

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

CHARLES RANDOLPH HARRELL,
a Florida citizen and resident,

CASE NO.: 4D22-0121

Appellant/Plaintiff,

LT. NO.: CACE-20-013803 Div. 25

vs.

BMS PARTNERS, LLC, a Florida
citizen, resident and limited liability
company, d/b/a BROWARD
MOTORSPORTS,

Appellee/Defendant.

_____ /

APPELLANT'S/PLAINTIFF'S AMENDED REPLY BRIEF

JULIE H. LITTKY-RUBIN, ESQ.

Florida Bar No. 983306

Clark, Fountain, La Vista, Prather, & Littky-Rubin, LLP

1919 N. Flagler Drive, Second Floor

West Palm Beach, FL 33407

Telephone: (561) 899-2100

Facsimile: (561) 832-3580

Email: jlittkyrubin@clarkfountain.com

awayne@clarkfountain.com

Attorney for Appellant/Plaintiff

RECEIVED, 06/09/2022 10:47:21 AM, Clerk, Fourth District Court of Appeal

TABLE OF CONTENTS

Table of Authorities iv

Argument 1

THE TRIAL COURT ERRED IN DEPRIVING THE PLAINTIFF OF ANY AND ALL RECOURSE FOR THE DEFENDANT’S ALLEGED NEGLIGENCE AND/OR STRICT PRODUCT LIABILITY, BASED ON AN AMBIGUOUS EXCULPATORY CLAUSE THAT CONTRAVENED PUBLIC POLICY AND THE FLORIDA CONSTITUTION. 1

A. *The failure of the exculpatory clause to clearly identify who or what entity the Plaintiff was releasing, rendered it ambiguous and unenforceable.* 1

 (1) **The sole use of unidentified, undefined, untethered initials failed to clearly identify the party or entity that the Plaintiff was releasing when he signed the exculpatory clause in the Defendant Seller’s contract.2**

 (2) **For all practical purposes, a case against a foreign manufacturer often precludes the Plaintiff from the ability to bring a lawsuit. 10**

 (3) **The plain language of the subject exculpatory clause excludes waiver of claims based on strict product liability. 12**

B. *Defendant’s exculpatory clause contravenes Florida’s well-established public policy first articulated in West v. Caterpillar Tractor Co., Inc., that sellers in the stream of commerce are responsible for strict product liability when a product causes injury.* 16

(1) This clause violates public policy.....	16
(2) Its silence on two issues the Plaintiff raised in his Initial Brief implies Defendant’s concession to both points.....	19
Conclusion.....	20
Certificate of Compliance.....	21
Certificate of Service.....	22

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE(S)</u>
<i>Alexander v. The Sports Authority, Inc.</i> , 2007 WL 1745328 (D. Md. 2007)	7
<i>Brooks v. Paul</i> , 219 So.3d 886 (Fla. 4th DCA 2017)	6
<i>Delta Air Lines, Inc. v. McDonnell Douglas Corp.</i> , 503 F.2d 239 (5th Cir. 1974) <i>cert. denied</i> , 421 U.S. 965 (1975)	15, 16
<i>Dows v. Nike, Inc.</i> , 846 So.2d 595 (Fla. 4th DCA 2003)	14
<i>Hackett v. Grand Seas Resort Owner’s Ass’n, Inc.</i> , 93 So.3d 378 (Fla. 5th DCA 2012)	8, 9
<i>Imerys Talc America, Inc. v. Ricketts</i> , 262 So.3d 799 (Fla. 4th DCA 2018)	10
<i>Kuhl</i> , 2022 WL 898566 (S.D. Fla. 2022)	8, 9, 10
<i>Loewe v. Seagate Homes, Inc.</i> , 987 So.2d 758 (Fla. 5th DCA 2008)	17
<i>Mazzoni Farms, Inc. v. E.I. DuPont de Nemours and Co.</i> , 761 So.2d 306 (Fla. 2000)	15
<i>Merlien v. JM Family Enterprises, Inc.</i> , 301 So.3d 1 (Fla. 4th DCA 2020)	6, 19, 20

