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I. Are pre-injury waivers/releases for injury or death enforceable in Florida?

Pre-injury waivers are generally enforceable in Florida as long as they are voluntarily entered into and do not contravene public policy. See Loewe v. Seagate Homes, Inc., 987 So. 2d 758 (Fla. 5th DCA 2008); Sanislo v. Give Kids the World, 157 So. 3d 256 (Fla. 2015). This is due to the countervailing policy that favors the enforcement of contracts. Id.

To be enforceable, the language of the pre-injury waiver must be clear and unambiguous, the intent to limit liability must be expressed in clear and unequivocal terms, the pre-injury release must clearly state that it releases the defendant from liability, and the bargaining power of the parties must be substantially equal. See Krathen v. School Board of Monroe Co., 972, So. 2d 887 (Fla. 3d DCA 2007); Diodato v. Islamorada Asset Mgmt., 138 So. 3d 513 (Fla. 3d DCA 2014); O’Connell v. Walt Disney World Co., 413 So. 2d 444 (Fla. 5th DCA 1982); Goyings v. Jack & Ruth Eckerd Foundation, 403 So. 2d 1144 (Fla. 2 DCA 1981); Bender v. Caregivers of America, Inc., 42 So. 3d 893 (Fla. 4th DCA 2010).

Where the pre-injury waiver is drafted by the defendant and passively accepted by the plaintiff, it will be strictly construed against the defendant. O’Connell v. Walt Disney World Co., 413 So. 2d 444 (Fla. 5th DCA 1982). The wording of the pre-injury waiver must be so clear and unambiguous that an ordinary person would understand what he is contracting away. Gillette v. All Pro Sports, 135 So. 3d 369 (Fla. 5th DCA 2014); Hackett v. Grand Seas Resort, 93 So. 3d 759 (Fla. 5th DCA 2012).

If the pre-injury waiver intends to limit liability for present and future events or activities, it must state so clearly and specifically. Diodato v. Islamorada Asset Mgmt., 138 So. 3d 513. Likewise, a pre-injury release cannot preclude an action based upon the defendant’s subsequent negligence unless the release clearly and specifically provides for such. Krathen v. School Board of Monroe County, 972 So. 2d 887.

A defendant may not use a pre-injury wavier to avoid liability for an intentional tort, but may be released for his own negligence if the pre-injury waiver clause states expressly. Bender v. Caregivers of America, Inc., 42 So. 3d 893. Failure of a pre-injury waiver to contain the word “negligence” does not render the waiver invalid or ineffective. Sanislo v. Give Kids the World, 157 So. 3d 256. Although specific words are not required, the “better practice is probably to use the words, ‘negligent’ or ‘negligence’ in drafting an exculpatory clause.” Hackett v. Grand Seas Resort, 93 So. 3d 759.

A pre-injury waiver is more likely to be deemed enforceable if it provides the plaintiff with an option to purchase insurance or pay an additional fee to cover specific risks or damages. L. Luria & Son, Inc. v. Alarntec Int’l Corp., 384 So. 2d 947 (Fla. 4th DCA 1980). However, the waiver need not identify all the possible ways in which a plaintiff could be injured or damaged to be enforceable. Sanislo v. Give Kids the World, 157 So. 3d 256. Waivers should be dated, signed, and witnessed by each person, and the exculpatory language should be clearly visible to
the person signing; exculpatory clauses written in conspicuous print are more likely to be enforced as long as the language is clear and unambiguous. See Parkham v. East Bay Raceway, 442 So. 2d 399 (Fla. 2d DCA 1983).

Pursuant to Fla. Stat. § 744.301(3), parents may execute pre-injury waivers on behalf of their minor children for injury, death, or property damage resulting from an inherent risk of a certain activity. See also Kirton v. Fields, 997 So. 2d 349 (Fla. 2008); Sanislo v. Give Kids the World, 157 So. 3d 256.

