SC12-2409

IN THE SUPREME COURT OF FLORIDA

STACY SANISLO and ERIC SANISLO,

Petitioners,

Case No. SC12-____
5th DCA Case No. 5D11-748

v.

GIVE KIDS THE WORLD, INC.,

Respondent.
_____/

PETITIONERS' JURISDICTIONAL BRIEF

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

THE CARLYLE APPELLATE LAW FIRM
The Carlyle Building
1950 Laurel Manor Drive, Suite 130
The Villages, Florida 32162
Telephone (352) 259-8852
Facsimile (352) 259-8842

CHRISTOPHER V. CARLYLE, B.C.S.
Florida Bar No. 991007
Email: served@appellatelawfirm.com
ccarlyle@appellatelawfirm.com

SHANNON McLIN CARLYLE, B.C.S.
Florida Bar No. 988367
Email: served@appellatelawfirm.com
scarlyle@appellatelawfirm.com

~ and ~

MICHAEL J. DAMASO, II
Florida Bar No. 18558
WOOTEN, KIMBROUGH & NORMAND, P.A.
236 South Lucerne Circle
Orlando, Florid 32801-4400
Telephone (407) 843-7060
Facsimile (407) 843-5836

Appellate Counsel for Petitioners
Stacy Sanislo and Eric Sanislo

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INTRODUCTION

In this case, the Fifth District Court of Appeal has certified conflict with the other District Courts of Appeal on one straightforward, yet extremely important issue. Specifically, the issue is whether a release requires a specific reference to negligence in order to make the release effective in such actions. The Fifth District has consistently held that a specific reference to negligence is not required; however, the other four Districts require such language. This conflict has resulted in one standard being applied to cases arising within the thirteen counties under the Fifth District's jurisdiction, and another standard in the remaining fifty-four counties. The current situation makes little sense because the rights of litigants should not be determined merely by the location when an accident occurs. Florida courts need uniformity on this issue, and it is respectfully submitted that this Court should accept jurisdiction to clarify the law.

STATEMENT OF CASE AND FACTS

The facts of this matter are not complex. Respondent, Give Kids the World, Inc. ("GKTW"), is an entity that provides vacations to seriously ill children. Petitioners, Stacy and Eric Sanislo ("Sanislo"), are the parents of a young girl with a serious illness, and they executed a liability release provided by GKTW as a condition of the entity providing a "wish request" to their daughter. The release made no specific mention of releasing GKTW from acts of negligence. While at the GKTW facility, Stacy Sanislo was injured when a pneumatic wheelchair lift that she and her husband were standing on collapsed. The lift collapsed because the weight limit had been exceeded.

Sanislo brought suit against GKTW, alleging negligence. GKTW moved for summary judgment, claiming that the release precluded a finding of liability. Sanislo moved for partial summary judgment, also on the issue of the release. The trial court granted Sanislo's motion, denied GKTW's motion, and the case proceeded to trial where the jury rendered a verdict in Sanislo's favor. GKTW appealed.

On October 12, 2012, the Fifth District issued its per curiam opinion (the "Opinion").[1] The Opinion found that the trial court erred in failing to grant

[1]The Opinion was originally issued on May 11, 2012. Sanislo moved for rehearing, and a substituted Opinion was issued on October 12, 2012.

summary judgment in GKTW's favor because, despite making no specific reference to negligence, the release's "language was broad enough to encompass" Sanislo's negligence claims. Opinion, at 4-5. The Opinion noted that the Fifth District has long held that a release need not contain express language referring to a release of negligence or negligent acts in order to bar such actions. Opinion, at 4. The Opinion certified conflict with the First, Second, Third and Fourth District Courts of Appeal.[2] Opinion, at 7.

Judge Cohen concurred specially, noting that he would have resolved the case by affirming the denial of GKTW's motion for summary judgment if he were not bound by the prior decisions of the Fifth District. Opinion, at 8. He opined that, contrary to Fifth District precedent, the better view is to require an explicit provision concerning negligence in order to release such actions. Opinion, at 8. He noted that exculpatory clauses are contrary to public policy and are disfavored, and suggested that a lay person should be able to clearly understand what he or she is, in fact, releasing. Requiring explicit language would remove any doubt concerning an individual's understanding of the releases effect. Opinion, at 8-9.

