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Public Policy Violations or Permitted Provisions?: The Validity of Exculpatory Provisions in Residential Leases

Warren v. Paragon Technologies Group[1]

I. INTRODUCTION

It has long been established in Missouri that a party may be contractually relieved from any claims of negligence through the use of exculpatory clauses.[2] Missouri courts have placed few limits on the use of such clauses, and the rule has been applied expansively throughout the years,[3] resulting in the extension of the rule to residential leases in *Warren v. Paragon Technologies Group*.[4]

II. FACTS AND HOLDING

Marilyn Warren lived in an apartment complex managed by Paragon Technologies Group.[5] Before Warren moved into her apartment, she signed a written lease containing an exculpatory clause.[6] The material portion of the clause purported to relieve the apartment company from any liability for injury to the resident "occurring in or about the Leased Premises or within the Apartment Community from any cause whatsoever even if said damages or injuries are alleged to be the fault of or caused by the negligence or carelessness or fault of the Apartment Company."[7] The clause also stated that the resident was to "indemnify and save the Apartment Company harmless from all loss, damage, liability and expense . . . which Resident might incur."[8] While Warren

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1. No. 79539, 1997 WL 471917 (Mo. Aug. 20, 1997). After rendering its own opinion, the Missouri Court of Appeals for the Eastern District transferred the case to the Missouri Supreme Court on December 24, 1996. *See* Warren v. Paragon Technologies Group, No. 69866, 1996 WL 741844 (Mo. Ct. App. Dec. 24, 1996).

2. Rock Springs Realty, Inc. v. Waid, 392 S.W.2d 270, 272 (Mo. 1965).

3. *See* Kansas City Stock Yards Co. v. A. Reich & Sons, Inc., 250 S.W.2d 692, 696 (Mo. 1952); Hornbeck v. All American Indoor Sports, Inc., 898 S.W.2d 717, 721 (Mo. Ct. App. 1995).

4. Warren v. Paragon Technologies Group, No. 79539, 1997 WL 471917 (Mo. Aug. 20, 1997).

5. *Id.* at *2.

6. *Id.*

7. *Id.*

8. *Id.*

was a tenant, she was injured when she slipped and fell on a patch of ice outside her apartment complex.[9]

The trial court ruled that the exculpatory clause was void as against public policy and sent the case to the jury. The jury returned a $38,000 verdict for Warren.[10] On appeal, the defendants argued that the exculpatory clause was a valid contractual defense to Warren's claim.[11] Warren argued, however, that although Missouri courts have upheld exculpatory clauses in commercial leases, the court should not extend the rule to residential leases.[12]

Warren also made three additional arguments. First, she argued that the contract language was a release that was not effective because no bona fide controversy existed at the time of the claimed release.[13] Second, she argued the exculpatory clause was a covenant not to sue that failed for lack of consideration.[14] Third, Warren argued that the contract language was "meaningless boilerplate."[15] The Missouri Court of Appeals for the Eastern District disagreed with the judgment of the trial court.[16] However, because of the general interest and importance of the matter, the court of appeals transferred the case to the Missouri Supreme Court.[17] The supreme court reversed the judgment of the trial court, but remanded the case to give the plaintiff the opportunity to properly answer the defendants' affirmative defense of release.[18]

III. LEGAL BACKGROUND

A. Introduction

Although exculpatory clauses in contracts have been in existence for many years, no clear majority rule has been established regarding their enforceability.[19] In Missouri, it has long been the rule that covenants relieving parties of future negligence are not void per se as against public policy.[20] Missouri courts have

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9. *Id.*
10. *Id.*
11. *Warren*, 1996 WL 741844 at *1-*2.
12. *Id.* at *2.
13. *Id.*
14. *Id.* at *3.
15. *Id.*
16. *Id.*
17. *Id.*
18. Warren v. Paragon Technologies Group, No. 79539, 1997 WL 471917 (Mo. Aug. 20, 1997).
19. Crawford v. Buckner, 839 S.W.2d 754, 756 (Tenn. 1992); McCutcheon v. United Homes Corp., 486 P.2d 1093, 1096 (Wash. 1971).
20. Kansas City Stock Yards Co. v. A. Reich & Sons, Inc., 250 S.W.2d 692, 698

recognized this general rule may not apply in cases involving gross negligence, fraud, unequal bargaining power, or a public interest.[21] However, if the contract does not involve the public, but rather private parties, Missouri courts have declared that no public interest exists, and thus no public policy can be violated.[22]

In *Kansas City Stock Yards Co. v. A. Reich & Sons, Inc.*,[23] the court upheld an exculpatory clause between a landlord and tenant in a commercial lease. The *Kansas City* court explained that a landlord could accept lower rent in exchange for the tenant's agreement to release the landlord from any liability.[24] In *Warren*, the court took this rationale one step further when it upheld an exculpatory clause in a residential lease.[25]

Although Missouri courts have declared that exculpatory clauses are not per se void,[26] such clauses are disfavored and will be strictly construed against the party claiming the benefit of the contract.[27] Therefore, exculpatory provisions must meet certain requirements before most courts will render them valid and enforceable.

