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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' REPLY BRIEF ON THE MERITS

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

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ARGUMENT

At its essence, this case presents this Court with one fundamental question: Is there a logical reason to require specificity through the use of the word negligence in indemnification agreements and not require such specificity when dealing with exculpatory clauses? It is respectfully submitted that the answer is no, and the same reasoning that this Court has applied to indemnification agreements for over forty years should be applied (as four District Courts of Appeal have recognized) to exculpatory clauses.

GKTW and the Fifth District seem to offer the same facile explanation as to why indemnification agreements and exculpatory clauses should be construed by different standards, and that is because they serve different purposes. *See Hardage Enters., Inc. v. Fidesys Corp.*, 570 So. 2d 436, 438 (Fla. 5th DCA 1990); Answer Brief, at 12. Yet, offering the differences between the two as a justification for construing them in different ways ignores their similarities, and ignores that the same legal principles apply to both. As the Fifth District has 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). Though this passage was cited and emphasized by Sanislo in the Initial Brief, GKTW has chosen not to address the reasoning in its Answer Brief.

As argued previously, if different standards were to apply to indemnification agreements and exculpatory clauses, then it would be logical to require more specificity when exculpatory clauses were being considered. 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); *Loewe v. Seagate Homes, Inc.*, 987 So. 2d 758, 760 (Fla. 5th DCA 2008); *Cain v. Banka*, 932 So. 2d 575, 578 (Fla. 5th DCA 2006). Further, unlike indemnification agreements, exculptatory clauses are generally not "negotiated at arm's length between two businesses." *Geise v. County of Niagara*, 458 N.Y.S. 2d 162 (N.Y. App. Div. 1983).[1]

[1]GKTW correctly points out that the *Geise* case was incorrectly cited by Sanislo in the Initial Brief. Answer Brief, at 31, n.10. This was done unintentionally, and Sanislo apologizes for the error.

Thus, public policy, logic and the nature of the agreements themselves would make it seem that, if anything, exculpatory clauses should be more strictly construed, and not the other way around. Yet, that is what GKTW urges this Court to do, without any more justification than they are "products of entirely different considerations." Answer Brief, at 12. In reality, given that the clauses both attempt to shift ultimate responsibility for negligent injury and are therefore generally construed by the same principles of law, the same requirement of specificity should apply in both contexts.

GKTW engages in a defense of its motives and mission, and argues that non-profit organizations and their volunteers will suffer if they are not able to "decrease its risk, protect its volunteers and apportion its charitable resources" through the use of exculpatory clauses. Answer Brief, at 12-14. Sanislo in no way suggested that the organization and its motives were anything less than honorable. Further, suggesting that non-profit organizations will greatly suffer if Sanislo's position is adopted by this Court is to ignore what this case is about. It is not about exposing non-profit entities to unlimited liability; rather, it is about requiring one who seeks to limit its liability through a release to do so explicitly. Such entities will be able to limit liability by the "simple" act of inserting a clause specifically acknowledging a waiver for negligent acts, which is not an onerous burden. *Give*

Kids the World v. Sanislo, 98 So. 3d 759, 763 (Fla. 5th DCA 2012) (Cohen, J., concurring specially).

For forty years, this Court has required that an indemnity clause must specifically state that negligence is being indemnified. Relying on this line of cases from this Court, four district courts of appeal have correctly recognized that indemnity agreements and exculpatory clauses are governed by the same general principles 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. That requirement is supported by public policy which looks on such clauses with disfavor and construes them against the drafter, and removes ambiguity which often is only resolved at the cost of judicial labor and expense to the parties. The time has come for this Court to resolve the conflict present in this State, 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.

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 forty 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'Connor, 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: doconnor@oconlaw.com; dangell@oconlaw.com; mhaftel@oconlaw.com); this 27th day of August, 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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