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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: YEAGER AIRPORT LITIGATION **CIVIL ACTION NO: 16-C-7000**

THIS DOCUMENT APPLIES TO:

CENTRAL WEST VIRGINIA REGIONAL AIRPORT AUTHORITY, INC., a West Virginia Corporation, Civil Action No: 15-C-1022 KAN

Plaintiff,

v.

TRIAD ENGINEERING, INC., a West Virginia corporation; et al.,

Defendants.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON DEFENDANT MICHAEL BAKER INTERNATIONAL, INC.'S FIFTEENTH AFFIRMATIVE DEFENSE AND DENYING MICHAEL BAKER INTERNATIONAL, INC.'S CROSS MOTION FOR SUMMARY JUDGMENT

On October 15, 2018, a hearing was conducted on Plaintiff's Motion for Summary Judgment on Defendant Triad Engineering, Inc.'s ("Triad") Fifteenth Affirmative Defense and Defendant Michael Baker International, Inc.'s ("MBI") Fifteenth Affirmative Defense (Transaction ID 62171802) and Triad Engineering, Inc.'s and Michael Baker International, Inc.'s Cross Motion for Summary Judgment (Transaction ID 62219387 and Transaction ID 62220231).[1]

Having reviewed the motions and briefs in support of and in opposition to said motions, having heard the argument of counsel, and having conferred with one another to ensure uniformity of their decision, as contemplated by *Rule 26.07(a)* of the *West Virginia Trial Court Rules*, the Presiding Judges unanimously **GRANT** Plaintiff's Motion for Summary Judgment on Defendant Michael

[1] The Court has been advised that the Plaintiff and Triad have reached a settlement in regard to Plaintiff's claims against Triad. Accordingly, the Court denies as moot Plaintiff's Motion for Summary Judgment on Defendant Triad Engineering, Inc.'s Fifteenth Affirmative Defense and denies Triad's Cross-Motion for Summary Judgment.

Baker International, Inc.'s Fifteenth Affirmative Defenses and **DENY** Michael Baker International, Inc.'s Cross Motion for Summary Judgment based on the findings of fact and conclusions of law set forth below.

FINDINGS OF FACT

1. This case involves issues related to the design and construction of a runway extension project at Yeager Airport. As part of this project, Triad was hired to, among other things, design a mechanically stabilized earth structure ("MSE") to support an extension of Runway 5-23 and provide construction management services. Plaintiff alleges that Triad's preliminary design work was completed by Patrick Fogarty, a registered professional engineer.

2. During the course of the project, Mr. Fogarty left his employment with Triad and accepted an engineering job with MBI. Plaintiff alleges that after Mr. Fogarty transferred to MBI, he continued to provide engineering services related to Yeager's runway extension project.

3. On December 20, 2005, the Airport Authority and MBI entered into a "Standard Client Agreement." Under this agreement, MBI was to provide, among other things, the following services:

> **WHEREAS, BAKER** is in the business of providing engineering and technical services and desires to perform such services for **CLIENT**.
>
> **NOW THEREFORE,** in consideration of the mutual promises and covenants contained herein, and intending to be legally bound hereby, the parties agree as follows:
>
> 1. **SCOPE OF WORK.** **BAKER** shall perform such engineering and technical services as are described in the attached Exhibit "A", including any additions or modifications mutually agreed upon and incorporated therein (hereinafter, "Work").

Id. at p. 6.

4. "Exhibit 'A'" referenced in the preceding clause provides:

Exhibit A
(Scope of Services)

The services required under this agreement may include but shall not be limited to, Consultation, Engineering Design, Environmental Services, Field Surveying, CADD Drafting and Design, and Construction Inspection.

An individual and distinct Scope of Services will be defined for each specific assignment or each group of assignments under this agreement.

Id. at p. 7.

