IN THE SUPREME COURT OF FLORIDA

Lower Tribunal Case Nos.:
Consolidated 4D01-2392; 4D01-2751 & 4D01-4346

Supreme Court Case No.

COUSINS CLUB CORP., d/b/a CLUB BOCA,

Petitioner

v.

CARLOS A. SILVA and ELIZABETH SILVA,
etc., as Legal Guardians of CARLOS E. SILVA,

Respondents

PETITIONER
COUSINS CLUB CORP. d/b/a CLUB BOCA
BRIEF ON JURISDICTION

ON APPEAL FROM THE FOURTH
DISTRICT COURT OF APPEAL OF FLORIDA

ROSEMARY B. WILDER, ESQ.
Marlow, Connell, Valerius, Abrams, Adler, Newman & Lewis
Counsel for Appellant/Petitioner
4000 Ponce de Leon Blvd.
Suite 570
Coral Gables, Florida 33146
Telephone: 305-446-0500
Direct Line: 786-999-1826

Facsimile: 305-446-3667

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STATEMENT OF THE FACTS AND CASE

This is a case of first impression in this Court regarding the effect of a manifestly clear and unambiguous release, knowingly signed in a contact sport situation.[1] *Cousins Club Corporation v. Silva*, 29 Fla.L.Weekly D868(Fla. 4th DCA April 7, 2004). On November 3, 1997 Carlos Silva went to Club Boca in order to participate in the Club's Monday Night Boxing event, by signing up to fight a friend and former wrestling teammate, Carlos Mejia. It is undisputed that Carlos Silva signed a release of any claims and a hold harmless agreement before he climbed into the ring, which stated:

> I, Carlos Silva have decided to participate in Monday Night Boxing promotion at Club Boca.
>
> In consideration of my participation, in the above entitled event, and with the understanding that my participation in Monday Night Boxing is only on the condition that I enter into this agreement for myself, my heirs and assigns.
>
> I hereby assume the inherent and extraordinary risks involved in Monday Night Boxing, and any risks inherent in any other activities connected

[1] Assuming the court determines and accepts jurisdiction, the following issues will be presented for its review: 1) if the accuracy of the lower court's finding that the release only applied to injuries "inherent in the sport of boxing," i.e., injuries that occurred in the ring itself and not as the result of alleged extrinsic neglect of Club Boca (for having the state to the ring and for lack of medical care and available oxygen), then the jury should have been instructed to apportion the total damages between those damages release and those damages *not* released; and 2) giving the jury *four* serial negligence interrogatories I(and a total of seven negligence interrogatories) prejudiced their deliberations.

> with this event in which I voluntarily practice.
>
> I expressly assume the risk and assume full responsibility for any and all injuries (including death) and accidents which may occur as a result of my participation in this event and release from liability Cousins Club Corp. and Powerline Productions, Inc. d/b/a Club Boca, its agents, officers, partners, employees, successors, assigns and representatives
>
> I hereby waive any claim I may hereafter have as a result of any and all Monday Night Boxing events and injury to my person or property as a result of my participation in any other activities connected with the event in which I may voluntarily participate.
>
> I hereby agree to indemnify Cousins Club Corp. and Powerline Productions, Inc. d/b/a Club Boca, for any and all claims, including attorney's fees and costs, which may be brought against them for myself, my heirs and assigns, as a result of any injury to me or my property which may occur as a result of Monday Night Boxing events.
>
> I understand that Cousins Club Corp. and Powerline Productions, Inc.., d/b/a Club Boca will not be responsible for or reimburse me for any costs or damages which I may suffer.
>
> I understand that Monday Night Boxing is a physical promotion and that physical injury may result.
>
> I am of lawful age and legally competent to make this agreement.
>
> At the time of the event I am not intoxicated or under the influence of alcohol or drugs, and I am participating in this even of my own free will. (R. 78-93) (T. 127-130).

