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IN THE FLORIDA SUPREME COURT

STACY SANISLO and ERIC SANISLO,

Petitioners,

vs.

GIVE KIDS THE WORLD, INC.,

Respondent.
_____/

Case No. SC12-2409

5th DCA Case No. 5D11-748

RESPONDENT'S ANSWER BRIEF ON THE MERITS

_____

On review from the Fifth District Court of Appeal

_____

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STATEMENT OF THE CASE AND OF THE FACTS

Respondent and Defendant below, Give Kids the World, Inc. ("Give Kids"), is a charitable organization that provides dream vacations to seriously ill children in conjunction with the Make-A-Wish-Foundation. *Give Kids the World, Inc. v. Sanislo*, 98 So. 3d 759, 760 n.1 (Fla. 5th DCA 2012); (R. 2:18). Petitioners, Stacy and Eric Sanislo, are Washington state residents and parents of a child with aplastic anemia. (R. 2:4, 2:17.) In November 2004, Mr. and Mrs. Sanislo completed a "wish request" in hopes that Give Kids would provide an Orlando vacation to their family. (R. 2:21-23.) Included in the wish request was an exculpatory provision at the heart of this appeal, which 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 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.

(R. 2:68-69).

The Sanislos' wish request was granted. (R. 2:18.) Give Kids awarded an all-expenses paid trip to Mr. Sanislo, Mrs. Sanislo, Mr. Sanislo's mother, the ailing child, and the Sanislos' seven other children. (R. 2:18, 2:34, R. 2:68-69.) After arriving at the Give Kids the World Village, Mr. and Mrs. Sanislo executed a second agreement which contained identical exculpatory language. (R. 2:19.)

While on property at the Village, some of the Sanislos' children noticed a parked horse-drawn carriage and wanted a ride. (R. 2:34.) Mrs. Sanislo spoke with unidentified volunteers who agreed to permit the entire family to load into the carriage for an outing. (R. 2:34-37.) After the children were situated in the seats, Mr. Sanislo, Mrs. Sanislo, and Mr. Sanislo's mother were "told by a bunch of people just to stand on the wheelchair lift for the pictures." (R. 2:38.) The pneumatic lift collapsed under the weight of the three adults.[1] Despite landing on her feet, Mrs. Sanislo sustained personal injuries in the roughly three foot fall. (R. 2:7.)[2]

The Sanislos filed suit against Give Kids, Heavenly Hoofs, Inc., and Thornlea Carriages, Inc., alleging negligence.[3] Give Kids and the Sanislos filed

[1] Mr. Sanislo and his mother combined for approximately 520 pounds (R. 2:29-30); Mrs. Sanislo's weight is not disclosed by the record on appeal.
[2] Photographs of a representative carriage are found at (R. 2:71-84).
[3] The limited evidentiary appellate record, consisting of no more than Mrs. Sanislo's deposition transcript and exhibits, does not reveal the roles of these

cross motions for summary judgment on the issue of whether the exculpatory language above precluded the action. *Give Kids the World*, 98 So. 3d at 761. The trial court found that it did not. *Id.* The case proceeded to jury trial against Give Kids only, and a verdict was returned in the Sanislos' favor. (R. 1:34.)

Give Kids appealed the summary judgment rulings, and the Fifth District reversed *per curiam*. *Id.* at 760. The court observed the universal rule in Florida that "unambiguous exculpatory contracts are enforceable unless they contravene public policy." *Id.* at 761. It determined that the exculpatory language, which "clearly encompassed events at the Village related to their stay and attendance at Orlando area theme parks," satisfied this standard. *Id.* at 762. The court concluded that "an ordinary and knowledgeable person [would] know what he or she is contracting away." *Id.*

Following rehearing and denial of rehearing en banc, *id.* at 760, conflict was certified with the other four districts which require an overt reference to the words "negligence" or "negligent acts" to uphold an exculpatory clause's enforceability in a negligence action. *Id.* at 761 n.3, 763.

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former codefendants. However, the summary judgment documents describe Heavenly Hoofs as the operator of the carriage and Thornlea Carriages as its manufacturer. (R. 1:2, 1:16.)

SUMMARY OF THE ARGUMENT

Florida should join the vast majority of states that have refused to adopt a rule requiring an express reference to a party's negligence to enforce a pre-injury exculpatory clause. Our state's interdistrict conflict arose when district courts unnecessarily – and apparently unintentionally – commingled principles of indemnity and exculpation. The Fifth District has correctly abstained from a wholesale endorsement of indemnity principles when passing on pre-injury releases. Logic and common sense support the rejection of an obstinate rule that would invalidate Give Kids's abundantly unambiguous contract.

Affirming the decision below would bring Florida into harmony with the federal maritime law which likewise does not require any specific reference to negligence. Conversely, reversal would ensure future divergence in decisions depending on whether Florida or federal law applies to a cause of action. This is no more rational than a split of authority across intrastate geographical lines.

Finally, public policy strongly supports enforcement of Give Kids's contract. Give Kids could not function without its volunteers' altruism, and its exculpatory clause shields them both from potential liability arising from charitable acts. Applying an unnecessarily harsh standard to the contract would impair future philanthropic efforts in Florida.

ARGUMENT

The narrow question which serves as the basis for this Court's jurisdiction is whether an exculpatory clause is automatically ambiguous unless it contains a specific reference to "negligence." Review is de novo. *Kirton v. Fields*, 997 So. 2d 349, 352 (Fla. 2008).

As a preliminary matter, the enforceability of an exculpatory clause speaks directly to the parties' freedom of contract. *Banfield v. Louis*, 589 So. 2d 441, 446 (Fla. 4th DCA 1991). "We have long recognized that 'while there is no such thing as an absolute freedom of contract, nevertheless, freedom is the general rule and restraint is the exception.'" *Fla. Dep't of Fin. Servs. v. Freeman*, 921 So. 2d 598, 607 (Fla. 2006) (citing *Larson v. Lesser*, 106 So. 2d 188, 191 (Fla. 1958)). This freedom would be undeniably compromised by a refusal to enforce Give Kids's contract.

