IN THE SUPREME COURT OF FLORIDA

STACY SANISLO and ERIC SANISLO,

Petitioners,

v.

GIVE KIDS THE WORLD, INC.,

Respondent.
_____/

Case No. SC12-2409

5th DCA Case No. 5D11-748

RESPONDENT'S AMENDED JURISDICTIONAL BRIEF

On review from the Fifth District Court of Appeal, State of Florida

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STATEMENT OF THE CASE

Respondent and Defendant below, Give Kids the World, Inc. ("GKTW"), is a charitable organization that provides seriously ill children with dream vacations. *Give Kids the World, Inc. v. Sanislo*, 98 So.3d 759, 760 (Fla. 5th DCA 2012). Petitioners, Stacy and Eric Sanislo, are the parents of a child who was awarded one of these vacations to Orlando from Washington. *Id.* at 760. Petitioners executed two identical liability releases prior to their stay with GKTW. *Id.* at 760-61.

A horse-drawn carriage ride was arranged for the Sanislos during their vacation. *Id.* The carriage had a pneumatic wheelchair lift, and Petitioners were standing on the lift to pose for a picture with their child. *Id.* However, Petitioners exceeded the lift's weight limit, and Stacy Sanislo was injured when she fell to the ground. *Id.* She thereafter brought suit for negligence against GKTW. *Id.*

The parties moved for cross summary judgment on the liability releases. *Id.* The trial court granted the Sanislos' motion and denied GKTW's, holding that the contracts did not bar the litigation. *Id.* A jury returned a verdict in the Sanislos' favor, and GKTW appealed the summary judgment orders. *Id.*

In a *per curiam* opinion, the Fifth District reversed. *Id.* The court found the subject exculpatory clauses were both clear and unambiguous to the extent "that an ordinary and knowledgeable person will know what he or she is contracting away." *Id.* Conflict was certified with the other four districts. *Id.* at 763.

SUMMARY OF THE ARGUMENT

Despite the certified conflict, the appropriate test is not whether an exculpatory clause contains a "magic word" such as negligence. Instead, exculpatory contract language is enforceable in all Florida courts so long as it is unambiguous and does not contravene public policy. Therefore, upon closer review, there is no true conflict among the districts.

Alternatively, the Fifth District's economy is uniquely reliant on the tourism and convention industry. Public policy considerations may be therefore divergent between the Fifth and the remainder of the state, and this Court should decline to exercise its discretionary jurisdiction even if it finds that a conflict exists.

ARGUMENT

I. The Perceived Conflict

Petitioners seek to invoke this Court's jurisdiction based on the seeming conflict among the districts as certified by the Fifth District. In their Brief on Jurisdiction, Petitioners repeat much of Judge Cohen's concurrence in seeking Supreme Court review. But this ignores the rule that "[c]onflict between decisions must be express and direct; i.e., it must appear within the four corners of the majority decision" for review to be appropriate in the Supreme Court. *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986) (e.a.). Judge Cohen's concurring opinion below therefore has no bearing on whether this Court may accept jurisdiction.

Instead, the jurisdictional determination must focus on what point of law the Fifth District relied upon in resolving the appeal. At issue were two exculpatory contracts executed by Petitioners that did not specifically state that GKTW was to be absolved of liability for its own negligence. *Give Kids the World, Inc.*, 98 So.3d at 760-61. Importantly, the Fifth has repeatedly recognized "[e]xculpatory clauses are disfavored under the law, but unambiguous exculpatory contracts are enforceable unless they contravene public policy." *Id.* at 761; *see also Hackett v. Grand Seas Resort Owner's Ass'n, Inc.*, 93 So.3d 378, 380 (Fla. 5th DCA 2012). These tenets are universal throughout the state.

