

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 BRIEF

—

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

Purcell Tire and Rubber Company, Inc. (“Purcell”) brought an action in the Circuit Court of Clay County, Missouri, against Executive Beechcraft, Inc. (“Beech”) seeking damages for alleged breach of contract and negligence by Beech. Beech moved for partial summary judgment limiting damages, which was granted (L.F. 156). The parties stipulated to a confession of judgment by Beech thereby making the entry of partial summary judgment ripe for appeal. (L.F. 157-158; 160). This case arose in a county within the Western District of Missouri. The Missouri Court of Appeals Western District has general appellate jurisdiction in all cases in that district except those within the exclusive jurisdiction of the Missouri Supreme Court. Jurisdiction was proper for this appeal in the Court of Appeals for the Western District of Missouri. *Mo. Const. art. V, sec. 3*. After opinion by the Western District, Respondent moved for transfer to this Court. Pursuant to this Court’s Order of March 20, and pursuant to Rule 83.04 and *Mo. Const. art. V secs. 3 and 10* jurisdiction is proper in this Court.

STATEMENT OF FACTS

Appellant Purcell is a Missouri Corporation engaged in the business of selling commercial and passenger tires and providing tire and vehicle services through its several locations throughout the country. (L.F. 11; 63).

Respondent Beech is a Missouri Corporation engaged in the business of buying, selling, maintaining, fueling, hangering, and inspecting general aviation aircraft of all sizes for owners and operators at its location at the Kansas City Downtown Airport. (L.F. 1; 63).

On approximately June 25, 1997, in connection with its proposed purchase of a 1986 Beechjet 400, Serial No. RJ-7, FAA No. N25BN from the RAN Corporation (“plane,” “aircraft,” or “airplane”), Purcell contracted with Beech for Beech to perform a pre-purchase survey and inspection to ensure the aircraft’s suitability for purchase. (L.F. 2). Included in this survey and inspection was a representation that Beech would check for oil leaks and perform a logbook review of the airplane’s maintenance logbooks. (L.F. 61). A copy of the signed pre-purchase survey and inspection agreement between Purcell and Beech may be found in the Legal File at pages 60-62. A copy of the agreement is attached hereto as appendix pages A1-A3. The base cost of the pre-purchase survey was \$1,250.00. (L.F. 62, 98-99).

Beech was required by the Pre-Purchase Survey Agreement to perform an extensive check of the aircraft Purcell was contemplating purchasing, including the following:

1. Fuselage
 - A. Corrosion Check
 - B. Check skin for cracks, dents, damage security, and paint condition
 - C. Check windows for cracks, crazing, seals, discoloration, windshield delamination and heater for operation

- D. Check aircraft interior for quality, repairs, cleanliness
 - E. Check doors for operation, fit and seal
2. Wings
- A. Check skins for corrosion, cracks, structural damage, paint condition
 - B. Check operation of deice boots, check for holes in rubber, security to wing
 - C. Check inspection hole cover plates for security
 - D. Check fairing condition, wing-to-fuselage
 - E. Check aileron and flap attach points
 - F. Check aileron trim tabs, moveable and fixed, for attachment
3. Tail Section
- A. Check horizontal and vertical stabilizer for security, skin cracks, paint condition and fairings
 - B. Check rudder and elevator attach points
 - C. Check trim tab attachment
4. Landing Gear
- A. Perform retraction test for operation and looseness of strut components
 - B. Check for strut leaks
 - C. Check gear door linkage
 - D. Check tire wear
 - E. Check brake operation

5. Engines

- A. *Check for oil leaks; remove oil filter for metal check*
- B. Check case condition for cracks, security of attaching parts, condition of baffling
- C. Compression check of horizontally opposed type
- D. Check intake and exhaust system for leaks
- E. Check engine mount for security
- F. *Borescope on turbine engine (when possible)*
- G. *Chip detector check on turbine*
- H. Check security and condition of electrical components
- I. Check cowling for cracks, fit and corrosion
- J. *Check fuel and hoses for condition and date codes*

6. Propellers

- A. Check general condition of props
- B. Check spinner and bulkhead for cracks or patches
- C. Check condition of deice system

7. Avionics

- A. All avionics will be turned on and checked for operation only
- B. Accuracy test will be performed upon request. An additional charge will apply.

8. **Log Book Review**, based on records furnished, for the following:

A. Airframe, Engine and Propeller Total Times

B. Overhaul status of engines and propellers

C. Status of mandatory overhaul or replacement items

D. Inspection status-100 Hr, Annual, Phase

E. Status of Airworthiness Directives

F. Aircraft damage history

G. Status of Mandatory Service Bulletins upon request. An additional charge will apply

9. General

A. All aircraft paperwork in order

B. Executive Beechcraft, Inc. opinion and general condition of the aircraft

C. Check all lights for operation

D. Proficiency run on engines per manufacturers maintenance manual

(L.F. 60-62). (Ital. and bold added).

Sometime after June 30, 1997, Beech performed a pre-purchase survey and inspection and charged Purcell for the inspection and Purcell paid the charge. (L.F. 2). After the inspection and in reliance on Beech's favorable inspection, Purcell purchased the aircraft for \$2,080,000.00 (L.F. 49; 63).

