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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO: 06-CA-9281 (34)

EDWARD Q. FRANCIS,

Plaintiff,

vs.

CITY OF WINTER PARK, a municipal corporation, and OFFICIALLY OFFICIALS, INC., a Florida corporation,

Defendants.

_____/

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

COMES NOW the Plaintiff, EDWARD Q. FRANCIS, by and through his undersigned counsel and submits the following Memorandum In Opposition to Defendants' Motions for Summary Judgment:

Summary of the Case

This is an action for negligence that arises from an accident that occurred on or about February 5, 2006 during a flag football game at which Plaintiff was a participating player. Plaintiff, during the normal and routine course of expected play, fell slightly out of bounds upon an iron drainage grate that was only inches from the "out of bounds lines" which had been marked before the game by Winter Park City Parks and Recreation Department personnel. Defendant, Officially Officials, Inc., pursuant to an agreement/contract with Defendant, City of Winter Park, provided referees to officiate the flag football games, including the one at which Plaintiff was injured.

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Both Defendants have moved for summary judgment on the basis of a "player contract" which they contend was executed in advance and constituted a pre-injury release and waiver of any claims for injury that might occur in the future. In addition, Defendant, Officially Officials, Inc. contends that its officials were "independent contractors" for which it is not liable.

Defendant, City of Winter Park, alleges that it routinely requires participants to execute a "player contract" at the beginning of each season and relies here upon an undated such agreement in seeking summary judgment in this matter. The agreement is undated on its face and there has been no direct testimony regarding the date of its execution. Moreover, Plaintiff had played in this municipal flag football league in past seasons, so there is no way to determine whether this "player contract" was for this season or is one produced from prior seasons or for prior games. The "player contract" states, in pertinent part, as follows:

> "I agree, by signing this contract, THAT IN THE EVENT OF INJURY, DISABILITY, OR INCURRED DISEASE OF A TEMPORARY OR PERMANENT NATURE WHILE PARTICIPATING IN THE ABOVE STATED ACTIVITY, I DO HEREBY RELEASE AND SAVE HARMLESS THE CITY OF WINTER PARK, PARKS AND RECREATION DEPARTMENT AND ANY AND ALL PERSONS OR ASSOCIATIONS AFFILIATED WITH THIS ACTIVITY FROM LIABILITY AND DAMAGE BY REASON OF SAID ACCIDENT INJURY OR DISEASE."

The "player contract" is not only undated but does not specify any terms beyond the language above. The date of the "activity" (apparently referring to a handwritten entry which states "football") is not specified, nor is it specified whether the agreement is intended to encompass future games or future seasons. The contract also fails to specify the type of "football" activity and does not state

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whether it applies to flag football only or other football activities. The contract is not signed by any representative of any Defendant herein, other than Defendant, City of Winter Park.

There is ample evidence in the deposition testimony to date that the condition of the playing field was materially changed on the date of the incident from its condition during past seasons or past flag football games in which Plaintiff participated. Specifically, on the date of the accident the iron drainage grate upon which Plaintiff fell in the course of normal play, severely injuring his face, was only inches from the "out of bounds lines" marked that day by city parks and recreation department personnel. In the past, the "bounds lines" had been placed such that the iron drainage grate had been at a much greater and safer distance from the field of play. Indeed, several qualified and experienced officials have all testified that the lining of the field with the drainage grate within inches of the bounds line was an unsafe and/or dangerous condition and that they would either have not allowed play or would have specifically warned players that day if they had noticed the grate's location before the game began. Included among those officials who so testified was one official, Henry Hamm, who was officiating the game at which Plaintiff was injured.

Finally, there has also been ample testimony that during some games both before and after the accident the iron drainage grates were covered by rubber mats and/or marked by orange cones for safety. There were no such protective measures taken on the day of the accident.