5. The Standard Client Agreement also contains the following clause that purports to limit MBI's liability for the engineering services it agreed to provide under said agreement:

LIMIT OF LIABILITY: To the fullest extent permitted by law, the OWNER agrees to limit BAKER's liability to the OWNER and to all construction contractors or subcontractors on the project for any and all injuries, claims, losses, expenses or damages whatsoever arising out of or in any way related to the Project or this Agreement from any cause or causes including but not limited to BAKER's negligent acts, errors, omissions, strict liability, breach of contract, or breach of warranty, such that the total aggregate liability of BAKER to all those named shall not exceed $50,000 or the total fee for BAKER's services rendered in the project, whichever is greater. Under no circumstances shall BAKER be liable to the OWNER for any consequential damages, including but not limited to loss of use or rental, loss of profit or cost of any financing, however caused, including BAKER's fault or negligence.

Id. at p. 6.

6. MBI filed its Amended Answer to the Airport Authority's Second Amended Complaint on November 27, 2017. Included in the Amended Answer was the following affirmative defense:

FIFTEENTH AFFIRMATIVE DEFENSE

Michael Baker's potential liability to the Plaintiff is limited to the total fee paid to Michael Baker, pursuant to the terms of the written contracts between Michael Baker and the Plaintiff, dated December 20, 2005 and February 28, 2007.

See MBI's Amended Answer to Second Amended Complaint at p. 19.

CONCLUSIONS OF LAW

1. "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 2 of *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). Additionally, "[i]t is the province of the Court, and not of the jury, to interpret a written contract." Syl. Pt. 1 of *Orteza v. Monongalia County Gen. Hosp.*, 173 W. Va. 461, 318 S.E.2d 40 (1984).

2. Because the Limitation of Liability Clause contained in MBI's contract with the Airport Authority is repugnant to this State's explicitly stated public policy; the clause is void and unenforceable. In Syllabus Point 3 of *Finch v. Inspectech, LLC*, 229 W. Va. 147, 727 S.E.2d 823 (2012), the Supreme Court of Appeals of West Virginia held that:

> Generally, **in the absence of an applicable safety statute**, a plaintiff who expressly and, under the circumstances, clearly agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct may not recover for such harm, **unless the agreement is invalid as contrary to public policy.** When an express agreement is freely and fairly made, between parties who are in an equal bargaining position, **and there is no public interest with which the agreement interferes**, it generally will be upheld.

(Emphasis added.)

3. The West Virginia Supreme Court further held in *Finch* that "[w]hen a statute imposes a standard of conduct, a clause in an agreement purporting to exempt a party from tort liability to a member of the protected class for the failure to conform to that statutory standard is unenforceable." *Id*. at Syl. Pt. 2 (emphasis added). As the Court further explained:

> A clause in an agreement exempting a party from tort liability is unenforceable on grounds of public policy if, for example, (1) the clause exempts a party charged with a duty of public service from tort liability to a party to whom that duty is owed, or (2) **the injured party is similarly a member of a class that is protected against the class to which the party inflicting the harm belongs**.

Id. at Syl. Pt. 4 (emphasis added).

4. The case law and analysis contained in the *Finch* opinion control the question of the enforceability of the Limitation of Liability Clause at issue in this case. In *Finch*, home buyers entered into a contract for the sale of a home. The buyers then entered into a contract with a home inspection company to inspect the home. The contract between the buyers and the inspection company contained a limitation of liability clause that provided as follows:

> It is understood and agreed that the COMPANY [Inspectech] is not an insurer and that the inspection and report are not intended to be construed as a guarantee or warranty of the adequacy, performance or condition of any structure, item or system at the property address. The CLIENT [the Finches] hereby releases and exempts the COMPANY and its agents and employees of and from all liability and responsibility for the cost of repairing or replacing any unreported defect or deficiency and for any consequential damage, property damage or personal injury of any nature. **In the event the COMPANY and/or its agents or employees are found liable due to breach of contract, breach of warranty, negligence, negligent misrepresentation, negligent hiring or any other theory of liability, then the liability of the COMPANY and its agents and employees shall be limited to a sum equal to the amount of the fee paid by the CLIENT for the inspection and report.**

Finch, 229 W. Va. 151 (emphasis added) (capitalization and brackets in original).

