No. 3–10–0431

Order filed May 5, 2011

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

CITY OF OTTAWA,	)	Appeal from the Circuit Court
	)	For the 13th Judicial Circuit
Plaintiff-Appellant,	)	LaSalle County, Illinois
	)	
v.	)	
	)	
OSMONICS, INC., TOBIN BROTHERS	)	
PLUMBING, INC., VISSERING	)	No. 06 L 180
CONSTRUCTION, INC., and	)	
McCLURE ENGINEERING	)	
ASS'NS, INC., and BASALAY,	)	
CARY and ALSTADT ARCHITECTS,	)	
LTD., an Illinois Corporation,	)	
	)	Honorable James Lanuti,
Defendants-Appellants.	)	Judge Presiding

JUSTICE O'BRIEN delivered the judgment of the court.
Justice Wright concurred in the judgment.
Justice Holdridge concurred in part, dissented in part in the judgment.

ORDER

Held: The trial court erred in granting summary judgment to Osmonics, Inc., where Osmonics's contract with the city did not clearly and unequivocally preclude the city from filing a suit sounding in negligence. The trial court did not err in granting summary judgment to Basalay, Cary and Alstadt Architects, where Basalay had no duty to design the water treatment building in such a way as to preclude flooding of the city's administrative offices.

Following a breach in the City of Ottawa's "reverse osmonics" piping system that resulted in water damage to both the previously existing business offices of the city and the city's new building housing the water treatment system, the city sued the designer of the reverse osmosis system, Osmonics Inc., and the architect, Basalay, Cary and Alstadt Architects, Ltd., which designed the water treatment building and the corridor connecting the treatment building with the existing business offices. The trial court granted summary judgment to Osmonics and Basalay and denied the city's motion to amend its pleading as to Basalay. The city appeals the trial court's rulings. We reverse in part, and affirm in part.

FACTS

Following a breach in the City of Ottawa's "reverse osmonics" piping system that resulted in water damage to both the existing business offices of the city and the new building housing the water treatment system, the city sued the designer of the reverse osmosis system, Osmonics, and the architectural firm, Basalay, that designed the new building and created the corridor connecting the new building with the business offices. The city also sued several other entities, the claims against which have been resolved.

The breach in the osmosis system occurred approximately two years after the system was installed by Osmonics. It was Osmonics's responsibility to supply, install and start-up the filtration equipment and train the employees. As a result of the system failure, water flowed from the building housing the osmosis system down the corridor designed by Basalay and into the existing administrative offices, causing damage to the city offices and equipment. The assistant water superintendent for the City of Ottawa agreed with reports indicating the breach in the osmosis system occurred when a flange failed due to compressed air that had accumulated as a result of leaks in glue

joints that allowed air to infiltrate the system. In its complaint against Osmonics, the city alleged Osmonics was negligent and breached its warranty of fitness for a particular purpose and an implied warranty of merchantability.

Osmonics filed a motion for summary judgment in which it argued the terms of its contract with the city barred the city's claims. Under the "Warranty and Claims" section of Osmonics's contract with the city the following is set forth, in pertinent part:

> Section 3.3 "SELLER EXPRESSLY DISCLAIMS LIABILITY FOR INCIDENTAL AND/OR CONSEQUENTIAL DAMAGES INCLUDING, WITHOUT LIMITATION, LOST PROFITS. THIS WARRANTY IS MADE EXPRESSLY IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ALL IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE. BUYER ASSUMES ALL LIABILITIES FOR USE AND MISUSE BY BUYER, ITS AGENTS OR ASSIGNEES.
>
> Section 3.5 Seller's obligation under this warranty is limited to the repair or replacement at its factor [*sic*], for the original user, of any product or component part thereof which shall prove to have been defective. No allowance will be made for repairs or alterations made by Buyer without seller's written consent or approval.
>
> Section 3.6 In no event shall Seller be liable to Buyer for any amount, including costs incurred or expended by Seller

> in attempting to correct any product deficiency, relating to any claim by Buyer against Seller in excess of the aggregate total purchase price under this contract. No charges or expenses incident to any claim will be allowed. The remedies provided herein are exclusive, and Seller shall incur no liability other than that stated herein."