Both Defendants seek summary judgment on the basis of the "player contract" provisions that purport to release or waive legal claims before they accrue. Defendant, Officially Officials, Inc. also seeks summary judgment contending that it is not liable for the negligence of its referees assigned to the particular game on the grounds that they were "independent contractors" rather than employees. For the reasons that follow, both motions for summary judgment should be denied.

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LEGAL STANDARD

A movant for summary judgment has the burden of showing conclusively the nonexistence of genuine issues of material fact. *Bryant v. Lucky Stores, Inc.,* 577 So.2d 1347 (Fla. 2d DCA 1990); *see Wills v. Sears, Roebuck & Co.,* 351 So.2d 29 (Fla.1977). Summary judgment is not available where material issues of fact remain. *Whitten v. Progressive Casualty Ins. Co.,* 410 So.2d 501, 506 (Fla. 1982). In determining whether to grant a motion for summary judgment, all facts must be taken in the light most favorable to the non-moving party. *Moore v. Morris,* 475 So.2d 666 (Fla. 1985).

ARGUMENT

I. Exculpatory Clauses and Pre-Injury Release/Waiver of Legal Claims

1. General Legal Principles

Both Defendants contend the "player contract" validly waived any claims for injuries in advance and before any injury occurred. Defendant, City of Winter Park, cites numerous cases in its Motion for Summary Judgment. All of these cases recognize that there are three recognized principles underlying the enforcement of exculpatory clauses:

> (1) Exculpatory clauses are generally looked upon with disfavor; and

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> (2) Agreements which purport to limit, in advance, one's liability for negligence will not be enforced unless the intention to limit is clearly and unequivocally expressed. *DeBoer v. Florida Offroaders Driver's Association, Inc.*, 622 So.2d 1134, 1135 (Fla. 5th DCA 1993), citing, *O'Connell v. Walt Disney World Co.*, 413 So.2d 444 (Fla. 5th DCA 1982); *Theis v. J & J Racing Promotions*, 571 So.2d 92 (Fla.2d DCA 1990); et al.
>
> (3) Such clauses must be strictly construed against the party seeking to be absolved of liability. See *Sunny Isles Marina, Inc. v. Adulami,* 706 So.2d 920 (Fla. 3rd DCA 1998).

The Fifth District Court of Appeal addressed these general principles most recently, citing another recent Fifth District case. Neither of these cases is cited by Defendants. In *Applegate v. Cable Waterski, L.C.,* --- So.2d ---, 2008 WL 45530 (Fla. 5th DCA 2008), Justice Torpy, citing *Cain v. Banka,* 932 So.2d 575, 578 (Fla. 5th DCA 2006), stated as follows:

> Exculpatory contracts are, by public policy, disfavored in the law because they relieve one party of the obligation to use due care and shift the risk of injury to the party who is probably least equipped to take the necessary precautions to avoid injury and bear the risk of loss.

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While it is true that some case law notes that there are no specific words of art required, at least in the Fifth District, see *Hardage Enterprises, Inc. v. Fidesys Corporation, N.V.,* 570 So.2d 436, 437 (Fla. 5th DCA 1990) and *Lantz v. Iron Horse Saloon, Inc.*, 717 So.2d 590 (Fla. 5th DCA 1998), it is equally true that these clauses are still disfavored as a matter of law, must be clear and unambiguous to be enforceable, and must strictly construed against the party seeking to be absolved of liability.

Finally, it goes without saying that the movant bears the burden of proving that there is a complete absence of any genuine issue of material fact when requesting entry of summary final judgment and this remains true when the motion for summary judgment is founded upon exculpatory clauses. See *Levine v. A. Madley Corp.,* 516 So.2d 1101 (Fla. 1st DCA 1987).

2. The "Player Contract" is not clear and unambiguous as to its term and whether it applies to future activity. Therefore, it is unenforceable as a matter of law.

The "player contract" is ambiguous on its face. It fails to specify whether the agreement applies to future games or future seasons and has no stated term or length. Since the Court is not permitted to supplement the agreement by going beyond its four corners, it is unenforceable on its face for this reason alone.

