2013 IL App (1st) 131059-U

FIFTH DIVISION
SEPTEMBER 13, 2013

No. 1-13-1059

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HALLORAN & YAUCH, INC.,	)	Appeal from the Circuit Court of
Plaintiff-Appellant,	)	Cook County.
v.	)	No. 10 L 7063
ROUGHNECK CONCRETE DRILLING & SAWING COMPANY,	)	Honorable Raymond W. Mitchell, Judge Presiding.
Defendant-Appellee.	)	

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices McBride and Taylor concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The contract between plaintiff and defendant contained a valid exculpatory clause, which operated to bar plaintiff's breach of contract claim. (2) The contract's limitation of damages clause was enforceable, thereby limiting plaintiff's available damages to the amount paid under the contract.

¶ 2 The instant interlocutory appeal arises from defendant Roughneck Concrete Drilling & Sawing Company's performance as a sub-subcontractor pursuant to a contract between defendant and plaintiff Halloran & Yauch, Inc., a subcontractor. Plaintiff, who had been hired as a

subcontractor to perform work in a concrete parking garage, hired defendant as a sub-subcontractor to drill nine holes in the west end of the parking garage. During the course of defendant's work, defendant drilled four holes through structural support cables. As a result, the general contractor of the project withheld over $76,000 from the compensation it owed plaintiff in order to repair the damage. Plaintiff filed suit against defendant for breach of contract and gross negligence, and defendant filed a motion for summary judgment. The trial court denied defendant's motion for summary judgment, but interpreted the contract to impose limits on the amount of damages that plaintiff could recover. Plaintiff appealed the trial court's decision concerning the limitation of damages provision in the contract and defendant cross-appealed, arguing that the trial court erred in denying its motion for summary judgment. We dismissed the appeals for lack of jurisdiction, but later granted plaintiff's petition for leave to appeal pursuant to Illinois Supreme Court Rule 308 (eff. Feb. 1, 1994). For the following reasons, we answer the questions certified by the trial court in the affirmative.

¶ 3 BACKGROUND

¶ 4 As noted, both parties appealed the trial court's decision, and we dismissed the appeal for lack of jurisdiction. *Halloran & Yauch, Inc. v. Roughneck Concrete Drilling & Sawing Co.*, 2013 IL App (1st) 121104-U. However, as the facts underlying the trial court's decision remain the same, we repeat them as set forth in our earlier order.

¶ 5 On June 17, 2010, plaintiff filed a three-count complaint against defendant. The complaint alleges that in January 2009, plaintiff, a commercial irrigation contractor, was hired as a subcontractor by Bulley & Andrews, LLC (Bulley), the general contractor for work to be

preformed at a parking garage in Chicago. The work to be performed by plaintiff included upgrades to the irrigation system for the landscaping at and near the parking garage. The work required holes to be cut into the concrete floors and ceilings of the parking garage so that plaintiff could place its irrigation pipes through the holes. Plaintiff hired defendant, a commercial concrete sawing and drilling contractor, as a sub-subcontractor to perform the required drilling. Plaintiff and defendant executed a written contract on April 7, 2009, which provided that defendant would drill 18 holes, 9 in the east elevation of the parking garage and 9 in the west elevation. The instant case only involves the work performed in the west elevation.

¶ 6 The complaint alleges that as part of defendant's work, defendant was required to perform electronic scanning of the concrete prior to drilling so that defendant could locate any structural supports, post tension cables, utility lines, or other items embedded in the concrete. On May 6, 2009, defendant visited the parking garage to scan and drill the holes in the west elevation of the parking garage. The next day, plaintiff received a telephone call from a representative of Bulley informing plaintiff that four of the holes drilled by defendant cut through or damaged the concrete reinforcement bars and the post tension cables embedded in the concrete, which were integral to the structural stability of the parking garage; defendant did not inform plaintiff of the damage caused by the holes. As a result of the damage, the parking garage required extensive repairs.

¶ 7 The first count of the complaint alleges that defendant breached its contract with plaintiff by damaging post tension cables. Plaintiff claims that as a result of defendant's actions, it has incurred damages in the amount of $76,495.00, which are directly related to the analysis and

repair of post tension cables damaged by defendant.

¶ 8 The second count of the complaint alleges gross negligence and willful conduct by defendant. The complaint alleges that when defendant drilled the first hole that damaged a post tension cable, defendant knew or should have known that the location of the drilled hole was incorrect and knew or should have known that it should re-scan the areas to be drilled prior to drilling further. However, defendant failed to re-scan the area or cease drilling. Defendant then drilled a second successive hole that also damaged a post tension cable. At that time, defendant had actual knowledge that the location drilled was again incorrect and knew or should have known that defendant should re-scan the area prior to further drilling. Defendant failed to re-scan the area or cease drilling.

¶ 9 The complaint alleges that defendant then drilled a third successive hole that damaged a post tension cable. Based on its previous actions, defendant had actual knowledge that the location drilled was incorrect and knew or should have known that the area needed to be re-scanned prior to any future drilling. However, defendant again failed to re-scan the area and failed to cease drilling. Finally, defendant drilled a fourth successive hole damaging another post tension cable.

¶ 10 The complaint alleges that defendant committed gross negligence[1] by continuing to drill after damaging the post tension cables and by failing to re-scan the area to be drilled after previous holes had damaged post tension cables. The complaint alleges that the drilling of the holes was "willful, reckless and in conscious disregard for the apparent and obvious facts and

[1] The contract limited negligence by defendant to gross negligence or willful misconduct.

conditions of the Premises of which [defendant] was wholly aware." The complaint further alleges that at no time during the drilling did defendant inform plaintiff that it had damaged at least four post tension cables. As a result of the gross negligence and willful conduct of defendant, plaintiff alleges that it incurred damages in the amount of $76,495.00 and requested judgment for that amount.