5. Citing *Wellington Power Corp. v. CNA Sur. Corp.*, 614 S.E.2d 680, 217 W. Va. 33 (2005), Defendant MBI argues that sophisticated parties generally should be free to enjoy the freedom to contract absent judicial intervention.

6. However, when *Wellington* is read in its full context, it also explains how the general freedom of contract must yield to other matters of public policy of greater significance. In Syllabus Point 3 of *Wellington*, the Supreme Court of Appeals of West Virginia held that, "[t]his State's public policy favors freedom of contract which is the precept that a contract shall be enforced **except when it violates a principle of even greater importance to the general public**." (Emphasis added).

7. The West Virginia Supreme Court went on to explain the concept of "public policy":

> Much has been written by text writers and by the courts as to the meaning of the phrase "public policy." All are agreed that its meaning is as "variable" as it is "vague," and that there is no absolute rule by which courts may determine what contracts contravene the public policy of the state. The rule of law, most generally stated, is that "public policy" is that principle of law which holds that "**no person can lawfully do that which has a tendency to be injurious to the public or against public good**" even though "no actual injury" may have resulted therefrom in a particular case "to the public." **It is a question of law which the court must decide in light of the particular circumstances of each case.**
>
> The sources determinative of public policy are, among others, our federal and state constitutions, **our public statutes, our judicial decisions, the applicable principles of the common law, the acknowledged prevailing concepts of the federal and state governments relating to and affecting the safety, health, morals and general welfare of the people for whom government - with us - is factually established**.
>
> *Cordle v. General Hugh Mercer Corp.*, 174 W.Va. 321, 325, 325 S.E.2d 111, 114 (1984), quoting Allen v. Commercial Casualty Ins. Co., 131 N.J.L. 475, 477-78, 37 A.2d 37, 38-39 (1944). When asked to void a contract based on a public policy, this Court is mindful of our rule that "the judicial power to declare a contract void as contravening sound public policy 'is a very delicate and undefined power,' and should be exercised only in cases free from doubt. *Richmond v. Railroad* Co., 26 Iowa 191." Syllabus Point 1, *Barnes v. Koontz*, 112 W.Va. 48, 163 S.E. 719 (1932).

Wellington Power Corp., 217 W. Va. 33, (Emphasis added).

8. Syllabus Point 3 of *Finch v. Inspectech, LLC*, 229 W. Va. 147, 727 S.E.2d 823 (2012) puts a fine point on this well-settled precept of law:

> Generally, **in the absence of an applicable safety statute**, a plaintiff who expressly and, under the circumstances, clearly agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct may not recover for such harm, **unless the agreement is invalid as contrary to public policy**. When an express agreement is freely and fairly made, between parties who are in an equal bargaining position, **and there is no public interest with which the agreement interferes**, it generally will be upheld.

(Emphasis added.)

9. The West Virginia Supreme Court further held that "[w]hen a statute imposes a standard of conduct, a clause in an agreement **purporting to exempt a party from tort liability to a member of the protected class for the failure to conform to that statutory standard is unenforceable**." *Id*. at Syl. Pt. 2 (Emphasis added).

10. As the Court further explained:

> A clause in an agreement exempting a party from tort liability is unenforceable on grounds of public policy if, for example, (1) the clause exempts a party charged with a duty of public service from tort liability to a party to whom that duty is owed, or (2) **the injured party is similarly a member of a class that is protected against the class to which the party inflicting the harm belongs**.

Id. at Syl. Pt. 4 (Emphasis added).

11. MBI also cites *State v. Memorial Gardens Dev. Corp.*, 101 S.E.2d 425, 143 W. Va. 182 (1957), which cautions courts against voiding contracts as being against public policy. However, the *Memorial Gardens* case is distinguishable.

12. In *Memorial Gardens*, the State of West Virginia sued a funeral home arguing that the sale of pre-need burial goods and services on a form contact violated certain statutory provisions requiring deposit of funds with banking entities authorized to do business in West Virginia.

