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 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, and they executed a contract which included two exculpatory clauses once their child's "wish" was granted. *Id.* at 760-61. They executed a second contract containing identical clauses when they arrived at the GKTW facility in Orlando from their home state of Washington. *Id.* at 761.

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 as it rose. *Id.* However, the weight limit of the lift was exceeded, 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 exculpation issue. *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 orders on the motions for summary judgment. *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.* Without comment, conflict was certified with the other four districts. *Id.* at 763.

Petitioners now seek to invoke this Court's discretionary jurisdiction to review the validity of the GKTW releases.

SUMMARY OF THE ARGUMENT

This honorable Court should decline to accept jurisdiction over this case. Despite the certified conflict, all five district courts of appeal actually apply the same test in passing on the validity of an exculpatory clause. The test is not whether such a clause contains a "magic word" such as negligence, as Petitioners seem to suggest. 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.

Additionally and 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. The precise conflict was not specified by the lower court. *Give Kids the World, Inc. v. Sanislo*, 98 So.3d 759, 763 (Fla. 5th DCA 2012). In their Brief on Jurisdiction, Petitioners point to and repeat much of Judge Cohen's concurring opinion in an effort to seek

Supreme Court review. But this ignores the rule that the Supreme Court's "discretionary review jurisdiction can be invoked only from a district court decision 'that expressly addresses a question of law within the four corners of the opinion itself.'" *Persaud v. State*, 838 So.2d 529, 532 (Fla. 2003) (citing *Fla. Star v. B.J.F.*, 530 So.2d 286, 288 (Fla. 1988)); *see also*, *Reaves v. State*, 485 So.2d 829, 830 (Fla. 1986) ("Conflict between decisions must be express and direct; i.e., it must appear within the four corners of the majority decision") (e.a.). Judge Cohen's concurrence below therefore has no bearing on whether this Court may accept jurisdiction over the matter.

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. It cannot be lost in this analysis that 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) (exculpatory clauses "are disfavored and thus enforceable only to the extent that the intention to be relieved from liability is made clear and unequivocal"). 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; *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).

Petitioners contend these four cases require an exculpatory clause to contain the specific word "negligence" to effectively bar a negligence action against the exculpee. The primary flaw in this position lies in the confusion between exculpatory clauses and those for indemnity. An analysis of the history of this line of cases reveals the source of confusion.

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), *rev. den.*, 289 So.2d 731 (1974), a case examining a contract purporting to provide exculpation and indemnity 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. Importantly, the court applied different tests in determining the validity of the clauses before it. It first 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. 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. *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. *Id.* at 209.

Not long after *Ivey Plants* was decided, the Fourth decided *L. Luria & Son, Inc. for Use and Benefit of 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*.

Goyings continues by misconstruing *Univ. Plaza Shopping Ctr.*, extending the latter case's holding that an indemnity provision must contain an express reference to negligence to exculpatory clauses. *Goyings*, 403 So.2d at 1146. But as articulated in *Ivey Plants*, legal principals do not apply equally to provisions for indemnity and exculpation. *Univ. Plaza Shopping Ctr.* only considered a contract for indemnity, and the Second District's reliance on that case in requiring an express reference to negligence in an exculpatory clause misapprehended that difference.

Additionally important for the instant jurisdictional analysis, *Goyings* is factually distinguishable. The case involved 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, "By their own choice of language, appellees 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. *See also*, *Murphy v. Young Men's Christian Ass'n of Lake Wales, Inc.*, 974 So.2d 565, 568 (Fla. 2d DCA 2008) (examining *Goyings* and noting that the "reasonable precautions" language therein 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.

Petitioners also cite to *Levine*, 516 So.2d 1101, in support of their position 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. & Telegraph. Co.*, 580 So.2d 628 (Fla. 1st DCA 1991). In that case, the court affirmed the effectiveness of an exculpatory clause for simple negligence (but not for willful, malicious, or grossly negligent conduct) 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*.

Later, the First bypassed an opportunity to clarify this possible intradistrict conflict in *Hopkins v. The Boat Club, Inc.*, 866 So.2d 108 (Fla. 1st DCA 2004). *Hopkins* was yet another case examining an exculpatory provision that did not

contain the word "negligence." *Id.* at 109-110. Because it arose out of a federal maritime cause of action, the First applied federal common law – which does not require any express references to negligence in exculpatory agreements – and found the pertinent contract enforceable. *Id.* at 110-11. Nonetheless, the case considered the state of Florida law on the issue, noting that the "first district is more closely aligned with the view that the appellee's negligence must be specifically mentioned." *Id.* at 111 n.3 (e.a.). *Hopkins*, which did not cite *Southworth & McGill*, therefore did not go so far as to expressly hold that the word "negligence" is a requirement for an exculpatory clause to be effective. It is not quite settled where the First stands on the issue, and because of this lack of clarity, it is impossible to say whether a true conflict exists.

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 as well. *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 recently applied Florida law in determining the validity of an exculpatory clause that did not contain an express reference to negligence in *Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151 (11th Cir. 2009). That court first repeated the settled rule that such provisions "'have been found valid and enforceable by Florida courts where the intention is made clear and unequivocal.'" *Id.* at 1166-67 (citing *Murphy*, 974 So.2d at 568). Critically, it continued, "The limitation of liability provision is clear and unequivocal under Florida law even though it does not use the word 'negligence.' 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*, 575 F.3d at 1167 (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 Investments*, 334 F.3d 712, 716 (8th Cir. 2003).

IV. Differing Public Policies

Alternatively, if this honorable Court determines that a conflict does exist 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.[1] Heightened enforceability of contracts favoring hosting institutions may be of more concern to Fifth District jurisprudence than other regions in the state.

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[1] 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* (June 5, 2012) ("So by the numbers, [Orlando]'s the nation's top destination").

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 distances to Orlando to enjoy the area's theme parks, as do millions of other tourists and businesspersons 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

There must be an actual controversy arising from the four corners of majority opinions for jurisdiction to lie in the state's high Court. A review of the cases cited by Petitioners in support of this apparent conflict reveal a history of confusion arising from the nuances between exculpatory clauses and indemnification agreements. The Supreme Court's rule that an express reference to negligence in indemnity provisions, *Univ. Shopping Plaza Ctr., Inc.*, was taken out of context when applied to exculpatory clauses in cases from the 1980's.

Both *Goyings* (2d District) and *Tout* (3d District) are insufficient to serve as the basis for this Court's conflict jurisdiction for factual reasons. The attacked contractual language in both cases likely would have failed to pass muster in the Fifth District, raising a genuine question of whether those two cases actually conflict with *Give Kids the World. Levine* (1st District) appears to intradistrictly conflict with *Southworth & McGill*, and it is therefore unclear precisely where that district lies on the issue. Finally, *Van Tuyn* (4th District) rested its holding on both the effectiveness of the contract under review for both release and indemnification purposes. As has been shown, 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. Therefore, even if the Court disagrees with GKTW and finds a conflict of law among the appellate districts, this Court should decline to exercise its discretionary jurisdiction over the case.

Respectfully submitted,

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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 ~~2d~~ **5th** 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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