I. Give Kids's Exculpatory Clause Is Not Ambiguous

Florida's basic principles governing exculpatory clauses are not in disagreement. Such clauses are strictly construed but nonetheless generally enforceable unless they are ambiguous or contravene public policy. *Hinely v. Fla. Motorcycle Training, Inc.*, 70 So. 3d 620, 624 (Fla. 4th DCA 2011). Exculpatory language must be "clear and unequivocal" to bar a negligence action. *Cain v. Banka*, 932 So. 2d 575, 578 (Fla. 5th DCA 2006). An ambiguity challenge will

fail unless an "ordinary and knowledgeable" person would not understand what he or she is contracting away. *Southworth & McGill, P.A. v. S. Bell Tel. & Tel. Co.*, 580 So. 2d 628, 634 (Fla. 1st DCA 1991).

Challenges to exculpatory clauses are therefore grounded either on ambiguity or public policy. This Court granted jurisdiction to resolve a conflict that solely impacts the ambiguity prong. The Fifth District expressly rejected the Sanislos' argument that Give Kids's clause was void for public policy reasons, *Give Kids the World*, 98 So. 3d at 762-63, and there is no independent jurisdictional basis to review that finding. Moreover, Petitioners did not argue that the contract was against public policy in their Initial Brief; that issue has been abandoned. *Hoskins v. State*, 75 So. 3d 250, 257 (Fla. 2011).

Although Give Kids's contract does not specifically include "negligence" among its terms, it does contain the word "liability." Petitioners urge this Court to adopt a bright-line rule that would per se invalidate all exculpatory clauses unless they include the word "negligence." Logic and common sense dictate that this ill-advised approach must be rejected.

First, the term "negligence" is a legal term of art which courts of this state take pains to define for juries. *See* Fla. Std. Jury Instr. (Civ.) 401.4 ("Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances," etc.). Give Kids submits that a reasonably

knowledgeable non-lawyer would derive more import from the word "liability" than the word "negligence." *See Southworth & McGill*, 580 So. 2d at 629-30 (where the First District enforced an exculpatory clause that referenced "liability" and "omission or errors" but not "negligence"). The Sanislos' proposed rule would transform the present test of whether the exculpating party understood the agreement to whether the drafter was aware of case law requiring magic words.

Judge Cohen observed that "[t]he other district courts of appeal have recognized how simple it is to add such a clause in a release." *Give Kids the World*, 98 So. 3d at 763-64 (COHEN, J., concurring). With deference to his honor, the suggested bright-line rule does not recognize that the exculpating party's comprehension is the focus of the inquiry. An ordinarily intelligent person would understand that Give Kids would not be liable for injuries suffered during the vacation. After all, the fact that Judge Cohen *concurred* evinces his honor's necessary conclusion that the contract was "clear and unequivocal" even without a reference to negligence.

This leads to the second problem with the proposed rule, which is that Give Kids's language would never mean *anything* if it were ineffective to bar a negligence action. It is unreasonable to suppose that Mrs. Sanislo read the pertinent language and believed it to be a nullity. Additionally, a hypothetical scenario is easy to imagine where Mrs. Sanislo had suffered an injury on Give

Kids's property that was not the result of Give Kids's negligence. If that were the case, Give Kids would not be liable in the first place because an accident by itself does not give rise to an inference of negligence. *Miller v. Wallace*, 591 So. 2d 971, 973 (Fla. 5th DCA 1991). The clause would again result as a nullity because there would be no liability to exculpate.

It is equally unreasonable to conclude that an ordinarily intelligent person would have been unsure of the contract's ramifications under our facts. Indeed, the challenged language contemplated "injuries encountered in connection with transportation, … entertainment, [and] photographs." It is difficult to imagine more precise language which might encompass Mrs. Sanislo's injury – she fell while posing for a picture during a recreational carriage ride.

Petitioners somehow assert that "[b]y listing these types of injuries Give Kids obviously intended to limit the scope of the release to the negligence of third parties." (Initial Brief on the Merits at 18.) To the contrary, the clause states that the Sanislos "hereby release Give Kids the World, Inc. *and all of its agents, officers, directors, servants and employees*" from, among other things, liability for injuries arising out of the activities listed above. Presupposing that this language only pertains to third parties is pure conjecture. Apparently attempting to create an ambiguity where none exists, Petitioners' characterization does not accurately reflect the contractual language.

Third, given the fundamental nature of contracts, adopting Petitioners' bright-line rule would not streamline or minimize litigation to any degree. Despite the facial appeal of a simplistic bright-line approach, contracts are inherently unique, and future litigants are certain to formulate new arguments for and against future clauses. To be sure, the presence of the word "negligence" does not automatically render an exculpatory clause enforceable. *See Loewe v. Seagate Homes, Inc.*, 987 So. 2d 758, 760 (Fla. 5th DCA 2008) (holding that a homebuilders' exculpatory clause that purported to exculpate damages due to "negligence" was nevertheless unenforceable in a negligence action).

Petitioners' bright-line test would only operate to invalidate detailed, readily ascertainable contracts where the wayward drafter was not fully apprised of a common law rule requiring a magic word. This artificial standard would assist neither Florida's courts nor its litigants. The well settled principles of contract interpretation, long followed by the Fifth District as well as the four others, are fully sufficient to litigate exculpatory clauses on a case-by-case basis. Give Kids's contract is understandable to a reasonable person of ordinary intelligence, thoroughly contemplates the activity which led to Mrs. Sanislo's injury, and unambiguously bars her negligence action.

