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IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO. SC12-2409

STACY SANISLO and ERIC SANISLO,

Petitioners,

-vs-

GIVE KIDS THE WORLD, INC.,

Respondent.
_____/

BRIEF OF AMICUS CURIAE, FLORIDA JUSTICE ASSOCIATION ON BEHALF OF PETITIONERS

On appeal from the Fifth District Court of Appeal of Florida

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INTRODUCTION

The Florida Justice Association ("FJA") is a voluntary statewide association of more than 4,000 trial lawyers concentrating on litigation in all areas of the law. The members of the FJA are pledged to the preservation of the American legal system, the protection of individual rights and liberties, the evolution of the common law, and the right of access to courts. The FJA has been involved as amicus curiae in hundreds of cases in the Florida appellate courts and in this Court.

This case is of interest to the FJA because it involves the application of a pre-injury release to an adult who has suffered bodily injuries, where the release does not specifically state the claims being released. For more than 50 years, the law everywhere in Florida, except for the Fifth District, has required a specific statement in a release to the effect that the releasee is being released from his or her own negligence if that is the intention of the release. A contrary law in the Fifth District means that people injured in that one district, which includes most of the major theme parks in Florida, have different rights than people who are injured elsewhere in the state.

The FJA believes that its input will be of assistance to the Court in resolving the issues raised, and that this Court's decision will have a tremendous impact on its members and their clients. See, e.g., Ciba-Geigy Ltd. v. Fish Peddler, Inc., 683 So.2d 522 (Fla. 4th DCA 1999) (briefs from amicus curiae are generally for the

purpose of assisting the court in cases which are of general public interest, or aiding in the presentation of difficult issues). Accord Rathkamp v. Dept. of Community Affairs, 730 So.2d 866 (Fla. 3d DCA 1999) (endorsing and adopting the opinion in Ryan v. Commodity Futures Trading Commission, 125 F.3d 1062 (7th Cir. 1997), regarding the role of amicus curiae).

SUMMARY OF ARGUMENT

In the decision below, the Fifth District misapplied the law and ignored this Court's binding precedent. The Fifth District should have recognized that because an exculpatory clause is contrary to public interest, it must be strictly construed, and that strict construction requires more than just a broad statement that all claims are included. To be effective, the releasor must be given notice that he or she is agreeing to waive any claims against the releasee for the releasee's own negligence.

Any other result fails to properly balance the right of contract against the public interest in the safety of the citizens. The decision below should be quashed.

ARGUMENT

The Fifth District is alone in Florida on the issue of the language required in a pre-injury release. In Hardage Enterprises, Inc. v. Fidesys Corp., 570 So.2d 436 (Fla. 5th DCA 1990), the court held that it was not necessary for a release to expressly state that it includes the releasee's own negligence. The court distinguished its conclusion from the facts of this Court's decision in University Plaza Shopping Center v. Stewart, 272 So.2d 507 (Fla. 1973):

> The University Plaza case is readily distinguishable because it dealt with an indemnification agreement rather than an exculpatory release. In the instant case, of course, we are concerned only with the latter. The distinction was explicated in our O'Connell opinion:
>
> > An exculpatory clause purports to deny an injured party the right to recover damages from the person negligently causing his injury. An indemnification clause attempts to shift the responsibility for the payment of damages to someone other than the negligent party (sometimes back to the injured party, thus producing the same result as an exculpatory provision).

Citing O'Connell v. Walt Disney World, 413 So.2d 444, 446 (Fla. 5th DCA 1982); See also, Kitchens of the Oceans, Inc. v. McGladrey & Pullen, LLP, 832 So.2d 270, 272 (Fla. 4th DCA 2002) ("Although there is a difference between contracts of indemnification and hold-harmless agreements, we deem the central holding of

the above cases to apply as well to a hold harmless agreement that, as here, functions much like an indemnification agreement").

In the Hardage passage above, the Fifth District deleted the first sentence from the passage as it appeared in O'Connell. The deleted sentence was (O'Connell at 446) (emphasis added):

> Although there is a distinction in definition between an exculpatory clause and an indemnity clause in a contract, they both attempt to shift ultimate responsibility for negligent injury, and so are generally construed by the same principles of law.

Therefore, in O'Connell, the Fifth District expressly noted that indemnity agreements and exculpatory clauses are bound by the same law, but then in Hardage overlooked that exact point when attempting to distinguish University Plaza.

The court also failed to recognize that its distinction of University Plaza negates itself. It distinguished University Plaza by arguing that the indemnity agreement in University Plaza is different from the exculpatory clause in Hardage, but also recognized that an indemnity agreement which requires the injured party to indemnify the negligent party is actually the same thing as an exculpatory clause. Indeed, both exculpatory clauses and indemnity agreements serve the same purpose; to destroy the tortfeasor's common law duty to act reasonably. The

distinction used by the Hardage court to avoid the controlling effect of University Plaza is, therefore, a distinction without a difference.