Contained in the Beechjet aircraft log book and contemporaneously entered therein, was an FAA detailed inspection record for a check performed on or about April 1, 1997 which revealed that the left engine leaked oil after sitting static for three to four days, and that a static leak check was unsatisfactory and the inspection record stated that the engine needed to be disassembled and checked for internal leaks. (L.F. 2).

Beech overlooked or ignored this log book entry and did not call it to Purcell's attention. (L.F. 2). Purcell would not have completed the aircraft purchase if Beech had made Purcell aware of the leak in the left engine. (L.F. 3).

After purchasing the airplane, Purcell discovered the leak that Beech overlooked in both the aircraft inspection and in the log book inspection. (L.F. 3). As a result of Beech's failure to discover and report the leak and the log book entry, Purcell suffered damages that included loss of use of the airplane; repair of the damaged engine; expenses in shipping the damaged engine to a repair facility and monitoring the repair; and expense of discovering and verifying damage that would have been known prior to purchase had Beech done a thorough inspection of the log book. (L.F. 3). Purcell's alleged damages exceed Three Hundred Seventy Two Thousand Four Hundred Fifty-Eight Dollars (\$372,458.00). (L.F. 4). Beech, without admitting fault, contended that any claim for damages by Purcell against Beech was limited to the cost of the inspection (\$1,250.00) in accordance with the purported liability-limiting language contained in its pre-purchase survey agreement. After hearing Beech's Motion for Partial Summary Judgment Clay County Circuit Judge Larry D. Harman Ordered without further analysis:

“Defendant's motion for partial Summary Judgment on the issue of damages only is granted. In the event defendant is forced liable to plaintiff for issues framed by the pleadings in this cause damages are limited to a maximum of \$1,250.00.” (L.F.156).

After briefing and oral argument, the Western District reversed the judgment of Judge Larry D. Harman and remanded. See Purcell Tire & Rubber Company v. Executive Beechcraft, 2000 WL 1744502 (Mo. App. W.D. Nov. 28, 2000). Beech moved for transfer to this Court.

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.

Lawrence v. Bainbridge Apartments, 957 S.W.2d 400 (Mo. App. 1997)

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371

(Mo. banc 1993)

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

Hornbeck v. All American Indoor Sports, Inc., 898 S.W.2d 717 (Mo. App. 1995)

Chehval v. St. John’s Mercy Medical Center, 958 S.W.2d 36 (Mo. App. E.D. 1997)

Monsanto v. Gould Electronics, Inc., 965 S.W.2d 314 (Mo. App. 1998)

Malan Realty Investors, Inc. v. Harris, 953 S.W.2d 624 (Mo. banc 1997)

Weindel v. DeSoto Rural Fire Protection Association, Inc., 765 S.W.2d 712

(Mo. App. E.D. 1989)

Schaffer v. Property Evaluations, Inc., 854 S.W.2d 493 (Mo. App. E.D. 1993)

Samson Sales, Inc. v. Honeywell, 465 N.E.2d 392 (Ohio 1984)

Aiple v. South Side National Bank, 442 S.W.2d 145 (Mo. App. E.D. 1969)

Hawkins v. Foster, 897 S.W.2d 80 (Mo. App. S.D. 1995)

Wilt v. Waterfield, 273 S.W.2d 290 (Mo. 1955)

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.

STANDARD OF REVIEW

The standard of review of a summary judgment is essentially de novo. Lawrence v. Bainbridge Apartments, 957 S.W.2d 400, 403 (Mo.App.1997); ITT Commercial Finance Corp., v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). The record is reviewed in the light most favorable to the party against whom summary judgment was entered and the non-moving party is granted the benefit of all reasonable inferences from the record. Id. To be entitled to summary judgment the movant must demonstrate that there is no genuine dispute of material fact and that he or she is entitled to judgment as a matter of law. Id.

ARGUMENT

The allegedly liability-limiting language in the pre-purchase survey agreement states:

It is expressly agreed that the liability, if any, of Executive Beechcraft, Inc. under this agreement shall be limited to the cost of services performed hereunder. All parties to this agreement expressly agree to indemnify and hold harmless Executive Beechcraft, Inc. from any damages or expenses claimed by any part [sic] to this agreement beyond the cost of the service performed hereunder.

(L.F. 60-62; Appendix A1-A3).

Purcell's argument that this liability-limiting clause is not enforceable is fourfold.

1. The Contractual Limitation Is Unenforceable Because It Does Not Clearly And Explicitly Release Executive Beechcraft For Liability From Its Own Negligence.

The alleged contractual limitation-of-liability provision is ineffective in its attempt to exculpate Executive Beechcraft for its own negligence.

In Alack v. Vic Tanny International of Missouri, Inc., 923 S.W.2d 330 (Mo. banc 1996), this Court addressed the enforceability of contractual provisions purporting to limit one's liability for his or her own future negligence. Alack became a member of Vic Tanny International health club facility. He signed a retail installment contract containing a general exculpatory clause purporting to release Vic Tanny from "any and all claims" against it. While Alack was using an upright row machine, the machine's handle disengaged from the weight cable and smashed into Alack's mouth and jaw, injuring him.