II. How We Got Here – The Interplay between Indemnity and Exculpation

Petitioners' Initial Brief focuses on a line of Supreme Court indemnification

cases; namely, *Cox Cable Corp. v. Gulf Power Co.*, 591 So. 2d 627 (Fla. 1992); *Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equip. Co.*, 374 So. 2d 487 (Fla. 1979); and *Univ. Plaza Shopping Ctr., Inc. v. Stewart*, 272 So. 2d 507 (Fla. 1973). A necessary premise implicit throughout the Initial Brief is that principles governing the interpretation of indemnity clauses should pertain equally to exculpatory clauses. The Give Kids contract does not purport to indemnify. And while similar, there is no disputing that there is a "marked and significant distinction" between indemnity and exculpation. *Ivey Plants, Inc. v. FMC Corp.*, 282 So. 2d 205, 207-208 (Fla. 4th DCA 1973)[4] (explaining the clauses' effects in detail[5]), *cert. denied*, 289 So. 2d 731 (1974). Examining the contexts in which they arise demonstrate that a blind adherence to indemnity principles is not only unnecessary but unwise when applied to exculpation.

To begin, even a cursory review of *Cox Cable*, *Charles Poe Masonry*, and *University Plaza* reveals the enormous difference in their facts and those here. In *University Plaza*, the non-party deceased was an employee of a barber shop that leased property from a shopping center. 272 So. 2d at 508. The widow filed suit

[4] The Initial Brief asserts that *Ivey Plants* was a decision from this Court. (Initial Brief at iv, 14.) It was issued by the Fourth District. 282 So. 2d 205.

[5] While informative, *Ivey Plants* does not directly assist in resolving the narrow question here – both the indemnification and exculpatory paragraphs it examined contained specific references to the defendant's "negligence" or "neglect." *Ivey Plants*, 282 So. 2d at 207.

against the shopping center only, which was deemed to be the solely at-fault entity. *Id.* at 509 n.1. The shopping center then filed a third party action against the barber shop based on an indemnity clause in the lease. *Id.* at 508. This Court concluded that the use of "general terms" was insufficient to notify the barber shop that it would be required to pay for the shopping center's negligence. *Id.* at 511. The faultless barber shop was therefore not required to pay for a third party's loss that it had no part in causing. *Id.* at 512.

In *Charles Poe Masonry*, an injured construction worker fell from a scaffold and sued the scaffold's manufacturer. 374 So. 2d at 488. The manufacturer filed a third party complaint against the subcontractor which had erected and maintained the scaffold. But because at least a portion of the accident was due to manufacturing defects and the clause did not indemnify for the manufacturer's affirmative fault, the indemnity provision did not apply. *Id.* at 489.

Similarly, in *Cox Cable*, a worker was injured while installing cable lines. 591 So. 2d at 628. Cox had contracted with the worker's employer to install equipment pursuant to a contract Cox maintained with Gulf Power. *Id.* The worker elected to pursue a lawsuit against Gulf Power only. *Id.* As in the two earlier cases, Gulf Power filed a third party suit against Cox based on an indemnity provision in their contract. *Id.* at 628-29. This Court invalidated the indemnity provision as insufficiently ambiguous given its use of "general terms." *Id.* 629.

The common theme in these cases is the liability two contracting entities owed to prospectively injured third parties. Vicarious liability is at the forefront of the discussion. *See Charles Poe Masonry*, 374 So. 2d at 489. Because both parties can conceivably cause injury to a third person, it makes sense to require specificity in indemnity arrangements. That way, the indemnitor understands whether it is accepting liability only for its negligence or for the negligence of the indemnitee as well. The allocation of risk, including the attendant burden of obtaining appropriate insurance coverage, is negotiated between two generally sophisticated businesses.

In contrast, exculpatory clauses are products of entirely different considerations. They are often drafted by purveyors of voluntary amusements or, as here, non-profit entities that condition the benefit of their efforts on a promise not to sue them. Individuals are informed that if they wish to engage in the particular activity, they will not be able to recover for injuries resulting from the offeror's oversights or carelessness incident to ordinary negligence. This is completely different than the allocation of potential fault between two for-profit enterprises and their insurers.

It cannot be overstated that exculpatory clauses in no way "encourage[] the releasee to ignore safety concerns." (Initial Brief on the Merits at 16.) Give Kids's mission is to provide memories of a lifetime to families enduring unimaginable

hardships. A wish vacation cannot meet this goal if it is not carried out safely. An injury deflates or even shatters the experience. Safety is therefore a focus inherent in Give Kids's philanthropy.

Further, Give Kids's reputation would suffer irreparable damage if it systematically failed to adhere to reasonable maintenance protocols or betrayed other indicia of routine negligence. Give Kids's reputation may be its most important asset; it drives donations, attracts volunteers, and affords Give Kids the opportunity to collaborate with other respected non-profit and for-profit entities. Give Kids's exculpatory clause has no effect on its pursuit of safety.

Instead, the purpose of exculpation is to limit the offeror's liability and therefore directly lower costs, overhead, and – most importantly – risk to itself and its representatives. Critically, non-profit volunteers will be dissuaded from their humanitarian endeavors if their benevolence exposes them to potential litigation. *See Zivich v. Mentor Soccer Club, Inc.*, *infra*.

The present facts are illustrative. Give Kids offered to provide a free Orlando vacation for no less than eleven members of the Sanislo family. As a condition to this gift, Give Kids required that the Sanislos promise not to file suit if they are injured due to the simple negligence of its representatives or volunteers. The Sanislos and Give Kids are private entities; entering into this arrangement was a fundamentally voluntary act for everyone involved. By limiting its potential

liability, Give Kids is able to decrease its risk, protect its volunteers, and apportion its charitable resources to as many suffering families as possible.

Amicus Curiae Florida Justice Association fantastically argues that, "If the release was worded accurately, it would read, 'I hereby give you the right to injure or kill me.'" (Brief of Amicus Curiae at 7.)[6] This is a respectfully absurd interpretation of the contract. Florida entities may never exculpate themselves from intentional torts for obvious public policy reasons. *Loewe*, 987 So. 2d at 760. This has nothing to do with ambiguity, negligence, or anything related to this appeal.