¶ 11 The third count of the complaint, not at issue in the instant appeal, alleges in the alternative that defendant committed fraud by stating that it would properly electronically scan the areas of the parking garage prior to drilling.

¶ 12 Attached to the complaint was the four-page contract executed by the parties. The contract contemplates work to be performed at three locations for a total of $14,355.00; the amount to be paid for the work at the parking garage at issue in the instant case was $2,970.00 for drilling 18 holes, 9 in the east elevation and 9 in the west elevation of the parking garage. Under the description of the work, the contract includes the statement "ALL HOLES ARE TO BE APPROVED BY OTHERS BEFORE WE DRILL." (Emphasis in original.) After the price, in the "Notes" section, the contract includes the following:

> "ROUGHNECK CONCRETE DRILLING AND SAWING CO.
> HAS BEEN HIRED TO PERFORM SCANNING. IF THE
> CLIENT DOES NOT HIRE ROUGHNECK TO PERFORM THE
> CUTTING PROCEDURES, ROUGHNECK WILL NOT BE
> HELD LIABLE IN ANY WAY FOR DAMAGE CAUSED BY
> ANY AND ALL CONCRETE CUTTING OR CORING

EXECUTED BY ANY AND ALL OTHER CONTRACTORS IN THE SCANNED AREA. THE AREA TO BE SCANNED MUST BE A MINIMUM OF 4" FROM ANY INTERSECTING POINT, WALL OR COLUMN TO THE SURFACE BEING SCANNED." (Emphasis in original.)

¶ 13 On the second page of the contract, directly before the "Terms and Conditions of Sale" section, the following language appears:

"Disclaimer: Roughneck makes no, and hereby expressly disclaims all warranties, express or implied, with respect to the nature, quantity or quality of the services to be performed hereunder. Except to the extent of its gross negligence or willful misconduct, Roughneck shall not be liable to the customer for any damages as a result of its performance or failure to perform the services."

Under the "Terms and Conditions of Sale" section, paragraphs 2 and 3 provide:

"2. Contract Claims Only. Customer's claims with respect to the services furnished hereunder shall be limited to the contractual warranties and remedies provided in this agreement and may be brought only in an action for breach of contract. Customer shall not make any claim against Roughneck based on any theory of tort, including but not limited to strict liability or negligence

> theories, except to the extent of the gross negligence or willful misconduct of Roughneck.
>
> 3. Liability of Roughneck. The total liability of Roughneck under this agreement for breach of warranty, or for any other breach of the Agreement or for any claim related to services furnished by Roughneck under this Agreement shall in no event exceed the amount paid to Roughneck by Customer hereunder. In no event shall [R]oughneck or its agents be liable for special, incidental or consequential damages of any kind whatsoever, or for the loss of profits or revenue, or for loss of use, or for actual losses or for loss of production or progress of construction, whether resulting in any manner from services furnished under this agreement or from [R]oughneck's breach of any warranty or any other obligation of [R]oughneck under this agreement. [T]he foregoing limitation of damages and disclaimer of special, incidental and consequential damages shall apply to all causes of action whatsoever asserted against [R]oughneck pertaining to the performance or nonperformance of the services or of [R]oughneck's other obligations under this agreement."

¶ 14 On August 9, 2010, defendant filed its answer and affirmative defenses. Defendant raised two affirmative defenses. The first claimed that, pursuant to the terms of the contract, plaintiff's

potential damages were limited to the amount of the contract, which was $3,230.00.[2] The second claimed that, pursuant to the contract, all areas to be scanned were to be a minimum of four inches from any intersecting point, wall, or column; however, plaintiff instructed defendant to scan areas within four inches of an intersecting point, wall, or column, so plaintiff knew that accuracy of the scanning was not guaranteed and accepted that risk by instructing defendant to scan those areas.

¶ 15 In the same pleading, defendant included a counterclaim for contribution against plaintiff. The counterclaim stated that the contract, as well as a second contract entered into concerning the same work, contained a requirement that plaintiff approve all holes before defendant drilled. The counterclaim alleged that the holes were approved by plaintiff, so to the extent that they caused any damage, plaintiff's approval proximately caused the damage.

¶ 16 On August 1, 2011, defendant filed a motion for summary judgment and to strike the *ad damnum* clause of each count of the complaint. Defendant argued: (1) since plaintiff did not possess an ownership interest in the parking garage, it had no standing to sue defendant for property damage; (2) plaintiff's negligence claim was barred by the *Moorman* doctrine; (3) plaintiff waived its right to bring the instant lawsuit when it executed the contract with defendant, which contained "clear and unambiguous limitations on liability and damages"; and (4) plaintiff's fraud claim was based on promissory fraud, which is not actionable in Illinois. Defendant also requested that the prayers for relief in all three counts be stricken because the

[2] It is not clear how the amount was calculated, since the portion listed for the work at the parking garage was $2,970.00.

contract contained language limiting the possible damages to the amount paid to defendant under the contract.

¶ 17 Attached to the motion for summary judgment was a copy of plaintiff's subcontract with Bulley, the general contractor on the project. The subcontract listed the owner of the property as InterPark, Inc. (InterPark). Section 7.4 of the subcontract provided:

> "Waiver of Subrogation. Subcontractor, on behalf of itself and all of its Sub-subcontractors, hereby waives all rights of action and subrogation against General Contractor, Owner and any lender for the Project, and their officers, agents, and employees to the extent of any insurance recoveries that may be obtained by such waiving party including, but not limited to personal injury and property damages including damages to tools and equipment caused by fire and other perils covered by insurance, except such rights as it may have to proceeds of insurance held by any other person as trustee or otherwise on behalf of Subcontractor."