B. Language Required

The intention to release one from his or her negligent acts must be clearly and expressly stated "in plain terms."[28] Missouri courts have defined "plain terms" to be those terms which are both unambiguous and understandable.[29] The exculpatory provision "should not compel resort to a magnifying glass and lexicon."[30] An intention to relieve one of liability will not be assumed in absence of such express wording.[31] These rules apply to provisions benefitting the lessee as well as the lessor.[32]

(Mo. 1952).

21. *Id.*

22. *Id. See also* Rock Springs Realty, Inc. v. Waid, 392 S.W.2d 270, 272 (Mo. 1965).

23. *Kansas City Stock Yards Co.*, 250 S.W.2d at 692.

24. *Id.* at 698.

25. Warren v. Paragon Technologies Group, No. 79539, 1997 WL 471917, at *4 (Mo. Aug. 20, 1997).

26. *Rock Springs Realty*, 392 S.W.2d at 272.

27. Hornbeck v. All American Indoor Sports, Inc., 898 S.W.2d 717, 721 (Mo. Ct. App. 1995).

28. *Rock Springs Realty*, 392 S.W.2d at 271.

29. Alack v. Vic Tanny Int'l, Inc., 923 S.W.2d 330, 335-36 (Mo. 1996).

30. *Id.* at 335.

31. Poslosky v. Firestone Tire & Rubber Co., 349 S.W.2d 847, 850 (Mo. 1961).

32. *Rock Springs Realty*, 392 S.W.2d at 273.

Most states that have chosen to enforce exculpatory clauses require the language of the clause to include specific reference to the negligence or fault of the drafter.[33] In *Alack v. Vic Tanny International, Inc.*,[34] the Missouri Supreme Court chose to follow the lead of other states that require the words "negligence," "fault," or their equivalent in the exculpatory provision before a claim for negligence will be barred.[35]

The *Alack* court refused to bar a claim for negligence where the words of the exculpatory provision attempted to shield the company from "any damages," "any injuries" and "any and all claims, demands, damages, rights of action, present or future . . . resulting or arising out of the Member's . . . use . . . of said gymnasium or the facilities and equipment thereof."[36] The court stated that such language was ambiguous since it did not specifically state that the club was released from its own negligence. In addition, the all-inclusive words incorporated claims arising from intentional torts, gross negligence, and activities involving the public interest—claims which can never be waived.[37] The *Alack* court stated, "[a] contract that purports to relieve a party from any and all claims but does not actually do so is duplicitous, indistinct and uncertain."[38] The *Alack* court explained that without such language, "while one might accept the risks inherently associated with any particular activity, it does not follow that he was aware of, much less intended to accept, any enhanced exposure to injury occasioned by the carelessness of the very person on which he depended for his safety."[39] The court suggested, however, that less precise language may be appropriate in cases where both parties are sophisticated commercial entities.[40] Whatever the situation may be, for an exculpatory clause to succeed, a reasonable person must know and understand what he is contracting away.[41]

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33. *Alack*, 923 S.W.2d at 334.

34. *Id.* at 330.

35. *See* Geise v. County of Niagara, 458 N.Y.S.2d 162, 164 (Sup. Ct. 1983) (words "fault" or "neglect" must be used to bar a liability claim); Doyle v. Bowdoin College, 403 A.2d 1206, 1208 (Me. 1979) (express reference to negligence required before release is effective); Haugen v. Ford Motor Co., 219 N.W.2d 462, 470 (N.D. 1974) (without a reference to negligence, there is no "plain and precise" intent to limit liability); Blum v. Kauffman, 297 A.2d 48, 49 (Del. 1972) (where the word negligence was not used, release did not "clearly and equivocally" show intent to bar liability claim).

36. *Alack*, 923 S.W.2d at 337.

37. *Id.*

38. *Id.*

39. *Id.* at 335.

40. *Id.* at 338 n.4.

41. *Id.* at 337-38.

Other states have not required specific mention of the words "fault" or "negligence."[42] However, the majority of these jurisdictions still require the release to be clear and conspicuous.[43] The difference in rulings results from different ideas of what constitutes clear and conspicuous language.

C. Public Policy

"The exculpatory clause frequently places the courts in a precarious position of choosing between two fundamental concepts of our legal system."[44] Jurisdictions should consider the countervailing principles of freedom of contract and responsibility for one's own actions when deciding whether to uphold exculpatory provisions.[45] The majority of states have protected the freedom of contract interest when the exculpatory provision is clear and conspicuous.[46]

However, language is not the only consideration in determining the validity of an exculpatory provision. Courts also consider whether the contract involves a public interest, whether the parties entered into the contract fairly, and whether the item contracted for is a practical necessity.[47] An increasing number of courts have found that exculpatory clauses in residential leases involve a public interest.[48] Courts also have found that the landlord-tenant relationship, along with the evolution of standardized form leases containing exculpatory clauses, causes grossly unequal bargaining power, making it "fruitless" for a tenant to search for a lease without such a clause.[49] In *Galligan v. Arovitch*,[50] the

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42. *See* Hardage Enters. v. Fidesys Corp., 570 So. 2d 436, 437 (Fla. Dist. Ct. App. 1990) ("any and all claims" language is sufficient); Neumann v. Gloria Marshall Figure Salon, 500 N.E.2d 1011, 1014 (Ill. 1986); Audley v. Melton, 640 A.2d 777 (N.H. 1994) (word "negligence" not required but language of the contract must still give clear notice to plaintiff); Gross v. Sweet, 400 N.E.2d 306 (N.Y. Ct. App. 1979) (while word "negligence" is not necessary, words conveying similar meaning must be included in release to bar claim).