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[2]The Opinion certified conflict with the following cases: *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). Opinion, at 7.

SUMMARY OF THE ARGUMENT

It is clear that this Court has jurisdiction over the certified conflict. It is respectfully submitted that this Court should exercise that jurisdiction to resolve the important issue presented by this case. Clear conflict exists between the Fifth District, which does not require an express reference to negligence in a release in order to release such claims, and the First, Second, Third, and Fourth Districts, which do require explicit language. The law of this state should be uniform on this issue, and cases should not be determined solely by where they arise. Important public policy considerations are involved, and citizens, tourists, businesses and the courts should have the benefit of this Court's clarity on the issue.

JURISDICTIONAL STATEMENT

The Supreme Court of Florida has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the supreme court or another district court of appeal on the same point of law. Art. V, § 3(b)(3) Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(iv).

ARGUMENT

ISSUE: THE FIFTH DISTRICT'S OPINION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE FIRST, SECOND, THIRD AND FOURTH DISTRICT COURTS OF APPEAL, AND THIS COURT SHOULD ACCEPT JURISDICTION TO RESOLVE THE CONFLICT.

The Opinion re-affirmed the Fifth District's unique position that a release need not make express reference to "negligence" or "negligent acts" in order to bar a negligence action. Opinion, at 3; *Cain v. Banka*, 932 So. 2d 575, 578 (Fla. 5th DCA 2006) (noting that "this district has 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"). As Judge Cohen noted in his special concurrence, the Fifth "District stands alone on this position." Opinion, at 8 (Cohen, J., concurring specially).

It is respectfully submitted that this Court should take the opportunity to resolve this express, direct and important conflict. Florida citizens and entities should have certainty on this issue, and the outcome of cases should not be determined by where they arise. As Judge Cohen noted, he would have resolved this case differently if he were a judge on any of the other District Courts of Appeal, and thus Sanislo has been denied the judgment rendered by the jury solely because Stacy Sanislo happened to be injured by GKTW's negligence in Osceola

County. 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.

This case involves important public policy concerns that require resolution by this Court. Exculpatory clauses 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." *Tatman v. Space Coast Kennel Club, Inc.*, 27 So. 3d 108, 110 (Fla. 5th DCA 2009). Thus, this Court should address the question of whether the public policy of this state should require that individuals (including millions of tourists) be made explicitly aware of what they are releasing, or if these disfavored clauses must be construed in every case for clarity.

This case raises an important question that potentially impacts every citizen of Florida and virtually all of the state's visitors at one time or another. Citizens, tourists, businesses and the courts should have the benefit of this Court's clarity on the issue. Indeed, high courts of other states have deemed the issue worthy of their consideration. *See, e.g., Alack v. Vic Tanny Int'l of Missouri, Inc.*, 923 S.W. 2d 330 (Mo. 1996) (holding that the "better rule" is a bright line test where the words "negligence" or "fault" must be used); *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.

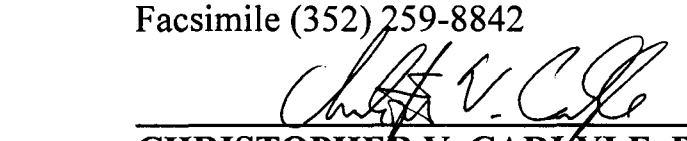
2d 705 (Tex. 1987) (establishing the "express negligence doctrine" requiring inclusion of specific terms).

CONCLUSION

This Court has discretionary jurisdiction to review the Opinion of the Fifth District Court of Appeal, and the Court should exercise that jurisdiction to consider the merits of the argument.