Defendant, City of Winter Park, failed to bring to this Court's attention a very important case which also happens to be the most recent similar case from the Fifth District Court of Appeal, *Cain v. Banka,* 932 So.2d 575 (Fla. 5th DCA 2006). In *Cain,* as here, the Defendants asserted that the "release" applied to **future** "activity" while the language of the "release" itself was silent on that

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issue. The *Cain* case involved a membership at a motocross racetrack that contemplated future visits and "races." In holding the "release" in *Cain* **unenforceable,** the Fifth District Court of Appeal stated as follows:

> The release itself contains no express language informing the plaintiff that it covered each and every occasion in the future that he visited the track. Given that exculpatory clauses are disfavored in the law and are strictly construed against the party seeking to be relieved of liability, *Sunny Isles Marina, Inc. v. Adulami,* 706 So.2d 920 (Fla. 3rd DCA 1998), those intended to encompass present as well as future events must state so with clarity and precision. The 1999 release contains no language providing for an effective period and the burden is on the party seeking to absolve itself from liability to do so in clear and unequivocal terms.
>
> Use of the plurals "races" or " practices" in the release does not, in and of itself, clearly and unequivocally establish that the release applied to all future visits. One need not hail from Daytona Beach to know that multiple races or practices are frequently held at a racetrack over a single day.
>
> Banka argues that the circumstances surrounding execution of the 1999 release establish clearly that it was part of a membership program at the track and was designed and understood to last for as long as the plaintiff remained a member of the track.
>
> …The defendant cites to no authority allowing a court to go beyond the four corners of the written release in order to supplement it with essential terms, whether by course of conduct, custom or otherwise. In fact, the law is otherwise-an exculpatory provision which is ambiguous is unenforceable. *Sunny Isles Marina.*
>
> The defendant's effort to use the membership program to supplement the absence of an operative period in the 1999 release not only runs afoul of the principle which places the burden on a party seeking to absolve itself of liability to do so

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> in clear and unequivocal terms, but it eliminates the need for a release, designed to apply to future conduct or activity, to contain clear language to that effect.

Cain v. Banka, Id. at 580. It should also be noted that the release in *Cain* was much longer and more detailed in its language than the "player contract" relied upon here.

Since the burden is on Defendants to absolve themselves from liability and to specify whether the agreement applies to future activity or games, the "player contract" is ambiguous on its face under *Cain* and unenforceable as a matter of law. Defendant cites no authority allowing the Court to supplement the contract by going beyond its four corners; therefore, it is unenforceable as a matter of law and on its face.

3. The absence of an effective date and termination date renders the "player contract" ambiguous and unenforceable as a matter of law.

Since the "player contract" is undated on its face and does not provide for an effective date, a termination date, a term or length of effectiveness, it is likewise ambiguous and unenforceable on its face. The Defendant is again asking this Court to go beyond the four corners of the agreement and supplement it with essential terms that are absent. This is something for which Defendant cites no legal authority and which this Court cannot do. See *Sunny Isles Marina, supra* and *Cain v. Banka, supra.* Again, since the burden is upon the drafter of the agreement to clearly and unambiguously specify its terms, the "player contract" is ambiguous on its face and unenforceable as a matter of law.

4. Genuine issues of material fact exist on determining its effective date and what season or activity the undated "player contract" purported to govern.

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In addition, the "player contract" relied upon by Defendants is undated creating genuine issues of material fact, particularly when considered with Plaintiff's testimony which created genuine issues of material fact as to when the "player contract" was signed, regarding which season or activity its terms purported to govern. No witness with direct knowledge can credibly state that this is the undated "player contract" signed on a particular date or even during or prior to the season at issue. Again, Defendants bear the burden of establishing the validity of this kind of agreement. At best for Defendant, there remains a genuine issue of material fact whether the agreement even covers this particular game or season.