Based on the terms of the contract, Osmonics asserted that Ottawa expressly disclaimed consequential and incidental damages arising out of both contract and tort causes of action and that the exclusive remedy in the event of a system failure was replacement or repair within the warranty period of any defective product or component. The trial court granted Osmonics's motion for summary judgment based on the contract and dismissed the counts against it. The city asserts summary judgment was improperly granted to Osmonics because Osmonics's contract with the city does not preclude a suit for negligence

In an amended complaint, the city also alleged negligence against Basalay, asserting the firm had provided design plans and specifications that failed to prevent or otherwise provide for foreseeable pipe failure discharging water into the adjacent administration building. The city asserts that the deposition testimony of George Cary, a Basalay architect who designed the structure for the water treatment plant, supports its assertion that Basalay breached its standard of professional conduct. Cary stated the new building was established a foot higher than the existing building which housed the administrative offices and Basalay had to accommodate the difference in elevation in its design. The elevation of the floor was indicated by the project engineer firm, which also was

responsible for the design of the floor. Cary stated the elevation of the corridor could not have been raised without moving the location of the building. Cary stated he knew water flows downhill. He stated no openings other than the door leading to the corridor were designed into the exterior walls of the new building. Basalay was never told there was a concern regarding flooding, although Cary admitted he was aware the new building would house pipes carrying significant amounts of water. Cary attested he was aware that if water is a potential problem, floor drains and the slope of the floor can be used to address the escape of water. Cary was aware of a trench drain incorporated into the floor plan for the new building. The floor was not sloped toward the trench. It was not Basalay's responsibility to design a drain system for the floor of the building. Basalay's project included the walls roofs of the new building and the renovation of the old building.

The trial court granted Basalay's motion for summary judgment, finding no genuine issue of material fact. The trial court also denied the city's motion to amend its complaint to include, in part, allegations that Basalay designed a slope in the corridor with knowledge that foreseeable pipe failure would result in a downward flow of water into the administrative building. The trial court found the city had been given ample opportunities to gather evidence, including expert opinion. The trial court also denied the city's motion to reconsider the summary judgment ruling, which the city supplemented with the affidavit of Daniel Gavin, a certified architect. Gavin opined that Basalay had a professional responsibility to discuss the design of the corridor, doorway and floor with the engineer; to propose and discuss options other than the corridor and doorway; and to warn the city of the dangers of water flow from one building to the other by means of the corridor and doorway. On appeal, the city asserts there exists a genuine issue of material fact as to whether Basalay's architectural design of the water treatment building structure and corridor was adequate in a water

treatment plant when it was foreseeable to Basalay that in the event of a crack, leak, or break in the water treatment plant, water would flow down the corridor slope into the administration building.

Because our conclusions are distinct to, and different for, each party, we address the trial court's rulings accordingly. We review summary judgment orders *de novo*. *Connecticut Specialty Insurance Co., v. Loop Paper Recycling, Inc.*, 356 Ill. App. 3d 67, 72 (2005). When reviewing a ruling on a summary judgment motion, we must construe all evidence in the light most favorable to the nonmoving party. *Stratman v. Brent*, 291 Ill. App. 3d 123, 137 (1997). Summary judgment is properly granted where the pleadings, admissions and depositions on file, together with the affidavits, demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Loop Paper Recycling, Inc*., 356 Ill. App. 3d at 71-72.

This case also concerns contract interpretation, which we also review *de novo*. *Doornbos Heating and Air Conditioning, Inc. v. James D. Schlenker, M.D., S.C.*, 403 Ill. App.3d 468, 488 (2010). A written contract is presumed to reflect the intention of the parties. *Doornbos*, 403 Ill. App. 3d at 488. In construing a contract, our primary objective is to ascertain and give effect to the intent of the parties as expressed in the written agreement. *Doornbos*, 403 Ill. App. 3d at 488. If the written agreement is unambiguous, then a court must construe the parties' intent from the writing itself as a matter of law and effectuate its plain and ordinary meaning. *Doornbos*, 403 Ill. App. 3d at 488. In the event of a contractual ambiguity, the court may consider extrinsic evidence to resolve any uncertainties present in the written agreement. *Doornbos*, 403 Ill. App. 3d at 488.