The apparent conflict arises instead from the holding, "This Court has expressly 'rejected the need for express language referring to release of the defendant for "negligence" or "negligent acts" in order to render a release effective to bar a negligence action.'" *Id.* (citing *Cain v. Banka*, 932 So. 2d 575, 578 (Fla. 5th DCA 2006)). The Fifth identified perceived conflict with one specific decision from each of the other four districts, none of which were rendered more recently than 1987. *Id.* at 763.[1]

Petitioners contend these four cases require an exculpatory clause to contain the specific word "negligence" to effectively bar a negligence action against the

[1] *See Levine v. A. Madley Corp.*, 516 So. 2d 1101 (Fla. 1st DCA 1987); *Van Tuyn v. Zurich Am. Ins. Co.*, 447 So. 2d 318 (Fla. 4th DCA 1984); *Goyings v. Jack & Ruth Eckerd Found.*, 403 So. 2d 1144 (Fla. 2d DCA 1981); *Tout v. Hartford Accident & Indem. Co.*, 390 So. 2d 155 (Fla. 3d DCA 1980).

exculpee. The primary flaw in this position lies in the confusion between exculpation and indemnification.

II. History of the Cases Cited in Support of Conflict

The discussion begins with *Ivey Plants, Inc. v. FMC Corp.*, 282 So. 2d 205 (Fla. 4th DCA 1973), *cert. den.*, 289 So. 2d 731 (1974), a case examining a contract purporting to provide exculpation and indemnification to the defendant party. The case includes a helpful explanation of the difference between the legal impacts of these two separate (but often confused) contractual concepts:

> There is a marked and significant distinction between the two clauses. The function of the exculpatory clause is to deprive one of the contracting parties of his right to recover damages suffered due to the negligent act of the other. The indemnity clause or contract simply affects a change in the person who ultimately has to pay for the damages, i.e., the promisor (indemnitor) in an indemnity contract undertakes to protect the promisee (indemnitee) against loss or damage through a liability on the part of the latter to a third person.

Id. at 207-08. The court noted that "[n]o clear-cut rule can be adduced from the various decisions of the courts of this state or our sister states as to the circumstances when exculpatory clauses will not be enforced." *Id.* at 208 (e.a.). Conversely, and relying on the then-recent *Univ. Shopping Plaza Ctr., Inc. v. Stewart*, 272 So. 2d 507 (Fla. 1973), the Fourth stated that for an indemnity provision to be valid, "the intent to indemnify the indemnitee for his own negligence must be specifically provided for in the indemnity contract." *Ivey Plants, Inc.*, 282 So. 2d at 209. *Univ. Shopping Plaza Ctr.*, 272 So. 2d 507, only

considered an contract for indemnity – exculpation was not at issue in that case. *Ivey Plants* concluded by holding the exculpatory provision enforceable – despite the lack of the word "negligence" – but the indemnity provision unenforceable for the same reason. *Ivey Plants, Inc.*, 282 So. 2d at 209.

Not long after *Ivey Plants*, the Fourth decided *L. Luria & Son, Inc. ex rel. Fireman's Fund Ins. Co. v. Alarmtec Intern. Corp.*, 384 So. 2d 947 (Fla. 4th DCA 1980). In that case, the exculpatory clause at issue did contain the word "negligence," and it was also held enforceable. *Id.* at 948. The case did not include any citations to *Ivey Plants*, instead simply holding that the provision under review was "clear and unequivocal in totally absolving the appellee from liability under the facts alleged." *Id.*

The confusion appears to begin with the Second District and *Goyings*, 403 So. 2d 1144, decided in 1981. *Goyings* cited to *L. Luria & Son* for the proposition that an exculpatory clause "must clearly state that it releases the party from liability for his own negligence." *Goyings*, 403 So. 2d at 1146. In fact, that holding is found nowhere in *L. Luria & Son*, nor was it the state of the law in the Fourth District at the time in light of *Ivey Plants*.