5. ***Genuine issues of material fact exist that conditions of the playing field had been materially changed or altered at the time of the accident.***

Cain also addresses the importance of whether the condition of the premises in question is the same as it was when the "release" or other exculpatory clause was signed, stating as follows:

> If the purpose of the Release was to cover all future times a person might be on the property, it should state the Release applies each and every time the person is on the premises, or state that the Release applies to all future entrances to the premises. Adding language suggesting the Release applies for all future events would then clearly and unequivocally tell a person that they are not only releasing their rights for the day they signed it, but for anytime they return to the premises in the future. Signing away one's rights for eternity should be stated more clearly than in the Release signed by [the plaintiff].
>
> Interestingly, the plaintiff does not rely directly on evidence that conditions at the track had materially changed between the date he executed the release and the date he sustained his injury, even though such evidence appears to exist. Banka

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> himself testified in his deposition that he substantially reconfigured the track just prior to the date of the plaintiff's accident. Nevertheless**,** even assuming materially unchanged conditions, we conclude that the language of the 1999 written release was not sufficiently clear and unequivocal to inform the plaintiff that he was executing a perpetual release of personal injury claims.

Cain, Id. at 579, 580. The implication here is that one cannot release a future claim not expressly contemplated or specified by the agreement, such as a claim arising from conditions of the premises in question that have materially changed since the agreement was executed.

In this case, the condition of the playing field, specifically the placement of "bounds lines" by Winter Park City Parks and Recreation Department personnel was materially changed from past occasions if the evidence of record is viewed, as it must be, in the light most favorable to the Plaintiff. *See Henderson v. Bowden,* 737 So.2d 532 (Fla. 1999). This provides further support that *Cain* mandates a denial of Defendants' motions for summary judgment. No one is suggesting that Plaintiff executed the agreement on the date of the incident after the "bounds lines" were placed differently than they had been placed in the past, much closer to the iron drainage grate. Likewise, the jury could find from the evidence that the rubber mats and cones were used on occasions prior to the accident date but not on the accident date and that this also constitutes a material alteration or change in the premises from previous games.

The parties clearly could not have contemplated releasing claims arising from conditions which did not exist at the time of execution of the agreement. The agreement also fails to specify that claims arising from future alterations or changes in the playing field are being released.

6. The "player contract" is ambiguous in that its language seems to contemplate only

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injuries from the inherent risks of "football" and not extraordinary risks created by an unreasonably dangerous condition caused by the conduct of the sponsor.

The "player contract" is also ambiguous in that its language certainly seems to contemplate only the normal risks inherent in the athletic activity of football rather than extraordinary risks caused by unreasonably dangerous conditions created by the sponsor within the field of normal play, such as the iron drainage grate. In *Cousins Club Corp. v. Silva*, 869 So.2d 719 (Fla. 4th DCA 2003), the Fourth District Court of Appeal held that a pre-incident release signed by an amateur boxer the night of a fight assuming, "the inherent and extraordinary risks involved in Monday Night Boxing and any risks inherent in any other activities connected with this event" was NOT effective to release the Defendant from negligence on the part of the Club. In that case the plaintiff was suffered a subdural hematoma during the boxing match. The trial testimony was that, although this was significant, his severe brain edema was the result of the 45 minute delay in summoning medical attention. The jury found that this was the fault of the Club. The Court held that "while [the plaintiff] 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 the Club's negligence." *Id.*

The "player contract" in the instant case is not clear and unambiguous on this point. Accordingly, the "player contract" is not clear and ambiguous in defining what players are releasing, when read in the context of these facts. In order to be clear in this context, the "player contract" must necessarily mention that Defendants' own negligence (both City of Winter Park and Officially Officials and its referees) is being released for future games or seasons and that the release is not limited to a game or season or risks merely inherent in the game of flag football.

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7. The "player contract" should be required to state specifically that Defendants' own negligent act are being released in order to be clear and unambiguous as a matter of law.