Respectfully submitted,

THE CARLYLE APPELLATE LAW FIRM
The Carlyle Building
1950 Laurel Manor Drive, Suite 130
The Villages, Florida 32162
Telephone (352) 259-8852
Facsimile (352) 259-8842



CHRISTOPHER V. CARLYLE, B.C.S.
Florida Bar No. 991007
Email: served@appellatelawfirm.com
ccarlyle@appellatelawfirm.com

SHANNON McLIN CARLYLE, B.C.S.
Florida Bar No. 988367
Email: served@appellatelawfirm.com
scarlyle@appellatelawfirm.com

~ and ~

MICHAEL J. DAMASO, II
Florida Bar No. 18558
WOOTEN, KIMBROUGH & NORMAND, P.A.
236 South Lucerne Circle
Orlando, Florid 32801-4400
Telephone (407) 843-7060
Facsimile (407) 843-5836

Appellate Counsel for Petitioners

CERTIFICATE OF SERVICE

I CERTIFY that pursuant to Florida Rule of Judicial Administration 2.516 (Service of Pleadings and Papers) a true copy of the foregoing has been served via email transmission to: **William J. Tolton, III, Esquire,** Ogden, Sullivan, & O'Connor, P.A., 113 South Armenia Avenue, Tampa, Florida 33609-3307 (Email: jtolton@ogdensullivan.com); **Matthew J. Haftel, Esquire**, O'Connor & O'Connor, LLC, 840 South Denning Drive, Suite 200, Winter Park, Florida 32789 (Email: mhaftel@oconloaw.com); **Michael J. Damaso, II, Esquire,** Wooten, Kimbrough & Normand, P.A., 236 South Lucerne Circle, Orlando, Florida 32801-4400 (Email: mdamaso@whkpa.com) this 15th day of November, 2012.

CHRISTOPHER V. CARLYLE, B.C.S.
Florida Bar No. 991007

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this 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 type.

CHRISTOPHER V. CARLYLE, B.C.S.
Florida Bar No. 991007

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 2012

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

GIVE KIDS THE WORLD, INC.,

Appellant,

v. Case No. 5D11-748

STACY SANISLO and ERIC SANISLO,

Appellees.

_____/

Opinion filed October 12, 2012

Appeal from the Circuit Court
for Osceola County,
Jeffrey Fleming, Judge.

Wm. Jere Tolton, III, of Ogden & Sullivan, P.A., Tampa, and Matthew J. Haftel and Derek J. Angell of O'Connor & O'Connor, LLC, Orlando, for Appellant.

Michael J. Damaso, II, of Wooten, Kimbrough and Normand, P.A., Orlando, Jack W. Shaw, Jr., of Jack W. Shaw, Jr., P.A., Winter Park, and Christopher V. Carlyle and Shannon McLin Carlyle of The Carlyle Appellate Law Firm, The Villages, for Appellees.

ON MOTION FOR REHEARING

PER CURIAM.

We grant Appellees' motion for rehearing in part and deny the en banc rehearing by order. Upon motion for rehearing, we withdraw our prior opinion and substitute the following opinion in its place.

Give Kids the World, Inc. ("GKTW"), the defendant below, appeals a final judgment entered against it in a negligence action. GKTW argues that the lower court erred by denying its pretrial motion for summary judgment on its affirmative defense of release. We agree and reverse.

GKTW is a non-profit organization that provides free "storybook" vacations to seriously ill children and their families at its resort village, the Give Kids the World Village ("the Village"). Stacy and Eric Sanislo ("the Sanislos") are the parents of a young girl with a serious illness. In November 2004, the Sanislos executed a liability release to GKTW in connection with a "wish request" that benefitted their daughter.[1] The release, in pertinent part, provided:

> By my/our signature(s) set forth below, and in consideration of Give Kids the World, Inc. granting said wish, I/we hereby release Give Kids the World, Inc. and all of its agents, officers, directors, servants and employees from any liability whatsoever in connection with the preparation, execution, and fulfillment of said wish, on behalf of ourselves, the above named wish child and all other participants. The scope of the release shall include, but not be limited to, damages or losses or injuries encountered in connection with transportation, food, lodging, medical concerns (physical and emotional), entertainment, photographs and physical injury of any kind.
>
> . . . .
>
> I/we further agree to hold harmless and to release Give Kids the World, Inc. from any and all claims and causes

[1] Fulfillment of a child's wish is accomplished in conjunction with the Make-A-Wish Foundation, a separate entity from GKTW.