It is worth noting that the term "release" can technically pertain to post-incident agreements which are also governed by similar but not identical principles.[7] *Compare Hackett v. Grand Seas Resort Owner's Ass'n, Inc.*, 93 So. 3d 378, 380 (Fla. 5th DCA 2012) ("while there is a distinction between a post-claim 'release' and a pre-claim 'exculpatory clause,' … [they are] generally underpinned by the same principles of law"), *with Witt v. Dolphin Research Ctr., Inc.*, 582 So. 2d 27, 28 n.1 (Fla. 3d DCA 1991) ("*Hardage* [*Enters. v. Fidesys Corp., N.V.*, 570 So. 2d 436 (Fla. 5th DCA 1990)], however, involves a completely different

[6] As of the date of service hereon, this Court has not ruled on F.J.A.'s Motion for Leave to File an Amicus Curiae Brief in Support of Petitioners. F.J.A.'s proposed brief is considered herein as an exercise of caution.

[7] To avoid confusion, this brief refers to pre-incident agreements as "exculpatory clauses" and post-incident agreements as "releases" throughout.

situation of a post-claim release of liability for damages which have already occurred and is thus not applicable in any way to the present case"). Therefore, while exculpatory clauses, indemnity agreements, and post-injury releases are all related, they are not identical, and sensibilities adhering to one do not necessarily adhere to the others.

With this background, we now turn to the first Florida decision invalidating an exculpatory clause for failing to expressly reference the defendant's negligence, *Goyings v. Jack & Ruth Eckerd Found.*, 403 So. 2d 1144 (Fla. 2d DCA 1981). *Goyings* specifically held that such a provision "must clearly state that it releases the party from liability for his own negligence." *Id.* at 1146. It cited two cases to reach this conclusion, *L. Luria & Son, Inc. ex rel. Fireman's Fund Ins. Co. v. Alarmtec Int'l Corp.*, 384 So. 2d 947 (Fla. 4th DCA 1980), and *Middleton v. Lomaskin*, 266 So. 2d 678 (Fla. 3d DCA 1972). Neither supports the holding.

L. Luria & Son upheld an exculpatory clause which disclaimed liability for "malfeasance or misfeasance in the performance of the services under the contract." 384 So. 2d at 948-49. "M]alfeasance or misfeasance" was sufficiently clear and unequivocal to cover the defendant's negligence even though the word "negligence" did not appear. In *Middleton*, the exculpatory clause included the defendant's "negligent acts" within its terms. 266 So. 2d at 679. *Middleton* held that this "clearly states that the lessors are not to be liable to the lessee for acts of

lessors' own negligence." *Id.* at 680. Neither case stated that the respective references to the defendants' own wrongdoing was necessarily dispositive, yet that is exactly the leap taken by the *Goyings* panel.

More to the point, *Goyings* erroneously observed that "the specificity requirement enunciated in *University Plaza* is to ensure that the contracting party is alerted to the meaning of the exculpatory clause." *Goyings*, 403 So. 2d at 1146 (emphasis added). As has been shown, however, *University Plaza* is limited to principles of indemnity; there was no exculpatory clause in that case. *University Plaza* does not so much as address exculpation, much less stand for the proposition cited in *Goyings*.

Goyings could have been resolved on alternative grounds alone. The case arose after a mentally disabled child suffered injuries while in a camp's custody. *Id.* at 1145. She had been placed in the camp by her mother for her "full care and support." *Id.* The pertinent exculpatory clause included the agreement that "*reasonable precautions* will be taken by Camp to assure the safety and good health of said boy/girl." *Id.* (emphasis added). The Second District reasoned, "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.

A quarter century later, the Second District reiterated the importance of this

"reasonable precautions" language in *Murphy v. Young Men's Christian Ass'n of Lake Wales, Inc.*, 974 So. 2d 565, 568 (Fla. 2d DCA 2008). In fact, the clause in *Murphy* actually contained a specific reference to negligence, but similar "reasonable precautions" limitations precluded its enforcement. *Id.* at 568-69.

Goyings therefore contained an unnecessary and apparently unintentional expansion of exculpatory jurisprudence which was not even required to answer its facts. Indeed, it is likely that the "reasonable precautions" language would have barred the purported exculpation in all appellate districts. Nonetheless, once *Goyings* became law, its holding was followed by the other districts in subsequent appeals.

Levine v. A. Madley Corp., 516 So. 2d 1101 (Fla. 1st DCA 1987), was the first case following *Goyings* that construed an exculpatory clause without a direct reference to negligence. It cited *Goyings* in holding that "for such a clause to be effective, it must clearly state that it releases a party from liability for his own negligence." *Id.* at 1103. The only other support for this position was *University Plaza*, *id.*, but again *University Plaza* does not address exculpation.

Meanwhile, the Fourth District had decided *Van Tuyn v. Zurich Am. Ins. Co.*, 447 So. 2d 318 (Fla. 4th DCA 1984). *Van Tuyn*, somewhat remarkably, was resolved pursuant to identically misguided reasoning as in *Goyings* – it held that *L. Luria & Son*, *Middleton*, and *University Plaza* required that an exculpatory clause

"must clearly state that it releases the party from liability for its own negligence." *Van Tuyn*, 447 So. 2d at 320. For the same reasons discussed above, *L. Luria & Son* and *Middleton* did not articulate this rule, and *University Plaza* did not even discuss exculpation. Indemnity and exculpation are simply not interchangeable.

The last conflict case, and the only Third District opinion identified in Petitioners' Initial Brief, is *Tout v. Hartford Accident & Indem. Co.*, 390 So. 2d 155 (Fla. 3d DCA 1980). *Tout* does not support Petitioners' proposed rule; it does not even support jurisdiction. Instead, *Tout* provides only one sentence of relevance, holding that "a limitation of liability for one's negligent acts cannot be inferred unless such intention is expressed in unequivocal terms." *Id.* at 156. It cited *Ivey Plants* for this position, which, importantly, is the same rule applied throughout Florida. *E.g.*, *Cain*, 932 So. 2d 575 (Fla. 5th DCA 2006), *passim*.