43. Alack v. Vic Tanny Int'l, Inc., 923 S.W.2d 330, 334 (Mo. 1996); *See Hardage*, 570 So. 2d at 437; *Audley*, 640 A.2d 777; *Gross*, 400 N.E.2d at 310.

44. Mitchell O. Moore, *Country Club Apartments v. Scott: Exculpatory Clauses in Leases Declared Void*, 32 MERCER L. REV. 419, 421 (1980).

45. Stanley v. Creighton Co., 911 P.2d 705 (Colo. 1996).

46. *See supra* notes 28-35.

47. *See, e.g.*, Garretson v. United States, 456 F.2d 1017 (9th Cir. 1972) (upholding exculpatory clause against ski jumper); Boucher v. Riner, 514 A.2d 485 (Md. Ct. Spec. App. 1986) (upholding exculpatory provision in contract for parachute lessons because sport was not "of practical necessity"); *Audley*, 640 A.2d at 777 (N.H. 1994) (upholding exculpatory clause because working with wild animals not considered essential activity).

48. *See, e.g.*, Crawford v. Buckner, 839 S.W.2d 754 (Tenn. 1992); McCutcheon v. United Homes Corp., 486 P.2d 1093 (Wash. 1971).

49. *See, e.g.*, Henrioulle v. Marvin Ventures, Inc., 573 P.2d 465 (Cal. 1978);

Pennsylvania Supreme Court recognized that "[t]here is no meeting of the minds, and the [exculpatory] agreement is in effect a mere contract of adhesion, whereby the tenant simply adheres to a document which he is powerless to alter, having no alternative other than to reject the transaction entirely."[51] One court has found that the mere existence of an exculpatory clause was a sign of unequal bargaining power.[52] However, where a person "can, at small cost to himself, simply refuse to be in the market altogether," no unequal bargaining power exists.[53]

Additional concerns are that tenants, preoccupied with other aspects of housing such as price and location, might unknowingly agree to exculpatory provisions, and that such provisions may affect personal health and safety.[54] In *Feldman v. Stein Building & Lumber Co.*,[55] the court stated, "While affirming the principle of freedom of contract, we note the well-settled rule that where freedom of contract and declared public policy are in conflict, the former necessarily must yield to the latter."[56]

A few jurisdictions have adopted a strict rule by disallowing exculpatory provisions in any situation.[57] While most states allow some type of exculpatory provisions, many have disallowed them in residential leases, considering them to be against public policy.[58] Other states are following the current trend and

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Galligan v. Arovitch, 219 A.2d 463 (Pa. 1966); *Stanley*, 911 P.2d at 705.

50. 219 A.2d 463 (Pa. 1966).

51. *Id.* at 465.

52. *See* Cardona v. Eden Realty Co., 288 A.2d 34 (N.J. 1972).

53. Todd D. Radoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1284 n.243 (1983) (noting differences between essential and non-essential activities).

54. *See* William K. Jones, *Private Revision of Public Standards: Exculpatory Agreements in Leases*, 63 N.Y.U. L. REV. 717 (1988).

55. 148 N.W.2d 544 (Mich. Ct. App. 1967).

56. *Id.* at 546.

57. Alack v. Vic Tanny Int'l, Inc., 923 S.W.2d 330, 339 (Mo. 1996). *See, e.g.*, Fedor v. Mauwehu Council, Boy Scouts of Am., Inc., 143 A.2d 466 (Conn. 1958); Walker v. Self Serv. Storage & Miniwarehouses, Inc., 492 So. 2d 210 (La. Ct. App. 1986); Miller v. Fallon County, 721 P.2d 342 (Mont. 1986) (discussing MONT. CODE ANN. § 28-2-702 (1980); Roll v. Keller, 336 N.W.2d 648 (N.D. 1983)).

58. *See, e.g.*, Lloyd v. Serv. Corp., Inc., 453 So. 2d 735, 739 (Ala. 1984) (though not void per se); Stanley v. Creighton Co., 911 P.2d 705, 707 (Colo. 1996); Tenants Council v. DeFranceaux, 305 F. Supp. 560 (D.C. 1969); Weaver v. American Oil Co., 276 N.E.2d 144 (Ind. 1971) (such clauses void in all leases); Feldman v. Stein Building & Lumber Co., 148 N.W.2d 544 (Mich. Ct. App. 1967); Papakalos v. Shaka, 18 A.2d 377, 379 (N.H. 1941); Ultimate Computer Services, Inc. v. Biltmore Realty Co., 443 A.2d 723 (N.J. 1982); Galligan v. Arovitch, 219 A.2d 463 (Pa. 1966); Crawford v. Buckner, 839 S.W.2d 754, 758 (Tenn. 1992); Teller v. McCoy, 253 S.E.2d 114 (W. Va.

have either forbidden or limited the use of exculpatory provisions in residential leases through statutory enactment.[59]

While it is clear that few jurisdictions approach the problem in quite the same way, courts often examine two main factors to balance the two interests of freedom of contract and responsibility for one's actions. First, courts determine whether residential leases involve a public interest. Second, courts determine the relative bargaining power of the parties.

