IN THE SUPREME COURT OF FLORIDA

Case No. SC19-1305

PEOPLES GAS SYSTEM,
a division of Tampa Electric Company,
Appellant,
v.
POSEN CONSTRUCTION, INC.,
Appellee.

REPLY BRIEF OF APPELLANT PEOPLES GAS SYSTEM

ON A CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, CASE NO. 18-13291

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STANDARD OF REVIEW

Posen agrees the applicable standard of review is *de novo*. PGS' Initial Brief ("IB") at 5; Posen's Answer Brief ("AB") at 12.

ARGUMENT

As a member-operator, PGS has a cause of action under Section 556.106(2)(a) – (c) to recover damages or obtain indemnification from Posen for the payment PGS made to settle Santos' personal injury claims as a direct result of Posen's violations of the Act.

A. The law on statutory interpretation.

Posen does not dispute PGS's explanation of the governing law on statutory interpretation. (IB:7-8; *see* AB:13, 18). That is, when the language of the statute is clear and unambiguous, as it is here (AB:13), the Court is tasked with: giving the statute "its plain and obvious meaning," without "*limit[ing]* its express terms or its *reasonable and obvious implications,*" *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984) (citation omitted); and "the legislative intent must be derived from the words used without involving incidental rules of construction or engaging in speculation as to what judges might think that the legislators intended or should have intended." *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 456 (Fla. 1992) (citation omitted). (IB:7-8).

This Court recently reaffirmed those principles in *Advisory Opinion to Governor re Implementation of Amendment 4, the Voting Restoration Amendment*,

2020 WL 238556, *6-8 (Fla. Jan. 16, 2020), making it clear that, in interpreting statutory language, the text of the statute controls the analysis:

- The Court "adhere[s] to the 'supremacy-of-text principle': 'The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.'" *Id.* at *6 (*citing* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012));
- Extraneous evidence of intent is not to be used because it improperly "shift[s] the focus of interpretation from the text and its context to extraneous considerations," which "can result in the judicial imposition of meaning that the text cannot bear, either through expansion or contraction of the meaning carried by the text." *Id.* at *6;
- The Court also adheres to the view that every word in a statute is to be "expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it." *Id.* at *7 (*citing* Joseph Story, *Commentaries on the Constitution of the United States* 157-58 (1833), *quoted in* Scalia & Garner, *Reading Law* at 69)).

B. The statutory text.

Posen does not apply those principles. Despite its acknowledgment that Section 556.106 is "clear and unambiguous" (AB:13), Posen glosses over the terms of the statute, ignoring two of three provisions governing the liability of excavators

– Section 556.106(2)(b) and (2)(c). Specifically, Posen makes no distinction between Section 556.106(2)(a) and (b). (AB:23) ("these two subsections specify the types of damage recoverable under the Act, as well as the limitation on the amount of those damages"). According to Posen, both Subsections (2)(a) and (2)(b) are limited to recovery of economic damages. (AB:22-23, 27-28 n.11).

As discussed below, that is incorrect – not only is Posen's interpretation not supported by the text, it would also render Subsection (2)(b) superfluous. The Legislature did not include two separate subsections providing for the exact same claims and relief so that one subsection can simply be ignored. *See*, *e.g.*, *Advisory Opinion to Governor re Implementation of Amendment 4*, 2020 WL 238556 at *8 ("This Court, of course, ordinarily avoids interpretations that 'render any language superfluous'"; the Court is "'not at liberty to ... ignore words that were expressly placed there at the time of adoption of the provision.'") (citations omitted); *State v. Bodden*, 877 So. 2d 680, 686 (Fla. 2004) ("words in a statute are not to be construed as superfluous if a reasonable construction exists that gives effect to all words") (citations omitted); *State v. Goode*, 830 So. 2d 817, 824 (Fla. 2002) ("the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless.") (citations omitted). Subsections (2)(a) and (2)(b) provide for distinct claims – *i.e.*, damages and

indemnification, respectively. (IB:9-10). Posen offers no reasonable alternative explanation.

Posen also fails to analyze Subsection (2)(c). It cites to the provision (AB:6, 16), but does not apply its terms because they undermine Posen's economic-damages-only theory. (AB:21-23). As explained in the Initial Brief, Subsection (2)(c) reinforces the *scope* of an excavator's liability: "Obtaining information as to the location of an underground facility from the member operator … does not excuse the excavator from liability *for any damage or injury resulting from any excavation* …." (IB:12) (citing § 556.106(2)(c), Fla. Stat.; emphasis added). In other words, an excavator's liability for "the total sum of the losses," § 556.106(2)(a) & (2)(b), Fla. Stat., extends to "*any damage or injury resulting from any excavation*." § 556.106(2)(c), Fla. Stat.

