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IN THE SUPREME COURT OF FLORIDA

Case No. SC19-1305

PEOPLES GAS SYSTEM,

Appellant,

v.

POSEN CONSTRUCTION, INC.,

Appellee.

AMICUS BRIEF OF FLORIDA JUSTICE REFORM INSTITUTE IN SUPPORT OF APPELLANT

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

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The Florida Justice Reform Institute (the "Institute") is Florida's leading organization of concerned citizens, business owners, business leaders, and lawyers, who work toward the common goal of promoting predictability and personal responsibility in Florida's civil justice system through the promotion of fair and equitable legal practices. The Institute can provide the Court with the perspective of its members who represent a wide range of interests in the business community and have a substantial interest in maintaining consistency and predictability in our civil justice system by having courts faithfully follow the text of Florida civil liability statutes and carefully observe the limits of their jurisdiction. To that end, the Institute supports Appellant Peoples Gas System ("PGS"), whose interests are aligned with the interests of the Institute's members who are litigating or are likely to be litigating actions of this nature, and seek to ensure the uniform interpretation and application of the Florida Underground Facility Damage Prevention and Safety Act (the "Act").

SUMMARY OF ARGUMENT

PGS has sued Posen Construction, Inc. ("Posen") under the Act to recover money it paid to settle a personal injury action brought by Posen's employee who was injured in an excavation accident. That accident is traceable directly back to Posen, who instructed its employee to excavate an unmarked area, producing, unsurprisingly, a rupture in PGS's underground natural gas pipeline, severely injuring the employee. The district court interpreted the Act to mean that the cost of settling the injured employee's personal injury claim is not a loss that can be recovered under the Act. That judicially imposed limitation cannot be reconciled with the broad language of the Act and its stated purpose.

The plain and unambiguous terms of the Act permit recovery of damages or indemnification against excavators whose violations of the Act result in losses. Denying a plaintiff member-operator, such as PGS, its statutory right to recover the losses it suffered because of an excavation accident caused by the excavator would improperly render provisions of the Act meaningless.

ARGUMENT

By its plain terms, the Florida Underground Facility Damage Prevention and Safety Act allows a member operator to pursue damages or indemnification in situations such as this that have resulted in losses because of an excavator's violation of the Act.

The Act. To decide whether PGS's settlement payment is a loss that PGS can recover under the Act, the Court must give effect to the Legislature's intent as expressed in the text of the Act. *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 198 (Fla. 2007). "[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984). Indeed, "[e]ven where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity." *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 454 (Fla. 1992) (citations omitted). "[T]he fact that the legislature may not have anticipated a particular situation does not make the statute ambiguous." *Id.* at 456.

Under the plain terms of the Act, an excavator has a duty to comply with the procedures set forth in the statute to conduct excavations only of specifically

marked areas, and then only in a careful and prudent manner, with the primary purpose of preventing injuries and damages. Fla. Stat. §§ 556.101(3)(a), 556.105, 556.114 (2010). When an excavator violates the duties imposed by the Act, it is held accountable for "the total sum of the losses" that ensue. Fla. Stat. § 556.106(2)(a) – (b) (2010). Specifically, Section 556.106(2) of the Act provides:

> (a) If a person violates s. 556.105(1) or (6), and subsequently … performs an excavation … that damages an underground facility of a member operator, it is rebuttably presumed that the person was negligent. The person, if found liable, is liable for *the total sum of the losses* to all member operators involved as those costs are normally computed. Any damage for loss of revenue and loss of use may not exceed $500,000 per affected underground facility …
>
> (b) If any excavator fails to discharge a duty imposed by this chapter, the excavator, if found liable, is liable for *the total sum of the losses* to all parties involved as those costs are normally computed. Any damage for loss of revenue and loss of use may not exceed $500,000 per affected underground facility …

§ 556.106(2)(a)–(b)(emphasis added).

In that same subsection, the Legislature emphasized that excavators who violate the Act are responsible for any resulting injury or damage, cautioning:

> (c) Obtaining information as to the location of an underground facility from the member operator as required by this chapter does not excuse any excavator from performing an excavation ... in a careful and prudent manner, based on accepted engineering and construction practices, and it does not excuse the excavator from liability for any damage or injury resulting from any excavation …

Fla. Stat. § 556.106(2)(c) (2010).

Damages. Section 556.106(2)(a) contemplates that an excavator who violates the requirements for advance notice of excavation activity will be liable to a member operator for damages in "the total sum of the losses to all member operators involved as those costs are normally computed." The Court must give that statutory language "its plain and ordinary meaning, unless words are defined in the statute or by the clear intent of the legislature." *Green v. State*, 604 So. 2d 471, 473 (Fla.1992).