In the instant case, the city admits that section 3.3 of the contract operates as a bar to its counts against Osmonics for breach of warranty of fitness for a particular purpose and implied warranty of merchantability. The city asserts, however, that the exculpatory clauses of section 3 of

the contract do not bar a claim for negligence. The city argues that because the contract provisions were drafted by Osmonics they must be strictly construed against it. The city also argues that because there is no language in the exculpatory clauses referring specifically to negligence or tort claims and because the term "consequential damages" refers to contract rather than tort damages, the contract cannot be construed to preclude claims sounding in negligence.

The general rule regarding exculpatory clauses in Illinois is that such clauses will be enforced unless it would be against the settled public policy of the state to do so, or there is something in the social relationship of the parties militating against upholding the agreement. *Tyler Enterprises* of *Elwood, Inc. v. Skiver*, 260 Ill. App. 3d 742, 750 (1994). Nevertheless, such clauses are not favored and are to be strictly construed against the party they benefit, particularly if the party was also the draftsman, as is the case here. See *Tyler*, 260 Ill. App. 3d at 750. "Such clauses must spell out the intention of the parties with great particularity and will not be construed to defeat a claim that is not explicitly covered by their terms." *Tyler*, 260 Ill. App. 3d at 750 (Internal quotes omitted).

In *Tyler*, this court construed a contract provision that read: "In no event shall Elanco be liable for consequential damages, whether or not arising out of negligence. Elanco's liability and Formulator's exclusive remedy for any cause of action arising out of this contract, including negligence, is expressly limited to Formulator's option to replacement of, or repayment of the purchase price for, the Technical Chemical with respect to which damages are claimed." *Tyler*, 260 Ill. App. 3d at 751. In *Tyler*, despite the defendant's apparent attempt to limit damages for any cause of action, we concluded the provision at issue did not preclude a claim sounding in strict liability because, in part, a party's negligence is irrelevant in a strict liability action. *Tyler*, 260 Ill. App. 3d at 751. We also stated the term "consequential damages" refers to contract rather than tort damages.

Tyler, 260 Ill. App. 3d at 751.

Moreover, although a specific reference to "negligence" is not required, unless the circumstances clearly indicate that such was the plaintiff's understanding and intention, general clauses exempting the defendant from all liability for loss or damage will not be construed to include loss or damage resulting from the defendant's intentional, negligent or reckless misconduct. See *Berwind Corp. v. Litton Industries, Inc*. 532 F.2d 1, 4-5 (7th Cir. 1976). In *Berwind*, in construing contract terms that appeared under the heading of "warranty," the court noted several concepts of contract interpretation that we find applicable in this case. See *Berwind*, 532 F. 2d at 6-7. The *Berwind* court first noted the exculpatory provision at issue appeared under the heading "Warranty," where the reader would expect to find further reference to the subject of warranty. *Berwind*, 532 F. 2d at 7. Secondly, the application of "the Bahamas rule" indicated the subsequent general phrase, "and in no event are we to be liable," was modified by the preceding specific terminology, "[o]ur liability under this contract is limited," leading the reader to believe the natural meaning of the clause was "in no event are we to be liable under this contract." *Berwind*, 532 F. 2d at 7. Thirdly, the *Berwind* court noted the exculpatory language did not contain the words "negligence," "tort" or their cognates. *Berwind*, 532 F. 2d at 7.

From the cases of *Tyler*, *Berwind*, and others, we understand that the accepted rules of interpretation of exculpatory clauses require that the agreement be given a fair and reasonable interpretation based upon a consideration of all of its language and provisions. See *Berwind*, 532 F. 2d at 5-6 (citing cases upon which Illinois courts have relied). Furthermore, such clauses are to be strictly construed against their maker. *Berwind*, 532 F. 2d at 4. If there is any doubt as to the meaning of an exculpatory clause, the party seeking its protection cannot be said to have carried his burden.

Berwind Corp., 532 F.2d at 6.

