancy itself must be treated as an ambiguity and parole inquiry ***must*** be scheduled to ascertain ***why*** a mutual repugnancy was written into the contract and what the

parties really intended — even though the "notwithstanding" language clearly set out how the 'repugnancy' was to be resolved.

It is the Third District's decision, in short, which has the potential for widespread harm since it calls into question every "notwithstanding" designation — and there are many, as detailed in our initial brief. We suggest no new rule, and no abolition of any time-honored rules of contract construction, despite Respondents' alarmist attempts to suggest otherwise. We ask only that the doubt cast by the Third District on the "notwithstanding" language used so widely throughout the law be dispelled through reversal of that decision.

CONCLUSION

Based on the foregoing facts and authorities and those contained in the initial brief, 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' Reply Brief on the Merits was mailed this 19th day of December, 1997 to: Marc Cooper, Esquire, Cooper & Wolfe, P.A., Suite 3580 First Union Building, 200 South Biscayne Boulevard, Miami, Florida 33 131; Joseph DeMaria, Esquire, Tew Cardenas Rebak Kellogg Lehman DeMaria & Tague, LLP, 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 33 13 1; 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.

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