A defendant cannot use a pre-injury waiver or release to immunize himself from liability for breach of a statutory duty to protect the plaintiff. Torres v. Offshore Professional Tour, Inc., 629 So. 2d 192 (Fla. 3d DCA 1993). Likewise, a common carrier generally cannot use exculpatory clauses to limit their liability for their own negligence. Russell v. Martin, 88 So. 2d 315 (Fla. 1956). This is primarily because exculpatory clauses are disfavored when a defendant is engaged in conducting a public service activity. Courts consider several factors when determining whether to invalidate a pre-injury waiver or release on the basis of public interest, including whether the service performed by the defendant is of great public importance, is a matter of practical necessity for the public, or is suitable for public regulation. Hinely v. Fla. Motorcycle Training, Inc., 70 So. 3d (Fla. 1st DCA 2011).

II. Are pre-injury waivers of jury trials enforceable in Florida?

In Florida, the right to jury trial guaranteed by Article 1, Section 22 of the Florida Constitution may be waived by a pre-suit/pre-injury contractual waiver in civil cases. See Amquip Crane Rental, LLC v. Vercon Constr. Mgmt., 60 So. 3d 536, 539 (Fla. 4th DCA 2011); Poller v. First Va. Mortg. & Real Estate Inv. Trust, 471 So. 2d 104, 106 (Fla. 3d DCA), rev. denied, 479 So. 2d 118 (Fla. 1985). Pre-controversy contractual waivers of a jury trial are not, stated differently, constitutionally impermissible, see Palomares v. Ocean Bank of Miami, 574 So. 2d 1159, 1160 (Fla. 3d DCA), rev. denied, 587 So. 2d 1328 (Fla. 1991), or against Florida’s public policy, see Credit Alliance Corp. v. Westland Mach. Corp., 439 So. 2d 332, 333 (Fla. 3d DCA 1983); Central Inv. Assocs. Inc. v. Leasing Serv. Corp., 362 So. 2d 702, 704 (Fla. 3d DCA 1978).

Pre-suit/pre-injury waivers of jury trials are accordingly enforceable and will be upheld by Florida courts. See Gelco Corp. v. Campanile Motor Svc., Inc., 677 So. 2d 952 (Fla. 3d DCA 1996); Vista Centre Venture v. Unlike Anything, Inc., 603 So. 2d 576 (Fla. 5th DCA 1992); Palomares, 574 So. 2d at 1160; C & C Wholesale, Inc. v. Fusco Management Corp., 564 So. 2d 1259 (Fla. 2d DCA 1990); Credit Alliance Corp., 439 So. 2d at 333; Central Inv. Assocs. Inc., 362 So. 2d at 704.
However, “[w]aiver of the right to a jury trial is to be strictly construed and not to be lightly inferred.” Poller, 471 So. 2d at 106 (citing Boston Rug Galleries, Inc. v. William Iselin & Co., 212 So. 2d 58 (Fla. 4th DCA 1968)). Moreover, pre-suit/pre-injury contractual waivers of a jury trial will not be enforced where they are unconscionable or there has been overreaching. See Vista Centre, 603 So.2d at 578; Credit Alliance Corp. v. Westland Mach. Co., 439 So. at 333.

Florida Rule of Civil Procedure 1.430, which prescribes the procedural method for invoking a jury trial, does not apply to pre-controversy contractual waivers of the right to a jury trial. See Palomares, 574 So. 2d at 1160.

III. Are agreements restricting claims for injury or death to binding arbitration enforceable in Florida?

Generally, yes, as Florida public policy favors arbitration. Laizure v. Avante at Leesburg, Inc., 44 So. 3d 1254, 1257 (Fla. 5th DCA 2010), aff’d, 109 So. 3d 752 (Fla. 2013), citing Bland, ex rel. Coker v. Health Care & Ret. Corp. of Am., 927 So. 2d 252, 258 (Fla. 2d DCA 2006) and Beverly Hills Dev. Corp. v. George Wimpey of Fla., Inc., 661 So. 2d 969 (Fla. 5th DCA 1995). The Florida Arbitration Code provides that arbitration agreements are “valid, enforceable, and irrevocable, except upon a ground that exists at law or in equity for the revocation of a contract.” Fla. Stat. §682.02(1). It is up to the court to decide whether the “arbitration agreement exists or [whether] a controversy is subject to an agreement to arbitrate.” Fla. Stat. §682.02(2). Of note, the Arbitration Code as revised applies to arbitration agreements entered into on or after July 1, 2013. See Fla. Stat. §682.013(1). The Revised Florida Arbitration code will also apply to agreements made before July 1, 2013, if “all the parties to the agreement or to the arbitration proceeding” agree in “a record.” Fla. Stat. §682.013(2). However, if no such agreement between the parties exists, the arbitration agreement will be governed by the applicable law which exists at the time the agreement is entered. Id.