Applying a variation of this test, the Colorado Court of Appeals, in *Stanley v. Creighton*,[60] first determined whether the subject matter of the contract "concern[ed] a duty to the public and whether the type of services performed affect[ed] the public interest."[61] Second, the court determined whether the parties fairly entered into the contract and whether they used clear and unambiguous language.[62] The *Stanley* court found that a landlord's services are generally held out to the public and that housing is a practical necessity to the public.[63] For this reason, the court found that public policy is a more important issue in residential leases than in commercial leases.[64] In addition, the court recognized a disparity of bargaining power in the average residential landlord-

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1979).

59. *See* Moore, *supra* note 44. Moore notes that these statutes include: ALASKA STAT. § 34.03.040 (Michie 1996); ARIZ. REV. STAT. ANN. § 33-1315 (West 1990); CAL. [CIV.] CODE § 1953 (West 1985); CONN. GEN. STAT. ANN. § 47a-41 (West 1994); FLA. STAT. ANN. § 83.47 (West 1987); GA. CODE ANN. § 44-7-2(b) (1991); HAW. REV. STAT. § 521-33 (1993); IOWA CODE ANN. § 562A.11 (West 1997); KAN. STAT. ANN. § 58-2547 (1994); KY. REV. STAT. § 383.570 (Supp. 1996); MASS. GEN. LAWS ANN. ch. 186, § 15 (West Supp. 1997); MINN. STAT. ANN. § 504.18 (West 1997); MONT. CODE ANN. § 70-24-202 (1997); NEB. REV. STAT. § 76-1415(l) (1996); NEV. REV. STAT. § 118A.220 (1995); N.M. STAT. ANN. § 47-8-16 (Michie Supp. 1997); N.Y. GEN. OBLIG. LAW § 5-321 (McKinney 1989); OHIO REV. CODE ANN. § 5321.13(D) (Anderson Supp. 1996); OR. REV. STAT. § 90.245 (1995); R.I. GEN. LAWS. § 34-18-17 (1995); S.C. CODE ANN. § 27-40-330 (Law. Co-op. 1991); VT. STAT. ANN. tit. 9, § 4457(b) (1993); WIS. STAT. ANN. § 704.07(1) (West Supp. 1996). *But see* MD. CODE ANN., REAL PROPERTY § 8-105 (1996) (clauses allowed for areas within exclusive control of tenant); N.C. GEN. STAT. § 42-42(b) (1996) (tenant may undertake specific duties to relieve landowner); N.D. CENT. CODE § 47-16-13.1 (1978); S.D. CODIFIED LAWS § 43-32-8 (Michie 1997); TENN. CODE ANN. § 66-28-102, 66-28-203(a) (1993) (prohibited in counties with population of at least 200,000); TEX. [PROP.] CODE ANN. § 92.006 (West 1995) (clause must be specific, in bold writing, and for consideration).

60. *Stanley*, 911 P.2d at 705.

61. *Id.* at 706.

62. *Id.* at 707.

63. *Id.* at 708.

64. *Id.*

tenant relationship.[65] In the alternative, the court recognized the legislature's regulation of the landlord-tenant relationship, which included a specific provision in the statutes dealing with liability of landowners.[66] Although the court applied the two-part test, the court explained that it was unnecessary to do so because the statute clearly established the state's public policy. For these reasons, the court held that the exculpatory clause was void as against public policy.[67]

Even in the absence of legislation prohibiting exculpatory clauses, several states have declared that public policy is defined by regulatory statutes and housing codes, and that private parties cannot contract to relieve such obligations.[68] "[H]ousing code[s] impose[] some duties upon owners and others upon occupants; neither can insulate himself from the duties imposed by law by making private arrangements with others."[69] Other states extend this rationale to duties imposed by common law.[70] Nonetheless, at least one court has refused to accept housing codes as evidence of public policy.[71]

In *Lloyd v. Service Corp.*,[72] the Alabama Supreme Court used a five-part test to determine the public policy issue. Using this test, a court must determine: 1) whether the service provided by the contract is of public necessity; 2) whether a significant number of people are forced to use the service; 3) whether the transaction places one party under the control of the other and makes him vulnerable to the other's carelessness; 4) whether the bargaining power of the parties is equal; and 5) whether there is a legislative policy against unconscionable contracts.[73]

In its analysis of these factors, the *Lloyd* court examined the history of residential leases. The court noted that, unlike in the past, the rental industry now is responsible for a large percentage of the housing units in the Alabama

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65. *Id.*

66. *See* COLO. REV. STAT. ANN. § 13-21-115 (West 1997).

67. Stanley v. Creighton, 911 P.2d 705, 709 (Colo. 1996).

68. *See* John's Pass Seafood Co. v. Weber, 369 So. 2d 616 (Fla. Dist. Ct. App. 1979); Panaroni v. Johnson, 256 A.2d 246 (Conn. 1969).

69. *Panaroni*, 256 A.2d at 254.