While any one of the above arguments is adequate legal basis upon which the Court is required to deny the motions for summary judgment, it bears noting further that some Florida courts require that such agreements state with specificity that claims based upon the defendants' own negligence are being released. Indeed, some district courts of appeal have taken a bright line position. *See Witt v. Dolphin Research Center, Inc.,* 582 So.2d 27 (Fla. 3d DCA 1991); *Levine v. A. Madley Corp.,* 516 So.2d 1101 (Fla. 1st DCA 1987); *Rosenberg v. Cape Coral Plumbing, Inc.,* 920 So.2d 61 (Fla. 2d DCA 2005); *Van Tuyn v. Zurich American Ins. Co.,* 447 So.2d 318 (Fla. 4th DCA 1984).

The Fifth District Court of Appeal has seemingly chosen a different path. First in *DeBoer v. Florida Offroaders Driver's Association, Inc.*, 622 So.2d 1134, 1135 (Fla. 5th DCA 1993) and later in *Lantz v. Iron Horse Saloon, Inc.*, 717 So.2d 590 (Fla. 5th DCA 1998), the Fifth District held that a release signed by the injured party before the injury occurred were effective to bar a subsequent claim for negligence even though neither of the agreements used the word "negligence."

Of course, these cases are all fact specific and the language of the releases and context in which they were signed varies widely. It is crucial to note that the court's underlying rationale for so holding in both of those cases was that the condition which caused the injuries ultimately complained of was readily apparent to the plaintiff at the time the plaintiff signed the release and/or was injured. In this case, there were material changes in the condition of the playing field when compared to Plaintiff's previous experiences. For example in *Lantz* the Fifth District Court of Appeal noted:

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> (Plaintiff) claims appellee was negligent in not providing safety equipment or helmets to those riding the bikes and in failing to post any rules or restrictions relating to the activity. Both of these conditions were readily apparent to her when she executed the release.

Id. at 590. *Deboer* likewise involved an obvious, known, and readily apparent risk of crossing a racetrack to reach a restricted area.

Here, several qualified and experienced officials have all testified that the grate's presence was an unreasonably unsafe and dangerous condition and that they would have disallowed play or warned players before allowing play if *they* had noticed the grates so close to the bounds lines. So, the dangerous condition in this case was *not* readily apparent to the experienced officials or the players at the time of the accident. Moreover, no one contends the "player contract" was signed the day of the incident when the field was lined differently than it had been lined in the past. The facts of this case are distinguishable from both *Lantz* and *Deboer* in that the grate was not as readily apparent as the dangers posed by the risks of the racing events in those cases.

The Fifth District held in *Hardage Enterprises Inc. v. Fidesys Corporation, N.V.*, 570 So.2d 436 (Fla. 5th DCA 1990) that:

> There are no words of art required in a release if the intent of the parties is apparent from the language used… According to the great weight of authority in this country, specific wording is not a precondition to finding that a release precludes negligence claims. *Id*. at p. 437.

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It is important to note that both the *Hardage* case and the subsequent Fifth District case, *Greater Orlando Aviation Authority v. Bulldog Airlines, Inc.*, 705 So.2d 120 (Fla. 5th DCA 1998), involve the signing of a release *after* the "damages" (these cases both involved construction deficiencies and damages of a purely economic nature) had occurred. The *Hardage* Court even distinguished an earlier decision, *Ivey Plants, Inc. v. FMC Corp.*, 282 So.2d 205 (Fla. 4th DCA 1973), *cert. denied*, 289 So.2d 731 (Fla. 1973), on this very basis:

> In the instant case, we are not concerned with a release for future acts of negligence, but from past acts – and there is nothing to suggest that those acts contemplated by the release excluded acts to be performed under the contract. Indeed, it is obvious that the exact opposite was intended by the parties. *Id.* at p. 438.

