

IN THE SUPREME COURT OF MISSOURI

Supreme Court Appeal No. 83383

PURCELL TIRE AND RUBBER COMPANY

Appellant,

v.

EXECUTIVE BEEHCRAFT, INC.

Respondent.

Appeal from the Circuit Court of Clay County, Missouri
Honorable Larry D. Harman

APPELLANT'S SUBSTITUTE REPLY BRIEF

ORAL ARGUMENT REQUESTED

GRAY, RITTER & GRAHAM, P.C.
Morry S. Cole, #46294
Maurice B. Graham, #18029
701 Market Street, Suite 800
St. Louis, Missouri 63101
Telephone: 314/241-5620

Facsimile: 314/241-4140

TABLE OF CONTENTS

	<u>PAGES</u>
Table of Contents 1	
Table of Authorities	2
Points Relied On.....	3
Facts	5
Argument.....	6
Conclusion	12

TABLE OF AUTHORITIES

PAGES

Alack v. Vic Tanny International of Missouri, Inc., 923 S.W.2d 330
(Mo. banc 1996) 7, 8, 9, 10, 12

Crawford v. Whittaker Construction, Inc., 772 S.W. 2d 819, 822
(Mo. Ct. App. 1989) 11

Economy Forms v. Alberici, 2000 WL 1741563
(Mo. App. E.D. Nov. 28, 2000) 10

In re Dun & Bradstreet Credit Customer Litig, 130 F.R.D. 366
(S.D. Ohio 1990) 9

Jensen v. ARA Services, Inc., 736 S.W.2d 374
(Mo. banc 1987) 9

McDonalds v. Sandbothe, 814 S.W.2d 665, 670
(Mo. Ct. App. 1991) 8

Purcell Tire v. Executive Beechcraft, 2000 WL 1744502
(Mo. App. W.D. Nov. 28, 2000) 10, 11

Ring v. Metropolitan Sewer District, 2000 WL 1774166
(Mo. App. E.D. Dec. 05, 2000) 8

Schaffer v. Property Evaluators, Inc., 854 S.W.2d 493 (Mo. Ct. App. 1993) 11

State ex rel. Byrd v. Chadwick, 956 S.W.2d 369, 381 (Mo. Ct. App. 1997) 9

Websters Third New Int'l Dictionary (1981) 11

POINTS RELIED ON

I

THE TRIAL COURT ERRED IN GRANTING PARTIAL SUMMARY JUDGMENT ON DAMAGES TO BEECH AND LIMITING DAMAGES TO \$1,250 IN THAT THE PURPORTED LIABILITY-LIMITATION CLAUSE IN THE AIRPLANE PRE-PURCHASE SURVEY AGREEMENT IS UNENFORCEABLE BECAUSE NO SEPARATE CONSIDERATION WAS GIVEN FOR IT, NO CONTROVERSY EXISTED AT THE TIME THE AGREEMENT WAS SIGNED, THE CLAUSE CONSTITUTES AN UNLAWFUL PENALTY AND THE CLAUSE IS AMBIGUOUS IN THAT IT DOES NOT CONTAIN THE WORDS “NEGLIGENCE” OR “FAULT,” IT IS NONSENSICAL, AND DOES NOT COVER, OR EXPLAIN, THE CONDUCT COVERED BY THE CLAUSE.

Alack v. Vic Tanny International of Missouri, Inc., 923 S.W.2d 330 (Mo. banc 1996)

Ring v. Metropolitan Sewer District, 2000 WL 1774166 (Mo. App. E.D. Dec. 05, 2000)

McDonalds v. Sandbothe, 814 S.W.2d 665, 670 (Mo. Ct. App. 1991)

Jensen v. ARA Services, Inc., 736 S.W.2d 374 (Mo. banc 1987)

State ex rel. Byrd v. Chadwick, 956 S.W.2d 369, 381 (Mo. Ct. App. 1997)

In re Dun & Bradstreet Credit Customer Litig., 130 F.R.D. 366 (S.D. Ohio 1990)

Economy Forms v. Alberici, 2000 WL 1741563 (Mo. App. E.D. Nov. 28, 2000)

Purcell Tire v. Executive Beechcraft, 2000 WL 1744502 (Mo. App. W.D. Nov. 28, 2000)

Crawford v. Whittaker Construction, Inc., 772 S.W. 2d 819, 822 (Mo. Ct. App. 1989)

Websters Third New Int’l Dictionary (1981)

Schaffer v. Property Evaluators, Inc., 854 S.W.2d 493 (Mo. Ct. App. 1993)

FACTS

In its Statement of Facts and throughout its argument, Executive asserts that to discover the oil leak in the engine of the Beechjet they inspected would have required partial disassembly of the engine. (See, e.g. Resps. Brief at 20). Purcell asserts that the leak was disclosed in the log book and was easily known had Executive properly performed its log book inspection. (L.F. 2-3).