13. Specifically, the statute at issue in *Memorial Gardens* included a finding that the sale of pre-need funeral goods and services was against public policy as such sales were susceptible to fraud against customers. The State argued that the statute was validly enacted under its police powers and the funeral home countered that the statute was unconstitutional for various reasons, including impairment of private contracts. The trial court found in favor of the funeral home and the State appealed.

14. On appeal, the West Virginia Supreme Court affirmed the lower court's decision, finding that:

> To the extent that legislation declares pre-need contracts for the furnishing of personal property or funeral or burial merchandise or services wherein the delivery or performance of the same is not immediately required, to be against public policy and void, unless all money paid thereunder shall be paid to and held by a bank, trust company or savings and loan association, covered by federal insurance and authorized to do business in this State, and subject to withdrawal only by the purchaser before death and by the seller (trustee) thereafter, such legislation is an unwarranted exercise of the police power of the state, and is unconstitutional, as being in violation of the provisions of Section 10 of Article III of the Constitution of West Virginia, and the Fourteenth Amendment to the Constitution of the United States.

Memorial Gardens at Syl Pt. 1.

15. Thus, the holding in *Memorial Gardens* serves as an example of the legislature's invalid attempt under its police power to interfere with private contracts. Additionally, *Memorial Gardens* was overruled by *Whitener v. West Va. Bd. of Embalmers & Funeral Directors*, 169 W. Va. 513, 288 S.E.2d 543 (1982).

16. After the West Virginia Supreme Court's ruling *Memorial Gardens*, the West Virginia Legislature amended its statutory provisions regarding the sale of pre-need funeral goods and services, including a change mandating deposit of funds derived from such sales to be deposited in a federally insured financial institution as opposed to a financial institution authorized to do business in West Virginia.

17. A group consisting of a funeral director, funeral home and potential customer filed a declaratory judgment action seeking to invalidate the new statute. In upholding the new legislation, the West Virginia Supreme Court ". . . reverse[d] *State v. Memorial Gardens*, 143 W.Va. 182, 101 S.E.2d 425 (1957), because **regulation of how funeral services are purchased in advance of need is within the legitimate scope of state police power**." *Whitener* at Syl. Pt. 1

(Emphasis added). The Court further held that **"[t]here is no constitutional right to pursue business in a certain way**. Regulations above how businesses are conducted must simply bear a rational relationship to a legitimate state goal, to be constitutional. W. Va. Code, 47-14-1, et seq., meets the test." *Whitener* at Syl. Pt. 2 (Emphasis added).

18. Viewing *Memorial Gardens* in the light of its subsequent history clearly indicates that the West Virginia Legislature may exercise its police power to invalidate provisions in private contracts that violate public policy.

19. In the present case, West Virginia statutes and regulations govern the standard of care for professional engineers (see W. Va. Code § 30-13-1, *et seq*.; and W. Va. CSR § 7-1-1, *et seq*.)

20. It is beyond dispute that these statutes and regulations are constitutional and reflect the State's legitimate exercise of its police powers to protect the public. West Virginia courts have consistently held that the public policy embodied in such statutes and regulations is sufficient to trump the inferior public policy of freedom of contract.

21. MBI's reliance on *Murphy v. N. Am. River Runners*, 412 S.E.2d 504, 186 W. Va. 310 (1991) is additionally misplaced. MBI relies on *Murphy* for the proposition that agreements freely entered into between parties of equal bargaining position will generally be upheld, as long as there is no public interest with which the agreement interferes.

22. In *Murphy*, the West Virginia Supreme Court found that the parties' agreement was unenforceable because it violated public policy. In that case, a customer of a rafting company was injured when her guide attempted to extricate another raft operated by the same company that was caught on some rocks. As part of the rescue effort, the guide intentionally "bumped" his raft into the raft stuck on the rocks. As a result of the collision, the passenger was

thrown forward and seriously injured her leg and ankle. The passenger subsequently sued the rafting company for her injuries. The rafting company filed for summary judgment, arguing that the passenger had signed a release that precluded her claim. In response, the passenger argued the release was invalid for several reasons, including the fact that rafting companies were governed by a safety statute that could not be avoided by the release. The trial court ruled in the rafting company's favor and the passenger appealed.