Plancher v. UCF Athletics Ass’n, Inc.,
121 So.3d 1097 (Fla. 5th DCA 2013)
quashed in part on other grounds, 175 So.3d 724 (Fla. 2015) 20

Rose v. ADT Sec. Services, Inc.,
989 So.2d 1244 (Fla. 1st DCA 2008) 18, 19

Samuel Friedland Family Enterprises v. Amoroso,
630 So.2d 1067 (Fla. 1994)..... 11

Sanislo v. Give Kids the World, Inc.,
157 So.3d 256 (Fla. 2015)passim

West v. Caterpillar Tractor Co. Inc.,
336 So.2d 80 (Fla. 1976) 11, 16, 17

OTHER AUTHORITIES

11 *Williston on Contracts* §32:10 (4th Ed.)..... 15

ARGUMENT

THE TRIAL COURT ERRED IN DEPRIVING THE PLAINTIFF OF ANY AND ALL RECOURSE FOR THE DEFENDANT'S ALLEGED NEGLIGENCE AND/OR STRICT PRODUCT LIABILITY, BASED ON AN AMBIGUOUS EXCULPATORY CLAUSE THAT CONTRAVENED PUBLIC POLICY AND THE FLORIDA CONSTITUTION.¹

A. The failure of the exculpatory clause to clearly identify who or what entity the Plaintiff was releasing, rendered it ambiguous and unenforceable.

Twice in its Answer Brief, the Defendant implicitly acknowledges the failings in its waiver. As Defendant asks:

Would it ***have been the better practice*** to have this lone provision state 'Release **Broward Motorsports?**' ***Perhaps.***

(Answer Brief, pp. 10-11). (Emphasis added). Several pages later, Defendant writes:

Appellee acknowledges that it ***may have been better*** if the words 'strict liability' was (sic) included in the text of the exculpatory clause at issue.

(Answer Brief, p. 20). (Emphasis added). Even recognizing these failings, the Defendant still wants this Honorable Court to uphold the erroneous dismissal.

¹In his Reply Brief, Mr. Harrell repeats the subheadings set forth in his Initial Brief, while addressing the Defendant's four sub-points by number in the context of those two sections.

(1) The sole use of an unidentified and undefined abbreviation, failed to clearly identify the entity that Plaintiff was releasing when he signed the waiver in the Defendant Seller's contract.

The Defendant believes that its sole use of the abbreviation "**BMS**" to describe who or what entit(ies) Plaintiff purportedly waived the ability to sue, was a legally sufficient description. While one could "guess," the document failed to define **the legal entit(ies)** being released.

A sophisticated purchaser may have believed that Defendant's failure to properly describe the entit(ies) being released made the exculpatory clause a legal nullity, giving the purchaser comfort in believing there was no harm in signing the clause, and no need to protest it during the transaction. This Court should respectfully **refuse to allow the drafter of a contract to define its critical terms after an injured victim makes a claim.**

Defendant steadfastly stands by the notion that "**BMS**" standing alone was enough to advise the purchaser Plaintiff of who or what he was releasing. Defendant "doubles down" by trying to analogize the unrecognizable, unidentified initials, "**BMS**," to actual famous, well-recognized acronyms like "NFL," "KFC" and "UPS. (Answer Brief, p. 9).

“**BMS**” is certainly not on par with abbreviations like “NFL,” “KFC,” or “UPS.” Even if it were, while these companies may use these abbreviations in their *branding* and *marketing*, this Court can be sure that they carefully identify and describe *actual legal entities* in their contracts and other legal documents.

In trying to show why “**BMS**” is supposedly such an obvious and clear acronym for “Broward Motorsports,” Defendant desperately boldfaces the *middle lower case “s”* in “Motorsports,” to support that a person of “ordinary intelligence” surely knew that BMS was the abbreviation taken from “**Broward Motorsports**.” (Answer Brief, p. 10) (underlined emphasis added, bold facing in original). Even if the initials made sense (*i.e.*, if Defendant had used “*BM*” instead of “**BMS**”), and even if they were as recognizable as “NFL,” or “KFC” or “UPS,” unidentified initials cannot be used in contracts or other legal documents, without further describing who or what legal entit(ies) the signatory is releasing from responsibility for negligently causing injury.