The facts regarding the boxing match itself were summarized by the appellate court as follows:

> Although the testimony at trial was not clear, some witnesses thought that within seconds into the first round Carlos got hit and fell through the

> ropes, hitting his head on a wooden stage located next to the ring. During the second round, Carlos received several blows to his head. The referee allowed the fight to continue. Club Boca did not have a ringside physician available for the boxing match.
>
> At the end of the third round, Carlos just sat in his corner with his head down. The referee asked one of his friends to remove him so they could start the next fight. Finally, the referee asked one of his friends to remove him so they could start the next fight. Finally, the referee had to help remove Carlos. Carlos sat in a chair and kept leaning his head forward. Within a few minutes, he was unresponsive although conscious. Then his head was completely down; he was unconscious, making snoring noises. His friends began requesting help. One friend ran to a bouncer and requested a paramedic. The bouncer finally came over and "yoked" Carlos up under the arms, dragging him outside. The bouncer thought that Carlos was drunk, even though one friend was screaming that Carlos was not drunk and should not be handled that way. Eventually someone called for medical assistance. Approximately forty-five minutes passed from the time that Carlos left the ring until he received emergency medical assistance.

Id.

It was undisputed that Carlos Silva was completely sober when he signed this exculpatory agreement. The trial judge concluded that it was legally ineffective as a release of claims any of for Club Boca's negligence.

The Fourth District agreed with the trial court that Silva waived any claims for damages he incurred which were inherent in the boxing match itself, but found that the exculpatory agreement did not bar Silva's claims against Club Boca for placing the ring too close to the stage and failing to have a doctor or medical personnel at ringside:

> We agree that, based on the language of the release, any negligence on the part of Club Boca fell outside the scope of the release. Thus, while

> Carlos may have been precluded from recovering for injuries resulting from any dangers inherent in boxing, he was not barred from recovering for injuries resulting from Club Boca's negligence. *See Van Tuyn v. Zurich Am. Ins. Co.,* 447 So. 2d 318 (Fla. 4th DCA 1984); *O'Connell v. Walt Disney World Co.,* 413 So. 2d 444, 447 (Fla. 5th DCA 1982). The trial court therefore properly denied Club Boca's motions for summary judgment, directed verdict, and a new trial on liability.
>
> In determining that Carlos' damage were most caused by Club Boca's negligence, rather than by any inherent risks in boxing, the jury specifically found that Club Boca was negligent in: (1) failing to provide or obtain medical treatment for Carlos; (2) failing to maintain its premises in a reasonably safe condition; and (3) failing to properly supervise the Monday Night Boxing event. The jury attributed 85% negligence to Club Boca and 15% to Carlos.

Id.

Based on direct and express conflict, in this case of first impression, Club Boca filed a notice of invoking this Court's discretionary jurisdiction.

SUMMARY OF THE ARGUMENT

This is a case of first impression in Florida, involving the validity of an exculpatory clause and hold harmless agreement, which was entered into prior to the plaintiff's involvement in a contact sport. In *University Plaza Shopping Center v. Stewart*, 272 So. 2d 507 (Fla. 1973), this Court set out the rule that while exculpatory clauses are not favored and must be strictly construed when there is an attempt to relieve a party of its own liability, if the intent to do this is clearly and unequivocally stated in the release, then the release is valid. The courts below only found that the release was "ambiguous" because Club Boca's negligence fell outside the scope of the release. The language of the release was manifestly clear and unambiguous. The

lower court erred in finding Club Boca's negligence "outside" the pre-event release, as Florida cases have held broader language valid and enforceable in non-contact sports. Where the lower courts found the release and hold harmless agreement clear and unambiguous, but simply did not allow the jury to apply it to any liability for acts occurring separate from the actual fight itself, it is submitted that this legal conclusion is incorrect as a matter of law and is in direct and express conflict with cases from this Court and many other district courts.

I.