Tout arose following a residential fire directly caused by the tenant's negligence. *Tout*, 390 So. 2d at 156. The tenant had previously entered into an agreement to purchase the property. *Id.* at 155. The sale had not closed, and the contract provided that prior to closing "Seller assumes the risk of loss from fire." *Id.* Under these circumstances, it was unreasonable to infer that the seller assumed the risk of loss of a fire *caused* by the tenant/buyer. This language would have likely failed in the Fifth District as well. *Cf. Hackett*, 93 So. 3d at 379 (where clause stating that "Management … will not be responsible for accidents or injury

to guest … of any kind" was insufficiently ambiguous to bar an action by a plaintiff injured by a malfunctioning chair).

More recently, however, the Third District approved an exculpatory clause which did *not* reference the defendant's negligence. *Krathen v. Sch. Bd. of Monroe Cnty.*, 972 So. 2d 887, 888 (Fla. 3d DCA 2007). The minor plaintiff was injured during cheerleading practice at Key West High School. *Id.* Although she alleged a litany of negligent failures by the school, the Third District was satisfied that a pre-incident agreement to exculpate the school from "any injury or claim resulting from … athletic participation" was sufficient to affirm summary judgment. *Id.* The court provided that "any claim resulting from athletic participation includes the claim for negligence such as was alleged here." *Id.* The status of the law in the Third District is therefore not so clear.

III. The Fifth District's Line of Cases

It bears repeating that the five districts apply the same basic guidelines when considering the clarity of exculpatory clauses:

> Exculpatory clauses are disfavored and are enforceable only where and to the extent that the intention to be relieved from liability was made clear and unequivocal and the wording must be so clear and understandable that an ordinary and knowledgeable person will know what he is contracting away.

Cain, 932 So. 2d at 578. The basis of the conflict arises in the Fifth District's rejection of "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." *Give Kids the World*, 98 So. 3d at 761 (citing *Cain*, 932 So. 2d at 578); *see also*, *Lantz v. Iron Horse Saloon, Inc.*, 717 So. 2d 590, 591 (Fla. 5th DCA 1998) ("[t]he test is not whether the release actually uses the phrase 'its own negligence' in the release"), *overruled on other grounds*, *Kirton v. Fields*, 997 So. 2d at 358; *Greater Orlando Aviation Auth. v. Bulldog Airlines, Inc.*, 705 So. 2d 120, 122 (Fla. 5th DCA 1998) ("Bulldog's contention that Florida courts have implied that the only method of conveying a clear and unambiguous expression of an intention to be free from liability for one's own negligence is to use the word 'negligence' is erroneous"); *Hardage Enters.*, 570 So. 2d at 437 ("[t]he judgment of the trial court is based upon the erroneous assumption that a [pre-injury] release will not bar claims of negligence merely because it does not specifically contain the word 'negligence'").

The conflict arose because the Fifth District repeatedly and correctly refused to amalgamate principles of indemnification and exculpation. As shown in the preceding section, *Goyings* and *Van Tuyn* misconstrued *University Plaza* as an exculpation case. The conflict grew from there.

Any notion that the Fifth District is more lenient on exculpatory clauses must be dispelled, however. The clause in *Cain*, which was not invalidated merely for not referencing negligence, was nevertheless unenforceable because it did not

specify whether it pertained to present or future events. *Cain*, 932 So. 2d at 580-81. Likewise, defendants' summary judgments were reversed due to ambiguous exculpatory clauses in both *Hackett*, 93 So. 3d 378, and *Tatman v. Space Coast Kennel Club, Inc.*, 27 So. 3d 108 (Fla. 5th DCA 2009). As previously noted, the contractual language in *Loewe*, 987 So. 2d 758, actually contained a reference to "negligence" but was invalidated on public policy grounds.

Both the Initial and Amicus Briefs make several references to *O'Connell v. Walt Disney World Co.*, 413 So. 2d 444 (Fla. 5th DCA 1982). *O'Connell*, however, can be distinguished for two reasons. First, the injured minor "agreed to hold appellee harmless *and indemnify* appellee for any damages." *Id.* at 446 (emphasis added). As Petitioners point out, the later *Hardage Enterprises* panel deemed this distinguishment crucial in relation to the *University Plaza* rule. *Hardage Enters.*, 570 So. 2d at 438.

More importantly, however, Disney's contract purported to preclude recovery from risks "inherent in horseback riding," and there were questions of fact as to whether the injury was caused by a natural risk of horseback riding or an extraneous factor. *O'Connell*, 413 at 448-49 ("[i]f, however, the defendant's actions increase or add new risks not normally inherent in the activity, a duty arises and he may be found negligent"). The injury therefore fell beyond the ambit of the clause – any discussion regarding the need to specify one's own negligence was

superfluous.

These cases show that the Fifth District applies stringent standards to exculpatory language, but it will not invalidate a clause merely because it fails to comply with an arbitrary bright-line rule. As explained in *Hackett*,

> The point of *Cain*, however, was not to sanction sloppy or ambiguous language within an exculpatory clause. Rather, it was simply to point out that we ought not to be hidebound by requiring the use of a specific word like "negligent," in order to enforce a release from liability.
>
> * * *
>
> Better practice is probably to use the words, "negligent" or "negligence" in drafting the exculpatory clause. Certainly the use of those magic words may well be the tipoff that one accepting this condition will be waiving the right to seek financial compensation from the party being released. Those words, however, are not the only ones that will suffice.

93 So. 2d at 380 (continuing that the word "accident" is nonetheless too ambiguous to exculpate a party from its negligence). Give Kids respectfully submits that no Florida court should be "hidebound" to a bright-line rule due to the inevitable case-by-case approach inhering in contract litigation.