Undefined or undescribed initials are meaningless in contracts and other legal documents. While “texting” vernacular may allow users to freely use abbreviations like “LOL,” “FWIW” “YOLO” and other initials as shorthand,

legal documents involving the rights and obligations of parties, do not.

Is there any legal universe in which a final judgment entered in favor of, or against, **a mere abbreviation, or a group of unspecified initials** would be proper or could be executed upon? Despite Defendant's suggestion, a reference to context clues in its contract does not tether the abbreviation "BMS" to any actual legal entities. (Answer Brief, p. 10).

Undescribed initials or abbreviations may also stand for a plethora of different entities. All one has to do is Google "BMS" to discover the many different groups and organizations it may describe; *e.g.*, "Bristol Meyers Squibb," "Battery Management Systems," "Bristol Motor Speedway," "BMS LLC" (a leading developer of secure high speed data, and **not** a retailer of motorcycles), and "BMS Motorsports in California" (which Plaintiff actually showed the trial court to illustrate this very point (R 595-97)), just to name a few.

The Defendant urges that the "breadth" of its clause is comparable to the one found in *Sanislo v. Give Kids the World, Inc.*, 157 So.3d 256 (Fla. 2015), rendering it enforceable. In *Sanislo*, the Florida Supreme Court held that the failure to use a phrase like "even for our own negligence" did not

invalidate the exculpatory clause barring a claim made for an injury sustained at an amusement park.

Defendant's argument is misplaced. *Sanislo had nothing to do with the identification* of the entity that the plaintiff had released upon signing the waiver. *Sanislo* involved the exoneration of an entity for its own negligence even though the clause did not say so specifically. The release in *Sanislo* stated in pertinent part:

I/We hereby release ***Give Kids the World, Inc.*** and all of its agents, officers, directors, servants, and employees from any liability whatsoever...

I/We further agree to hold harmless and to release ***Give Kids the World, Inc.*** from and against any and all claims and causes of action of every kind...*Id.* at 258-59. (Emphasis added).

The clause in *Sanislo* clearly identified the entity being released. That case would have been very different had its release contained only the initials "GWTWI," **without spelling out what those initials stood for**, even if "Give Kids the World, Inc." *had* also been mentioned in other parts of the document.

The Defendant overlooks that the law **disfavors exculpatory clauses**, and courts only enforce them when they are **unambiguous**. See,

Merlien v. JM Family Enterprises, Inc., 301 So.3d 1, 4 (Fla. 4th DCA 2020) (citing, *Sanislo*, 157 So.3d at 260). This Court in *Brooks v. Paul*, 219 So.3d 886, 888 (Fla. 4th DCA 2017) mandated that exculpatory clauses “will be **strictly construed** against the party claiming to be relieved of liability.” (Emphasis added).

While Broward Motorsports is listed in several places after explaining all those who are doing the “releasing,” (e.g., heirs, assigns etc.) there is only one part of that clause that matters for this Court’s purposes: the part where the Defendant **failed to clearly and unambiguously identify the entity or entities that the purchaser was releasing**. (R 288).

The only person or entity the contract releases is three undefined initials “**BMS**.” This Honorable Court should not affirm the trial court’s ruling concluding that the Plaintiff waived all of his claims against an entity merely described by an unexplained abbreviation.

Maybe this Defendant was just lazy in its drafting. Maybe it was being sneaky, hoping to ensnare signatories into releasing any and all possible related entities, without so advising, or defining them, or spelling them out.

Clearly, the Defendant certainly understands the importance of identifying proper legal entities, as seen in its admonishing emails sent to Plaintiff's counsel. (R 290-91; 169, ¶5). Whatever the case, the use of these undefined initials to encompass multiple unidentified entities is fatal to the enforceability of this exculpatory clause, and respectfully requires reversal of this dismissal.