The subcontract also provided that violation of any condition of the contract would constitute default and that, in the case of default, Bulley had the option of terminating the subcontract and ceasing to make further payment to plaintiff.

¶ 18 Also attached to the motion for summary judgment were plaintiff's answers to interrogatories, in which plaintiff stated that $76,495.00 was withheld by Bulley from sums that were due to plaintiff for the work performed on the parking garage.

¶ 19 In its response to the motion for summary judgment, plaintiff argued: (1) it had standing to file suit against defendant because they had a contractual relationship and plaintiff suffered actual damages; (2) if plaintiff did not have standing for its own claim, it had standing to file suit against defendant to recoup its damages through the theory of subrogation; (3) an exception to the *Moorman* doctrine exists because if plaintiff does not have standing for the contract action, then it is left without a remedy if it cannot bring a tort action; and (4) the limitation of damages and limitation of liability provisions in the contract are ambiguous and unconscionable. Plaintiff's response also noted that, as a result of the problems with the drilling, plaintiff did not pay defendant for its work.

¶ 20 Attached to plaintiff's response was an affidavit from Thomas Halloran, a vice president with plaintiff and the person who had signed the contract with defendant. The affidavit stated that he had served as the vice president of plaintiff for over 20 years. The affidavit further stated that on April 7, 2009, Halloran signed the contract with defendant; plaintiff did not draft the contract. Halloran was not aware of the terms concerning the limitation of damages when he signed the contract and was never made aware of the terms by defendant's representative. If he had been made aware of the limitations of damages provision, he would not have signed the contract. Finally, the affidavit stated that plaintiff had retained defendant a number of times previously and the April 7, 2009, contract was the first time their agreement was reduced to writing; generally, the agreement to perform work was verbal.

¶ 21 On December 9, 2011, the trial court issued a written order concerning defendant's motion for summary judgment. The trial court found that plaintiff did not have standing to file a

cause of action in tort against defendant because plaintiff did not have an ownership interest in the damaged property. The trial court further found that the tort claim was for strictly economic loss and was barred by the *Moorman* doctrine. However, the court noted:

> "the tort issue is not wholly resolved by the standing and *Moorman* issues because in the parties' contract, Defendant agreed to be liable for damages arising from its gross negligence or willful misconduct. The contract provides that Defendant shall not be liable to Plaintiff for any damages as a result of its performance 'except to the extent of its gross negligence or willful misconduct.' Therefore, even though the *Moorman* doctrine and lack of standing leave Plaintiff with only contractual remedies, the contract allows for recovery for gross negligence or willful misconduct."

Consequently, the trial court denied defendant's motion for summary judgment on count II of the complaint, which concerned the negligence claim.

¶ 22 The trial court then found that the terms of the contract were not ambiguous and that the only reasonable interpretation of the contract was that the only theory under which defendant could be liable was gross negligence or willful misconduct. The court further found that the contract clearly provided that the amount paid to defendant was the maximum amount for which defendant could be liable. The trial court disagreed with plaintiff's argument that the contract led plaintiff to believe that defendant would accept responsibility for damages if it was hired to perform the drilling on the project. However, the court found that summary judgment was not

justified "because Defendant agreed to be liable up to the amount it was paid on the contract for grossly negligent or willful conduct."

¶ 23 The trial court found that the limitation of damages provisions were not unconscionable, either procedurally or substantively. Accordingly, the trial court found that they should be enforced as written. Finally, the trial court found that plaintiff's promissory fraud claim was not actionable and granted defendant's motion for summary judgment on that count.

¶ 24 In sum, the trial court denied defendant's motion for summary judgment on counts I and II of the complaint, concerning the breach of contract and negligence claims, and granted the motion for summary judgment on count III of the complaint, concerning the fraud claim. The court further granted defendant's motion to strike the *ad damnum* clauses of the complaint, holding that "[a]ny recovery that Plaintiff might secure is limited to the amount Plaintiff paid Defendant under the contract."

¶ 25 Both plaintiff and defendant filed motions to reconsider, which the trial court denied on February 6, 2012. On March 15, 2012, the trial court entered an order finding that, pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010), the trial court's order of December 9, 2011, was a final order and there was no just reason for delaying the enforcement or appeal thereof. On April 10, 2012, plaintiff filed a notice of appeal and on April 12, 2012, defendant filed a notice of cross-appeal. On appeal, we dismissed both appeals for lack of jurisdiction, since the order appealed from was not a final order despite the trial court's Rule 304(a) finding. *Halloran*, 2013 IL App (1st) 121104-U, ¶ 34.

¶ 26 On March 20, 2013, the trial court entered an order certifying four questions for review:

"A. Were the limitation of damages provisions and related provisions set forth in the Contract wholly enforceable such that Halloran's breach of contract claims were barred thereunder?

B. Did the Contract provisions restrict the amount of damages allowed to Halloran as same pertain to Roughneck's gross negligence and willful misconduct?

C. Did Halloran have standing to bring the instant lawsuit?

D. Was Halloran's tort claim *** barred by the *Moorman Doctrine*?"

Plaintiff filed a petition for leave to appeal pursuant to Rule 308 on April 3, 2013, and we granted the petition on April 24, 2013.

¶ 27 ANALYSIS

¶ 28 Illinois Supreme Court Rule 308 (eff. Feb. 1, 1994) provides a remedy of permissive appeal from interlocutory orders where the trial court has deemed that they involve a question of law as to which there is substantial ground for difference of opinion and where an immediate appeal from the order may materially advance the ultimate termination of the litigation. We apply a *de novo* standard of review to legal questions presented in an interlocutory appeal brought pursuant to Rule 308. *Simmons v. Homatas*, 236 Ill. 2d 459, 466 (2010). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). Additionally, we are limited to the issues raised in the certified questions and will not go beyond those questions to consider other claims.