> of action of every kind arising from any and all physical or emotional injuries and/or damages which may happen to me/us, or damage to or theft of our personal belongings, jewelry or other personal property which may occur while staying at the Give Kids the World Village.

The wish request was approved and, upon their arrival at the Village from the state of Washington, the Sanislos executed another liability release with identical language.

During the course of her stay at the Village, Stacy Sanislo was injured when she, along with her husband, posed for a picture on a pneumatic wheelchair lift that was attached to the back of a horse-drawn wagon. The lift collapsed because the weight limit had been exceeded, injuring Ms. Sanislo. The Sanislos brought suit against GKTW, alleging that Ms. Sanislo's injuries were caused by GKTW's negligence. In its answer, GKTW asserted the affirmative defense of release. Subsequently, GKTW filed a motion for summary judgment, arguing that the signed liability releases precluded a finding of liability. The Sanislos filed a motion for partial summary judgment on the issue of release as well. The trial court denied GKTW's motion, but granted that of the Sanislos.[2] Following a jury verdict, judgment was entered in the Sanislos' favor.

On appeal, GKTW correctly asserts that it was entitled to summary judgment based on the release. Exculpatory clauses are disfavored under the law, but unambiguous exculpatory contracts are enforceable unless they contravene public policy. Applegate v. Cable Water Ski, L.C., 974 So. 2d 1112, 1114 (Fla. 5th DCA 2008) (citing Cain v. Banka, 932 So. 2d 575, 578 (Fla. 5th DCA 2006)). The wording of the exculpatory clause must be clear and understandable so that an ordinary and knowledgeable person will know what he or she is contracting away. Raveson v. Walt

[2] The parties stipulated that if the trial court granted one of the motions for summary judgment, then the other should be denied.

Disney World Co., 793 So. 2d 1171, 1173 (Fla. 5th DCA 2001). 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." Cain, 932 So. 2d at 578.[3] In Cain, this Court noted that an exculpatory clause absolving a defendant of "any and all liability, claims, demands, actions, and causes of action whatsoever" was sufficient to encompass the plaintiff's negligence action filed against a defendant track owner in connection with motocross bike riding. Id. at 579; see also Hardage Enters., Inc. v. Fidesys Corp., N.V., 570 So. 2d 436, 437 (Fla. 5th DCA 1990) (determining that "any and all claims, demands, damages, actions, causes of action, or suits in equity, of whatsoever kind or nature" encompassed negligent action). A release need not list each possible manner in which the releasor could be injured in order to be effective. Cf. DeBoer v. Fla. Offroaders Driver's Ass'n, Inc., 622 So. 2d 1134, 1136 (Fla. 5th DCA 1993).

The instant release contains two separate provisions releasing GKTW from liability. One provision releases GKTW from "any and all claims and causes of action of every kind arising from any and all physical or emotional injuries and/or damages which may happen to me/us . . . which may occur while staying at the Give Kids the World Village." This language is markedly similar to the language in the release signed by the plaintiff in Cain, which encompassed the release of a negligence action. 932 So. 2d at 577. A second provision releases GKTW from "any liability whatsoever in connection with the preparation, execution, and fulfillment of said wish . . . ." This language is

[3] As pointed out by the concurring opinion, this position is contrary to caselaw in the other district courts of appeal.

broad enough to encompass negligence claims arising from the injuries suffered by Ms. Sanislo due to the collapse of the wheelchair lift.

The Sanislos argue that the release is not clear and unambiguous because it applies to liability arising "in connection with the preparation, execution and fulfillment of said wish." They suggest the nature and scope of the wish is not clear or defined and thus renders the release unenforceable. However, the wish, which was requested by the Sanislos, clearly encompassed events at the Village related to their stay and attendance at Orlando area theme parks. The Sanislos' interpretation is not likely the interpretation that an "ordinary and knowledgeable person" would give to the clause. See Raveson, 793 So. 2d at 1173. The language used clearly and unambiguously releases GKTW from liability for the physical injuries Ms. Sanislo sustained during her stay at the Village, and was sufficiently clear to make the Sanislos aware of the breadth of the scope of the release and what rights they were contracting away. The ability to predict each and every potential injury is unattainable and is not required to uphold an exculpatory provision within a release.