ARGUMENT

I

THE TRIAL COURT ERRED IN GRANTING PARTIAL SUMMARY JUDGMENT ON DAMAGES TO BEECH AND LIMITING DAMAGES TO \$1,250 IN THAT THE PURPORTED LIABILITY-LIMITATION CLAUSE IN THE AIRPLANE PRE-PURCHASE SURVEY AGREEMENT IS UNENFORCEABLE BECAUSE NO SEPARATE CONSIDERATION WAS GIVEN FOR IT, NO CONTROVERSY EXISTED AT THE TIME THE AGREEMENT WAS SIGNED, THE CLAUSE CONSTITUTES AN UNLAWFUL PENALTY AND THE CLAUSE IS AMBIGUOUS IN THAT IT DOES NOT CONTAIN THE WORDS "NEGLIGENCE" OR "FAULT," IT IS NONSENSICAL, AND DOES NOT COVER, OR EXPLAIN, THE CONDUCT COVERED BY THE CLAUSE.

ARGUMENT

I. Alack and Footnote 4

Executive Beechcraft (“Executive”) agrees that Alack v. Vic Tanny International of Missouri, Inc., 923 S.W.2d 330 (Mo. banc 1996), is a clear starting point to analyze exculpatory causes for future negligence in Missouri. (Resps. Brief at 20). Further, Executive agrees that clear and explicit language in the contract is required to absolve a person from such liability. Id. However, relying heavily on dicta in footnote 4 from Alack and cases that involve neither inspection contracts nor exculpatory clauses for future negligence, Executive argues that its cryptic exculpatory clause should be enforced. Footnote 4 states: This case does not involve an agreement negotiated at arms length between equally sophisticated commercial entities. Less precise language may be effective in such situations and we reserve any such issues. Alack at fn 4.

Footnote 4, were it the law, would require several facts to be found before a trial court could rule on the validity of a clause purporting to release future negligence without using the words “negligence” or “fault”:

1. That an agreement was negotiated.
2. The negotiations were arms-length negotiations.
3. The arms-length negotiations were between equally sophisticated commercial entities.

Alack provides no guidance as to how to define the very important terms in each of these factors, nor is there any easy way to define them consistently. If this Court, in this case, abandons the clear and unambiguous law stated in Alack and applies factors similar or substantially similar to those in footnote 4, it will be adopting a difficult test for trial courts throughout the state to apply with consistent results. Such amorphous words and phrases as “negotiated”, “at arms-length”, “equally sophisticated”, and “sophisticated commercial

entities” are terms that are subject to various interpretations. Even if such a test is applied to this case, Executive’s purported exculpatory clause should still be held unenforceable.

1. Agreement Negotiated

The record in this case shows that there were no meaningful negotiations between the parties and that the Aircraft pre-purchase survey was basically a contract of adhesion. (See L.F. 94-98). The purported liability-limiting clause was boilerplate.

2. Negotiations at Arms Length

Missouri case law is replete with discussions of arms-length negotiations. The cases describe give and take, compromise, extensive discussions, multiple drafts, deletions, additions and revisions. See, e.g., Ring v. Metropolitan Sewer District, 2000 WL 1774166 (Mo. App. E.D. Dec. 05, 2000)(arms-length negotiations between competent attorneys occurred after seven years of litigation); McDonalds v. Sandbothe, 814 S.W.2d 665, 670 (Mo. Ct. App. 1991)(Trial court was not required to construe ambiguous lease against lessee and in favor of lessors merely because lease was drafted by lessee, where lessors did not merely sign lease and amendments but signed lease and amendments only after extensive arms-length negotiations by experienced real estate development specialist which resulted in extensive interlineations, deletions and additions); Jensen v. ARA Services, Inc., 736 S.W.2d 374 (Mo. banc 1987); State ex rel. Byrd v. Chadwick, 956 S.W.2d 369, 381 (Mo. Ct. App. 1997)(court looks at character of negotiations, inter alia, to determine that the negotiations were at arms-length (citing In re Dun & Bradstreet Credit Customer Litig., 130 F.R.D. 366 (S.D. Ohio 1990)).

Certainly the record in this case does not support a finding that any arms-length negotiations took place. Here, Executive’s form contract was faxed to Purcell and back to Executive with no negotiation whatsoever. (L.F. 94-98). There were no extensive discussions, revisions, additions, deletions, or any other type of give and take or compromise.

3. Negotiations Between Equally Sophisticated Commercial Entities

What does “equally sophisticated commercial entities” mean? Does it mean that the parties share approximately equal financial sophistication? Or does that mean that they share approximately equal technical sophistication? When it comes to the relative sophistication of the parties as to the inner workings and inspection of airplanes and aircraft log books, certainly these parties do not stand on equal footing.