See *Townsend v. Sears, Roebuck & Co.*, 227 Ill. 2d 147, 153 (2007) ("An interlocutory appeal pursuant to Supreme Court Rule 308 is ordinarily limited to the question certified by the circuit court ***.").

¶ 29 On appeal, we consider all four questions certified by the trial court. Plaintiff argues that we should only consider the first two questions, since they are the only questions included in plaintiff's petition for leave to appeal and defendant did not file a cross-petition for leave to appeal. Defendant, on the other hand, argues that we should consider all four questions certified by the trial court. While it would have been the better practice for defendant to file a cross-petition, we nevertheless agree with defendant that all four questions are properly before us. When we granted plaintiff's petition for leave to appeal, we also referenced defendant's answer to the petition, which included a discussion of all four questions. Moreover, a trial court is permitted to certify questions on its own motion (Ill. S. Ct. R. 308(a) (eff. Feb. 1, 1994)), and we may consider such questions even when the petition for leave to appeal does not include them (*Treister v. American Academy of Orthopaedic Surgeons*, 78 Ill. App. 3d 746, 757-58 (1979)). If we may consider questions certified *sua sponte* by the trial court, we certainly may likewise consider certified questions that have been proposed by the parties, even though some of the questions were not included in the petition for leave to appeal, especially since they were discussed in the answer to the petition. Accordingly, we turn to the merits of the parties' arguments.

¶ 30 I. Exculpatory Clause

¶ 31 The first question certified by the trial court asks: "Were the limitation of damage

provisions and related provisions set forth in the Contract wholly enforceable such that Halloran's breach of contract claims were barred thereunder?" The question as phrased is not entirely clear, as demonstrated by the parties' different interpretations in their briefs. Plaintiff focuses its analysis on the limitation of damages clause, while defendant also discusses the contract's exculpatory clause that it contends bars plaintiff's breach of contract claim. In considering the question and reviewing the trial court's order denying defendant's motion for summary judgment, we agree with defendant's interpretation of the question, since the trial court found that plaintiff could solely recover under a tort theory because plaintiff's breach of contract claim was barred by the contract's exculpatory clause. Consequently, since the second certified question also concerns the limitation of damages clause, we reframe the first two questions to better address the issues before us. For the first, we consider whether the contract's exculpatory clause bars plaintiff's breach of contract claim, and for the second, we consider whether the contract's limitation of damages provision may restrict the amount of damages available to plaintiff under either theory. This reading of the questions also clarifies the first question's use of the word "barred," as an exculpatory clause would operate to bar a claim while a limitation of damages provision would not.[3]

¶ 32 Our consideration of the first certified question requires us to interpret the contract between plaintiff and defendant. The principal objective in construing a contract is to determine and give effect to the intention of the parties at the time they entered into the contract. *Fleet*

[3] A limitation of damages provision could *effectively* bar a claim by limiting damages to zero, but that is different than an outright bar, such as in the case of an exculpatory clause.

Business Credit, LLC v. Enterasys Networks, Inc., 352 Ill. App. 3d 456, 469 (2004). " '[A]n agreement, when reduced to writing, must be presumed to speak the intention of the parties who signed it. It speaks for itself, and the intention with which it was executed must be determined from the language used. It is not to be changed by extrinsic evidence.' " *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 462 (1999) (quoting *Western Illinois Oil Co. v. Thompson*, 26 Ill. 2d 287, 291 (1962)). A court interpreting a contract begins by examining the language of the contract alone and, "[i]f the language of the contract is facially unambiguous, then the contract is interpreted by the trial court as a matter of law without the use of parol evidence." *Air Safety*, 185 Ill. 2d at 462 (citing *Farm Credit Bank v. Whitlock*, 144 Ill. 2d 440, 447 (1991)). If an ambiguity is present, then the court may admit parol evidence to aid in resolving the ambiguity. *Air Safety*, 185 Ill. 2d at 462-63 (citing *Whitlock*, 144 Ill. 2d at 447).

¶ 33 In the case at bar, we are asked to interpret two provisions of the contract between plaintiff and defendant. On the second page of the contract, directly before the "Terms and Conditions of Sale" section, the following language appears:

> "Disclaimer: Roughneck makes no, and hereby expressly disclaims all warranties, express or implied, with respect to the nature, quantity or quality of the services to be performed hereunder. Except to the extent of its gross negligence or willful misconduct, Roughneck shall not be liable to the customer for any damages as a result of its performance or failure to perform the services."

Under the "Terms and Conditions of Sale" section, paragraph 2 provides:

> "2. Contract Claims Only. Customer's claims with respect to the services furnished hereunder shall be limited to the contractual warranties and remedies provided in this agreement and may be brought only in an action for breach of contract. Customer shall not make any claim against Roughneck based on any theory of tort, including but not limited to strict liability or negligence theories, except to the extent of the gross negligence or willful misconduct of Roughneck."

Plaintiff claims that the first sentence of paragraph 2 of the contract contradicts the exculpatory clause of the disclaimer, leading to an unconscionable result in that defendant has shielded itself from all liability. "In interpreting a contract, it is presumed that all provisions were intended for a purpose, and conflicting provisions will be reconciled if possible so as to give effect to all of the contract's provisions." *Shorr Paper Products, Inc. v. Aurora Elevator, Inc.*, 198 Ill. App. 3d 9, 13 (1990). In the case at bar, contrary to plaintiff's interpretation, the two provisions can be read so that they do not conflict.

