Electronically Filed 07/18/2013 04:29:47 PM ET

RECEIVED, 7/18/2013 16:43:33, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

STACY SANISLO and ERIC SANISLO,

Petitioners,

Case No. SC12-2409
5th DCA Case No. 5D11-748

v.

GIVE KIDS THE WORLD, INC.,

Respondent.
_____/

PETITIONERS' INITIAL BRIEF ON THE MERITS

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

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INTRODUCTION

This Court has accepted jurisdiction to resolve a conflict certified by the Fifth District Court of Appeal in the decision below, *Give Kids the World, Inc. v. Sanislo*, 98 So. 3d 759 (Fla. 5th DCA 2012). In *Sanislo*, the Fifth District certified conflict with the other District Courts of Appeal on one straightforward, yet extremely important issue. Specifically, the issue is whether an exculpatory clause requires a specific reference to negligence in order to make the clause 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 Court should resolve this conflict and establish a precedent that will create uniformity and consistency in the courts of this state.

STATEMENT OF THE CASE AND FACTS

The facts of this matter are not complex, and they are set forth in the Fifth District's opinion. Respondent, Give Kids the World, Inc. ("GKTW"), is an entity that provides vacations to seriously ill children. *Sanislo*, 98 So. 3d at 760. 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. *Id.* The release made no specific mention of releasing GKTW from acts of negligence. It provided:

> By my/our signature(s) set forth below, and in consideration of Give Kids the World, Inc. granting said wish, I/we hereby 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 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 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 Villages.

Id. at 760-61.

While at the GKTW facility, Stacy Sanislo was injured when a pneumatic wheelchair lift that she and her husband were standing on collapsed. *Id.* at 761. GKTW volunteers had told Ms. Sanislo to stand on the lift so that pictures could be taken (R 2:28). The lift collapsed because the weight limit had been exceeded. *Id.* The Sanislos had been directed onto the lift by GKTW volunteer and/or employee.

Sanislo brought suit against GKTW, alleging negligence. *Id.* 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 parties stipulated that if the trial court granted one motion, the other should be denied. Id. at 761, n.2. 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. *Id.*

On October 12, 2012, the Fifth District issued its per curiam opinion.[1] *Sanislo* found that the trial court erred in failing to grant summary judgment in GKTW's favor because, despite making no specific reference explaining that the

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

release would release GKTW from its own acts of negligence, the release's "language was broad enough to encompass" Sanislo's negligence claims. *Id.* at 762. The opinion noted that, in contrast to every other district court in Florida, 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. *Id.* at 761. *Sanislo* certified conflict with the First, Second, Third and Fourth District Courts of Appeal.[2] *Id.* at 763.

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. *Id.* (Cohen, J., concurring specially). He opined that, contrary to Fifth District precedent, the better view is to require an explicit provision concerning the releasee's own negligence in order to release such actions. *Id.* 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. *Id.* at 763-64.

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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

Exculpatory clauses are disfavored because they relieve one party of the obligation to use due care, and shift the risk back to the other party who is generally not in as good a position to take steps to avoid the injury. They are also strictly construed against the drafter.

Though different in effect, indemnification agreements and exculpatory clauses are generally construed under the same principles of law. For 40 years, this Court has required explicit language in an indemnity agreement in order to indemnify the indemnitee for damages resulting from negligence. Relying on this reasoning, the First, Second, Third, and Fourth District Courts of Appeal have required explicit references to negligence in exculpatory clauses as well. This is logical and appropriate, because if they are governed by the same principles of law, an exculpatory clause should not be construed under a more lenient standard. Only the Fifth District Court of Appeal has not required such explicit language.

This Court should confirm that the specificity requirement which has been applied to indemnification contracts also applies to situations involving exculpatory clauses. By doing so, this Court will provide the ordinary, knowledgeable person with a clear understanding of what future claims he or she is

waiving. Such a rule will remove uncertainty from these actions, and will benefit the courts of this state by reducing litigation to construe ambiguous agreements.