Plaintiff submits that, in a case, as here, in which the defendant contends that the plaintiff is releasing the defendant for future activities, even if in the interim conditions of the premises are materially changed or altered, and where the danger posed is no readily apparent, the above case law can be distinguished. On these facts, Plaintiff submits the language of the release must be more specific as to whether and what negligence is being released in order to be considered sufficiently clear and unambiguous to be enforceable. This case is distinguishable from *Lantz* and *Deboer* which hold that language referencing defendants' negligence specifically is not required for enforceability of such an agreement. Plaintiff submits that in case like this, where the danger is not readily

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apparent, where there is an issue of whether future events are included, where there have been material changes in the condition of the premises, and where those changes created extraordinary risks not contemplated at the time the agreement was signed, that the agreement should be crystal clear that the defendant(s) are being released for their own negligence, including for future events and in the event the released party creates material changes in the condition of the premises after the agreement is signed. Otherwise, a plaintiff is lured into signing a contract that releases claims that were surely not contemplated at execution.

II. Independent Contractor Defense

1. Direct Corporate Liability

First, it should be noted that this defense, relied upon by Defendant, Officially Officials, Inc., applies in theory to bar only vicarious liability for the referees officiating the game. Plaintiff has pled negligent training and instruction theories of direct corporate liability, as opposed to vicarious liability. These theories of direct corporate liability are not barred regardless of this Court's ruling on the "independent contractor" defense. There has been ample evidence that the referees at the game did not receive adequate training and instruction on inspecting the field of play for safety.

2. The "Undertaker" Doctrine

It is also clear that Defendant, Officially Officials, Inc., assumed a contractual duty and undertook the duty to provide referees and officiating services for the subject flag football games, and the failure to perform that duty with reasonable care by inspecting the field of play for safety renders said Defendant legally liable. Again, this is a theory of direct corporate liability. In *Irving v. Doctor's Hospital*, 415 So.2d 55 (Fla. 4th DCA 1982), the court reversed a judgment in favor of the defendant hospital for failure to give the following jury instruction:

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> One who undertakes by contract to do for another a given thing cannot excuse himself to the other for a faulty performance, or a failure to perform, by showing that he has engaged another to perform in his place, and that the fault or failure is that of another or independent contractor.

415 So.2d at 57 n.2. In *Clay Electric Coop., Inc. v. Johnson*, 873 So. 2d 1182, 1186 (Fla. 2003), the Supreme Court of Florida stated as follows:

> Whenever one undertakes to provide a service to others, whether one does so gratuitously or by contract, the individual who undertakes to provide the service-i.e., the "undertaker"-thereby assumes a duty to act carefully and to not put others at an undue risk of harm. This maxim, termed the "undertaker's doctrine," applies to both governmental and nongovernmental entities. The doctrine further applies not just to parties in privity with one another, i.e., the parties directly involved in an agreement or undertaking-but also to third parties. Florida courts have applied the doctrine to a variety of third-party, contract-based negligence claims and ruled that the defendants could be held liable, notwithstanding a lack of privity. (Footnotes omitted).

Thus, regardless of what this Court determines with respect to the status of the officials as agents, employees, or independent contractors, Defendant bears potential direct corporate liability for failing to train and instruct its officials, as well as for failing to reasonably perform a contractual duty it assumed pursuant to the "undertaker's doctrine." On those grounds alone, summary judgment should be denied as to Defendant, Officially Officials, Inc.

3. Non-delegable Duties

Non-delegable duty is an exception to the general independent contractor law which provides that a party is not responsible for negligence of an independent contractor it hires. See *Acevedo v. Lifemark Hospital of Florida, Inc.,* Not Reported in So.2d, 2005 WL1125306 (Fla. Cir. Ct.). Non-

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delegable duties derive from the idea that one cannot contract away ultimate responsibility for certain tasks one is obliged to perform. *U.S. Sec. Serv. Corp. v. Ramada Inn,* 665 So.2d 268, 270 (Fla. 3d DCA 1996). While "the *performance* of [a] non-delegable [sic] duty" may be contracted out to an independent contractor, the "ultimate legal *responsibility* for the proper performance of [the non-delegable duty]" remains with the party upon whom the non-delegable duty is imposed. *Id.* (emphasis in original).