¶ 34 As the parties agree, the disclaimer disclaims liability for causes of action other than those based on defendant's gross negligence or willful misconduct. However, paragraph 1 of the "Terms and Conditions of Sale" sets forth an express warranty, not at issue in the case at bar, that defendant "shall use the equipment in the performance of the services in accordance with instructions provided from the manufacturer thereof"; such a warranty would not be covered by

the exculpatory clause, since it is a specific duty that defendant assumed in the contract. See *Jewelers Mutual Insurance Co. v. Firstar Bank Illinois*, 213 Ill. 2d 58, 65 (2004) ("A party cannot promise to act in a certain manner in one portion of the contract and then exculpate itself from liability for breach of that very promise in another part of the contract."). According to paragraph 2, a claim with respect to the warranty would need to be brought in an action for breach of contract. The second sentence of paragraph 2 permits tort causes of action for defendant's gross negligence or willful misconduct, consistent with the disclaimer. Thus, by reading the two sentences of paragraph 2 in conjunction, it is apparent that the first sentence refers to the breach of warranty claim and the second applies to tort claims. Accordingly, the exculpatory clause would bar claims other than for the express warranty and defendant's negligence or willful misconduct.

¶ 35 We next consider whether the exculpatory clause was enforceable so as to bar plaintiff's breach of contract claim. "Public policy strongly favors freedom to contract [citation], as is manifest in both the United States Constitution and our constitution." *McClure Engineering Associates, Inc. v. Reuben H. Donnelley Corp.*, 95 Ill. 2d 68, 72 (1983). "[T]he general rule is to enforce exculpatory contracts 'unless (1) it would be against a settled public policy of the State to do so, or (2) there is something in the social relationship of the parties militating against upholding the agreement.' " *Harris v. Walker*, 119 Ill. 2d 542, 548 (1988) (quoting *Jackson v. First National Bank*, 415 Ill. 453, 460 (1953)). However, exculpatory clauses are not favored and must be strictly construed against the benefitting party, especially when that party drafted the clause. *Harris*, 119 Ill. 2d at 548. Thus, "[s]uch clauses must spell out the intention of the

parties with great particularity and will not be construed to defeat a claim which is not explicitly covered by their terms." *Scott & Fetzer Co. v. Montgomery Ward & Co.*, 112 Ill. 2d 378, 395 (1986).

¶ 36 In the case at bar, plaintiff's breach of contract claim is clearly encompassed by the exculpatory clause, as it is a non-tort claim for damages based on defendant's performance under the contract. Additionally, there is nothing in the social relationship between the parties militating against upholding the agreement, since they are two commercial parties in equal bargaining positions. Accordingly, the exculpatory clause will be enforced to bar plaintiff's breach of contract claim unless it is against public policy.

¶ 37 "[T]here is no precise definition of 'public policy.' The term is generally used to describe the customs, morals, and notions of justice that prevail in a state." *Zerjal v. Daech & Bauer Construction, Inc.*, 405 Ill. App. 3d 907, 911 (2010) (citing *Marchlik v. Coronet Insurance Co.*, 40 Ill. 2d 327, 332 (1968)). Additionally, "[p]ublic policy is not static and, when not fixed by the constitution, can be set by the legislature or courts." *Zerjal*, 405 Ill. App. 3d at 911. A court will find a contract provision to be against public policy "if it is injurious to the interests of the public, contravenes some established interest of society, violates some public statute, is against good morals, tends to interfere with the public welfare or safety, or is at war with the interests of society or is in conflict with the morals of the time." (Internal quotation marks omitted.) *In re Estate of Feinberg*, 235 Ill. 2d 256, 265 (2009). In the context of an exculpatory clause, exculpatory clauses are contrary to public police if they are: "(1) between an employer and employee; between the public and those charged with a duty of public service, such as a common

carrier or a public utility; or (3) between parties where there is a disparity of bargaining power to that the agreement does not represent a free choice on the part of the plaintiff, such as a monopoly." *Johnson v. Salvation Army*, 2011 IL App (1st) 103323, ¶ 19 (citing *White v. Village of Homewood*, 256 Ill. App. 3d 354, 358-59 (1993)); *McKinney v. Castleman*, 2012 IL App (4th) 110098, ¶ 14.

¶ 38 In the case at bar, plaintiff claims that the clause is against public policy since it is unconscionable due to the defendant's attempt to shield itself from all liability. However, as noted, the contract permits claims for breach of the express warranty and for certain tort claims, so defendant has not shielded itself from all liability. Plaintiff further argues that, while the contract purports to permit tort claims, it nevertheless affords no relief due to the limitation of damages provision. While we consider the enforceability of the limitation of damages provision in the next section, we cannot find that the existence of a limitation of damages provision for the tort claims renders the exculpatory clause unconscionable or against public policy. See *Chicago Steel Rule & Die Fabricators Co. v. ADT Security Systems, Inc.*, 327 Ill. App. 3d 642, 652 (2002) (upholding contract that included an exculpatory clause precluding negligence and breach of contract claims as well as limiting damages). Since there is nothing preventing the enforcement of the exculpatory clause, we agree with the trial court that plaintiff's breach of contract claim was barred by the exculpatory clause and, consequently, answer the first certified question in the affirmative.

¶ 39 II. Limitation of Damages Clause

¶ 40 The second question certified by the trial court asks: "Did the Contract provisions restrict

the amount of damages allowed to Halloran as same pertain to Roughneck's gross negligence and willful misconduct?"[4] The question requires interpretation of paragraph 3 of the "Terms and Conditions of Sale" portion of the contract, which provides:

> "3. Liability of Roughneck. *The total liability of Roughneck under this agreement for breach of warranty, or for any other breach of the Agreement or for any claim related to services furnished by Roughneck under this Agreement shall in no event exceed the amount paid to Roughneck by Customer hereunder.* In no event shall [R]oughneck or its agents be liable for special, incidental or consequential damages of any kind whatsoever, or for the loss of profits or revenue, or for loss of use, or for actual losses or for loss of production or progress of construction, whether resulting in any manner from services furnished under this agreement or from [R]oughneck's breach of any warranty or any other obligation of [R]oughneck under this agreement. [T]he foregoing limitation of damages and disclaimer of special, incidental and consequential damages shall apply to all causes of action whatsoever asserted against [R]oughneck pertaining to the performance or nonperformance of the services or

[4] As noted, we reframed the question to consider both tort and contract theories; however, since our answer to the previous question is that the contract claim is barred, the effect of the limitation of damages provision on the contract claim is irrelevant.

of [R]oughneck's other obligations under this agreement."