ARGUMENT

Forty years ago, this Court in *University Plaza Shopping Center, Inc. v. Stewart,* 727 So. 2d 507 (Fla. 1973) considered the issue of whether a contract of indemnity which indemnifies the indemnitee for damages resulting from his sole negligence must specifically state that negligence is being indemnified. This Court found that such language was required, and this Court has expanded *University Plaza's* reasoning to require such specific language in other contexts regarding indemnification.

Often relying on *University Plaza* and its progeny, four district courts of appeal in this state have recognized that indemnity agreements and exculpatory clauses are governed by the same general principals of law, and they have required specific language in such clauses when the drafter of the clause seeks to be released from his or her own negligence. Such a requirement is supported by public policy which looks on such clauses with disfavor and construes them against the drafter. Such a requirement removes ambiguity which often is only resolved at the cost of judicial labor and expense to the parties. Such a requirement is in keeping with this Court's reasoning in *University Plaza* and the line of cases that followed. This Court should resolve the conflict and rule that the Fifth District join the other district courts of appeal in requiring an express

reference to negligence in order to render an exculpatory clause effective in such actions.

ISSUE: AN EXCULPATORY CLAUSE SHOULD CONTAIN AN EXPRESS REFERENCE TO NEGLIGENCE IN ORDER TO BE EFFECTIVE IN SUCH ACTIONS.[3]

"An exculpatory clause purports to deny an injured party the right to recover damages from a person negligently causing his injury." *Cain v. Banka*, 932 So. 2d 575, 578 (Fla. 5th DCA 2006). As the Fifth District has repeatedly recognized, they 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); *Cain*, 932 So. 2d at 578; *Loewe v. Seagate Homes, Inc.*, 987 So. 2d 758, 760 (Fla. 5th DCA 2008). This being the case, they are strictly construed against the party seeking to be relieved from liability. *Id.*

Given the public policy disfavoring such clauses, the courts of this state have consistently held that they are only enforceable to the extent that an ordinary and knowledgeable person would know what they are contracting away. *Cain*, 932 So. 2d at 578. Similar policy considerations are present when a contract of

[3]This case, like *Kirton v. Fields*, 997 So. 2d 349 (Fla. 2008), concerns the enforceability of a pre-injury release, which is a question of law arising from undisputed facts. Therefore, the standard of review is de novo. *Id.* at 352.

indemnification seeks to indemnify a party against its own wrongful acts. *Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equip. Co.,* 374 So. 2d 487, 489 (Fla. 1979).

Forty years ago, this Court considered the issue of whether a contract of indemnity which indemnifies the indemnitee for damages resulting from his sole negligence must specifically state that negligence is being indemnified. *University Plaza Shopping Center, Inv. v. Stewart,* 727 So. 2d 507, 512 (Fla. 1973). It held that, in order to be effective, a "specific provision protecting the indemnitee from his own negligence" must be included. *Id.* at 511. *University Plaza* limited its holding to only those situations where liability resulted *solely* from the negligence of the indemnitee. *Id.* at 512.

Six years later, this Court held that indemnity contracts which attempt to indemnify a party against its own wrongful conduct will be enforced "only if they express an intent to indemnify against the indemnitee's own wrongful acts in clear and unequivocal terms." *Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equip. Co.,* 374 So. 2d 487, 489 (Fla. 1979). This Court noted that *University Plaza* was limited to instances where liability was based solely on the fault of the indemnitee, but recognized that the "public policy underlying that decision applies with equal force" to situations where the indemnitor and

indemnitee are jointly liable. *Id.* at 489-90. It stated that under "classic principles of indemnity, courts of law rightly frown upon the underwriting of wrongful conduct, whether it stands alone or is accompanied by other wrongful acts." *Id.*

This trend of requiring explicit language in the indemnity context continued with this Court's decision in *Cox Cable Corp. v. Gulf Power Co.,* 591 So. 2d 627 (Fla. 1992), decided over 20 years ago. In *Cox Cable*, this Court reaffirmed the holding of *Charles Poe Masonry*, and cited the public policy underlying the holding of that case. *Cox Cable*, 591 So. 2d at 629.