70. *See* Tenants Council v. DeFranceaux, 305 F. Supp. 560 (D.D.C. 1964); George Washington Univ. v. Weintraub, 458 A.2d 43 (D.C. 1983) (recognizing implied warranty of habitability as duty which cannot be waived); Papakalos v. Shaka, 18 A.2d 377, 379 (N.H. 1941) (recognizing common law duty to use ordinary care); Cerny Pickas & Co. v. C.R. Jahn Co., 106 N.E.2d 828 (Ill. App. Ct. 1952); Kuzmiak v. Brookchester, Inc., 111 A.2d 425, 428 (N.J. Super. Ct. App. Div. 1955) (recognizing landlord's common law duty to maintain premises under his control).

71. Matthews v. Mountain Lodge Apartments, 388 So. 2d 935 (Ala. 1980).

72. 453 So. 2d 735 (Ala. 1984).

73. *Lloyd*, 453 So. 2d at 738.

and affects the lives of thousands.[74] In addition, the relationship between the landlord and tenant subjects the tenant to the landlord's acts of carelessness since the landlord, in most cases, is responsible for repairs. This makes the tenant dependent upon the landlord.[75] Third, the court noted that tenants have no meaningful choice in the matter. The tenant can either accept the exculpatory terms or go elsewhere, where similar or identical terms are likely to exist.[76] "Th[e] consumer, in need of goods or services, is frequently not in a position to shop around for better terms, because all competitors use the same clauses."[77]

In previous decisions, the Alabama courts held that residential leases did not involve a public interest, and, thus, exculpatory clauses were not violative of public policy.[78] In *Lloyd*, while the court recognized that exculpatory clauses in residential leases are not per se void, it stated that it would apply the five-part test to determine whether a particular clause is violative of public policy.[79]

In *Crawford v. Buckner*,[80] the Tennessee Supreme Court applied yet another test. Adopting the six-part test first used in *Tunkl v. Regents of the University of California*,[81] the *Crawford* court examined: 1) whether the contract concerns a business suitable for public regulation; 2) whether the service provided is of public importance and public necessity; 3) whether the party holds himself out to provide this service for anyone who seeks it, or who meets established standards; 4) whether the party invoking exculpation has more bargaining power because of the nature of the service provided; 5) whether, because of superior bargaining power, the party presents the public with a standardized adhesion contract and makes no provision allowing the public to obtain protection against negligence; and 6) whether the person or property is placed under the control of the seller, subject to risk of carelessness by the seller.[82] The court noted, "It is not necessary that all be present in any given transaction, but generally a transaction that has some of these characteristics would be offensive."[83]

In applying the *Tunkl* test to residential leases, the court determined that residential leases involve a business that is suitable for regulation, based upon the fact that several other state legislatures have regulated this area.[84] The *Crawford* court found that residential landlords offer shelter, a public necessity,

74. *Id.*
75. *Id.* at 738-39.
76. *Id.* at 739.
77. *Id.*
78. *Lloyd*, 453 So. 2d at 738.
79. *Id.*
80. 839 S.W.2d 754 (Tenn. 1992).
81. 383 P.2d 441 (Cal. 1963).
82. *Crawford*, 839 S.W.2d at 757.
83. *Id.*
84. *Id.* at 757.

and that they hold themselves out as willing to provide the service for any member of the public. Thus, the court answered the second and third considerations of the *Tunkl* test in the affirmative.[85]

The *Crawford* court next noted that because the average potential tenant is faced with a "take it or leave it"[86] standardized contract, the tenant's only solution is to sign or reject the entire transaction. Normally, there is no provision allowing the tenant to pay extra money for protection from a landlord's negligence.[87] Thus, the court answered the fourth and fifth considerations of *Tunkl* in the affirmative. The court answered the final consideration of the *Tunkl* test in the affirmative as well because residential leases place the person or property under control of the landlord, subject to the landlord's carelessness.[88]

The defendants argued, however, that residential leases are purely private affairs, not matters of public interest. In the past, where residential leases were not as common, some courts recognized this as a valid argument.[89] The *Crawford* court responded by stating:

> [W]e are not faced merely with the theoretical duty of construing a provision in an isolated contract specifically bargained for by *one landlord and one tenant* as a purely private affair. Considered realistically, we are asked to construe an exculpatory clause, the generalized use of which may have an impact upon thousands of potential tenants.[90]

Freedom of contract also has been restricted where common areas are involved. Several jurisdictions have noted that exculpatory clauses should not be upheld where the landlord maintains control of common areas.[91] Because

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85. *Id.* at 758.

86. *Id. See also* Lloyd v. Service Corp., 453 So. 2d 735, 735 (Ala. 1984).

87. Crawford v. Buckner, 839 S.W.2d 754, 758 (Tenn. 1992). However, some courts have ruled that provisions allowing a reduction in rent in exchange for the landlord's relief from liability are contrary to public policy. *See, e.g.*, Foisy v. Wyman, 515 P.2d 160, 164 (Wash. 1973). *But see* Knight v. Hallsthammar, 623 P.2d 268, 272 (Cal. 1981).

88. *Crawford*, 839 S.W.2d at 758.