(Emphasis added.)

¶ 41 On appeal, plaintiff argues that the limitation of damages provision is not enforceable because it is unconscionable or, alternatively, ambiguous. As noted, the principal objective in construing a contract is to determine and give effect to the intention of the parties at the time they entered into the contract. *Fleet Business Credit*, 352 Ill. App. 3d at 469. To determine the intent of the parties, the court must look to the instrument itself, its purpose, and the surrounding circumstances of its execution and performance. *Fleet Business Credit*, 352 Ill. App. 3d at 469. "When a dispute exists between the parties as to the meaning of a contract provision, the threshold issue is whether the contract is ambiguous." *Fleet Business Credit*, 352 Ill. App. 3d at 469 (citing *Installco, Inc. v. Whiting Corp.*, 336 Ill. App. 3d 776, 783 (2002)). "Contractual language is ambiguous when it is ' "susceptible to more than one meaning [citation] or is obscure in meaning through indefiniteness of expression." ' " *Fleet Business Credit*, 352 Ill. App. 3d at 469 (quoting *Shields Pork Plus, Inc. v. Swiss Valley Ag Service*, 329 Ill. App. 3d 305, 310 (2002), quoting *Wald v. Chicago Shippers Ass'n*, 175 Ill. App. 3d 607, 617 (1988)). An ambiguity is not created simply because the parties do not agree upon an interpretation. *Fleet Business Credit*, 352 Ill. App. 3d at 469.

¶ 42 A. Ambiguity

¶ 43 In the case at bar, the limitation of damages provision is not ambiguous. To the contrary, the provision is definitely expressed and not susceptible to more than one meaning. See *Fleet Business Credit*, 352 Ill. App. 3d at 469 (quoting *Shields Pork Plus, Inc.*, 329 Ill. App. 3d at 310,

quoting *Wald*, 175 Ill. App. 3d at 617). We previously decided in *Newcastle Properties, Inc., v. Shalowitz*, 221 Ill. App. 3d 716, 726 (1991), to use the plain meaning of provisions in a contract that limited recovery to the "amount paid" by defendant, and both parties agree that *Newcastle* applies to the case at bar.

¶ 44 In *Newcastle*, the plaintiff seller entered into a contract with the defendant purchasers to purchase a condominium unit; the purchase agreement included a provision providing that " '[i]f Purchaser defaults on any of Purchaser's covenants or obligations hereunder, then, *** all sums theretofore paid to the Seller (including without limitation earnest money and payments for Extras) by Purchaser shall be forfeited as liquidated damages and shall be retained by Seller.' " *Newcastle*, 221 Ill. App. 3d at 719. As an earnest money deposit, the defendants provided an irrevocable standby letter of credit in the amount of $109,500 that it obtained from a bank.[5] *Newcastle*, 221 Ill. App. 3d at 720. The defendants ultimately did not close on the unit or pay any of the money required by the purchase agreement; however, the plaintiff failed to present the letter of credit prior to its expiration. *Newcastle*, 221 Ill. App. 3d at 721. At the time of the defendants' breach, they had only paid plaintiff $3,122 for " 'extras' " under the contract. *Newcastle*, 221 Ill. App. 3d at 721. The plaintiff argued that it was entitled to the $109,500 in addition to retaining the $3,122, and the trial court awarded the plaintiff $109,500, as well as prejudgment interest. *Newcastle*, 221 Ill. App. 3d at 721.

[5] The *Newcastle* court explained that "[a] standby letter of credit requires the issuer ([the bank]) to pay the beneficiary (plaintiff) a sum certain prior to the expiration of the note upon the presentation of documents specified in the purchase agreement which demonstrate that the parties who procured the letter's issuance (defendants) have defaulted." *Newcastle*, 221 Ill. App. 3d at 720.

¶ 45 On appeal, we reversed, only permitting the plaintiff to recover the $3,122 that the defendants actually paid prior to the contract's breach. *Newcastle*, 221 Ill. App. 3d at 729. In considering whether the plaintiff could recover the $109,500 payable under the letter of credit prior to its expiration, we looked to Florida case law because there was no relevant Illinois case law. *Newcastle*, 221 Ill. App. 3d at 723. After examining the relevant case law and applying the plain meaning of the terms of the purchase agreement, we determined that the plaintiff was only entitled to retain the $3,122 paid prior the defendants' breach. *Newcastle*, 221 Ill. App. 3d at 725. We noted that " '[i]n common usage, "paid" does not mean "payable" ' " and that "[t]he word 'paid' is the past tense of the verb 'to pay,' while the word 'payable' is an adjective which refers to sums which are owed but have not yet been paid." *Newcastle*, 221 Ill. App. 3d at 725 (quoting *Giammettei v. Egan*, 135 Conn. 666, 668 (1949)). See also *P.G. Lake, Inc. v. Commissioner*, 148 F.2d 898, 900 (5th Cir. 1945) ("The ordinary and usual meaning of 'paid' is to liquidate a liability in cash." (citing *Helvering v. Price*, 309 U.S. 409, 413 (1940))); *Scotto v. Brink's, Inc.*, 962 F.2d 225, 227 (2d Cir. 1992) (holding that employer "paid" wages when the employer actually did so, not when the wages might have been earned).