In the instant case, the City of Ottawa does not assert that it is not a sophisticated commercial entity, therefore, there is no public policy bar or social relationship disparity that would preclude us finding an exculpatory clause. Nevertheless, a fair and reasonable interpretation of Osmonics's contract with the city is that it does not bar a claim sounding in negligence. Osmonics, which drafted the contract, seeks to construe section 3.5 as a warranty clause subject to the time limitation of section 3.1. Osmonics then seeks to construe the last sentence of section 3.6 as another exculpatory clause that ostensibly precludes claims of any other kind. First of all, the clause upon which Osmonics wishes to rely occurs in a general and specific discussion of warranty terms. Secondly, the last sentence of section 3.6 reads: "The remedies provided herein are exclusive, and Seller shall incur no liability other than that stated herein." Occurring as it does at the end of paragraph 3.6, the last sentence of 3.6 naturally refers to only the warranty damage provisions and is not entitled to be given the weight of a separate exculpatory clause precluding any other type of claim. Osmonics's attempt to find relief in the "incidental and consequential" damages language of section 3.3 also falls short of sustaining its burden of dispelling any doubt as to the meaning of the language at issue. Osmonics did not offer evidence to indicate the parties' intentions included meanings other than those expressed in the contract. We must therefore agree with the city that Osmonics failed to include in the contract clear and explicit language or unequivocal terms indicating an intention that the city was barred from bringing suit against Osmonics under a theory of negligence. Any doubt in interpreting the meaning of any exculpatory clause should be resolved in favor of the city. For these reasons we reverse the trial court's ruling granting summary judgment to Osmonics.

The city next asserts the trial court erred in granting Basalay summary judgment because

Basalay, well-trained in architecture, had a duty to design the corridor in a way that avoided the down slope of water from the new to the old building and a duty to warn the city that a breach in the system would cause water to flow down the corridor and cause damage in the adjacent administration building. The city asserts Basalay's failures proximately caused the water damage. In response, Basalay argues it did not owe Ottawa a duty regarding plumbing services or design, that its duty was defined by its contract with the city, and in any case, any failure on the part of Basalay was not the proximate cause of the damages to the city.

In *Ferentchak v. Village of Frankfort,* 105 Ill.2d 474, 476 (1985), the court considered a case in which plaintiffs sought to hold a civil engineer liable in negligence because work he had done in accordance with the terms of a contract was in fact insufficient to protect the plaintiffs' home from flood damage. The civil engineer had contracted with a property developer to design a water drainage system for a group of lots. *Ferentchak*, 105 Ill. 2d at 476-77. The contract did not require the civil engineer to set foundation grade levels but, as it turned out, the water drainage system was ineffective in relation to the foundation level of plaintiffs' home. *Ferentchak*, 105 Ill. 2d at 476-78. The *Ferentchak* court held that the defendant's reliance upon the terms of his contract was not misplaced and that the contract did not give rise to a duty to perform work outside its parameters. *Ferentchak*, 105 Ill. 2d at 480-81. Even when considering whether the defendant was negligent in failing to exercise the degree of skill or care required of a civil engineer, the *Ferentchak* court reiterated that the scope of the engineer's duty in tort was defined by his contract, which did not require that he set the foundation grade levels. *Ferentchak,* 105 Ill. 2d at 481-82.

We find *Ferentchak* instructive in the instant case. Here, the city does not contend that Basalay did not perform according to the terms of the contract it had with the city. Cary, Basalay's

architect, testified Basalay's part of the project included the walls and roofs of the new building and the renovation of the old building. Although Cary was aware that water could be relieved through a system of drains and slope, Basalay was not responsible for the design or construction of the floor or the drainage system. Furthermore, Cary stated the new building was established a foot higher than the existing building which housed the administrative offices, a process over which Basalay had no control. Cary stated that Basalay had to accommodate the difference in elevation and that the slope could not be changed absent a change in the location of the building. Because Basalay had no contractual duty to accommodate in its design work the potential for flooding from a failure in Osmonics's system, the city's attempt to find Basaly liable for negligence fails.