89. *See Lloyd*, 453 So. 2d at 738; Barkett v. Brucato, 264 P.2d 978 (Cal. Ct. App. 1953).

90. *Crawford*, 839 S.W.2d at 758 (citing McCutcheon v. United Homes Corp., 486 P.2d 1093, 1097 (Wash. 1971) (emphasis in original)). *See also* John D. Perovich, Annotation, *Validity of Exculpatory Clause in Lease Exempting Lessor From Liability*, 49 A.L.R.3d 321 (1974).

91. Stanley v. Creighton Co., 911 P.2d 705, 708 (Colo. Ct. App.). *See, e.g.*, Middleton v. Lomaskin, 266 So. 2d 678, 680 (Fla. Dist. Ct. App. 1972) (dissent); Cappaert v. Junker, 413 So. 2d 378, 382 (Miss. 1982).

such clauses create a possibility of threat to the public, these courts have held such clauses to be void as against public policy.[92]

In *Warren*, the Missouri Supreme Court declined to use any of these approaches. The court simply stated that although releases of future negligence are disfavored and are to be strictly construed, such releases are not void as against public policy.[93] To release a party from its own negligence, the language of the exculpatory clause must be "clear, unambiguous, unmistakable, and conspicuous."[94] The court stated that the defendants met their burden of proving that the language was a release because "parties are presumed to read what they sign."[95]

The Missouri Court of Appeals' analysis in *Warren*, not expressly adopted by the Missouri Supreme Court, recognized that the exculpatory clause was a "clear and unambiguous release."[96] In addition, the court of appeals found that the record did not show any evidence of a gross disparity in bargaining power, or that the "tenant was faced with a 'take it or leave it' agreement in order to obtain adequate housing."[97] The court of appeals also stated that the plaintiff did not claim there was gross negligence or a public interest involved.[98]

Both the Missouri Supreme Court and the Missouri Court of Appeals found that the precedent established by *Alack v. Vic Tanny International, Inc.* did not forbid allowing exculpatory clauses in residential leases.[99] The supreme court simply found that the precedent established by *Alack* did not forbid allowing exculpatory clauses in residential leases.[100] Neither opinion, however, contained any discussion about how the inherent relationship between landlord and tenant or the existence of a standardized lease form could suggest unequal bargaining.[101]

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92. *Stanley*, 911 P.2d at 708. *See, e.g., Cappaert*, 413 So. 2d at 382.

93. Warren v. Paragon Technologies Group, No. 79539, 1997 WL 471917, at *1 (Mo. 1997).

94. *Id.*

95. *Id.* at *2.

96. Warren v. Paragon Technologies Group, No. 69866, 1996 WL 741844, at *2 (Mo. Ct. App. Dec. 24, 1996), *transferred*, No. 79539, 1997 WL 471917 (Mo. Aug. 20, 1997).

97. *Id.*

98. *Id.*

99. *Id.*; Warren v. Paragon Technologies Group, No. 79539, 1997 WL 471917 (Mo. Aug. 20, 1997).

100. *Warren*, 1997 WL 471917 at *1.

101. *Id.*; Warren v. Paragon Technologies Group, No. 69866, 1996 WL 741844, at *2 (Mo. Ct. App. Dec. 24, 1996), *transferred*, No. 79539, 1997 WL 471917 (Mo. Aug. 20, 1997).

IV. INSTANT DECISION

In *Warren v. Paragon Technologies Group*,[102] the Missouri Supreme Court held that exculpatory provisions in residential leases were not per se void, and the exculpatory clause in dispute was enforceable under the facts of the case. The court found that the defendants met their burden of proving that the language was a valid release because parties are presumed to read what they sign, and the plaintiff's signature was present on the five legal-sized pages of the single-spaced form lease.[103]

The court stated that in absence of other evidence, the parties appeared to have reached an agreement on the release.[104] The plaintiff, however, failed to reply to the defendants' affirmative defense of release. Because the defendants did not object to this procedural error, the case was treated as if the plaintiff had made a general denial of the affirmative defense. On appeal, such a matter is treated "as if a reply traversing the defense has been filed in accordance with the evidence."[105] Thus, because the trial court decided this case before the *Alack* decision, the court remanded the case to the trial court to allow the plaintiff to plead or introduce evidence on an avoidance of the defendants' affirmative defense of release based on the holding of *Alack*.[106] Because the case was remanded, the court also commented on the defendants' other argument for reversal, the lack of duty to remove snow and ice from the apartment complex.[107] The court rejected this argument, stating that the defendants assumed such a duty.[108]

In a concurring opinion, Judge Edward Robertson wrote that the case should not have been remanded for a new trial, but instead should have been remanded with directions for the trial court to enter judgment for the defendants.[109] Judge Robertson stated that the plaintiff should not have been allowed to answer the affirmative defense because nothing in the evidence suggested that the plaintiff did not see the non-liability clause, that the plaintiff was not aware of what she signed, or that the language of the clause was ambiguous—claims which would have brought her under the *Alack* rule requiring clear and unambiguous language.[110] Judge Robertson stated that although the

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102. *Warren*, 1997 WL 471917.

103. *Id.*

104. *Id.* at *2.

105. *Id.* (citing Mahurin v. St. Luke's Hosp., 809 S.W.2d 418, 421 (Mo. Ct. App. 1991)).