¶ 46 In the case at bar, the provision clearly states that the total liability shall in no event exceed the amount paid. We therefore follow *Newcastle* in deciding that if plaintiff paid nothing, then the amount paid plainly equals zero dollars. See *Newcastle*, 221 Ill. App. 3d at 725-26; see also *Village of Glenview v. Northfield Woods Water & Utility Co.*, 216 Ill. App. 3d 40, 48 (1991) (" ' [p]arties in entering into an agreement are presumed to have used terms having no technical meaning ***, and the words are to be construed according to their common understanding and

common usage.' " (quoting *Wolf v. Schwill*, 282 Ill. 189, 191 (1917))). Since we determine that damages are limited to the amount paid under the contract, we have no need to consider plaintiff's alternative arguments concerning the ambiguity of the actual value of the contract.

¶ 47 B. Unconscionability

¶ 48 Plaintiff also claims that the limitation of damages provision is unenforceable because it produces an unconscionable outcome inasmuch as it has the effect of preventing plaintiff's recovery of damages. For the following reasons, we conclude that the limitation of damage provision set forth in the contract was enforceable such that defendant's tort claims could not exceed the amount plaintiff paid defendant for work on the project — in this case, zero dollars.

¶ 49 Contracting parties generally have the power to define the limits of their respective obligations, and courts may not arbitrarily create exceptions to contract provisions which would have the effect of supplanting that power. *J & B Steel Contractors v. C. Iber & Sons*, 172 Ill. 2d 265, 277-78 (1994) (citing *Underground Construction Co. v. Sanitary District*, 367 Ill. 360, 371 (1937)). Courts generally enforce liquidated damages provisions " 'if the parties have expressed their agreement in clear and explicit terms and there is no evidence of fraud or unconscionable oppression.' " *Karimi v. 401 North Wabash Venture, LLC*, 2011 IL App (1st) 102670, ¶ 27 (quoting *Hartford Fire Insurance Co. v. Architectural Management, Inc.*, 194 Ill. App. 3d 110, 115 (1990)). There is no fixed rule to all liquidated damages provisions, and each one must be decided on its own facts and circumstances. *Dallas v. Chicago Teachers Union*, 408 Ill. App. 3d 420, 424 (2011).

¶ 50 Unconscionability can be procedural, substantive, or a combination of both. *Razor v.*

Hyundai Motor America, 222 Ill. 2d 75, 99 (2006) (citing *Frank's Maintenance & Engineering, Inc. v. C.A. Roberts Co.*, 86 Ill. App. 3d 980, 989 (1980)). Procedural unconscionability refers to situations in which a contract term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it. *Razor*, 222 Ill. 2d at 100. Procedural unconscionability analysis takes into account the plaintiff's lack of bargaining power. *Razor*, 222 Ill. 2d at 100 (citing *Frank's Maintenance*, 86 Ill. App. 3d at 989). Substantive unconscionability, on the other hand, concerns those terms which are inordinately one-sided in one party's favor. *Razor*, 222 Ill. 2d at 100 (citing *Rosen v. SCIL, LLC*, 343 Ill. App. 3d 1075, 1081 (2003)).

¶ 51 In the case at bar, the limitation of damages provision is not unconscionable even though it happens to limit plaintiff's available damages to zero. First, a determination of procedural unconscionability here would be inappropriate because plaintiff does not claim that the provision was too difficult to find, read, or understand. *Razor*, 222 Ill. 2d at 100. Instead, an affidavit from plaintiff's vice president states that the vice president received, signed, and returned the contract without any disclosure from defendant's representative of the limitation of damages provision it contained. Plaintiff's argument that it "unknowingly and unwittingly provided indemnification to Roughneck for its negligence" is immaterial when plaintiff had the opportunity to read the provision. See *Tortoriello v. Gerald Nissan of North Aurora, Inc.*, 379 Ill. App. 3d 214, 234-35 (2008) (holding that plaintiff purchaser had sufficient notice of arbitration clause in form contract because she had opportunity to read contract's terms) (citing *Kinkel v. Cingular Wireless LLC*, 223 Ill. 2d 1, 26 (2006), and *Bunge Corp. v. Williams*, 45 Ill. App. 3d 359, 364 (1977)).

¶ 52 Second, plaintiff does not persuade us to accept its substantive unconscionability claim because we do not find the limitation of damages provision to be inordinately one-sided. While plaintiff argues that the limitation of damages provision is substantively unconscionable because it effectively deprives plaintiff of a remedy, the provision does, in fact, provide plaintiff with a remedy: the amount paid under the contract can be recovered as damages. Of course, since plaintiff chose not to pay defendant under the contract, in the case at bar, the "amount paid" is zero. Additionally, even without being able to recover any monetary damages, plaintiff is effectively released from its obligation to issue compensation for defendant's services if successful in its lawsuit. Moreover, the limitation of damages provision is not inordinately one-sided because defendant also suffered a loss in that it was not paid for work that it performed.

¶ 53 We must also note that limitation of damages provisions measuring damages according to the amount of money paid have been enforced in the past. See, e.g., *Newcastle*, 221 Ill. App. 3d at 727 (finding plaintiff only entitled to retain $3,122 paid prior to defendant's breach); *Zerjal v. Daech & Bauer Construction, Inc.*, 405 Ill. App. 3d 907, 914 (2010) (enforcing a limitation of damages provision under which a home inspector was liable only up to the $175 cost of the inspection). In evaluating liquidated damages, courts must balance the interest of compensating plaintiffs and requiring defendants to pay for damages resulting from their conduct against the interest in freedom of contract to allocate risk of loss. See *Hartford*, 194 Ill. App. 3d at 116-17 (citing *The Hartford* v. *Burns International Security Services*, 172 Ill. App. 3d 184, 189-90 (1988), and *Bastian* v. *Wausau Homes, Inc.*, 635 F. Supp. 201, 203 (N.D. Ill. 1986)). Balancing these competing interests, we find that the limitation of damages provision was not

unconscionable when both parties were sophisticated business entities and the provision itself was not inordinately one-sided.