The Act does not define losses, a patently broad term. Instead, the Legislature chose to limit the scope of losses in only one way: the Act limits the amount of damages that can be recovered for loss of revenue and loss of use. § 556.106(2)(a), ("Any damage for loss of revenue and loss of use may not exceed $500,000 per affected underground facility…."). Otherwise, the Act is structured so that an excavator who violates the Act must be held responsible for the total sum of losses resulting from an excavation accident, which includes "any damage or injury resulting from any excavation." §§ 556.106(2)(a)–(c). The broad relief afforded against excavators makes sense because, as Appellant explains in its Initial Brief at 10-11, an excavator can control the course and scope of its excavation work and is thus in the best position to prevent accidents leading to injury or damage.

The courts do not have authority to impose any other limitation on the damages a member operator may pursue to recover its losses. *See Cont'l Assurance Co. v. Carroll*, 485 So. 2d 406, 409 (Fla. 1986) ("This Court cannot grant an exception to a statute nor can we construe an unambiguous statute different from its plain meaning."); *Dobbs v. Sea Isle Hotel*, 56 So. 2d 341, 342 (Fla. 1952) ("[H]ad the legislature intended to establish other exceptions it would have done so clearly and unequivocally.... We cannot write into the law any other exception....").

To give effect to "losses" and not render that term meaningless, it must be applied without implying limitations that the Legislature chose not to prescribe. *See, e.g.*, *Heart of Adoptions*, 963 So. 2d at 198–99 (a word may not be "construed in isolation if to do so would render other sections of the chapter meaningless"; "courts should avoid readings that would render part of a statute meaningless"); *Holly*, 450 So. 2d at 219 ("courts of this state are without power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications"); *Scherer v. Volusia Cty. Dep't. of Corr.*, 171 So. 3d 135, 139 (Fla. 1st DCA 2015) ("No part of a statute, not even a single word, should be ignored, read out of the text, or rendered meaningless, in construing the provision.").

Indemnification. Separate from damages, the Legislature also chose to impose an indemnification obligation under Section 556.106(2)(b). *See, e.g.*, *Stuart v. Hertz Corp.*, 351 So. 2d 703, 705 (Fla. 1977) (indemnification obligation may arise out of liability imposed by law). An excavator who "fails to discharge a duty imposed by [the Act]" is liable "for the total sum of the losses *to all parties involved* as those costs are normally computed." § 556.106(2)(b) (emphasis added). As with Subsection (2)(a), there is only one express limitation on the scope of losses: "Any damage for loss of revenue and loss of use may not exceed $500,000 per affected underground facility…." *Id*. Consistent with the primary purpose of the Act, an excavator is charged not only with excavating specifically marked areas, but also with conducting excavations of such marked areas "in a careful and prudent manner, based on accepted engineering and construction practices." § 556.106(2)(c). If an excavator fails to do so, it will not be excused from liability "for any damage or injury resulting from any excavation[.]" *Id.*

Thus, an excavator who violates the Act, as Posen did here, is exposed to liability for the losses incurred by "all parties involved" in the excavation. Posen's violation of the Act led to the excavation accident that injured Posen's employee and gave rise to his personal injury claims. PGS incurred the cost of settling those claims. Based on the Act's plain terms, there is no reasoned basis to conclude that the cost of settling claims that arose from an excavation accident directly tied to

Posen's violation of the Act falls outside of the plain and ordinary meaning of "losses to all parties involved." *See Forsythe*, 604 So. 2d at 454 ("[e]ven where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity.").

PGS and the injured employee are parties to the excavation accident, and the payment that PGS made to resolve the injured employee's claims is a monetary loss to PGS. Because the Act assigns liability to the excavator under these circumstances, it gives rise to an indemnification right to other parties, like PGS, who end up incurring the excavator's liability. *See, e.g.*, *Martinez v. Miami-Dade County*, 975 F. Supp. 2d 1293 (S.D. Fla. 2013) (interpreting Fla. Stat. § 30.2905(2)(a) (2011) to mean that it creates an indemnification obligation by providing that an employer "shall be responsible for the acts or omissions of the deputy sheriff"). The right to indemnification allows the Act to fulfill its purpose.

CONCLUSION

For these reasons, the Institute respectfully submits that the Act allows a member operator, like PGS, to pursue damages or to obtain indemnification to recover the losses it incurs as a result of an excavation accident that is attributable to an excavator who violates the Act. The question certified by the Eleventh Circuit Court of Appeals should be answered in the affirmative.

Respectfully submitted,

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I HEREBY CERTIFY that, on October 14, 2019, this amicus brief was filed with the Clerk of the Court, using the Florida Courts E-Filing Portal, which will send an electronic copy of the brief to the following counsel of record.

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I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with rule 9.210(a) of the Florida Rules of Appellate Procedure.

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