23. The Supreme Court of Appeals of West Virginia reversed the trial court's decision on several grounds, including violation of public policy. In support of its decision, the Court stated:

> An example of [a clause in an agreement exempting a party from tort liability where the injured party is similarly a member of a class which is protected against the class to which the party inflicting the harm belongs] is that when a statute imposes a standard of conduct, a clause in an agreement purporting to exempt a party from tort liability to a member of the protected class for the failure to conform to that statutory standard is unenforceable. Restatement (Second) of Contracts § 195 comment a, at 66 (1979). *See also* Restatement (Second) of Contracts § 179(a) (1979) (**a public policy against enforcement of promises or other terms may be derived by the court from legislation relevant to such a policy**); *Mulder v. Casho*, 61 Cal. 2d 633, 394 P.2d 545, 547, 39 Cal. Rptr. 705, 707 (Sup. Ct. 1964) (en banc); *Fedor v. Mauwehu Council, Boy Scouts of America, Inc.*, 21 Conn. Supp. 38, 143 A.2d 466, 467 (Conn. Super. Ct. 1958); Prosser and Keeton on the Law of Torts § 68, at 493 (W. Keeton 5th ed. 1984); 57A Am. Jur. 2d Negligence §§ 56, 57 (1989). Thus, **a plaintiff's express agreement to assume the risk of a defendant's violation of a safety statute enacted for the purpose of protecting the public will not be enforced; the safety obligation created by the statute for such purpose is an obligation owed to the public at large and is not within the power of any private individual to waive**. *See, e. g., Mulder v. Casho*, 394 P.2d at 547, 39 Cal. Rptr. at 707.

Murphy at 509 (Emphasis added).

24. "W. Va. Code, 20-3B-3(b) 1987. . . requires commercial whitewater guides to '**conform to the standard of care expected of members of their profession**.' This statute

establishes such standard of care as a statutory safety standard for the protection of participants in whitewater rafting expeditions." *Murphy* at 511 (Emphasis added).

25. Like whitewater rafting companies, engineering firms are bound by a regulatory standard of care for the protection of the public. W. Va. CSR § 7-1-12.3 governs the "Registrant's Obligation to Society" and states, in pertinent part, that ". . . **Registrants shall approve and seal only those design documents and surveys that conform to accepted engineering standards and safeguard the life, health, property and welfare of the public.**" W. Va. CSR § 7-1-12.3(b) (Emphasis added).

26. Just as the statutory standard of care imposed on rafting companies was sufficient to invalidate the release on public policy ground in *Murphy*, the regulatory standard of care imposed on engineering firms is sufficient to invalidate the Limitation of Liability Clause on public policy grounds in the present case.

27. MBI incorrectly claims that W. Va. Code § 30-13-2 does not establish a statutory code of conduct for engineers similar to the home inspector statute as the statute merely "regulates the registration of engineers." MBI's argument failed to accurately depict the intent of W. Va. Code § 30-13-1 *et seq* and completely ignores the promulgated regulations.

28. W. Va. Code § 30-13-1 specifically states that "[t]he Legislature hereby determines the need to regulate the practice of engineering. W. Va. Code § 30-13-2 provides, in pertinent part, that "[i]n order to safeguard life, health and property and to promote the public welfare, the practice of engineering in this State is hereby declared to be subject to regulation in the public interest. … Engineering is hereby declared a learned profession and its practitioners are held accountable to the State and the public by professional standards in keeping with the

ethics and practice of other learned professions in this State. The practice of engineering is a privilege granted by the State."

29. W.Va. Code § 30-13-4 establishes the Board of Registration for Professional Engineers. W.Va. Code § 30-13-9(a) then provides that the Board "[m]ay promulgate and shall adopt 'rules of professional responsibility for engineers.'" which "are binding to any person registered with the board."