¶ 54 Plaintiff, attempting to support the proposition that the inability to procure any damages from a defendant as a result of a contract that is neither a release or a waiver is unconscionable *per se*, cites *Pettie v. Williams Brothers Construction, Inc.*, 225 Ill. App. 3d 1009 (1992). In *Pettie*, the appellate court found that an express indemnity agreement between a contractor and a subcontractor was proscribed by the Indemnity Act (Ill. Rev. Stat. 1987, ch. 29, ¶ 61), since it required the subcontractor to indemnify the contractor for the contractor's negligence. *Pettie*, 225 Ill. App. 3d at 1017. *Pettie* did not speak to the inability to procure damages as determining whether a contract provision is an indemnification provision. Moreover, in the case at bar, as plaintiff acknowledges, there was no indemnity agreement between plaintiff and defendant. The contract merely limited the damages available to plaintiff to the amount paid under the contract. Since plaintiff chose not to pay defendant anything, its recovery is limited to zero dollars. The fact that the available damages under the facts before us happen to be zero does not transform the limitation of damages provision into an indemnity agreement.

¶ 55 As a final matter, while not argued by the parties, we are compelled to address an issue related to plaintiff's indemnification argument. Generally, under section 1 of the Construction Contract Indemnification for Negligence Act (the Indemnification Act), "every covenant, promise or agreement to indemnify or hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable." 740 ILCS 35/1 (West 2008). The limitation of damages provision in the case at bar could arguably fall within the

Indemnification Act, since we have determined in the past that "[a] contract which purports to relieve a tortfeasor of *some or all* of its liability, premised upon its own negligence, cannot stand" in light of the Indemnification Act. (Emphasis added.) *Lavelle v. Dominick's Finer Foods, Inc.*, 227 Ill. App. 3d 764, 770 (1992); *Motor Vehicle Casualty Co. v. GSF Energy, Inc.*, 193 Ill. App. 3d 1, 7 (1989). However, we determine that it does not.

¶ 56 Our supreme court has noted that "[w]ork in the construction industry is often hazardous and if it is not performed with proper safeguards and precautions, workers [citation] and members of the general public as well are exposed to danger of injury." *Davis v. Commonwealth Edison Co.*, 61 Ill. 2d 494, 498 (1975). The court further explained that "the legislature in enacting section 1 [of the Indemnification Act] may have considered that the widespread use of [indemnity and hold-harmless] agreements may have removed or reduced the incentive to protect workers and others from injury." *Davis*, 61 Ill. 2d at 499. Thus, the Indemnification Act focuses on the interest in the safety of workers and members of the general public. *Ralph Korte Construction Co. v. Springfield Mechanical Co.*, 54 Ill. App. 3d 445, 447 (1977). We have in the past determined that contracts that could conceivably indemnify a party against its own negligence do not implicate the Indemnification Act when they "do not involve injury suffered by a construction worker or a member of the general public but instead, damage suffered by one of the contracting parties due to the alleged negligence of another." *Korte*, 54 Ill. App. 3d at 447 (contractor paid for fire damage caused by subcontractor's negligence); see also *Intergovernmental Risk Management ex rel. Village of Bartlett v. O'Donnell, Wicklund, Pigozzi & Peterson Architects, Inc.*, 295 Ill. App. 3d 784, 793-94 (1998). But see *Modern Steel Treating*

Co. v. Liquid Carbonic Industrial/Medical Corp., 298 Ill. App. 3d 349, 355 (1998) (applying Indemnification Act to two-party contract where one party caused explosion of other party's property). In the case at bar, there is no personal injury involved and the only issue is whether plaintiff or defendant bears the loss of the damage to InterPark's property. Thus, we cannot say that the provision would be prohibited under the Indemnification Act.

¶ 57 Plaintiff could have bargained with defendant for a different risk allocation. Alternatively, plaintiff could have hired another subcontractor willing to work without agreeing to limiting damages to the amount paid. Plaintiff instead freely entered into a contract with defendant which included a limitation of damages provision that precluded recovery of damages greater than the amount paid under the contract. Plaintiff and defendant each had the power to define the limits of their respective obligations (*J & B Steel Contractors*, 172 Ill. 2d at 277-78), and this power extended to the parties' allocation of the risk of loss. See *Hartford*, 194 Ill. App. 3d at 190. Under such circumstances, we will not arbitrarily create an exception to the parties' contract by deeming the limitation of damages provision unconscionable. Accordingly, we answer the second certified question in the affirmative.

¶ 58 III. Standing and *Moorman* Doctrine

¶ 59 The final two questions certified by the trial court concern whether plaintiff lacks standing and whether plaintiff's tort claims are barred by the *Moorman* doctrine. However, since we have determined that plaintiff's breach of contract claim is barred and plaintiff is entitled to no monetary damages on its tort claim, answering the final two questions would not advance the instant litigation in any way. See *Burnette v. Stroger*, 389 Ill. App. 3d 321, 332 (2009) (purpose

of an immediate, interlocutory appeal is solely to " 'materially advance the ultimate termination of the litigation' " (quoting 155 Ill. 2d R. 308(a))).

¶ 60 CONCLUSION

¶ 61 We answer the first certified question in the affirmative, finding that the contract's exculpatory clause barred plaintiff's breach of contract claim. We also answer the second certified question in the affirmative, finding that the contract's limitation of damages clause limited plaintiff's damages to the amount paid under the contract — in this case, zero dollars. We decline to answer the third and fourth certified questions, since they would not materially advance the ultimate termination of the litigation.

¶ 62 Certified questions answered.