IV. Federal Courts Agree with the Fifth District

The Fifth District's established rejection of the bright-line rule is in line with the federal courts. As noted by *Hopkins v. Boat Club, Inc.*, 866 So. 2d 108, 111-12 (Fla. 1st DCA 2004), "federal courts have consistently refused to hold that words such as 'negligence' or 'negligent acts' are indispensible." *See Sander v.*

Alexander Richardson Invs., 334 F.3d 712, 716 (8th Cir. 2003) (rejecting argument that clause "must refer to liability arising from the marina's fault in some manner" *even after* counsel "made clear during oral argument that they do not suggest that the clause is deficient for not using the magic term 'negligence'"); *Morton v. Zidell Explorations, Inc.*, 695 F.2d 347, 349 n.1, 351 (9th Cir. 1982) (affirming trial court's determination that exculpatory "red letter clause" was not overarching under maritime law despite no reference to the exculpee's negligence); *In re Royal Caribbean Cruises Ltd.*, 403 F. Supp. 2d 1168, 1170-71 (S.D. Fla. 2005) (granting summary judgment in maritime negligence action based on an exculpatory clause which did not reference the defendant's negligence or fault); *see also Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1167 (11th Cir. 2009) (construing Florida law under *Cain* and *Greater Orlando Aviation* in holing that negligence is not expressly required to enforce an exculpatory provision).

Much of the federal precedent appears to originate from *United States v. Seckinger*, 397 U.S. 203, 212 n.17 (1970), which stated in the context of indemnity, "We specifically decline to hold that a clause that is intended to encompass indemnification for the indemnitee's negligence must … explicitly state that indemnification extends to injuries occasioned by the indemnitee's negligence." The Supreme Court recognized that "[c]ontract interpretation is largely an individualized process." *Id.* *Seckinger* was decided before *University*

Plaza, but *University Plaza* focused on the reasoning in footnote ten of the overturned *United States v. Seckinger*, 408 F.2d 146 (5th Cir. 1969). *Univ. Plaza Shopping Ctr.*, 272 So.2d at 511. Footnote ten in the Fifth Circuit decision opined that the then-current state of Florida law required "language specifically designating indemnification against one's own negligence" to be enforceable for that purpose. *Seckinger*, 408 F.2d at 150 n.10 (citing *Gulf Oil Corp. v. Atl. Coast Line R.R. Co.*, 196 So. 2d 456, 459 (Fla. 2d DCA 1967), *cert. denied*, 201 So. 2d 893). The footnote therefore discussed Florida law only.

University Plaza makes no reference to the federal Supreme Court's prior rejection of the position it ultimately accepted. Once *University Plaza*'s holding was inadvertently expanded into the realm of exculpatory clauses, the divergence between federal and state exculpatory law was inevitable.

This incongruence appeared again in *Cook v. Crazy Boat of Key West, Inc.*, 949 So. 2d 1202 (Fla. 3d DCA 2007). *Cook* agreed with *Hopkins* that "[s]tate laws requiring specific reference to the releasee's negligence therefore conflict with federal law and may not be applied in cases involving federal maritime law." *Id.* at 1203 (citing *Hopkins*, 866 So. 2d at 111). Free from any Florida precedent that would have indiscriminately invalidated the pertinent contract, the Third District found that the "release is sufficient to alert the signatory as to what they are signing" despite no reference to negligence. *Id.* at 1204. The defendant's

summary judgment was affirmed. *Id.* at 1202.

Thus, if this Court accepts Petitioners' bright-line rule, there will remain a division in the interpretation of contracts depending on whether Florida or maritime law applies to a case. Few concepts could be more esoteric to an individual contemplating an exculpatory clause than whether state or federal precedent would govern its construction. This is no less irrational than a deviation of laws across geographical appellate boundaries.

Considering Florida boasts the continental states' longest coastline and tremendous waterborne activity, future maritime-engendered dissonance would be guaranteed. The effect would defeat the very purpose of this Court's conflict jurisdiction, which is to "maintain[] harmony and uniformity of decisions as legal precedents." *Jollie v. State*, 405 So. 2d 418, 423 (Fla. 1981) (BOYD, J., dissenting). This case presents the Court with an opportunity to align our state with maritime law and prevent otherwise assured future discord.

V. The Weight of Authority Supports Affirmance

Finally, Florida would join the clear national majority position if *Give Kids the World* is affirmed. A host of other states' high courts have expressly rejected Petitioners' proposed inflexible rule. Kentucky, for one, has adopted the four prong test provided by American Jurisprudence. *Hargis v. Baize*, 168 S.W.3d 36,

47 (Ky. 2005).[8] That legal encyclopedia observes that exculpatory clauses will generally be enforced if *any* of the following four conditions are met:

> 1) it explicitly expresses an intention to exonerate by using the word "negligence;" or
>
> 2) it clearly and specifically indicates an intent to release a party from liability for a personal injury caused by that party's own conduct; or
>
> 3) protection against negligence is the only reasonable construction of the contract language; or
>
> 4) the hazard experienced was clearly within the contemplation of the provision.

Hargis, 168 S.W.3d at 47; 57A Am. Jur. 2d Negligence § 53 (2013).

The Sanislos therefore promote an express negligence test that is only the first of four possible means to comport with the American Jurisprudence standard. While the Give Kids contract may not contain the word negligence, it plainly satisfies the remaining three alternatives.

Specifically, under the second prong, the contract identifies Give Kids personnel and releases them from "any liability whatsoever in connection with" enumerated activities. This can only be read to include the representatives' conduct. Moving to the third prong, negligence is the only form of liability the clause could have reasonably contemplated. If the clause does not exculpate from

[8] *Hargis* references 57A Am. Jur. 2d Negligence § 52 (2004). *Hargis*, 168 S.W.3d at 47. The four prong test now appears in 57A Am. Jur. 2d Negligence § 53 (2013).

negligence, it exculpates nothing, which is an unreasonable reading of the contract. Finally, under the fourth prong, Mrs. Sanislo's injury exactly occurred "in connection with transportation, … entertainment, [and] photographs." This language would be sufficient in Kentucky and other jurisdictions following the American Jurisprudence inquiry.

