ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY

1800 OCOTILLO, L.L.C. v. THE WLB GROUP, INC.
CV-08-0057-PR

PARTIES AND COUNSEL:

Petitioner: The WLB Group, Inc. ("WLB"), represented by Jerry C. Bonnett of Bonnett, Fairbourn, Friedman & Balint, P.C.

Respondent/Cross-Petitioner: 1800 Ocotillo, LLC ("Ocotillo"), represented by Dow Glenn Ostlund and Tracy S. Morehouse of Tiffany & Bosco, P.A.

FACTS:

Ocotillo is a real estate developer that, in 1998, commenced development of a townhouse project in Phoenix on property bounded on one side by the Arizona Canal. In November of that year, Ocotillo agreed to pay WLB $26,970 in exchange for WLB's provision of surveying, engineering, and landscape architecture services to the townhouse project. Ocotillo authorized its design-build contractor, Morris Building and Management, Inc. ("Morris Building"), to sign the contract with WLB. WLB sent the contract to Morris Building via facsimile and attached a page to the contract entitled "Standard Conditions."

Morris Building separately signed the page evidencing its agreement to these terms, including the following limitation-of-liability provision:

> 7. Client agrees that the liability of WLB, its agents and employees, in connection with services hereunder to the Client and to all persons having contractual relationships with them, resulting from any negligent acts, errors, and/or omissions of WLB, its agents, and/or employees is limited to the total fees actually paid by the Client to WLB for services rendered by WLB hereunder.

In January 2000, Ocotillo entered into a supplemental contract with WLB for provision of additional services in exchange for payment of $28,000 to WLB. The supplemental contract incorporated the 1998 contract.

Pursuant to the terms of the contract and supplemental contract, WLB prepared a survey purportedly depicting the boundaries of the townhouse project property and all claimed rights-of-way affecting the property. This survey, however, allegedly failed to accurately identify an existing right-of-way owned by Salt River Project and Salt River Valley Water Users Association (collectively, "SRP"), the entity charged with managing the Arizona Canal. WLB prepared improvement drawings and a final plat based on this survey. After SRP disputed the final plat due to an inaccurate depiction of its right-of-way, the City of Phoenix refused to issue needed construction permits. Moreover,

after SRP's right-of-way was properly identified, Ocotillo claims it was required to procure a redesigned site layout and property improvements from other engineering and survey firms.

In December 2000, Ocotillo sued WLB for breach of contract and professional negligence. WLB counterclaimed for unpaid fees and sought a declaratory judgment regarding the enforceability of the limitation-of-liability provision set forth in the contract.

In July 2002, the trial court granted partial summary judgment for WLB on Ocotillo's breach-of-contract claim and additionally ruled that the limitation-of-liability provision in the Contract was unenforceable as against public policy. After WLB filed another motion for partial summary judgment in March 2004, the court reconsidered its prior ruling and decided the provision was enforceable. The court stated as follows:

> The limitation of liability between two parties (or their agents) who each had experience in business transactions, where it is undisputed that both principals read the contract before signing it and which dealt with a substantial and sophisticated real estate transaction, is valid and not contrary to public policy. If the condition was not read or unable to be read the same rule applies in this court's view (i.e. it should have been read). In addition to cases cited by WLB at 9, 11-12 of its motion, *see Pinnacle Peak* (129 Ariz. 385, 631 P.2d 540) where Justice O'Connor speaking for Division One determined that the strict application of the parol evidence rule was necessary where there was a written contract concerning sophisticated parties in a sophisticated dickered real estate transaction.
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> While paragraph 7 was not itself apparently a negotiated or dickered contract term, the contract as a whole, although it contains boilerplate including paragraph 7, is decidedly not a contract of adhesion. We are not dealing with a boilerplate term between parties of unequal bargaining position where the drafter has reason to believe that the adhering party would not have asserted to the particular term had he or she known of its presence (*Darner*, 682 P.2d 388, 396). Ocotillo's representative signed the very page on which paragraph 7 appears so the argument that WLB failed to forcefully bring paragraph 7 to its attention is not persuasive. There is no claim of fraud or misrepresentation. The limitation of liability in this business setting is not unconscionable. *See Valhal* (44 F.3d 195); *Markborough* (227 Cal. App. 3d 705); *Marbro* (688 A.2d 159). The court distinguishes *Angus* (173 Ariz. 159, 840 P.2d 1024) in part, as there a reasonable expectations issue was raised and held to be for the jury where the eighteen-month limitation on liability between sophisticated parties was unilaterally presented as
> a "change" after initial contract documents were agreed to. That part of *Angus* finding that the eighteen-month limitation term was not unconscionable as a matter of law is applicable to the instant case. The limitation did not have to be in bold print in the instant case.
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> We are not dealing with a limitation of professional negligence where a personal injury has occurred but only economic loss. *See e.g. Flory* (129 Ariz. 574,

578, 633 P.2d 383, 387) (privity of contract required to maintain action for breach of an implied warranty but no privity required for certain personally injured plaintiffs to sue).

There are certain contract principles which courts should foster and not inhibit under our system of jurisprudence. One is that boilerplate provisions are expected to be in virtually every contract, and where not unconscionable and where they don't invite a reasonable expectations analysis, they are important, mean what they say and are binding. This is especially true in this case where the contract was entered into in a business setting between sophisticated parties and/or their sophisticated agents.

Minute Entry filed May 27, 2004, in Maricopa County Superior Court No. CV 2000-021738.

Finally, in November 2006, after WLB filed another motion for partial summary judgment, the trial court entered judgment pursuant to Arizona Rule of Civil Procedure 54(b), declaring that the limitation-of-liability provision was enforceable and that "enforceable damages be fixed in the amount already paid, to wit, Fourteen Thousand Two Hundred Forty Two ($14,242.00) Dollars." Minute Entry filed November 16, 2006, in Maricopa County Superior Court No. CV 2000-021738. Ocotillo timely appealed from this order.

In an opinion filed January 29, 2008, the court of appeals concluded that public policy does not prohibit the enforcement of a contractual provision that limits the liability of a design professional for its sole negligence, but that enforceability must be decided by a jury. Thus, the court reversed and remanded. WLB filed its petition for review in this Court on February 27, 2008. Ocotillo filed its cross-petition on March 12, 2008.

ISSUE PRESENTED BY PETITIONER WLB

Whether a contractual limitation on liability in a contract between a land surveyor and a land developer is an "assumption of risk" as that term is used in Arizona Constitution, Art. 18, § 5 so as to require a jury trial even in cases seeking recovery for only economic loss.

ISSUE PRESENTED BY CROSS-PETITIONER OCOTILLO

Whether it is void as against public policy of the State of Arizona to allow a licensed professional, such as WLB, to limit its liability for its own professional negligence through a limitation of liability/assumption of risk provision attached to the professional services contract? The Court of Appeals found that such limitation of liability provisions by certain types or classes of licensed professionals are not contrary to the public policy of the State of Arizona. Ocotillo petitions this Court to review the Court of Appeals' decision on that issue.