Non-delegable duties can be imposed legally, through statutes and regulations, contractually, or through the common law. *Dixon v. Whitfield,* 654 So.2d 1230, 1232 (Fla. 1st DCA 1995); *McCall v. Alabama Bruno's, Inc.,* 647 So.2d 175, 178 (Fla. 1st DCA 1994); *E.J. Strickland Const. v. Dept. of Agric. and Consumer Serv. of Fla.,* 515 So.2d 1331, 1334-35 (Fla. 5th DCA 1987). Non-delegable duties based on contracts derive from the general principle behind non-delegable duties. Simply stated, once a party undertakes an obligation under a contract, that party cannot circumvent that obligation by re-contracting away that obligation to a third party, or independent contractor. *Gordon v. Sanders,* 692 So.2d 939, 941 (Fla.3dDCA 1997). In *Gordon,* an oral contract was created for the removal of trees. *Id.* at 940. The original contracting party delegated performance of the contract to independent subcontractors. *Id.* at 940. The subcontractors performed the work negligently and the plaintiff sought recovery based on the "non-delegable duty to perform properly the inherently dangerous activity of removal of the [trees.]"*Id.* at 940-41.The trial court granted directed verdict because there was insufficient evidence. *Id.* at 941.The appellate court reversed, finding that there was sufficient evidence to go to the jury on the question of whether a non-delegable duty existed under the oral contract. *Id.*

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Florida law recognizes that certain duties are "nondelegable". *Webb v. Priest*, 413 So.2d 43, 47 n.2 (Fla. 3d DCA 1982). The person obligated to perform a nondelegable duty may delegate the work, but not the responsibility for it. *Atlantic Coast Dev. Corp. v. Napoleon Steel*, 385 So.2d 676, 679 (Fla. 3d DCA 1980); *Gatwood v. McGee*, 475 So.2d 720 (Fla. 1st DCA 1985). And the person who has the duty may not divest himself of it by simply walking away from it. Whether the person who has the nondelegable duty can be held vicariously liable for the negligence of the one to whom it is delegated is not determined by the nature of their relationship. While the issue often arises when an employer delegates his duty to an independent contractor whom he "employs", such a relationship is not necessary. Accordingly, the fact that Plaintiff had no contract with Defendant, Officially Officials, Inc. is immaterial.

Florida law has made numerous kinds of duties nondelegable. For example, a duty may be nondelegable because the activity involved is inherently dangerous. *Midyette v. Madison*, 559 So.2d 1126 (Fla. 1990) (clearing land by fire); *Noack v. B. L. Watters, Inc.*, 410 So.2d 1375 (Fla. 5th DCA 1982) (installation of gas lines*); Gaska v. Exxon Corp.*, 558 So.2d 457 (Fla. 4th DCA 1990) (duty to de-gas tank). A duty may also be nondelegable because the responsibility has been contractually assumed. *Irving v. Doctor's Hospital of Lake Worth, Inc.*, 415 So.2d 55 (Fla. 4th DCA 1982) (hospital's contractual duty to provide care to patient). *Toombs v. Fort Pierce Gas Co.*, 208 So.2d 615 (Fla. 1968). In *Toombs*, the Supreme Court held that a bystander could recover for injuries suffered in a gas explosion under an implied warranty theory, even absent any contractual privity with the gas company.

Since the duty to officiate the games was a contractual duty owed by Defendant, Officially Officials, Inc. pursuant to its agreement with the City of Winter Park and required trained

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professional referees with knowledge and expertise in officiating the Winter Park flag football league games, the duty was non-delegable, and said Defendant cannot contract away the responsibility of proper performance of the duty safely and reasonably.