THE FOURTH DISTRICT'S OPINION IS IN DIRECT AND EXPRESS CONFLICT WITH THE DECISION OF THIS COURT IN *UNIVERSITY PLAZA;* AND THE DISTRICT COURT DECISIONS IN *LANTZ, GARY, KEY BISCAYNE, BRUCE, DEBOER, AND DILLALO, INFRA* WHICH HOLD THAT CLEAR AND UNAMBIGUOUS EXCULPATORY CLAUSES MUST BE ENFORCED AND THIS COURT HAS JURISDICTION TO REVIEW THE OPINION BELOW NAD QUASH IT

This is a case of first impression in Florida, involving the validity of an exculpatory clause and hold harmless agreement, which was entered into prior to the plaintiff's involvement in a contact sport. In *University Plaza Shopping Center v. Stewart*, 272 So. 2d 507 (Fla. 1973), this Court set out the rule that while exculpatory clauses are not favored and must b strictly construed when there is an attempt to relieve a party of its own liability, if the intent to do this is clearly and unequivocally stated in the release, then the release is valid. The courts below only found that the release was "ambiguous" because Club Boca's negligence fell outside the scope of the release. The language of the release was clear and unambiguous. The lower court erred in finding Club Boca's negligence "outside" the pre-event release, as Florida cases have held broader language valid and enforceable in non-contact sports. Where the lower courts found the release and hold harmless agreement clear and unambiguous, but simply did not allow the jury to apply it to any liability for acts occurring separate from the actual fight itself, it is submitted that this legal conclusion is incorrect as a matter of law and is indirect and express conflict with cases from this

Court and many other district courts.

The release and indemnity agreement signed by Carlos Silva satisfies the requirements of *University Plaza* and similar type releases have been held valid in a variety of non-contact sports cases. *Lantz v. Iron Horse Saloon*, 717 So. 2d 590 (Fla. 5th DCA 1998) (riding a pocket bike); *DeBoer v. Florida Offroaders Drivers Assoc.,* 622 So. 2d 1134 (Fla. 5th DCA 1993) (auto race); *Raveson v. Walt Disney Company,* 793 So. 2d 1171 (Fla. 5th DCA 2001) (horseback riding); *Theis v. J & J. Racing Promotions,* 571 So. 2d 92 (Fla. 2d DCA 1990) (auto race); *Gary v. party Time Company, Inc.,* 434 So. 2d 338 (Fla. 3d DCA 1983); *Bruce v. Heiman,* 392 So. 2d 1026 (Fla. 5th DCA 1981) (auto race); *Thomas v. SportsCar Club of America, Inc.,* 386 So. 2d 272 (Fla. 4th DCA 1980) (auto race); *Dillalo v. Riding Safely Inc.,* 687 So. 2d 353 (Fla. 4th DCA 1972) (an otherwise valid exculpatory clause was ineffective only because it was signed by a minor); *See also, Gulfstream Park Racing Association Inc. v. Gold Spur Stable Inc.*, 820 So. 2d 957 (Fla. 4h DCA 2002); *Greater Orlando Aviation Authority v. Bull Dog Airlines, Inc.,* 705 So. 2d 120 (Fla. 5th DCA 1998); *Hardage Enterprises Inc. v. Fidesys Corp. N.J.,* 570 So. 2d 436 (Fla. 5th DCA 1990); *Key Biscayne Divers Inc. v. Marine Stadium Enterprises Inc.*, 490 So.2d 137 (Fla. 3d DCA 1986).

In *Lantz, supra*, a minor was injured on a pocket bike when the back wheel of his bike was clipped by another bike. The release executed by his mother was held to be valid even though it did not specifically use the word “negligence.” The plaintiff claimed that defendant, saloon owner, failed to provide proper instructions, warnings,

and safety equipment. That release provided in general terms that the plaintiff released the defendant. "...from any and all manner of action, causes of action, suits and damages, claims or demands whatsoever which plaintiff now has or may ever have by reason of any matter." *Lantz* at 591. The *Lantz* court concluded that this language was sufficient clear and unequivocal to release the negligence claims made by the plaintiff. The language in the release signed by Silva is far more detailed than in *Lantz*. The exculpatory clause and hold harmless clause at issue repeatedly and clearly bring home to the boxing participant that his participation in the Monday Night events were totally his responsibility without recourse against the Club.

In *Gary, supra*, the plaintiff engaged in an unusual and aberrant form of skiing. The court held that the exculpatory clause combined with the plaintiff's voluntary aberrant acts formed the basis for the application of the doctrine of express assumption of risk and barred plaintiff's cause of action. The release itself, although not the sole basis for the court's decision, was far more general in its language than the one at bar.

