

NO. 0000 1. 4

**IN THE CIRCUIT COURT OF UPSHUR COUNTY, WEST VIRGINIA  
BUSINESS COURT DIVISION**

**THE VELOTTA COMPANY,  
an Ohio Corporation,**

**Plaintiff,**

**v.**

**STANTEC CONSULTING SERVICES,  
INC., a New York Corporation,**

**Defendant/Third-Party Plaintiff,**

**v.**

**CTL ENGINEERING OF WEST VIRGINIA, INC.,  
a West Virginia Corporation,**

**Third-Party Defendant.**

**ORDER DENYING PLAINTIFF, THE VELOTTA COMPANY'S,  
MOTION FOR PARTIAL SUMMARY JUDGMENT**

This matter comes before the Court pursuant to Plaintiff, The Velotta Company's, Motion for Partial Summary Judgment. A briefing schedule entered on November 3, 2015, provided parties an opportunity for reply and rebuttal. The Court has reviewed the Motion, memorandum in support thereof, Defendant's memorandum in opposition, and Plaintiff's reply memorandum, and now finds the matter ripe for adjudication.

Velotta requests that the Court invalidate, as a matter of law, the Limitation on Liability Clause contained within each of the contracts at issue in this case on the grounds that the clause violates public policy.

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 law. *San Francisco v. Wendy's Int'l Inc.*, 221 W.Va. 734, 750, 656 S.E.2d 485 (2007). "The circuit court's

function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syl. Pt. 9, *Law v. Monongahela Power Co.*, 210 W.Va. 549, 558 S.E.2d 349 (2001). A motion for summary judgment should be denied "even where there is no dispute to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom." Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). When considering a motion for summary judgment, the court "must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion." *Id.* However, "[s]ummary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." *Id.*

In the instant case, the Plaintiff's Motion for Partial Summary Judgment requests that the Court find that the clause at issue<sup>1</sup> is invalid and unenforceable on the grounds that a limitation of liability clause that absolves a party of a failure to adhere to a statutorily imposed standard of conduct is contrary to public policy. Defendant does not dispute that engineers are held to a statutorily imposed standard of conduct or that West Virginia case law allows the courts to invalidate a limitation of liability clause when the clause purports to exempt a party from tort liability for failure

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<sup>1</sup> LIMITATION OF LIABILITY: The CLIENT [i.e., Velotta] releases STANTEC from any liability and agrees to defend, indemnify, and hold STANTEC harmless from any and all claims, damages, losses and/or expenses, direct and indirect, or consequential damages, including but not limited to attorney's fees and charges and court and arbitration costs, arising out of, or claimed to arise from, the performance of the SERVICES, excepting liability arising from the negligence or willful misconduct of STANTEC.

It is further agreed that the total amount of all claims the CLIENT may have against STANTEC under this AGREEMENT or arising from the performance or non-performance of the SERVICES under any theory of law, including but not limited to claims for negligence, negligent misrepresentation, and breach of contract, shall be strictly limited to the lesser of the fees paid to STANTEC for the SERVICES or \$500,000. ....

STANTEC's liability with respect to any claims arising out of this AGREEMENT shall be absolutely limited to direct damages arising out of the SERVICES and STANTEC shall bear no liability whatsoever for any consequential loss, injury or damages incurred by the CLIENT, including but not limited to claims for loss of use, loss of profits and loss of markets.



to conform to a statutory standard. However, Defendant asserts that Velotta does not fall within the class sought to be protected by the legislature and therefore Velotta cannot now seek to invalidate a clearly-stated, freely negotiated contract clause. Plaintiff's rebuttal does not dispute the 'protected class' prerequisite, but argues that Velotta falls within this class.