Under The Florida Arbitration Code, there are three elements for courts to consider when ruling on a motion to compel arbitration: 1) whether a valid written agreement to arbitrate exists; 2) whether an arbitrable issue exists; and 3) whether the right to arbitration was waived. See Laizure, 44 So. 2d 1254 at 1257 citing Seifer v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999) and Terminix Int’l Co. L.P. v. Ponzio, 693 So. 2d 104, 106 (Fla. 5th DCA 1997). Arbitration agreements in wrongful death or personal injury claims are enforceable to the extent that a valid arbitration agreement exists and that the arbitration clause does not violate public policy. See Global Travel Marketing, Inc. v. Shea, 908 So. 2d 392, 403 (Fla. 2005) (finding that the evidence did not suggest that the “arbitration clause alone is tantamount to waiver or forfeiture of a wrongful death or personal injury claim”); see also Shotts v. OP Winter Haven, Inc., 86 So. 3d 456, 459 (Fla. 2011) quoting Shea, at 398 (“no valid agreement exists if the arbitration clause is unenforceable on public policy grounds.”).

Unlike pre-injury releases of wrongful death or personal injury claims, pre-injury arbitration agreements are enforceable. See Laizure, 109 So. 3d at 754 (holding that arbitration clause in “valid contract binds the signing party’s estate and heirs in a subsequent wrongful death case”); Shea, 908 So. 2d at 403 (holding that pre-injury arbitration clause by a parent on behalf of a child was enforceable as it did not waive or forfeit a wrongful death or personal injury
claim); see also Consolidated Resources Healthcare Fund I, Ltd. v. Fenelus, 853 So. 2d 500 (Fla. 4th DCA 2003) (wrongful death and negligence claims were within scope of arbitration clause contained in nursing home admission agreement). The difference between the two is that a pre-injury arbitration agreement does not extinguish the claim, but only modifies the forum in which the claim will be heard, whereas the pre-injury releases forfeits any rights in the claim. Id. quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (an arbitration agreement “constitutes a prospective choice of forum which ‘trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”).

However, not all pre-injury arbitration agreements or clauses are enforceable. See Seifert, 750 So. 2d at 636. In Seifert, the Florida Supreme Court held that the wrongful death claim was not arbitrable where the arbitration agreement contained in the buyers purchase and sale contract did not include arbitration of personal injury tort claims. Id. at 638; but see Kaplan v. Jimball Hill Homes Florida Inc., 915 So. 2d 755, 759 (Fla. 2d DCA 2005) (finding that when arbitration agreement provides for arbitration of disputes relating to a contract, the tort claims based on the duties dependent upon the existence of the contractual relationship between the parties are normally arbitrable). As such, enforceability of arbitration agreements for personal injury or wrongful death claims is limited to the parties’ intentions at the time of the agreement. Regency Group, Inc. v. McDaniels, 647 So. 2d 192, 193 (Fla. 1st DCA 1994) (“the agreement of the parties determines the issues subject to arbitration.”). Additionally, the enforceability of the arbitration agreement is also dependent on whether the agreement has some kind of nexus in relation to the alleged claim. See Seifert, 750 So. 2d at 636 (“the determination of whether an arbitration clause requires arbitration of a particular dispute necessarily ‘rests on the intent of the parties’” (quoting Seaboard Cost Line R.R. v. Trailer Train Co., 690 F. 2d 1343, 1348 (11th Cir. 1982))).