The underlying principles at play in cases involving a pre-injury release are public policy on one hand, and the freedom to contract on the other. In Florida, exculpatory clauses are disfavored, so the court must view with heightened scrutiny any contract purporting to release a party for his/her/its own negligence. As was explained by the Utah Supreme Court, "the right to contract is always subordinate to the obligation to stand accountable for one's negligent acts…." Berry v. Greater Park City Co., 2007 UT 87, 171 P.3d 442, 445-46 (2007).

This Court has previously held that a release in conjunction with a settlement must be construed strictly within its terms, and rejected the argument that the claims released language should be given a broad reading. Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co., 761 So.2d 306, 315 (Fla. 2000). In Mazzoni, this Court held that release language discharging DuPont "from any and all claims, actions, causes of action, including consequential damages, demands, rights, damages, costs, losses, and any other liability or expense of whatsoever kind, which the undersigned . . . now has or may or shall have by reason of the use of or application of DuPont Benomyl products" did not release DuPont from claims of fraudulent inducement.

The mistake made by the Fifth District is that, although it has paid homage to the rule of strict construction of exculpatory clauses, its decisions fail to strictly construe the release language. "Exculpatory clauses are disfavored and are enforceable only where and to the extent that the intention to be relieved from liability was made clear and unequivocal and the wording must be so clear and understandable that an ordinary and knowledgeable person will know what he is contracting away." Cain v. Banka, 932 So.2d 575, 578 (Fla. 5th DCA 2006), citing Gayon v. Bally's Total Fitness Corp., 802 So.2d 420 (Fla. 3d DCA 2001).

The duty of reasonable care is a common law creation. It is reasonable to assume that every person knows that he has an obligation of reasonable care to every other person, and every other person has a duty of reasonable care to him. The question presented here is whether a release "of all claims" is sufficient to put the releasor on notice that he is extinguishing the releasee's duty of reasonable care. To put it another way, a release of the releasee's negligence actually encourages the releasee to be negligent, or reckless, or at least indifferent to his obligation of reasonable care. If the release was worded accurately, it would read, "I hereby give you the right to injure or kill me."

No reasonable person would sign a document that gives another person the right to injure or kill. Yet the Fifth District's decisions on this issue come to that conclusion. Despite acknowledging that a pre-injury release must be explicit, the

Fifth District has concluded that the exact nature of the release may be hidden in general broad language that releases "all claims." While it is true that the term "all claims" logically includes negligence claims, the duty to expressly state the claims being released means more than a broad statement that logically includes negligence. Most reasonable people reading a release of "all claims" would have no idea that it gives the operator the right to injure or kill with impunity.

In this respect, the outcome of this case is clearly controlled by the decision in University Plaza in which this Court wrote, "In our judgment, the use of the general terms 'indemnify . . . against any and all claims' does not disclose an intention to indemnify for consequences arising solely from the negligence of the indemnitee." There is no meaningful distinction with the situation here. The use of general terms when what is intended is a specific waiver of negligence claims is similar to a defendant who, in a discovery response, produces a few responsive documents in 100,000 pages of irrelevant material.

Moreover, the Fifth District's own application of the rule has been inconsistent. In Tatman v. Space Coast Kennel Club, Inc., 27 So.3d 108, 110-11 (Fla. 5th DCA 2009), the court invalidated a release because it was ambiguous, writing:

> The operative language - I agree to not hold SCKC or Brevard County Parks & Rec Dept. liable for any accident or injury-fails to define whose injuries are covered in a circumstance, even though there are multiple

> possibilities. It does not say, for example, that injuries to the signer of the form, or to the dog, or to both are covered by the exculpation, nor does it assert an exculpation for injuries caused by the dog to third parties. Likewise, the clause does not define whether injuries incurred by the signer at the show but not associated with a dog attack (a slip and fall, for example), are covered. Because of its patent ambiguity, we conclude that an "ordinary and knowledgeable" person would not, when viewing this clause, know what he or she was contracting away.

There is no logical reason to conclude that an agreement to not hold the releasee liable "for any accident or injury" (Tatman) is any less clear than "from any and all claims" (Sanislo). They are essentially the same language, yet the Fifth District has come to different conclusions. The language in Tatman should logically include negligence claims if the language in the release in this case includes negligence claims. That the Fifth District has come to different conclusions in two different cases is an indication that the language is not clear and unambiguous. One thing that is not in doubt is that if the releases in both cases said "including claims against the releasee for the negligence of [releasee]" there would be no ambiguity.

Every other district court in Florida has concluded that University Plaza is controlling in this situation. The Fifth District has come to an incorrect conclusion, which does not properly balance the state's interest in public safety with the private interest to contract.

CONCLUSION

The decision below should be quashed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished to all counsel of record on the attached service list, by email, on July 29, 2013.

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CERTIFICATE OF COMPLIANCE

Amicus Curiae, Florida Justice Association, hereby certifies that the type size and style of the Amicus Curiae Brief is Times New Roman 14pt.

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