30. W. Va. CSR § 7-1-12 sets forth the rules governing the professional responsibilities of engineers.

31. W. Va. CSR § 7-1-12.2, entitled "Rules of Professional Responsibility" provides, in pertinent part:

> To comply with the Board's responsibilities, which are to safeguard life, health, and property, to promote the public welfare, and to maintain a high standard of integrity and practice, the Board has developed the following Rules of Professional Responsibility set forth in this section. These rules supplement the provisions for professional responsibility prescribed in W. Va. Code § 30-13-21 and are binding on every registrant.
>
> (a) All persons registered in West Virginia are required to be familiar with the W. Va. Code § 30-13-1 *et seq.*, this rule, and all applicable laws relating to the practice of engineering. The Rules of Professional Responsibility delineate specific obligations the registrant shall meet. In addition, each registrant is charged with the responsibility of adhering to standards of highest ethical and moral conduct in all aspects of the practice of engineering.
>
> (b) the practice of engineering is a privilege, as opposed to a right. All registrants shall exercise this privilege by performing services only in the areas of their competence according to current standards of technical competence . . .

32. The purpose of the statute and promulgated regulations are clearly to protect and safeguard "life, health, property, and to promote the public welfare."

33. MBI argues that because the Limitation of Liability Clause purports to only limit instead of eliminate liability, the clause comports with West Virginia public policy. The Court finds that this issue was already disposed of in *Finch*, 229 W. Va. 147.

34. As in the present case, the unenforceable limitation of liability clause in *Finch* attempted to both eliminate and limit the home inspection company's liability to amount of the fee paid by the client.

35. While it is true that the West Virginia Supreme Court found that a complete release of all liability would contravene public policy, the Court also found that the purported limitation of liability offended public policy:

> Moreover, the specific terms of the "Unconditional Release and Limitation of Liability" clause of the parties' Inspection Agreement expressly attempt to relieve Inspectech of liability attributable to its inspection of the house the Finches requested it to inspect, and, to the extent said release does not completely absolve Inspectech of such liability, **such terms further endeavor to limit the extent of Inspectech's liability, both of which provisions directly contravene the home inspector standard of conduct established by W. Va. C.S.R. § 87-5-1 *et seq*. . . Insofar as the "Unconditional Release and Limitation of Liability" provision purported to limit the amount of Mr. Flanagan's and Inspectech's liability to the amount the Finches had paid for the home inspection and corresponding report, which figure is substantially less than the mandated limits of liability coverage, such release does not adequately protect the Finches as members of the class intended to be protected from home inspectors' unscrupulous conduct. *See* Syl. pt. 2, *Kyriazis*, 192 W. Va. 60, 450 S.E.2d 649. Therefore, the subject release is invalid as violative of public policy for this reason, as well.**

Finch, 229 W. Va. 147, 156-157 (Emphasis added).

36. MBI's reliance on foreign jurisdictions for case law to support their attempt to limit liability and subvert the clear public policy of this State is not persuasive.

37. Two significant common threads run through these foreign cases. First, none of the cases involve contracts for the design of a structure designed for the primary purpose of public safety. *See RSN Props. v. Eng'g Consulting Servs.*, 301 Ga. App. 52, 686 S.E.2d 853