In *Key Biscayne, supra*, a release was held valid so as to absolve a marina from liability for rain storm damage to a vessel. The release provided that plaintiff agreed to indemnify and hold defendant harmless from all liability for personal injury and property damage: 1) arising out of the ordinary negligence of the defendant in connection with the premises or storage space, or 2) in connection with the plaintiff's boat, or 3) for loss or damage due to rain or other casualty loss. The subject release is not only essentially consistent with the clause in *Key Biscayne* and it is actually far

more specific.

Exculpatory clauses have been held to be valid in a number of auto racing cases. In *Bruce, supra*, a plaintiff signed a release to drive in a race, but was injured while a spectator in an area restricted to those who signed waivers when he was hit in the head by a wheel. In *Theis, supra*, a release and waiver was held valid to bar a claim for gross negligence at race track resulting in the death of a driver. The plaintiff claimed the death was caused by another driver improperly running test laps when he should not have done so.

In *DeBoer, supra*, a release and waiver for auto racing was held valid to bar a spectator's claim for negligence at race track. The plaintiff was hit by a car while crossing the track from the spectator to the restricted area. The court reasoned that to be valid, a release need not list every possible means of injury. This point is noteworthy in our case since the subject release uses the language of "participation in Monday night boxing," rather than listing all possible causes of injury.

Even the Fourth District held that where a release clearly states that the defendant is released from liability for its own negligence in connection with horseback riding, summary judgment for defendant would be appropriate based on
the defense of the express assumption of risk by virtue of signing the waiver. *Dillalo, supra*. The reason that the court reversed the summary judgment was because plaintiff was a minor when she signed it. The release in *Dillalo* provided: "I release Defendant from all claims...and injuries as a result of acts or omissions or negligence of defendant while riding horses...I am aware of the risks and dangers involved in horseback riding

and that unanticipated and unexpected dangers may arise...I assume all risks of injury." *Dillalo* at 355. This clause is strikingly similar to the language in the subject exculpatory clause.

When the subject release and exculpatory clause is viewed in the light of the circumstances and the above cited case law, it clearly and unequivocally released the defendant from all negligence claims made in this case.

The exculpatory clauses read and signed by the plaintiff, as a matter of law, should have been enforced and the court's refusal to do so creates direct and express conflict. Silva released both the inherent and extraordinary risks involved in Monday Night Boxing and any risk inherent in any other activities connected with this even. This clear and unambiguous document should have been given full force and effect under the law contained in the above cited cases. This Court has jurisdiction to review the decision in *Club Boca*, to reconcile the conflict, and to quash *Club Boca* and uphold the exculpatory clauses in this contact sport situation.

CONCLUSION

This Court has jurisdiction to review the decision in *Club Boca* and to quash it, as being in direct and express conflict with *University Plaza, Lantz; DeBoer; Theis; Gary; Bruce; Dillalo* and *Key Biscayne, supra*.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Initial Brief was mailed on ____day of May, 2004 to: Justus W. Reid, Esq., Kerri E. Smith, Esq., Reid, Metzger & Associates, P.A., One Clearlake Centre, 250 Australian Avenue South, Suite 700, West Palm Beach, FL 33401; appellate counsel for appellees, Edna L. Caruso, Esq., Caruso, Burlington, Bohn & Compiani, P.A., Suite 3-A/ Barristers Building, 1615 Forum Place, West Palm Beach, FL 33402; Gregg I. Shavitz, Esq., Shavitz Law Group, P.A., 2000 Glades Road, Suite 200, Boca Raton, FL 33431; Manuel Fernandez, Esq., Law Offices of James J. Gallagher, P.A., First Union Center, Suite 2020, 200 East Broward Boulevard, Fort Lauderdale, FL 33301.

MARLOW, CONNELL, VALERIUS,
ABRAMS, ADLER, NEWMAN & LEWIS
4000 Ponce de Leon Blvd.
Suite 570
Coral Gables, Florida 33146
Telephone: (305) 446-0500
Facsimile: (305) 446-3667

By___________________________
ROSEMARY B. WILDER
Florida Bar No. 442615

CERTIFICATE OF COMPLIANC E WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing Petitioner's Brief on Jurisdiction complies with Fla.R.App.P. 9.210 and has been typed in Times New Roman, 14 Point.

____