Given the reasoning and public policy of this line of cases, many Florida courts have in turn applied their reasoning to cases involving exculpatory clauses. This is appropriate and correct because, even as the Fifth District has recognized, indemnity clauses and exculpatory clauses are governed by similar principles of law. As that court stated:

> Although there is a distinction in definition between an exculpatory clause and an indemnity clause in a contract, *they both attempt to shift ultimate responsibility for negligent injury, and so are generally construed by the same principles of law.* An exculpatory clause purports to deny an injured party the right to recover damages from the person negligently causing his injury. An indemnification clause attempts to shift the responsibility for the payment of damages to someone other than the negligent party (sometimes back to the injured party, thus producing the same result as an exculpatory provision).

O'Connell v. Walt Disney World Co., 413 So. 2d 444, 446 (Fla. 5th DCA 1982) (emphasis added). Because the same principles of law apply, numerous courts have taken this Court's requirement of explicitness set forth in *University Plaza* and *Charles Poe Masonry* and applied it to cases involving exculpatory clauses over the decades.

In *Goyings v. Jack and Ruth Eckerd Foundation,* 403 So. 2d 1144 (Fla. 2d DCA 1981), the Second District recognized that while previous Florida law required that the language of an exculpatory clause be clear and unequivocal, courts differed as to what exactly that meant. *Id.* at 1146. Citing *University Plaza*, *Goyings* noted that this Court "held that to exculpate the indemnitee from liability occasioned by his own negligence, a contract must include an explicit provision to that effect." *Id.* It further noted that the rationale behind *University Plaza's* "specificity requirement was to ensure that the contracting party is alerted to the meaning of the exculpatory clause." *Id. Goyings* reversed a summary judgment granted on the release and found that in order to be effective, an exculpatory clause must "explicitly" state that the one seeking to be released "would be absolved from liability from injuries resulting from its negligence." *Id.* at 1146. The Second District has consistently required such specificity. *Rosenburg v. Cape Coral Plumbing, Inc.*, 920 So. 2d 61, 66 (Fla. 2d DCA 2005) (reversing summary

judgment on release where it did not "expressly state" that negligence was being released); *Murphy v. Young Men's Christian Ass'n of Lake Wales, Inc.*, 974 So. 2d 565, 568-69 (Fla. 2d DCA 2008) (citing *Goyings* and noting its requirement that a release from negligence must be explicitly stated).

In *Van Tuyn v. Zurich American Insurance Co.,* 447 So. 2d 318 (Fla. 4th DCA 1984), the court found that for an exculpatory clause to be effective, "it must clearly state that it releases the party from liability for its own negligence." *Id.* at 320. *Van Tuyn* then noted "that this must be a clear and unequivocal statement was emphasized" by this Court in *University Plaza* "in the context of an indemnity clause in a contract." *Id.* Thus, the Fourth District "has held that an exculpatory agreement must expressly include the term 'negligence' to . . . be clear and unequivocal." *Bender v. CareGivers of Am., Inc.*, 42 So. 3d 893, 894 (Fla. 4th DCA 2010) (*quoting Travent, Ltd., v. Schecter*, 718 So. 2d 939, 940 (Fla. 4th DCA 1998) (requiring a specific reference to negligence to be effective as a matter of law)).

Similarly, the First District in *Levine v. A. Madley Corporation*, 516 So. 2d 1101 (Fla. 1st DCA 1987), cited *University Plaza* as well as *Goyings* in holding that an exculpatory clause will only be effective if it clearly states that it releases a party from his own negligence. *Id.* at 1103. *See also Hopkins v. The Boat Club,*

Inc., 866 So. 2d 108 (Fla. 1st DCA 2004) (noting that the First District is "more closely aligned with the view that the appellee's negligence must be specifically mentioned").