Instead of addressing all of the provisions governing an excavator's liability, Posen pivots to legislative history and rules of statutory construction to try to justify the dismissal of PGS's complaint. (AB:20-21, 25-28). Those extrinsic aids, however, have no place in analyzing an unambiguous statute. *See*, *e.g.*, *Advisory Opinion to Governor re Implementation of Amendment 4*, 2020 WL 238556 at *6 (extraneous evidence of intent improperly shifts the focus of interpretation from the objective meaning of the text and its context to subjective considerations). Nor do the extrinsic aids support Posen's position. *See infra*, Points C and D.

C. Posen's liability for damages under Section 556.106(2)(a).

Notably, Posen does not dispute: (i) that the payment made by PGS to settle Santos' claims constitutes a loss to PGS; (ii) that the settlement payment is not a remote loss, but rather a loss resulting from Posen's violation of the statute; or (iii) that an excavator is in the best position to prevent accidents leading to injury or damage because it can control the course and scope of its excavation work. (IB:11, 13, 15). Posen's position, based on its incomplete and flawed interpretation of Section 556.106, is simply that PGS cannot recover its losses under the statute.

According to Posen, that is because both Subsections (2)(a) and (2)(b) are limited to recovery of *economic* damages. (AB:22-23, 27-28 n.11). To support that theory, Posen points to the limitation in Subsections (2)(a) and (2)(b) on the amount recoverable for certain categories of damages – *i.e.*, loss of revenue and loss of use. (AB:22-23). Posen reasons that "[t]he use of the word 'to' in the phrase 'losses to all member operators' (or 'parties') indicates that the 'loss' to be reimbursed to a member operator are those economic damages an operator directly incurs as a result of an excavator's breach of its duties to the member operator, such as property damage or lost revenue"; "[t]his interpretation is supported by the next sentence in both subsections (a) and (b), which specify that '[a]ny damage for loss of revenue and loss of use may not exceed $500,000 per affected underground facility.'" (AB:23). That argument is flawed for several reasons.

The limitation on the amount of loss of revenue and loss of use that can be recovered does not have the preclusive effect that Posen claims it does. To put this in context, that limitation is also included in the provision governing a member operator's liability, Section 556.106(3), which provides:

> If, after receiving proper notice, a member operator fails to discharge a duty imposed by this act and an underground facility of a member operator is damaged by an excavator who has complied with this act, as a proximate result of the member operator's failure to discharge such duty, the excavator is not liable for such damage and the member operator, if found liable, is liable to such person for the total cost of any loss or injury to any person or damage to equipment resulting from the member operator's failure to comply with this act. *Any damage for loss of revenue and loss of use shall not exceed $500,000 per affected underground facility*, except that revenues lost by a governmental member operator, which revenues are used to support payments on principal and interest on bonds, shall not be limited.

§ 556.106(3), Fla. Stat. (emphasis added). Posen does not contend that a member operator's liability would be restricted to only economic damages based on the inclusion of the monetary cap on loss of revenue and loss of use damages. After all, Section 556.106(3) contemplates that a member operator can be subject to liability for "the total cost of any loss or *injury* to any person or damage to equipment." *Id.* (emphasis added).

The same is true for excavators. In Section 556.106(2)(c), which Posen fails to analyze, the Legislature made it clear that excavators are subject to liability for *injuries* they may cause: "Obtaining information as to the location of an underground facility from the member operator … does not excuse the excavator

from *liability for any damage or injury resulting from any excavation ….*"" § 556.106(2)(c), Fla. Stat. (emphasis added); (IB:12). In short, the Legislature did not limit an excavator's liability to economic damages (in either Section 556.106(2)(a) or (b)), while subjecting member operators to liability for personal injury and property damage.[1]

Nor can Posen's interpretation be reconciled with the statute's purpose. Posen argues that *the* purpose of the statute is "damage prevention, not damage recovery," but that is not accurate. (AB:20) (citing to *Hinson Elec. Contracting Co., Inc. v. Bellsouth Telecomms., Inc.*, 642 F. Supp. 2d 1318, 1327 (M.D. Fla. 2009), which actually states that "[t]he first purpose of the Act is damage prevention, not damage recovery"). Damage prevention is certainly part of the statute's purpose, but so is damage recovery because that *promotes* prevention. As Posen recognizes, the statute clearly imposes duties on excavators and member operators (AB:18, 20, 21, 22, 23), which must be performed to "prevent[] injury to persons or property and the interruption of services resulting from damage to an underground facility caused by excavation or demolition operations."

[1] On a related note, Posen acknowledges that under Section 556.106(3) – the subsection addressing a member operator's liability – "the only instance in which a member operator is liable for all damages to any person damaged by an excavation is where the member operator is at fault and the excavator is not at fault." (AB:17, n.8). Indeed, that is the only instance in which a member operator would be liable – that is, if it violated the statute and the excavator had not. *See* IB:20. Otherwise, if an excavator violates the statute and causes damage, the excavator is responsible for all of the resulting losses – even if the member operator is partially at fault. *Id.*

§ 556.101(3)(a), Fla. Stat. To encourage the performance of those duties, the Legislature expressly provided for liability.[2] Nothing in Section 556.106(2) limits an excavator's liability to only economic damages.