Additionally important for jurisdictional purposes, *Goyings* is factually distinguishable. *Goyings* examined an exculpatory clause executed prior to a child attending a camp. *Goyings*, 403 So. 2d at 1145. The contract provision which

included the exculpatory language also stated, "It is further agreed that reasonable precautions will be taken by Camp to assure the safety and good health of said boy/girl." *Id.* The case resolved at least in part based on this language, as the Second District noted, "[A]ppellees agreed to take reasonable precautions to assure Leigh Anne's safety. This duty to undertake reasonable care expressed in the first part of the provision would be rendered meaningless if the exculpatory clause absolved appellees from liability." *Id.* at 1146. No such language exists in the contract executed by Petitioners, and it is quite possible that this additional language alone would have been dispositive. *Murphy v. Young Men's Christian Ass'n of Lake Wales, Inc.*, 974 So. 2d 565, 568 (Fla. 2d DCA 2008) (noting that the "reasonable precautions" language in *Goyings* was significant in deciding that case). This key factual distinguishment with *Goyings* renders it inapplicable to serve as the basis for this Court's discretionary jurisdiction.

Shortly after *Goyings* was decided, the Fourth District issued *Van Tuyn*, 447 So. 2d 318. Citing to *Ivey Plants*, *L. Luria & Son*, and *Univ. Plaza Shopping Ctr.*, the Fourth held, "The agreement being reviewed is devoid of any language manifesting the intent to either release or indemnify [Defendant] for its own negligence." *Van Tuyn*, 447 So. 2d at 320. GKTW never sought indemnity from Petitioners, rendering this point of law likewise insufficient to support conflict jurisdiction in this Court.

Levine, 516 So. 2d 1101, serves as Petitioners' basis that the First District is in conflict with the Fifth. That decision also misconstrues and expands *Univ. Plaza Shopping Ctr.*, which again solely considers the validity of contracts for indemnity, in holding that an exculpatory clause "must clearly state that it releases a party from liability for his own negligence." *Levine*, 516 So. 2d at 1103. By citing both *Goyings* and *L. Luria & Son*, it is apparent that these early cases and misapprehension of the limitation of the *Univ. Plaza Shopping Ctr.* holding was the source of confusion in the 1980's.

However, the First District then issued *Southworth & McGill, P.A. v. S. Bell Tel. & Tel. Co.*, 580 So. 2d 628 (Fla. 1st DCA 1991). In that case, the court affirmed the effectiveness of an exculpatory clause for simple negligence despite the lack of any reference to negligence in the contract. *Id.* at 629-30, 633-34. If *Levine* indeed requires an exculpatory clause to include the word "negligence," then it is at odds with *Southworth & McGill*. Because of this lack of clarity within the First District, it is impossible to say whether a true conflict exists with the Fifth District.

Finally, Petitioners argue that *Tout*, 390 So. 2d 155, indicates that the Third District is also in conflict with the Fifth. *Tout*, like *Goyings*, is factually distinguishable. The exculpatory clause at issue merely provided that the seller of real property "assumes risk of loss from fire or otherwise until closing." *Id.* at 155.

Prior to closing, the buyer, who was renting the home, caused a fire. *Id.* at 156. Because the terse exculpatory clause was not sufficiently unequivocal, the Third District found it unenforceable. *Id.*

Indeed, the brevity of this particular clause may well have failed in the Fifth District. *C.f. Hackett*, 93 So.3d at 379 (where the Fifth District found unenforceable as vague an exculpatory clause stating, "Management ... will not be responsible for accidents or injury to guest or for the loss of money, jewelry or valuables of any kind"). It is certainly open to argument whether the *Tout* language is sufficiently "clear and understandable so that an ordinary and knowledgeable person will know what he or she is contracting away." *Give Kids the World, Inc.*, 98 So.3d at 761. While it is obviously speculative as to how the Fifth District might pass on the *Tout* contract, GKTW respectfully submits that sufficient doubt is raised as to whether any conflict actually exists between *Tout* and Fifth District precedent.