As these cases reveal, the body of law requiring explicit language in an exculpatory clause in order to release one from his own negligence has its roots in this Court's *University Plaza* and *Charles Poe Masonry* decisions, with good reason. The same principles of law apply in the contexts of indemnification and exculpatory clauses. *O'Connell,* 413 So. 2d at 446; *Charles Poe Masonry,* 374 So. 2d at 489. Both are disfavored for reasons of public policy, and both will be enforced only when the opposing party clearly understands what rights he is giving up.

Further, an exculpatory clause relieves "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). Given the usual imbalance of power between the parties and the reality that indemnification agreements are usually entered into at arm's length, it is illogical to construe indemnification agreements more strictly. In *Geise v. County of Niagara*, 458 N.Y.S. 2d 162 (N.Y. 1983), the court found that exculpatory

agreements should be more strictly construed than indemnity agreements. As the court stated:

> The only time that this general rule of strict judicial construction has been relaxed is where the courts have dealt with indemnification agreements. This is in recognition of the fact that these agreements are usually negotiated at arm's length between two businesses and are merely a means allocating between the two contracting parties the risk of liability to third parties, essentially through the employment of insurance.

Id. at 472. The *Geise* court went on to note that it was not construing an indemnification agreement but rather "an exculpatory agreement which has the potential of depriving an injured plaintiff of a remedy. In such cases, the courts have applied exacting standards in evaluating the language used." *Id.*

Applying a more lenient standard in the context of exculpatory clauses does not make sense given the context in which they often arise. As this Court has noted, public policy and the relationship of the parties are significant factors in determining enforceability of exculpatory clauses, and they have not been enforced "where the relative bargaining power of the contracting parties is not equal and the clause seeks to exempt from liability for negligence the party who occupies a superior bargaining position." *Ivey Plants, Inc. v. FMC Corp.*, 282 So. 2d 205, 208 (Fla. 1973). By not including explicit language, the possibility that an average, ordinary and knowledgeable person (not a business person) would not understand

what they were releasing in greatly increased. *Sanislo*, 98 So. 3d at 763 (Cohen, J., concurring specially).

The Fifth District's diversion from the other courts of appeal on this issue stems from *Hardage Enterprises, Inc. v. Fidesys Corp.*, 570 So. 2d 436 (Fla. 5th DCA 1990) where the court rejected the argument that a release must contain the word "negligence" to be effective. *Hardage* noted that "the *University Plaza* case is readily distinguishable because it dealt with an indemnification agreement rather than an exculpatory release. In the instant case, of course, we are concerned only with the latter." *Id.* at 438. The court then mentioned the *O'Connell* decision which explained the difference between an exculpatory clause and an indemnification agreement, and again addressed *University Plaza*, stating that "the Florida Supreme Court limited its holding to the factual situation and determined that the use of the general term 'indemnify . . . against any and all claims' does not disclose an intention to indemnify for consequences arising *solely* from the negligence of the indemnitee." *Id.* at 438.

It should be noted that *Hardage* did not cite this Court's *Charles Poe Masonry* or *Cox Cable* decisions which expanded the *University Plaza* reasoning and did away with the limitation to the specific circumstances of the case. If the *Hardage* court believed that *University Plaza's* limiting language confined it to the

specific situation in that case, it would perhaps explain why it refused to apply the *University Plaza* specificity requirements.

It should also be noted that the decision in *Hardage* did not recognize the distinction between a release of liability for the negligence of third parties, and a release of liability for the negligence of the releasee itself. That distinction was the basis for this Court's decision in *University Plaza*, and is the basis for the conflict cases. *See University Plaza*, 272 So. 2d at 511-2. The rationale is that a release is easily understood to release a party providing a service from acts of negligence of third parties who may provide part of the service, but it is counterintuitive for a release to include the negligence of the releasee. Releasing the releasee for his own negligence actually encourages the releasee to ignore safety concerns. Reasonable people do not expect a release to include permission for the releasee to be negligent, so any document intending to do so must be include specific, unambiguous language to that effect.