106. *Warren*, 1997 WL 471917 at *3

107. *Id.*

108. *Id.*

109. *Id.* at *4.

110. *Id.*

plaintiff did not formally answer the defendants' affirmative defense, it was clear that the trial court and the parties knew the nature of the parties' claims surrounding the exculpatory clause, and that the plaintiff, having had every opportunity to respond to the affirmative defense, raised "every legal and factual claim to which her imagination entitled her."[111]

Concurring in part and dissenting in part, Judge Ronnie White stated that the decision of the trial court should have been affirmed.[112] Judge White reasoned that the clause at issue in *Warren* was not as conspicuous as *Alack* requires, and that the defendants did not meet their burden of proving conspicuousness.[113] Judge White stated that because such clauses are disfavored, "[t]here must be no doubt that a reasonable person agreeing to an exculpatory clause actually understands what future claims he or she is waiving."[114] Judge White believed that the language was not conspicuous because the clause was in the twentieth paragraph of a thirty-three paragraph lease and was located at the bottom of the second, single-typed page.[115]

The Missouri Supreme Court failed to expressly adopt the more detailed analysis of the Court of Appeals for the Eastern District, which stated that there was no public policy violation and that the clause was enforceable because: 1) the exculpatory clause contained a "clear and unambiguous" release of the defendant's future acts of negligence; 2) there was no evidence of gross disparity in the two parties' bargaining power; 3) there was no evidence that the plaintiff could not look for housing elsewhere to find a lease which did not include an exculpatory clause; and 4) the case did not involve an intentional tort or gross negligence and was not of public interest.[116]

The majority opinion of the Missouri Supreme Court also made no comment about several other issues decided by the court of appeals. For example, no comment was made about the court of appeals' determination that an exculpatory clause may be valid even though no bona fide controversy exists, a variance from other types of releases.[117] The court of appeals also discussed why the plaintiff failed in her argument that the clause was a covenant not to sue and thus required consideration.[118] The court of appeals reasoned that the plaintiff did not sign a covenant not to sue because, at the time the contract was

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111. *Warren*, 1997 WL 471917 at *5.

112. *Id.*

113. *Id.* at *6.

114. *Id.* at *5.

115. *Id.* at *6.

116. Warren v. Paragon Technologies Group, No. 69866, 1996 WL 741844, at *2 (Mo. Ct. App. Dec. 24, 1996), *transferred*, No. 79539, 1997 WL 471917 (Mo. Aug. 20, 1997).

117. *Id.*

118. *Id.* at *3.

signed, there was no existing claim.[119] The exculpatory clause relieved the defendant from future acts of negligence, and thus was distinguishable from cases involving the covenants not to sue.[120]

The court of appeals also rejected the plaintiff's final argument that the exculpatory language was "meaningless boilerplate."[121] The plaintiff cited to *Maples v. Charles Burt Realtor, Inc.*, where exculpatory language was found not to bar a claim for the defendant's fraudulent conduct.[122] The court of appeals distinguished the case from the present dispute in that the former involved fraudulent conduct and a general exculpatory clause, while the case at bar involved mere negligence and a clause which specifically stated that the defendant was not liable for any negligence.[123]

In ruling that the exculpatory clause was not void, the Missouri Supreme Court in *Warren* failed to follow the trend of recent decisions in several other jurisdictions, where courts have found exculpatory contracts in residential leases unfair due to the inherent disparity in bargaining power between a landlord and a tenant, a tenant's lack of any real alternative, and the public interest in obtaining adequate housing.[124] The court found no reason not to expressly extend the *Alack* rule to residential leases.[125]

V. COMMENT

The Missouri Supreme Court in *Warren v. Paragon Technologies Group*[126] did what other jurisdictions have refused to do—it upheld an exculpatory clause in a residential lease. However, the court established no clear path for other courts to follow. Although the court made it clear that exculpatory clauses in residential leases were not per se void, it failed to provide a clear set of guidelines for subsequent determinations of similar cases. The court read the *Alack* opinion—holding that "[a]lthough exculpatory clauses in contracts releasing an individual from his or her own future negligence are disfavored, they are not prohibited against public policy"[127]—as applicable to residential

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119. *Id.*

120. *Id.*

121. *Warren*, 1996 WL 741844 at *3.

122. *Id.* (citing Maples v. Charles Burt Realtor, Inc., 690 S.W.2d 202, 213 (Mo. Ct. App. 1985)).

123. *Warren*, 1996 WL 741844 at *3.

124. *See supra*, note 52.

125. Warren v. Paragon Technologies Group, No. 79539, 1997 WL 471917, at *3 (Mo. Aug. 20, 1997).

126. *Id.*

127. Alack v. Vic Tanny Int'l, Inc., 923 S.W.2d 330, 334 (Mo. 1996).

leases as well.[128] Although *Alack* in no way limited its ruling, it made no mention of its applicability to residential leases.