(2009)(real estate developer entered into contract with engineering firm to perform soil studies and to render a professional engineering opinion on the suitability of using septic systems in a residential subdivision); *Valhal Corp. v. Sullivan Assocs.*, 44 F.3d 195 (1995) (real estate developer entered into contract with architectural, planning and engineering firm for feasibility study for potential construction project); *Blaylock Grading Co., LLP v. Smith*, 658 S.E.2d 680, 189 N.C. App. 508 (2008) (grading company entered into contract with engineering firm for land surveying services); *1800 Ocotillo, LLC v. WLB Group, Inc.*, 219 Ariz. 200, 196 P.3d 222 (2008) (property developer entered into contract with engineer for surveying services); *W. William Graham, Inc. v. Cave City*, 289 Ark. 105, 709 S.W.2d 94 (1986) (municipality entered into contract with engineer for the design of a wastewater treatment facility); *Markborough Cal. v. Superior Court*, 227 Cal. App. 3d 705, 277 Cal. Rptr. 919 (1991) (property developer entered into contract with engineering firm to design a manmade lake for a residential community); *Leis Family L.P. v. Silversword Eng'g*, 126 Haw. 532, 273 P.3d 1218 (2012) (property owner entered into contract with engineering firm for installation of a thermal energy system designed by subcontractor engineering firm); *Marbro Inc. v. Borough of Tinton Falls*, 297 N.J. Super. 411, 688 A.2d 159 1996) (Borough entered into contract with contractor for improvements to a local park); and *Illinois Power Company v. Duke Engineering & Services, Inc.*, 2002 WL 35232810 (N.D. Ill. 2002) (public utility entered into contract with engineering firm to address degraded voltage issues and failed to meet the agreed upon completion date).

38. Second, with the exception of *Markborough*, *supra* (which involved a rupture in the artificial lake's liner resulting in a leak)[2] and *Marbro*, *supra*, (which involved the resurfacing

[2] The *Markborough.* case, *supra*, turned in part on a statutory provision under California law that enabled parties to a construction contract to negotiate and expressly agree: ". . . with respect to the allocation, release, liquidation, exclusion, or limitation as between the parties of any liability (a) for design defects, or (b) of the promisee to the promisor arising out of or relating to the construction contract." *Id*. at 709. The West Virginia legislature has passed

of a park after large quantities of glass emerged from the soil) all of the foreign cases involved only economic loss. See *RSN Props., supra* (developer could not get county approval to develop certain lots because they were not suitable for septic systems); *Valhal Corp., supra* (real estate developer could not build to original plan because architectural, planning and engineering firm failed to discover height restriction); *Blaylock Grading Co., supra* (engineering firm incorrectly set benchmarks for the complex in excess of that identified in the plans requiring grading company to purchase additional fill material); *1800 Ocotillo, LLC*, supra (engineer failed to identify third-party interest in a right-of-way leading to the denial of certain building permits); *W. William Graham, Inc., supra* (engineer failed to submit design plans on time resulting in loss of funds to municipality); wastewater treatment facility); and *Leis Family L.P., supra* (damages related to underperforming thermal energy system); *Illinois Power Company, supra* (damages related to failure to meet agreed upon completion deadline) .

39. In the case at bar, because Plaintiff has suffered tangible damage to its property, the economic loss doctrine is not at issue in this case.

40. Plaintiff also argues Defendant MBI is not entitled to Summary Judgment because questions of material fact exist as to whether MBI's actions constitute gross negligence or willful conduct which would preclude applicability of its limitation of liability clause. The Court declines to rule on whether a question of material fact exists as to whether MBI's actions constitute gross negligence and willful conduct as such finding is not necessary in light of the Court's finding that the limitation of liability provision is invalid on public policy grounds.

41. The Presiding Judges FIND there is no public policy greater than the protection of people and property. Defendant MBI was bound by a regulatory standard of care in its

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no statute comparable to the one at issue in *Markborough* and said statute is clearly incompatible with West Virginia public policy.

engineering work specifically promulgated to protect the safety of persons and property. As such, Defendant MBI's Limitation of Liability Clause is not applicable because the inferior public policy of freedom of contract cannot supplant the greater public policy of safety. Furthermore, any attempt to either eliminate or limit an engineering firm's liability violates this State's strong public policy that favors public safety.

WHEREFORE, it is ORDERED, ADJUDGED, and DECREED that Plaintiff's Motion for Summary Judgment on Defendant Michael Baker International, Inc.'s Fifteenth Affirmative Defense (Transaction ID 62171802) is GRANTED and Michael Baker International, Inc.'s Cross Motion for Summary Judgment (Transaction ID 62220231) is DENIED.

It is so **ORDERED**.

ENTER: February 4, 2019.

/s/ Derek C. Swope
Lead Presiding Judge
Yeager Airport Litigation