If Alack applies to all contracts purporting to release one party from future acts of negligence, extensive fact finding by trial judges to determine the validity of exculpatory clauses can be avoided in the future.

II. The Court of Appeal’s Opinion

The Western District’s opinion in this case is sound, it is reasonable, and it falls within the mandates of Alack. Further, the Eastern District issued an opinion on the same day with similar reasoning. See, Economy Forms v. Alberici, 2000 WL 1741563 (Mo. App. E.D. Nov. 28, 2000).

The Western District begins its analysis by observing that in Missouri it is presumed that contracts are read, understood, and agreed to as part of the bargain. Purcell Tire v. Executive Beechcraft, 2000 WL 1744502 (Mo. App. W.D. Nov. 28, 2000). The Court further observes that there is, legally, a different approach to clauses that purport to release a party for liability for future negligent acts than other contractual provisions. Id.

The Court observed, and Purcell agrees, that both Purcell and Executive intended for Purcell to rely on the “pre-purchase survey” in making a decision as to whether or not to purchase the plane. That is evident from the title of the contract. Purcell also agrees that it is incongruous for Purcell to expect that, when Executive was negligent and caused damage, the economic loss resulting from that negligence would remain entirely with Purcell.

Executive argues that the Court of Appeals found that the contract was not ambiguous. (Resps. substitute brief at 37). In actuality, the Court of Appeals observed that the purported liability-limiting clause was “cryptic” and phrased in a way that “the customer [would] be less likely to take notice of the shift in the allocation of liability.” Purcell at *4. The Court stated:

Executive cannot point to clear, specific, unmistakable and conspicuous language in this contract and argue that, whatever the nature and context of the pre-purchase survey contract, and whatever a survey purchaser might otherwise reasonably have expected, Purcell must have noticed the language in question and therefore must be held to have explicitly agreed to retain virtually all of the economic risk of a negligently performed inspection. Here, the language was not even clear and specific, much less unmistakable and conspicuous; and we have no evidence that the provision was implicitly bargained for. Id.

A “bargain” as a noun is “a discussion of terms of an agreement,” and, as a verb, is “to negotiate over the terms of an agreement.” Crawford v. Whittaker Construction, Inc., 772 S.W. 2d 819, 822 (Mo. Ct. App. 1989) (citing Websters Third New Int’l Dictionary 1981). “Vague and inconspicuous exculpatory language in an inspection contract which purports to absolve the inspecting party of any responsibility will generally be presumed to be unbargained for.” Id. Schaffer v. Property Evaluators, Inc., 854 S.W.2d 493 (Mo. Ct. App. 1993). There is no evidence of bargain here. Without a clear, explicit and unmistakable shifting of risk and evidence of bargain, an exculpatory clause should be held unenforceable as a matter of law and public policy.

Contrary to Executive’s argument that the Western District’s opinion unnecessarily extends Alack to commercial entities, the Western District’s opinion clarifies the law in a plain and simple bright line that is easy for trial courts throughout the state to follow and apply.

CONCLUSION

For each and every reason stated herein and for the sake of establishing a bright-line easy-to-apply legal standard to guide trial courts throughout the state, this Court should adopt the law as set forth in Alack to apply to all contractual provisions purporting to release a party from future negligence and should, as did the Western District, reverse and remand this case to the trial court for further proceedings.

Respectfully Submitted,

GRAY, RITTER & GRAHAM, P.C.

Morry S. Cole #46294
Maurice B. Graham, #18029
701 Market Street, Suite 800
St. Louis, MO 63101
314/241-5620 Phone
314/241-4140 Fax

CERTIFICATE OF SERVICE

I hereby certify that two copies of Appellants Brief were served this 5th day of May, 2001, by depositing same in the U.S. Mail, first class, postage prepaid, and addressed as follows:

Robert W. Cotter, Esq.
Kent M. Bevan, Esq.
DYSART TAYLOR LAY COTTER
& McMONIGLE
4420 Madison Ave.
Kansas City, MO 64111

SPECIAL RULE NO. 1(C) CERTIFICATE

I hereby certify that this Brief complies with the limitations contained in Special Rule No. 1(b) and that this brief contains 2,101 words according to the word count of Corel Word Perfect Version 8.

GRAY, RITTER & GRAHAM, P.C.

Morry S. Cole #46294
Maurice B. Graham, #18029
701 Market Street, Suite 800
St. Louis, MO 63101
314/241-5620 Phone
314/241-4140 Fax

SPECIAL RULE NO. 1(F) CERTIFICATE

I hereby certify that this disk has been checked for viruses in compliance with Special Rule No. 1(f) and that it is virus free.

GRAY, RITTER & GRAHAM, P.C.

Morry S. Cole #46294
Maurice B. Graham, #18029
701 Market Street, Suite 800
St. Louis, MO 63101
314/241-5620 Phone
314/241-4140 Fax