A lengthy list of other high court decisions that have rejected the call for a "negligence requirement" includes *Chadwick v. Colt Ross Outfitters, Inc.*, 100 P.3d 465, 467 (Colo. 2004) (en banc) ("we have also made clear that the specific terms 'negligence' and 'breach of warranty' are not invariably required for an exculpatory agreement to shield a party from claims based on negligence and breach of warranty"); *Courbat v. Dahana Ranch, Inc.*, 141 P.3d 427, 439-40 (Haw. 2006) (holding that clause without any reference to negligence was effective to bar negligence but not gross negligence action); *Cormier v. Cent. Mass. Chapter of the Nat'l Safety Council*, 620 N.E.2d 784, 786 (Mass. 1993) (where "any and all liability loss, damage, costs, claims and/or causes of action" was deemed "obviously [] sufficient to bar a claim in negligence without specifically mentioning that word"); *Adloo v. H.T. Brown Real Estate, Inc.*, 686 A.2d 298, 304 (Md. 1996) ("[t]o be sure, as the weight of authority makes clear … the exculpatory clause need not contain the word 'negligence' or any other 'magic words'" (citations omitted)); *Cudnik v. William Beaumont Hosp.*, 525 N.W.2d 891,

894 n.3 (Mich. 1994) (where clause in medical malpractice action was not void for ambiguity because it "quite clearly attempts to absolve defendant all liability 'of every kind and character' arising out of the radiation therapy" despite no reference to negligence); *Mayfair Fabrics v. Henley*, 226 A.2d 602, 605 (N.J. 1967) (in enforcing exculpatory clause that did not reference negligence, noting that "there are no required words of art and, whatever be the language used or the rule of construction applied, the true goal is still the ascertainment and effectuation of the intent of the parties"); *Reed v. Univ. of N.D.*, 589 N.W.2d 880, 885-86 (N.D. 1999) (language stating that plaintiff was to "assume all responsibility for injuries I may incur as a direct or indirect result of my participation" was "clear and unambiguous" so as to preclude a negligence claim); *Zivich v. Mentor Soccer Club, Inc.*, 696 N.E.2d 201 (Ohio 1998) (discussed *infra*); *Estey v. MacKenzie Eng'g Inc.*, 927 P.2d 86, 89 (Or. 1996) ("[w]e decline to hold that the word 'negligence' must expressly appear in order for an exculpatory or limitation of liability clause to be effective against a negligence action"); *Chepkevich v. Hidden Valley Resort, L.P.*, 2 A.3d 1174, 1182 (Pa. 2010) ("this Court, the Superior Court, and federal courts applying Pennsylvania law have consistently upheld exculpatory agreements in the absence of any specific reference therein to negligence"); *Empress Health & Beauty Spa, Inc. v. Turner*, 503 S.W.2d 188, 190 (Tenn. 1973) ("it is not necessary that the word 'negligence' appear in the exculpatory clause

and the public policy of Tennessee favors freedom to contract against liability for negligence"); *Russ v. Woodside Homes, Inc.*, 905 P.2d 901, 906 (Utah 1995) ("the word 'negligence' is not a talisman to enforce contracts avoiding potential liability"); *Fairchild Square Co. v. Green Mtn. Bagel Bakery, Inc.*, 658 A.2d 31, 438 (Vt. 1995) ("even under the exacting *Colgan* standard 'a specific reference to negligence liability is not essential'" (citing *Colgan v. Agway, Inc.*, 553 A.2d 143, 146 (Vt. 1988))); *Scott ex rel. Scott v. Pac. W. Mtn. Resort*, 834 P.2d 6, 9-10 (Wash. 1992) (en banc) (rejecting proposed requirement of "the word 'negligence' or language with similar import" and holding "[c]ourts should use common sense in interpreting purported releases, and the language 'hold harmless … from all claims' logically includes negligent conduct"); *Murphy v. N. Am. River Runners, Inc.*, 412 S.E.2d 504, 511 (W. Va. 1991) ("language in a pre-injury exculpatory agreement or anticipatory release stating that a defendant is relieved in effect from all liability for any future loss or damage is sufficiently clear to waive a common-law negligence action, even though the language does not include explicitly the words 'negligence' or 'negligent acts or omissions'; these 'magic words' are not essential to a clear waiver of the right to bring a common-law negligence action"); *Atkins v. Swimwest Family Fitness Ctr.*, 691 N.W.2d 334, 341 (Wis. 2005) ("this court has never specifically required exculpatory clauses to include the word 'negligence'"); *Schutkowski v. Carey*, 725 P.2d 1057, 1061 (Wyo. 1986) (adopting

a "common sense" approach "based on the clear intent of the parties rather than specific 'negligence' terminology" for interpreting exculpatory clauses); *but see Sweeney v. City of Bettendorf*, 762 N.W.2d 873, 878-79 (Iowa 2009) (requiring specific reference to exculpee's own negligence); *Alack v. Vic Tanny Int'l of Mo., Inc.*, 923 S.W.2d 330, 337-38 (Mo. 1996) (discussed *infra*); *Gross v. Sweet*, 400 N.E.2d 306, 309-10 (N.Y. 1979) ("That does not mean that the word 'negligence' must be employed for courts to give effect to an exculpatory agreement; however, words conveying a similar import must appear").[9]

This catalog of decisions demonstrates that the conflict cases are sequestered among an acute minority. Petitioners point to *Alack*, 923 S.W.2d 330, as their primary extrajurisdictional authority in support of their rigid rule. Even that case, however, states that "[t]he words 'negligence' or 'fault' *or their equivalents* must be used conspicuously so that a clear and unmistakable waiver and shifting of risk occurs." *Id.* at 337 (emphasis added). Give Kids suggests that its reference to its own "liability" would perhaps even meet Missouri's rigorous standards.