Basalay's proximate cause argument also has merit. Although proximate cause is ordinarily a question for the trier of fact, what constitutes proximate cause becomes a question of law "when the facts are not only undisputed but are also such that there can be no difference in the judgment of reasonable men as to the inferences to be drawn from them." *Merlo v. Public Service Co. of Northern Illinois,* 381 Ill. 300, 318 (1942). Illinois courts draw a distinction between a condition and a cause. *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 257 (1999). If the negligence charged does nothing more than furnish a condition by which the injury is made possible, and that condition causes an injury by the subsequent, independent act of a third person, the creation of the condition is not the proximate cause of the injury. *First Springfield*, 188 Ill. 2d at 257. The test to be applied is whether the first wrongdoer reasonably might have anticipated the intervening efficient cause as a natural and probable result of the first party's own negligence. *First Springfield*, 188 Ill. 2d at 257.

In the in instant case, we do not believe Basalay might have reasonably anticipated that the

breach in Osmonics's pipe system would be a natural and probable result of its own act of designing the water treatment building with a downward slope toward the administration building. The facts before us are not in dispute and the inference to be drawn from them does not support a finding that Basalay's design plan was the proximate cause of the flood damage incurred by the city.

We also find no reason to question the trial court's denial of the city's motion to amend its complaint. A ruling on a motion to amend the pleadings is within the discretion of the trial court. *Deming v. Montgomery*, 180 Ill. App.3d 527, 533, (1989). In this case, an examination of the proposed amendment indicates the city is basically repleading its original count under the guise of further allegations. The city's proposed expert affidavit does not change our conclusion. As we have stated, Basalay's professional duty was defined by the terms of its contract with the city. The trial court did not err in granting Basalay's summary judgment motion.

For these reasons, we affirm the trial court's ruling granting Basalay summary judgment and reverse the trial court's ruling granting Osmonics summary judgment.

For the foregoing reasons, the judgment of the circuit court of LaSalle County is affirmed in part and reversed in part.

Affirmed in part and reversed in part.

JUSTICE HOLDRIDGE, concurring in part and dissenting in part:

I agree with the decision to affirm the trial court's grant of summary judgment to Basalay, Cary and Alstadt Architects, and to affirm the trial court's denial of the plaintiff's motion to file an amended complaint. However, I also would have affirmed the trial court's grant of summary judgment to Osmonics, Inc., and I therefore dissent from that portion of the judgment of the court.

It is well settled that parties may waive their rights, duties and obligations by express agreement. *Lake County Trust Co. v. Two Bar B, Inc.*, 182 Ill. App. 3d 186, 192 (1989). Parties may even go so far as to contract for an exclusive remedy under a contract (*O'Shield v. Lakeside Bank*, 335 Ill. App. 3d 834, 839 (2002)) and, once agreed upon, an exclusive remedy provision is binding upon all of the parties and will be enforced by Illinois courts. *Omnitrus Merging Corp. v. Illinois Tool Works, Inc.*, 256 Ill. App. 3d 31, 34 (1993). Moreover, our courts have recognized and enforced exclusive remedy provisions even when the contract omits the word "exclusive" if the contract, taken as a whole, warrants that construction. *Hicks v. Airborne Express, Inc.*, 367 Ill. App. 3d 1005, 1011 (2005). "'An exclusive remedy clause will be enforced unless it violates public policy or something in the social relationship of the parties works against upholding the clause.'" *Hicks*, 367 Ill. App. 3d at 1011 (quoting *W.E. Erickson Construction, Inc. v. Chicago Title Insurance Co.,* 266 Ill. App. 3d 905, 910 (1994)). While exclusive remedy clauses must be strictly construed against the benefitting party, public policy permits exclusive remedy clauses between competent parties in order to allow such parties to allocate business risk as they see fit. *Hicks*, 367 Ill. App.3d at 1011.

Here, the City of Ottawa and Osmonics, Inc. are exactly the type of parties one would expect to enter into a contract containing an exclusive remedy provision. Ottawa, admittedly a sophisticated municipal corporation, issued a bid package soliciting bids for work to be performed on a water improvement project. The record established that no less than 16 vendors submitted bids, and Osmonics was awarded the contract only after several months of deliberation and weighing of the merits of each bid. There can be no doubt that at least one factor in Osmonics submitting the successful bid was the fact that the exclusive remedy provision allowed it to reduce its insurance

costs on the project. In fact, Ottawa avers in its complaint that it seeks $142,919.14 on behalf of its insurance carriers, Martin Boyer Company, Inc. and the Illinois Municipal Risk Management Association. The record clearly supports the conclusion that the contract unambiguously provided an exclusive remedy provision that allocated the risks of negligence and breach of warranties to Ottawa.