The Defendant relies on the inapposite Maryland federal trial court case, *Alexander v. The Sports Authority, Inc.*, 2007 WL 1745328 (D. Md. 2007). In *Alexander*, the plaintiff sued The Sports Authority, and two other entities for negligence and product liability. *Id.* at 1. The exculpatory clause at issue stated in pertinent part:

I AGREE that I hereby release **this bicycle shop**, equipment manufacturer, and distributor, from any and all responsibility or liability for physical injuries to myself or others or property damage resulting from the use of this equipment. Except to the extent that such claim might be based on the sole and exclusive negligence of **this bicycle shop**, I AGREE **NOT** to make a claim against or sue **this bicycle shop** for injuries or damages relating to bicycling and/or the use of this equipment.

As that court found, the plain language of that clause made it clear to the signatory of *that* contract that he was releasing the bicycle shop he

bought the bike from...”**this** bicycle shop.” Because that was so clear, the court properly found that the clause could be enforced even without actual mention of the defendant, “The Sports Authority.”

Irrespective of the public policy issues, the Defendant’s exculpatory clause never stated that Mr. Harrell was releasing “**this** Seller” or “**this** Dealer.” The only “entity” that Defendant advised Mr. Harrell he was releasing for the specified claims was the unidentified, unexplained, undefined, “**BMS**.”

Hackett v. Grand Seas Resort Owner’s Ass’n, Inc., 93 So.3d 378 (Fla. 5th DCA 2012) analyzed in detail in Plaintiff’s Initial Brief is much more akin to these facts. There, the court refused to enforce an exculpatory release against “Management,” because the contract did not clearly define “Management.”

Even though “Grand Seas Resort” was named in the first paragraph of the contract, and a person signed off as the “Grand Seas Resort” representative, the contract **failed to properly connect** “Grand Seas Resort” to the term “Management.” See *also, Kuhl*, 2022 WL 898566 (S.D. Fla. 2022) (distinguishing *Hackett* by noting that the term “Management” was

not tied to any particular entity as compared to the document in *Kuhl*, where the term “and affiliates” was also used, illustrating that unlike the term “Management” in *Hackett*, “affiliates” was “not **untethered and devoid of discernable meaning**”).

Florida law mandates that before a court may enforce an exculpatory clause, “the wording must be so clear and understandable” that an ordinary knowledgeable person would know what he or she was contracting away. See, *Sanislo*, 157 So.3d at 260-61. There is nothing about this wording, including the subsequent mention of Broward Motorsports, that identifies exactly who or what “**BMS**” is, and who or what was being released from liability.

The second paragraph of the clause where Mr. Harrell had to “indemnify and hold harmless “***Broward Motorsports***” from any and all such claims...” buttresses the ambiguity. (R 288). Why didn’t the Defendant repeat the use of “**BMS**” in the “hold harmless/indemnification” section (as the Defendant in *Sansilo* did when it named the exact same entity in both places)? Don’t **two differently referenced entities** in these waiver provisions reflect that **two different entities** are involved?

How is it clear to the signatory that the untethered initials, “BMS,” actually represent the same legal entity as “Broward Motorsports” as found in the indemnification provision, without providing some guidance or explanation to that effect? By comparison, the *Sanislo* defendant repeated the precise and exact same entity in both the exculpatory part of the clause, *as well as* in the indemnification provision. *Id.* at 258-59.

As eloquently described in *Kuhl* the floating, undefined letters “**BMS**” were also “**untethered and devoid of discernable meaning.**” *Id.* at 4. The trial court erred in depriving the Plaintiff of his constitutional right to access the courts by dismissing his claims based on the mere use of unspecified, undefined and unidentified initials.

(2) For all practical purposes, a case against a foreign manufacturer often precludes the Plaintiff from the ability to bring a lawsuit.

The Defendant insists that this exculpatory clause still leaves the Plaintiff with a right of action against the manufacturer, Suzuki, a **Japanese** manufacturer over which the Plaintiff may not get jurisdiction. As this Court has ruled in cases like *Imerys Talc America, Inc. v. Ricketts*, 262 So.3d 799 (Fla. 4th DCA 2018), dismissal is proper when a foreign manufacturer lacks

minimum contacts with the State. Suzuki will likely claim lack of minimum contacts, and will defend by asserting that the negligence here was attributable to this Defendant dealer in the assembly of this product, as the Plaintiff has also alleged. (R 218-19).