Petitioners also briefly touch on *Geise v. Niagara Cnty.*, 458 N.Y.S.2d 162

[9] Georgia and Illinois are two notable states that do not require an express reference to negligence but where no on-point opinion from the respective high court could be identified. *Neighborhood Assistance Corp. v. Dixon*, 593 S.E.2d 717, 718 (Ga. Ct. App. 2004); *Oelze v. Score Sports Venture, LLC*, 927 N.E.2d 137, 144 (Ill. App. Ct. 2010). California requires a specific reference to negligence to bar claims for "active negligence" but not for "passive negligence," a distinction foreign to Florida law. *CAZA Drilling (Cal.), Inc. v. TEG Oil & Gas U.S.A., Inc.*, 48 Cal. Rptr. 3d 271, 281 (Ct. App. 2006).

(N.Y. App. Div. 1983), an intermediate appellate decision.[10] But *Geise* held that exculpatory clauses which do not contain the word "negligence" may still be enforceable so long as they contain "words conveying a similar import." *Geise*, 458 N.Y.S.2d at 472; *see also Gross*, 400 N.E.2d at 309-10 (same). Give Kids again suggests that "liability" may survive a New York ambiguity challenge.

Amicus Curiae points to *Berry v. Greater Park City Co.*, 171 P.3d 442 (Utah 2007), for its lone out-of-state citation. While *Berry* indeed recognizes that "the right to contract is always subordinate to the obligation to stand accountable for one's negligent acts," *id.* at 445-46, Utah does not require any reference to negligence to enforce an otherwise valid exculpatory clause, *Russ* 905 P.2d at 906.

Finally, *Zivich*, cited in both *Kirton*, 997 So. 2d at 356-67, and *Global Travel Mktg., Inc. v. Shea*, 908 So. 2d 392, 401 (Fla. 2005), deserves particular attention. Like so many others, its exculpatory clause did not expressly reference the defendant's negligence.[11] A child was seriously injured after soccer practice while climbing on a goal. *Zivich*, 696 N.E.2d at 203. The Court found that a pre-injury agreement to release the soccer club from "any claim … as a result of the registrant's participation in the Soccer Club and/or being transported to or from the

[10] Petitioners erroneously cite *Geise* as if it were issued by the New York Court of Appeals, that state's highest court. (Initial Brief at iv, 13).

[11] The actual contractual language did not appear in the Supreme Court of Ohio opinion but can be found in the unreported intermediate case, *Zivich v. Mentor Soccer Club, Inc.*, 1997 WL 203646, *1 (Ohio Ct. App. 1997).

same" was sufficient to encompass a suit in negligence. *Id.* at 203-04; 1997 WL 203646, *1. In reaching this conclusion, it identified additional public policy concerns unique to non-profit organizations reliant on volunteers:

> [T]he threat of liability strongly deters many individuals from volunteering for nonprofit organizations. Insurance for the organizations is not the answer, because individual volunteers may still find themselves potentially liable when an injury occurs. Thus, although volunteers offer their services without receiving any financial return, they place their personal assets at risk.
>
> Therefore, faced with the very real threat of a lawsuit, and the potential for substantial damage awards, nonprofit organizations and their volunteers could very well decide that the risks are not worth the effort. hence invalidation of exculpatory agreements would reduce the number of activities made possible through the uncompensated services of volunteers and their sponsoring organizations.
>
> Therefore, we conclude that although Bryan, like many children before him, gave up his right to sue for the negligent acts of others, *the public as a whole received the benefit of these exculpatory agreements*. Because of this agreement, the Club was able to offer affordable recreation and to continue to do so without the risks and overwhelming costs of litigation. … *Public policy does not forbid such an agreement. In fact, public policy supports it*.

Zivich, 696 N.E.2d at 205 (internal citations omitted) (emphasis added); *see also Hohe v. San Diego Unified Sch. Dist.*, 224 Cal. App. 3d 1559, 1564 (Ct. App. 1990) ("Hohe, like thousands of children participating in recreational activities sponsored by groups of volunteers and parents, was asked to give up her right to sue. The public as a whole receives the benefit of such waivers so that [non-profit groups] are able to continue without the risks and sometimes overwhelming costs

of litigation.").

In *Kirton*, this Court voided as against public policy all exculpatory clauses executed by parents on behalf of their minor children. *Id.* at 358. *Kirton* was careful to limit its holding (but not its reasoning) to commercial settings. *Id.* at 350 n.2, 360 ("[w]e emphasize that our holding is limited to commercial enterprises" (ANSTEAD, J., specially concurring)). *Kirton* agreed with the above passage in *Zivich*, opining, "If pre-injury releases were invalidated, these volunteers would be faced with the threat of lawsuits and the potential for substantial damage awards, which could lead volunteers to decide that the risk is not worth the effort." *Kirton*, 997 So.2d at 357 (QUINCE, C.J.); *see also Global Travel Mktg.*, 908 So. 2d at 401 (Fla. 2005) (PARIENTE, C.J.) (citing *Zivich* in distinguishing businesses from volunteer-run activities, noting that "potential liability is a risk against which a for-profit business may insure itself" (internal citations omitted)).

Give Kids has endured nearly a decade of onerous litigation stemming from a volunteer's perfunctory framing of a family photograph. The cost of this and future lawsuits arising from the carelessness of charities' unpaid volunteers inexorably limits the ability to provide relief to others in need. If there remains any doubt that this Court should reject an express negligence rule governing exculpatory contracts, the public policy impact on charitable organizations eliminates it.

CONCLUSION

This Court should reject Petitioners' unyielding rule that would invalidate otherwise fully comprehensible exculpatory clauses. Overturning *Give Kids the World* would place Florida in the decided national minority and ensure future disharmony with maritime causes of action. Affirmance would not veer from *University Plaza* or otherwise disturb *stare decisis* – exculpation and indemnification are manifestly distinct, and there is no reason to unnecessarily commingle their principles.

Respectfully, the decision of the Fifth District should be affirmed, and cases in conflict with *Give Kids the World* should be disapproved.

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 **7th** day of August, 2013.

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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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