I find the majority's reliance upon *Tyler Enterprises of Elwood, Inc. v. Jack Skiver*, 260 Ill. App. 3d 742 (1994), and *Berwind Corp. v. Litton Industries, Inc.*, 532 F.2d 1 (7th Cir. 1976), to be misplaced. Both *Tyler* and *Berwind* are clearly distinguishable from the instant matter. In *Tyler,* the court held that a statutory cause of action for strict liability, which did not arise out of the contractual relationship of the parties, was not covered by the contractual remedy provision that excluded all causes of action "arising out of this contract, including negligence." *Tyler*, 260 Ill. App. 3d at 761. Here, we are dealing with an exclusive remedy provision that did not limit the parties to causes of action "arising out of this contract." Instead, the language in the instant matter is clear in stating that "[t]he remedies provided herein are exclusive, and [Osmonics] shall incur no liability other than that stated herein."

Similarly, in *Berwind*, the court merely held that an ambiguous exclusive remedy provision will be strictly construed against the drafter. *Berwind*, 532 F.2d at 4. As the majority points out, in *Berwind,* the exclusive remedy clause was found in a section of the contract entitled "Warranties" which led the court to conclude that the clause was limited in application to breach of warranty claims. Here, unlike *Berwind*, the exclusive remedy clause is contained in the section of the contract entitled "Warranties and Claims" and, thus, clearly establishes the intent of the parties that the exclusive remedy provision applies to both "warranties" and "claims." Likewise, the ambiguous

language of the remedy clause in *Berwind,* interpreted by the court to mean that "in no event are we to be liable under this contract," was insufficient to shield the drafter against a negligence claim. *Berwind*, 532 F.2d at 7. Here, we do not have the ambiguous contract provision that confronted the court in *Berwind.* Rather, the contract provision in the instant matter clearly and unambiguously limits all remedies: "[t]he remedies provided herein are exclusive, and [Osmonics] shall incur no liability other than that stated herein."

There are several other cases in which contract language similar to the provisions at issue herein has been held under Illinois law to prevent an action for negligence. See *Arkwright Mutual Insurance Co. v. Garrett & West, Inc.*, 790 F. Supp. 1386, 1388 (N.D. Ill. 1992); *Gates Rubber Co. v. USM Corp.*, 508 F.2d 603 (7th Cir. 1975); *Illinois Central Gulf R.R. Co. v. Paragas, Inc.*, 772 F.2d 253 (5th Cir. 1984). In *Arkwright*, the court held, under Illinois law, that a contract which contained two provisions, one specific to warranties and another more general clause that prohibited recovery of "any incidental or consequential damages of any nature whatsoever," evidenced a specific intent of two sophisticated business parties to bar any tort claims between the parties. *Arkwright*, 790 F. Supp. at 1390. Similarly, in *Gates*, the court found that a warranty limitation provision, accompanied by a provision barring recovery of "any special indirect or consequential damages," barred an action in tort. *Gates*, 508 F.2d at 617. Likewise, in *Paragas*, the court refused to read into a commercially negotiated liability limitation clause what the court referred to as a "negligence loophole." *Paragas*, 772 F.2d at 255 (contract provision preventing recovery of "all indirect, special or consequential damages" was sufficient to establish the party's intent to prevent any actions sounding in tort).

Given the similarity of the contract language at issue herein "expressly disclaiming liability

for incidental and/or consequential damages" and the contract language found sufficient to bar a tort action in *Arkwright, Gates,* and *Paragas,* I would hold that the plain language of the contract in the instant matter bars Ottawa's claims against Osmonics. I would, therefore, find that the trial court did not err in granting summary judgment to Osmonics. I respectfully dissent from that portion of the judgment of the court reversing the trial court's grant of summary judgment to Osmonics.