The mere distinction between indemnification agreements and exculpatory clauses is not, by itself, a justification for addressing them in different ways. Yet, once the seed was sown, the Fifth District has continued to rely on that distinction as a basis for refusing to apply the *University Plaza* reasoning to exculpatory clauses. *See Greater Orlando Aviation Auth. v. Bulldog Airlines, Inc.*, 705 So. 2d

20 (Fla. 5th DCA 1998) (finding "irrelevant" cases construing indemnification when considering an exculpatory clause in a lease); *Lantz v. Iron Horse Saloon*, 717 So. 2d 590 (Fla. 5th DCA 1998) (distinguishing *University Plaza* as "*a case dealing with an indemnity agreement in a lease*") (emphasis in original).

Yet, at least one case from the Fifth District has required express language in a contractual provision regarding assumption of risk, a provision which the court stated "is covered by the same principles which apply to any other type of exculpatory clause." *O'Connell v. Walt Disney World Co.,* 413 So. 2d 444, 447 (Fla. 5th DCA 1982). O'Connell then found that the assumption of risk provision "would not bar recovery for injuries resulting from defendant's negligence because it is not so expressly stated." *Id.* (emphasis added).

Courts in other jurisdictions have likewise recognized the wisdom in requiring specific language in an exculpatory clause. In *Alack v. Vic Tanny International of Missouri, Inc.*, 923 S.W.2d 330 (Mo. 1996), the Missouri Supreme Court undertook an extensive analysis of the issue presented here. Ultimately, the court held

> [t]he better rule is one that establishes a bright-line test, easy for courts to apply, and certain to alert all involved that the future "negligence" or "fault" of a party is being released. The words "negligence" or "fault" or their equivalents must be used conspicuously so that a clear and unmistakable waiver and shifting of risk occurs.

> There must be no doubt that a reasonable person agreeing to an exculpatory clause actually understands what future claims he or she is waiving.

Id. at 337-38 (also noting that "general language" will not suffice to waive negligence).

The language of the release in this case is ambiguous on the question of its scope. The pertinent part related to the scope of the release provides:

> 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.

All of the specific items mentioned have to do with third parties. GKTW does not own hotels to provide lodging, is not a restaurant that will provide food, is not a hospital or medical practice which will provide medical care, and is not in the entertainment business. While transportation could include the negligence of its own drivers, it could just as easily apply only to accidents caused by third parties during transport.

By listing these types of injuries GKTW obviously intended to limit the scope of the release to the negligence of third parties. Or, more insidiously, GKTW hoped the release would include its own negligence but created the scope paragraph to mislead the reader. At the very least, the scope language in the release created an ambiguity which must be construed against the drafter. If

GKTW intended the scope to include its own negligence, the scope paragraph would have also listed acts of negligence of its own employees.

The ordinary, reasonable person should be able to read the exculpatory clause and know exactly what he or she is releasing. "A clause which provides a waiver of liability for one's own negligence is easily understood." *Sanislo*, 98 So. 3d at 763 (Cohen, J., concurring). Adopting the rule requiring an explicit reference to negligence or negligent acts removes the uncertainty from these cases, and also serves the interest of not requiring judicial resources be used to construe exculpatory clauses with less precise language. This Court should adopt the rule used by the First, Second, Third and Fourth District Courts of Appeal, and require an express reference to negligence in order to render an exculpatory clause effective in such actions.

CONCLUSION

This Court should resolve the conflict that presently exists in Florida between the Fifth District and First, Second, Third and Fourth Districts and hold that an express reference to negligence is required in order to render the release effective to such actions. For 40 years, this Court has required such specificity in regards to indemnification agreements, and the same reasoning and law applies in the context of exculpatory clauses. This Court should reverse the decision of the Fifth District in this case and find that the final judgment entered in Sanislo's favor be given effect.

Respectfully submitted,

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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: **Dennis R. O'Conner, Esquire**, **Derek J. Angell, Esquire**, and **Matthew J. Haftel, Esquire**, O'Connor & O'Connor, LLC, 840 South Denning Drive, Suite 200, Winter Park, Florida 32789 (Email: doconner@oconlaw.com; dangell@oconlaw.com; mhaftel@oconloaw.com); this 18th day of July, 2013.

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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.

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