West Virginia courts recognize "the freedom to contract is a substantial public policy that should not be lightly dismissed." *Wellington Power Corp. v. CNA Sur. Corp.*, 217 W.Va. 33 (2005). As such, courts "are not to extend arbitrarily those rules which say that a given contract is void as being against public policy." *Id.* (citations omitted). "The law is well settled in this State that a party to a valid contract may in advance limit his liability for acts of negligence whether the subsequent action be based on contract or tort." *Stamp v. Windsor Power House Coal Co.*, 154 W.Va. 578 (1970) (citation omitted). Limitation on liability clauses are enforced as long as they are clearly-stated in writing. *Murphy v. N. Am. River Runners, Inc.*, 186 W.Va. 310 (1991) ("When such 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.").

There are limited public policy exceptions to this general rule. One such exception applies "[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 syllabus ¶ 1.

Velotta is not a member of the "protected class" with respect to the relevant code sections. The stated purpose of West Virginia's code of conduct for engineers is: "In 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." W. Va. Code §30-13-2. Section 7-1-12(d) of the West Virginia Code of State Rules requires registered engineers to "serve the

legitimate interests of their employers, clients, and customers within the limits defined by this rule.” However the limits defined by the rule refer to avoiding conflicts of interests and undertaking assignments only when qualified. W.V.C.S.R. §7-1-12.4 (“Registrant's Obligation to Employer and Clients”). The Complaint alleges only that Stantec failed to “complete its work in a diligent and timely manner, providing incomplete, incorrect, and error-filled designs.”

Based upon a review of the statutes and rules cited by Plaintiff, it is clear that engineers are regulated by the state because of the potential that members of the public may be endangered by faulty engineering work. The purpose of these regulations is not to protect private contractors like Velotta—a corporation with equal bargaining power—from economic harm associated with delays in project completion. Velotta’s claims are not of a public concern and do not relate to public welfare.

The cases cited by the Motion exhibit this purpose. All of the cases cited involve a tortfeasor who held superior bargaining power over an injured party who had to rely upon the tortfeasor’s expertise: a river rafting company and customer, an university and student athlete, and a home inspector and homeowner. *Murphy v. North American River Runners, Inc.*, 186 W.Va. 310, 412 S.E.2d 504 (1991); *Kyriazis v. University of West Virginia*, 192 W.Va. 60, 450 S.E.2d 649 (1994); *Finch v. Inspectech, LLC*, 229 W.Va. 147, 727 S.E.2d 823 (2012).

Accordingly, it is clear that Velotta is not a member of the class of individuals whom the public policy exception is intended to protect. Plaintiff is not a general consumer or member of the public without industry knowledge, but rather a sophisticated client on equal footing with Defendant. This clearly-stated, express agreement was freely and fairly made between two parties in equal bargaining position and there is no public interest with which the agreement interferes. Construing the evidence in the light most favorable to the Plaintiff, no genuine issues of material fact remain regarding the enforceability of the Limitation of Liability Clause.



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THEREFORE, upon the record and pertinent legal authorities, the Court ORDERS that the Plaintiff, the Velotta Company's Motion for Partial Summary Judgment is DENIED. The Clerk of the Circuit Court of Upshur County, West Virginia, is directed to forward an attested copy of this Order to Resolution Judge, the Honorable James J. Rowe, Greenbrier County Courthouse, P.O. Box 751, 200 North Court Street, Lewisburg, WV 24901; the Business Court Division Central Office at the Berkeley County Judicial Center, 380 W. South Street, Suite 2100, Martinsburg, West Virginia, 25401; and all counsel of record.

cc 12/23/15  
Jd. Rowe  
BC Div  
J. Gabbart  
A. Catanzarite  
P. Retty

ENTER this 23 day of Dec, 2015.

  
CHRISTOPHER C. WILKES, JUDGE  
BUSINESS COURT DIVISION

ATTEST: A true copy from the records located in the office of the Clerk of the Circuit Court of Upshur County, West Virginia.

Given under my hand 12/23/15

BRIAN P. GAUMET, CLERK  
By Melissa Stumeling  
Deputy Clerk