When the Florida Supreme Court adopted strict tort liability in *West v. Caterpillar Tractor Co. Inc.*, 336 So.2d 80 (Fla. 1976), it recognized that a manufacturer that places a potentially dangerous product on the market and encourages its use, undertakes a special responsibility toward members of the public who may be injured by the product, even in the absence of privity. *Id.* at 86. The supreme court expanded this doctrine to others in the distributive chain—including retailers—in *Samuel Friedland Family Enterprises v. Amoroso*, 630 So.2d 1067, 1068 (Fla. 1994) (“Since *West*, Florida courts have expanded the doctrine of strict liability to others in the distributive chain including retailers, wholesalers, and distributors.” (Citations omitted)).

The Plaintiff “might” be able to sue Suzuki as the original manufacturer. However, a potential action against another entity in the chain of distribution

does not relieve the Defendant from its use of an ambiguous exculpatory clause.

(3) The plain language of the subject exculpatory clause excludes waiver of claims based on strict product liability.

The Defendant urges that the breadth and clarity of its waiver language covers any and all claims that a victim may bring. The language of the clause belies that argument.

The Defendant cites *Sanislo* to support that the language involved in our case was just as broad and all-encompassing as the language used in that case. In *Sanislo*, the plaintiffs agreed to hold harmless and release Give Kids the World, Inc.:

[f]rom and against **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... *Id.* at 259.**
(Emphasis added).

Sanislo's broad, all-encompassing language is a far cry from the carefully circumscribed language Defendant used to describe the actions being released in this case. (R. 288). The Release started out broad, advising the signatory that it would "release BMS for any liability or

responsibility in any way for personal injury or death, or other damages,” “including property damages...” (R. 288).

However, it then specifically narrowed “any liability or responsibility in any way for personal injury,” by **meticulously identifying specific claims that the signatory was waiving** (and in turn, identifying claims that were **not** included) limiting them to those:

[W]hich may be due or in part **to have been caused by the negligence or gross negligence** of Broward Motorsports, its agents, employees, officers, directors, or subsequent corporate entities, **this includes both active and passive negligence, as well as any liability for negligent failure to adequately warn** which I might otherwise have as a cause of action or lawsuit against Broward Motorsports... (R. 288) (emphasis added).

The indemnity provision had Mr. Harrell agree to:

indemnify and hold harmless Broward Motorsports from any and all **such** claims or causes of action by whomever made and wherever presented. (R. 288) (emphasis added).

Plainly, the Defendant only sought release of any liability or responsibility for personal injury “**caused by the negligence or gross negligence**” of Broward Motorsports, including both “**active and passive negligence**” and “any liability for **negligent failure to adequately warn.**”

(R. 288). In the indemnity provision, the signatory also agreed to indemnify and hold [Broward Motorsports—again NOT BMS] harmless from any “**such**” claims, clearly using the word “such” to tie that provision to the exculpated claims referenced above.

The Defendant asserts those words and phrases are surplusage that this Court should disregard. It relies on cases like *Dows v. Nike, Inc.* 846 So.2d 595 (Fla. 4th DCA 2003) to assert that the word “any” has no limitation. Defendant ignores that its exculpatory clause contained **specific limitations** and qualifications.

Why would the Defendant specifically enumerate theories of liability and causes of action, if it meant to have the purchaser waive any and all causes of action **without qualification**? Why would the Defendant explicitly enumerate only the “negligent failure to warn” if it really meant to include **all** claims for strict liability and other negligent product defects? Irrespective of how this Honorable Court rules on the ambiguity, consideration, or public policy issues, clearly **any claims for strict product liability are viable and actionable** because the Plaintiff never waived his right to bring them.

Williston on Contracts admonishes that when general and specific clauses conflict, the specific clause governs the meaning of the contract. 11 *Williston on Contracts* §32:10 (4th Ed.) *Id.* at 1. As Professor Williston wrote, “even absent a true conflict, **specific words will limit the meaning of general words** if it appears from the whole agreement that the parties’ purpose was directed solely toward the matter to which the specific words or clause relate.”