4. Agency vs. Independent Contractor is a question of fact for the jury

Given that Defendant, Officially Officials, Inc., was admittedly performing a contractual duty to provide referees to the City of Winter Park and hired, in some form or fashion, the two gentlemen who officiated the game at issue, there is clearly an issue of fact as to whether the said referees were actual agents of Defendant, Officially Officials, Inc.

Essential to the existence of an actual agency relationship is (1) acknowledgement by the principal that the agent will act for him, (2) the agent's acceptance of the undertaking, and (3) control by the principal over the actions of the agent. *Villazon v. Prudential Health Care Plan, Inc.,* 843 So.2d 842 (Fla. 2003). When one considers an action based on actual agency, it is the *right* to control, rather than actual control, that may be determinative. *Id.* Independent contractors may become agents depending on the totality of the circumstances. *Id.* The existence and scope of an agency relationship are generally questions of fact. *Id.* The nature and extent of the relationship of the parties with respect to agency presents a question of fact and is not controlled by the descriptive labels employed by the parties. *Parker v. Domino's Pizza, Inc.,* 629 So.2d 1026, 1027 (Fla. 4th DCA 1993).

While it is true that the referees and Defendant, Officially Officials, Inc. describe their relationship as "independent contractors", it is equally clear that the referees' assignments and jobs were under Defendant's right to control. It was said Defendant who had the contract with the City of

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Winter Park and who made the ultimate decision to assign a referee to a particular game. It was said Defendant who had the right to control whether a referee was even officiating a particular game. Anthony MacDonald, the owner and operator of Defendant, Officially Officials, Inc. admits that there was an express agreement between his company and the City of Winter Park to provide officials for the games and that he expected his officials to inspect the field of play, ensure a safe field of play, and that he assigned them to the games to do just that. He also admits his referees were there to perform the duties he agreed to provide to the city. He also admits that the referees he hired were Officially Officials, Inc.'s representatives on the field of play. Thus, it can certainly not be said that there is an absence of genuine issues of material fact regarding the nature and scope of the relationship of the referees to Defendant, Officially Officials, Inc.

CONCLUSION

Exculpatory clauses such as the one relied upon by Defendants are disfavored as a matter of law in Florida. Such agreements must be construed strictly against the party seeking to be absolved, and the trial court cannot supplement essential terms by going to evidence beyond the four corners of the agreement. To be enforceable, such agreements must be clear and unambiguous in all their essential terms on the face of the agreement.

The "player contract" is not sufficiently clear and unambiguous to be enforced on its face and Defendants seek to require this Court to go beyond the four corners of the agreement to supplement essential but absent terms. In addition, the conditions of the premises were materially altered or changed after the unknown date the "player contract" was purportedly executed.

The drafter of such an agreement bears the burden of establishing, without going beyond the

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four corners of the agreement, that it clearly and unambiguously releases the drafter for the claim asserted. Without going beyond the four corners of the agreement, Defendants cannot meet this burden.

Finally, genuine issues of material fact exist on the issues such as the effective date and term or length of the agreement, whether it applies to future activities or games or seasons, and whether the condition of the field of play was materially altered after the agreement was executed. For all of the foregoing reasons, Defendants' Motions for Summary Judgment should be denied.

As to the "independent contractor" defense, the theories of direct corporate liability, the "undertaker" doctrine, and genuine issues of material fact as to whether the referees were actual agents of Defendant, Officially Officials, Inc. preclude entry of summary judgment against Plaintiff.

WHEREFORE, Plaintiff, EDWARD Q. FRANCIS, requests that Defendants' Motions for Summary Judgment be denied or, in the alternative, that discovery be completed on all the issues of fact remaining.

I HEREBY CERTIFY that on this _____ day of January, 2008, a true and correct copy of the foregoing has been furnished by hand delivery to: Sutton G. Hilyard, Jr., Esq., P.O. Box 4973, Orlando, FL 32802 and James A. Wilkinson, Esq., P.O. Box 2928, Orlando, FL 32802

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