D. Posen's liability for indemnification under Section 556.106(2)(b).

As discussed above, Posen does not actually analyze the language of Subsection (2)(b) and the related liability provision under (2)(c). Instead, it makes non-dispositive assertions that both of PGS's claims are barred because they "sound in indemnity" and that Section 556.106 does not create a claim for indemnification because "the Act does not refer to damages suffered by third parties, nor does it impliedly render a utility vicariously or derivatively liable for the negligence of an excavator." (AB:17, 31-32; *see also id.* at 24-30).[3]

The latter assertion alludes to the Florida statute at issue in *Martinez v. Miami-Dade County*, 975 F. Supp. 2d 1293 (S.D. Fla. 2013), and the Arizona and Idaho statutes discussed in the Initial Brief. (AB:29-31). Although none of those

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[2] *Cf. Smith v. Piezo Tech. & Prof'l Adm'rs*, 427 So. 2d 182, 184 (Fla. 1983) ("Where a statute requires an act to be done for the benefit of another or forbids the doing of an act which may be to his injury, though no action be given in express terms by the statute for the omission or commission, the general rule of law is that the party injured should have an action; for where a statute gives a right, there, although in express terms it has not given a remedy, the remedy which by law is properly applicable to that right follows as an incident.") (citing *Girard Trust Co. v. Tampashores Dev. Co.*, 95 Fla. 1010, 1015-16, 117 So. 786, 788 (Fla. 1928)).

[3] Posen notes that PGS did not raise a claim for common law indemnity (AB:5, 24-25), but does not dispute that a statutory claim for indemnity may exist regardless of whether a common law indemnity claim is or can be pleaded. (IB:15-16).

statutes reference an express right to indemnification, Posen considers the language in those statutes sufficient to afford indemnification relief; for the *Martinez* statute, Posen points to the language that an employer "shall be responsible for the act or omissions of a deputy sheriff" and for the Arizona and Idaho statutes, it points to references to third parties or third persons. (AB:29-31).

Posen does not explain why Section 556.106(2)(b)'s language – subjecting excavators to liability for "the total sum of the losses *to all parties involved* as those costs are normally computed" – which is broader than the language in all of those statutes, is not sufficient to give rise to indemnification. Posen simply asserts it is insufficient, but cannot adequately explain what Subsection (2)(b) otherwise stands for. Under Posen's flawed logic, Subsection (2)(b) is improperly treated as superfluous.[4]

Curtis v. City of West Palm Beach, 82 So. 3d 894 (Fla. 4th DCA 2011), on which Posen relies (AB:28-29), does not support its position. *Curtis* holds that "remedies sought in an action brought under a statute which creates a statutory right or duty are generally limited to those specified within the statute" and that "[w]hether a violation of a statute can serve as the basis for a private cause of

[4] Posen also cites to the out of state statutes noted in PGS's Initial Brief at 16 n.9, which expressly use the word "indemnify." (AB:25-27). The existence of those statutes does not change the analysis. There is more than one way to provide for indemnification. The Florida Legislature accomplished that through the broad language of Section 556.106(2)(b) & (c), which, as discussed, Posen largely ignores.

action is a question of legislative intent." *Id.* at 895 (citations omitted). That question takes us back to the unambiguous language of the statute, which plainly expresses the legislative intent. *Id.*

In *Curtis*, the statute only provided for injunctive relief: "[i]f an agency employing firefighters fails to comply with the requirements of this part, a firefighter employed by such agency who is personally injured by such failure to comply may apply directly to the circuit court ... *for an injunction* to restrain and enjoin such violation of the provisions of this part and to complete the performance of the duties imposed by this part." *Id.* at 896. Here, in contrast, Section 556.106(2)(b) and (c) (as well as Subsection (2)(a)) afford extensive relief against excavators. Section 556.106(2) subjects an excavator like Posen to liability for "the total sum of the losses to all parties involved," § 556.106(2)(b), Fla. Stat., which extends to "any damage or injury resulting from any excavation." § 556.106(2)(c), Fla. Stat. PGS's settlement payment to Santos – for injuries resulting from Posen's violation of the statute – falls within the broad relief provided under Section 556.106(2).

Based on the statute's express, broad terms and its purpose, PGS is entitled to pursue its claims against Posen under Section 556.106(2) to recover the losses it incurred as either damages or indemnification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 27, 2020, I e-filed this Initial Brief with the Clerk of the Court by using the Florida Courts E-Filing Portal, which will send an electronic copy of the brief to counsel listed below.

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CERTIFICATE OF COMPLIANCE

I certify that this Reply Brief was prepared in Times New Roman, 14-point font, in compliance with the requirements of Florida Rule of Appellate Procedure 9.210.

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