Dicta in *Mazzoni Farms, Inc. v. E.I. DuPont de Nemours and Co.*, 761 So.2d 306 (Fla. 2000) analyzing the “**qualifying**” language in the release is also instructive. (“Nevertheless the ‘any and all claims...of whatsoever kind’ **is qualified later...**”). Here too **there was qualifying language** in the release that limited the “any and all claims” language, and did not include claims for strict liability.

Overlapping with the violation of public policy argument set forth below, Defendant’s reliance on *Delta Air Lines, Inc. v. McDonnell Douglas Corp.*, 503 F.2d 239 (5th Cir. 1974), *cert. denied*, 421 U.S. 965 (1975), is also misplaced. The opinion both applies **California** law and pre-dates the adoption of strict liability in Florida.

Delta involved a **commercial transaction** between an airline and an airplane manufacturer that ended with collapsed nose gear. *Id.* at 240. “[T]here were no personal injuries” involved. *Id.* (Emphasis added).

Instead, Delta sought the cost of repair, based in part on strict product liability. *Id.* It was under those discrete circumstances that the Fifth Circuit upheld the broad “warranty article” in the purchase contract, finding it subsumed Delta’s claims for property damage, even those based on strict product liability. *Id.* at 241-43; 245.

Delta did not involve personal injury, and does not apply here. The Plaintiff did not waive his right to bring strict liability claims. At the very least, this Court should reverse the trial court’s dismissal of those claims.

B. Defendant’s exculpatory clause contravenes Florida’s well-established public policy first articulated in West v. Caterpillar Tractor Co., Inc., that sellers in the stream of commerce are responsible for strict product liability when a product causes injury.

(1) This clause violates public policy.

Failing to appreciate the rationale behind strict product liability has led the Defendant to mislead this Court. Defendant refutes Mr. Harrell’s assertion that this exculpatory clause has essentially left him with no remedy, vociferously arguing that Plaintiff has a claim against Suzuki. Defendant

omits that Suzuki is a foreign corporation that will undoubtedly contest jurisdiction based on the lack of minimum contacts.

This case typifies why Florida adopted strict product liability in *West v. Caterpillar* in the first place. When a manufacturer or retailer or distributor puts a purportedly defective product into the stream of commerce, any entity in that chain may be held responsible for injuries sustained by the victim, irrespective of privity. Thus, while Defendant may assert that the Plaintiff has a viable cause of action against Suzuki, being able to sue a Japanese manufacturer in Florida is another matter entirely.

Defendant criticizes Plaintiff's reliance on *Loewe v. Seagate Homes, Inc.*, 987 So.2d 758 (Fla. 5th DCA 2008) as illustrative that exculpatory clauses like these that allow entities in the chain of distribution to exonerate themselves in advance of injuries caused by defective products, are against public policy. The Defendant cites no authority suggesting that strict liability is **not** a part of Florida's judicial fabric. It cites no law to refute that a sellers of defective products should not be able to exonerate themselves **in advance** with an exculpatory clause.

The Defendant does not refute that there is clearly a distinction between a pre-injury exculpatory clause insulating a defendant from liability for a defective product, and those used when contact sports, thrill-seeking activities, or gym memberships are involved. While Defendant correctly asserts, that “Florida law is complete with cases enforcing exculpatory clauses in personal injury cases,” those cases involve activities like trampoline parks and tackle football. (Answer Brief, p. 25).

Defendant tries to refute Plaintiff’s assertion about the absence of cases allowing sellers of consumer goods to immunize themselves with the use of an exculpatory clause, by relying on **one** case involving contractual **warranty claims**, *Rose v. ADT Sec. Services, Inc.*, 989 So.2d 1244, 1248 (Fla. 1st DCA 2008), asserting:

Specifically, **contrary to the Appellant’s argument that exculpatory clauses are never permitted in claims involving allegations of strict liability, Florida law permits their enforcement** as long as they are clear and understandable to the ordinary individual. *See, Sanislo supra*. (Answer Brief, p. 27) (Emphasis added).