III. The Federal Courts

The Eleventh Circuit has recently recognized that "Florida courts do not, as a rule, require the 'use of terms such as "negligence" or "negligent acts" in order to validly release negligence claims.'" *Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1167 (11th Cir. 2009) (citing *Cain*, 932 So. 2d at 579). The *Cooper* controversy arose out of the Southern District of Florida, no part of which is

located within the Fifth District. This holding in also in line with the federal common law, which provides that exculpatory clauses are valid so long as they are unambiguous even where the word "negligence" does not appear. *E.g.*, *Sander v. Alexander Richardson Invs.*, 334 F.3d 712, 716 (8th Cir. 2003).

IV. Differing Public Policies

Alternatively, if this honorable Court determines that a conflict exists among the districts, public policy does not demand that the conflict be resolved. It is well known that the Fifth District is home to Orlando and its countless tourist attractions and convention centers, forming the backbone of the region's economy.[2] Heightened enforceability of contracts favoring hosting institutions may be of more concern to Fifth District jurisprudence than other regions in the state.

Petitioners assert, "The law, and the public's perception of the law, should not be impacted by arbitrary matters such as in which county an accident occurs." Pet. Br. Juris. at 5. GKTW would submit that the location of the accident leading to the instant controversy is anything but "arbitrary" – Petitioners traveled long

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[2] Florida welcomed approximately 87.3 million visitors in 2011. VISIT FLORIDA, *VISIT FLORIDA Official Media Newsroom*, available at http://media.visitflorida.org/research.php (last visited Dec. 5, 2012). Orlando alone reported roughly 51.4 million visitors, or nearly 59% of the state's total. Visit Orlando, *Visit Orlando Visitor Statistics*, available at http://corporate.visitorlando.com/research-and-statistics-orlando-visitor-statistics/visitor-forecast/ (last visited Dec. 5, 2012); *see also*, Kitty Bean Yancy, USA Today, *Orlando area claims a U.S. tourism record in 2011* (Jun. 5, 2012) ("So by the numbers, [Orlando]'s the nation's top destination").

distances to Orlando to enjoy the area's theme parks, as do millions of other individuals each year. While Florida's other districts of course enjoy tourism industry of their own, the pervasiveness of that economic sector in the Fifth gives rise to public policy considerations unique within its geography. It is therefore respectfully submitted that this Court should exercise its discretion by declining to review the matter on appeal even if it is determined that a conflict exists.

CONCLUSION

An actual conflict must arise within the four corners of majority opinions. Both *Goyings* and *Tout* are insufficient to serve as the basis for this Court's conflict jurisdiction for factual reasons. The contractual language in both cases likely would have failed in the Fifth District, raising a genuine question of whether they actually conflict with *Give Kids the World. Levine* appears to intradistrictly conflict with *Southworth & McGill*, and it is therefore unclear precisely where the First District lies on the issue. Finally, *Van Tuyn* applied its reasoning equally to a contract for exculpation and for indemnification. The two are not interchangeable.

Even if the Court finds a conflict present, however, GKTW respectfully submits that the tourism- and convention-centric economy of the Orlando region gives rise to public policy considerations that may not be present throughout Florida. This Court should respectfully decline to exercise its discretionary jurisdiction over the case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via electronic mail to: **Christopher V. Carlyle, Esq. & Shannon McLin Carlyle, Esq.**, *The Carlyle Appellate Law Firm*, 1950 Laurel Manor Drive, Suite 130, The Villages, Florida 32162 (served@appellatelawfirm.com) and **Michael J. Damaso, II, Esq.**, *Wooten, Kimbrough & Normand, P.A.*, 236 South Lucerne Circle, Orlando, Florida 32801-4400 (mdamaso@whkpa.com) this 27th day of December, 2012.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Jurisdictional Brief conforms to the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) in that it was computer generated utilizing Times New Roman 14 point font.

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