In addition to assessing the clarity of the language used in releases, this Court must consider the parties' relative bargaining power in determining the enforceability of a release. Ivey Plants, Inc. v. FMC Corp., 282 So. 2d 205, 208 (Fla. 4th DCA 1973). Enforcement of an exculpatory clause has been denied where the relative bargaining power of the contracting parties is unequal and the clause seeks to exempt from liability for negligence the party who occupies a superior bargaining position. Id. However, Florida courts have held that the bargaining power of the parties will not be considered unequal in settings outside of the public utility or public function context. For instance,

in Banfield v. Louis, 589 So. 2d 441, 443-44 (Fla. 4th DCA 1991), the court upheld the enforcement of a release executed by a participant in a triathlon and the trial court's ruling that a disparity in bargaining power was "not applicable to entry of athletic contests of this nature, where a party is not required to enter it and not entitled to participate unless they want to." The Banfield court emphasized that the application of Ivey Plants was limited to circumstances in which a release was executed on behalf of a public utility or a company serving some public function. Id. at 444-45. Consistent with this analysis, Florida courts have refused to find an inequality of bargaining power in recreational settings. Id.; DeBoer, 622 So. 2d at 1136. Similarly, in Hardage Enterprises, this Court found that an exculpatory clause in an agreement entered into by the owner of a hotel complex and a construction manager of the complex was enforceable because its language was unambiguous and the parties were not in a position of unequal bargaining power. 570 So. 2d at 438. This Court explained that the case did not present "a situation where public policy mandates the protection of consumers who are offered a contract in a 'take it or leave it' form." Id. at 439.

GKTW argues that the bargaining power of the parties cannot be viewed as unequal, because the Sanislos voluntarily participated in the GKTW program. The Sanislos, for their part, argue that the parties are of unequal bargaining power because they were offered a contract in a "take it or leave it" form, and GKTW gave them no choice but to sign the release in order to have their daughter's wish fulfilled. Unfortunately for the Sanislos, however, the instant case is more akin to Banfield and DeBoer than it is to Ivey Plants. The Sanislos' desire to fulfill their ill daughter's wish is certainly understandable, but the parents' desire to fulfill the wish and take advantage of

the GKTW program does not equate to unequal bargaining power. The Sanislos were not consumers as contemplated in Hardage Enterprises. They were provided a copy of the release at the time they applied to the Make-A-Wish Foundation and made a decision to waive certain rights. GKTW is entitled to enforcement of that release.

We certify conflict with the First, Second, Third, and Fourth District Courts of Appeal. 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).

REVERSED.

ORFINGER, C.J., and PALMER, J., concur.
COHEN, J., concurs and concurs specially with opinion.

COHEN, J., concurring specially.

If I were writing on a clean slate, I would affirm the trial court's denial of GKTW's summary judgment. I am bound, however, to follow this Court's prior decisions that do not require an express reference to negligence in a release in order to render the release effective to such actions. This District stands alone on this position. 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).

The better view is to require an explicit provision to that effect. Exculpatory clauses 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." Tatman v. Space Coast Kennel Club, Inc., 27 So. 3d 108, 110 (Fla. 5th DCA 2009). While those trained in the law might understand and appreciate that the general language releasing a party from any and all liability could encompass the injuries suffered by Ms. Sanislo, a release should be readily understandable so that an ordinary and knowledgeable person would know what is being contracted away. I would suggest that the average ordinary and knowledgeable person would not understand from such language that they were absolving an entity from a duty to use reasonable care. Conversely, a clause which provides a waiver of liability for one's own negligence is

easily understood. The other district courts of appeal have recognized how simple it is to add such a clause in a release. I suggest we do the same.