Defendant does not cite the part in *Rose* where the court distinguished strict liability **in tort** from implied warranty actions arising from contracts. *Id.*

at 1248. *Rose* involved a contract where the ADT sales man making misrepresentations about its fire alarm system and resulting property damage.

Rose involved warranty claims. Our case involves tort claims. *Rose* is inapposite, and does not refute that pre-injury exoneration from injuries caused by defective product is against Florida's public policy. The idea that a retailer could "end-around" that policy by placing an exculpatory clause in the contract to buy a consumer product contravenes Florida's public policy.

(2) Its silence on two issues the Plaintiff raised in his Initial Brief implies Defendant's concession to both points.

The Defendant failed to address two key points raised in the Initial Brief: (1) the failure of consideration, and (2) the trial court's misplaced reliance on *Merlien v. JM Family Enterprises, Inc.*, 301 So.3d 1 (Fla. 4th DCA 2020).

The exculpatory clause explicitly states "**in consideration of \$10**, and other good and valuable consideration..." Whether there was consideration impermissibly required the trial court to look outside the Complaint's four corners.

The Defendant does not assert that it “paid” the \$10, or that the four-corners of the complaint showed that it was paid. By not responding, **Defendant implicitly concedes the argument’s correctness**, necessitating reversal.

The Defendant also fails to respond to the Plaintiff’s argument regarding the trial court’s reliance on *Merlien* and *Plancher v. UCF Athletics Ass’n, Inc.*, 121 So.3d 1097 (Fla. 5th DCA 2013), *quashed in part on other grounds*, 175 So.3d 724 (Fla. 2015) (Initial Brief, pp. 19-23). The trial court used *Merlien* to support its finding that the use of untethered initials to describe the entity being released, was legally sufficient.

Neither the Defendant nor the trial court acknowledge **that neither *Merlien* nor *Plancher* allowed the use of unspecified and untethered initials to describe the entity being released**, amounting to another implicit concession of error.

CONCLUSION

This Court should respectfully reverse the erroneous dismissal for one or more of the following reasons:

- (1) The Defendant’s contract fails to properly identify the legal entit(ies) it required the Plaintiff to release;

- (2) The exculpatory clause excludes product liability claims from its breadth, saving those claims at the very least;
- (3) The contract fails for lack of consideration (or the court needed to explore that outside the complaint's four corners); and
- (4) The exculpatory clause violates public policy.

It should remand to reinstate Plaintiff's claims.

CERTIFICATE OF COMPLIANCE

Appellant's/Plaintiff's Reply Brief has been typed using the 14-point Arial font, and the text does not exceed 4,000 words.

By: /s/ Julie H. Littky-Rubin
JULIE H. LITTKY-RUBIN
Florida Bar No. 983306

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished via electronic mail through the Florida Courts E-filing Portal on June 9, 2022 to:

Jason M. Azzarone, Esq. Gregory S. Glasser, Esq. La Cava, Jacobson & Goodis, P.A. 501 East Kennedy Blvd., 12 th Floor Tampa, FL 33602 jazzarone@ljglegal.com mlara@ljglegal.com gglasser@ljglegal.com jperdomo@ljglegal.com	Lawrence E. Lafferty, Esq. Jonathan M. Midwall, Esq. Cole, Scott & Kissane, P.A. P.O. Box 569015 Miami, FL 33256 lawrence.lafferty@csklegal.com jonathan.midwall@csklegal.com peggy.may@csklegal.com yeny.guerra@csklegal.com
--	--

/s/Julie H. Littky-Rubin

Julie H. Littky-Rubin, Esq. for
CLARK, FOUNTAIN, LA VISTA,
PRATHER, & LITTKY-RUBIN, LLP
1919 N. Flagler Drive, 2nd Floor
West Palm Beach, FL 33407
PH: (561) 899-2100
Fax: (561) 832-3580
Email: jlittkyrubin@clarkfountain.com
awayne@clarkfountain.com
Florida Bar No. 983306
Attorney for Appellant/Plaintiff