In addition, the *Alack* court expressly stated that a matter involving a public interest could not be contracted away.[129] Yet the *Warren* court failed to thoroughly consider whether the residential lease involved a public interest. Furthermore, in its consideration of the *Warren* case, the Missouri Court of Appeals explicitly concluded that no public interest was involved, without considering the relationship between a landlord and tenant or the availability of adequate housing.[130]

Other courts that have delved into this issue have recognized that although the residential landlord-tenant relationship was once an area of purely private interest, the increasing demand for affordable residential housing has created a public interest.[131] It can hardly be argued that there is equal bargaining power between the typical landlord and tenant. It is unlikely that a tenant who does not like the terms of a lease can refuse to enter into it and find a more favorable lease elsewhere.[132] While this may have been possible in the 1940s and 1950s, the current demand for affordable housing has created a business in which landlords have much more leverage, and an era in which a lease without an exculpatory clause is an extreme rarity.[133] In addition, a tenant who does not like the terms of a lease often cannot negotiate with the landlord to pay an increased price in exchange for the landlord's omission of the exculpatory clause.[134]

Such problems undoubtedly exist, but the *Warren* court failed to consider them. If the court had applied either the five-factor *Lloyd* test or the six-factor *Tunkl* test used by the *Crawford* court, it is doubtful that it would have reached the same outcome.

The facts in the instant case are even more supportive of a ruling declaring the exculpatory provision invalid than the facts of *Crawford.* In *Crawford*, the tenant sued for the landlord's negligent failure to maintain a fire alarm in an area within the tenant's exclusive control.[135] As previously stated, there is a stronger

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128. *Warren*, 1997 WL 471917 at *1.

129. *Alack*, 923 S.W.2d at 337.

130. Warren v. Paragon Technologies Group, No. 69866, 1996 WL 741844, at *2 (Mo. Ct. App. Dec. 24, 1996), *transferred*, No. 79539, 1997 WL 471917 (Mo. Aug. 20, 1997).

131. Lloyd v. Service Corp., Inc., 453 So. 2d 735, 737-39 (Ala. 1984); Crawford v. Buckner, 839 S.W.2d 754, 756-59 (Tenn. 1991).

132. *See Lloyd*, 453 So. 2d 735, 739; *Crawford*, 839 S.W.2d 754, 758; McCutcheon v. United Homes Corp., 486 P.2d 1093, 1097 (Wash. 1971).

133. *See Lloyd*, 453 So. 2d 735, 739.

134. *Crawford*, 839 S.W.2d 754, 758.

135. *See* Stanley v. Creighton, Co., 911 P.2d 705, 708 (Colo. Ct. App. 1996); Cappaert v. Junker, 413 So. 2d 378, 379 (Miss. 1982).

argument for relieving a landlord of liability when the negligence arises in an area not under the landlord's exclusive control. In *Warren,* the tenant complained about the landlord's failure to maintain a walkway, a common area within the landlord's exclusive control.[136] Therefore, if applied to the facts in *Warren*, the sixth requirement of the *Tunkl* test—that property be under control of the landlord—would be answered in the affirmative as well. The first five *Tunkl* requirements also would be answered in the affirmative when applied to *Warren*, merely based upon the existence of the landlord-tenant relationship.

In addition, Missouri courts have recognized a tort cause of action against a landlord for failure to maintain common areas in a reasonably safe condition,[137] a duty which does not apply to areas under a tenant's exclusive control.[138] A situation similar to the facts of *Warren* arose in *Maschoff v. Koedding.*[139] A tenant of an apartment complex slipped on some snow that the landlord failed to clear off the parking lot.[140] The court held that the landlord breached his duty to maintain the common areas in a reasonably safe manner and ruled for the tenant.[141] Thus, the *Warren* court would have been in accordance with existing case law had it ruled that this common law duty defined public policy and could not be waived.[142]

Thus, without fully analyzing the issue, the *Warren* court ruled on an important area of the law, taking away valuable protection from tenants in the process. Although other jurisdictions also have held that residential exculpatory clauses are not per se void, few have placed such minor restrictions upon their use.[143]

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136. Warren v. Paragon Technologies Group, No. 79539 WL 471917, at *3 (Mo. Aug. 20, 1997).

137. Aaron v. Havens, 758 S.W.2d 446, 447 (Mo. 1988). *See also* Erhardt v. Lowe, 596 S.W.2d 489, 491 (Mo. Ct. App. 1980).

138. Pate v. Reeves, 719 S.W.2d 956 (Mo. Ct. App. 1986).

139. 439 S.W.2d 234 (Mo. Ct. App. 1969).

140. *Id.* at 235.

141. *Id.* at 237.

142. *See supra* note 60.

143. *See, e.g.*, Porter v. Lumbermen's Investment Corp., 606 S.W.2d at 715, 717 (Tex. Ct. App. 1980) (unless "gross disparity in bargaining power").

VI. CONCLUSION

In its brief opinion, the *Warren* court extended the general rule of allowing exculpatory clauses to residential leases.[144] The court, in the course of its decision, necessarily (albeit implicitly) found that no unequal bargaining power existed between the tenant and the landlord, and that no public interest was involved. Although the court did not rule that all residential exculpatory clauses will be upheld, it implied that recovery by tenants most likely will be barred in the absence of extraordinary factors.

KAREN A. READ

144. Warren v. Paragon Technologies Group, No. 79539 WL 471917, at *3 (Mo. Aug. 20, 1997).