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In Florida, Exculpatory Clauses Do Not Need Express Language Referring to the Exculpated Party's Negligence

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In *Sanislo v. Give Kids the World, Inc.*, 157 So.3d 256 (Fla. 2015), the Supreme Court of Florida considered whether a party to a contract, in order to be released from liability for its own negligence, needs to include an express reference to negligence in an exculpatory clause. The court held that, unlike an indemnification clause, so long as the language in an exculpatory clause is clear, the absence of the terms "negligence" or "negligent acts" in an exculpatory clause does not, for that reason alone, render the exculpatory clause ineffective.

Background

Give Kids the World, Inc. (GKW) is a non-profit organization that provides free vacations to seriously ill children and their families at GKW's resort village. To use the resort, vacationers have to fill out an application. Stacy and Eric Sanislo filled out an application to bring their seriously ill child to the village for a vacation and GKW accepted their application. Upon arriving at the resort, the Sanislos filled out a liability release form. Both the application form and the release form contained language that stated, in pertinent part:

> I/we hereby release [GKW] . . . from any liability whatsoever in connection with the preparation, execution, and fulfillment of said wish, on behalf of ourselves, the above named wish child and all other participants. The scope of this release shall include, but not be limited to, damages or losses or injuries encountered in connection with transportation, food, lodging, medical concerns . . . , entertainment, photographs and physical injury of any kind . . . .
>
> I/we further agree to hold harmless and release [GKW] from and against any and all claims and causes of action of every kind arising from any and all physical or emotional injuries and/or damages which may happen to me/us . . . .

While at the resort, Stacy Sanislo was injured when a wheelchair lift on a wagon collapsed due to weight overload. Subsequently, the Sanislos filed suit against GKW, alleging that Mrs. Sanislo's injuries were caused by GKW's negligence. In response, GKW alleged that the Sanislo's claims were barred by the exculpatory clauses in the application and release forms.

The parties filed cross-motions for summary judgment based on the language of the exculpatory clauses. The trial court held that the language of the exculpatory clauses did not preclude a negligence action. On appeal, the Fifth Circuit Court of Appeal, in conflict with other Florida courts of appeal, held that the exculpatory clauses barred the Sanislos' negligence claims despite the fact that they did not specifically reference the terms "negligence" or "negligent acts." In light of the conflict between the circuit courts of appeal, the Supreme Court of Florida accepted an appeal of the Fifth Circuit's decision to consider the question of whether, absent an express reference to negligence, an exculpatory clause is too ambiguous to release a party from liability for its own negligence.

Analysis

In its analysis, the court noted that public policy disfavors exculpatory contracts because they relieve one party of its obligation to use due care and shift the risk of loss to a party who is not, generally, equipped to take the precautions needed to avoid injury. However, the court also noted that public policy favors enforcing contracts. Balancing these interests, the court found that "[e]xculpatory clauses are unambiguous and enforceable where the intention to be relieved from liability [is] made clear and unequivocal and the wording [is] so clear and understandable that an ordinary and knowledgeable person will know what he or she is contracting away."

To reach its decision, the court distinguished indemnification clauses from exculpatory clauses. For a party to be indemnified for its own negligence pursuant to an indemnification clause, the indemnification clause must include a specific reference to the indemnitee's own negligence. In contrast, an exculpatory clause need not include an explicit reference to the released party's negligence. So long as an exculpatory clause is otherwise clear and unambiguous, the clause can bar a negligence action even if it does not include the terms "negligence" or "negligent acts."

Applying this law to the exculpatory clauses in the GKW application and release forms, the court affirmed the Fifth Circuit's holding that the language of the exculpatory clauses was sufficiently clear and unequivocal to bar the Sanislos' negligence claims.

Although *Sanislo* addressed a personal injury claim, the court's analysis should extend to exculpatory clauses in construction contracts. Thus, so long as an exculpatory clause in a construction contract is sufficiently clear to put a contracting party (such as a property owner) on notice that it is releasing the other party (such as a general contractor) from liability for any and all claims for property damage, Florida courts should – even in the absence of an explicit reference to negligent conduct – enforce the clause and find that the clause protects a negligent contractor from being liable to the owner. By allowing contractors to exculpate themselves from liability for their own negligence even in the absence of an express reference to negligent conduct, Florida's supreme court has made it more difficult for subrogating insurers – who step into their insured's shoes – to pursue claims against negligent contractors.

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