The Court held that—while exculpatory clauses releasing an individual from his or her own future negligence are not prohibited as against public policy—they are disfavored. Such clauses are to be “strictly construed against the party claiming the benefit of the contract, and clear and explicit language in the contract is required to absolve a person from such liability.” *Id.* at 334 (quoting Hornbeck v. All American Indoor Sports, Inc., 898 S.W.2d 717, 721 (Mo. Ct. App. 1995)). The Alack court ruled:

We are persuaded that the best policy is to follow our previous decisions and those of other states that require clear, unambiguous, unmistakable, and conspicuous language in order to release a party from his or her own future negligence. The exculpatory language must effectively notify a party that he or she is releasing the other party from claims arising from the other party's own negligence. Our traditional notions of justice are so fault-based that most people might not expect such a relationship to be altered, regardless of the length of an exculpatory clause, unless done so explicitly. General language will not suffice. (Underline added).

923 S.W.2d at 337. In Alack, the exculpatory clause purported to shield Vic Tanny from liability for "any damages, any injuries" and "any and all claims, demands, damages, rights of action, present or future resulting from or arising out of the Member's use ... of said gymnasium or the facilities and equipment thereof." *Id.* (emphasis omitted). The Court held that the exculpatory clause was ambiguous because it did not specifically state that a member was releasing Vic Tanny from its own future negligence. The Court held that:

The better rule is one that establishes a bright-line test, easy for courts to apply, and certain to alert all involved that future "negligence" or "fault" of a party is being released. The words "negligence" or "fault" or their equivalents must be used conspicuously so that a clear and unmistakable waiver and shifting of risk occurs. There must be no doubt that a reasonable person agreeing to an exculpatory clause actually understands what future claims he or she is waiving.

Id. at 337-38.

In the present case, the contract prepared and faxed to Purcell for signature by Beech's secretary provided:

It is expressly agreed that the liability, if any, of Executive Beechcraft, Inc. under this agreement shall be limited to the cost of services performed hereunder. All parties to this agreement expressly agree to indemnify and hold harmless Executive Beechcraft, Inc. from any damages or expenses claimed by any part [sic] to this agreement beyond the cost of the services performed hereunder.

(Appendix at A2; LF at pp. 60-62).

This language is similar -- though less clear -- to the contractual language in Alack. There is no clear or explicit language suggesting that Executive Beechcraft intended to exculpate itself from its own "negligence" or "fault" as required under Alack. Thus, the language is ineffective to limit Executive Beechcraft's liability for its own negligence.

The clause is overbroad, confusing, and nonsensical. It states that "all parties to this agreement expressly agree to indemnify and hold harmless Executive Beechcraft, Inc. from any

damages or expenses claimed by any part [sic] to this agreement...” Id. There were only 2 parties to the agreement. The language is nonsensical because, among other things, it purports to be an agreement that Beech will indemnify Beech for any damages or expenses Beech claims. It also purports to indemnify Beech or Purcell (all parties) from “damages or expenses claimed by any part to this agreement...” (underline added). It is nonsensical that a “part” to the agreement would claim damages or expenses. Only inventive and inferential editing can bring this clause within the legal mandates of Alack.

The importance of setting forth what conduct is covered under an indemnification agreement was addressed in Chehval v. St. John’s Mercy Medical Center, 958 S.W.2d 36 (Mo. App. E.D. 1997). In Chehval, a physician sought to enforce an indemnity clause in an employment agreement with the hospital. The clause at issue provided that the hospital would “defend, indemnify and hold harmless physician for all sums, including defense cost, which physician shall become legally obligated to pay as damages because of injury to a person arising out of the rendering or failure to render the professional services and obligations, including clinical duties, which are the subject of and which are described in this agreement.” Id. at 38. The hospital claimed the indemnity provision was unenforceable because it was ambiguous. The court observed analyzing other case law that:

Because nothing in the language of the relevant indemnification provisions clearly encompassed the conduct at issue in those cases; the provisions were silent on the issue of indemnity for the indemnified party’s own negligent acts.

Here on the other hand, the indemnification provision expressly encompasses liability arising out of “clinical duties” set forth in the Agreement, and only the

Physician has “clinical duties” under the terms of the agreement. Therefore, it is clear Medical Center must indemnify Physician for sums he must pay for injuries arising out of any act or failure to act within physicians clinical duties.

Id. at 40-41. Under the court’s reasoning, indemnification provisions must specifically identify the conduct covered.

Beech’s indemnification provision does not identify the conduct covered. The clause does not state that Purcell is indemnifying Beech for its own conduct. Thus, the provision is unenforceable.

Below, Respondent relied heavily on two cases, Monsanto v. Gould Electronics, Inc., 965 S.W.2d 314 (Mo. App. 1998) and Malan Realty Investors, Inc. v. Harris, 953 S.W.2d 624 (Mo. banc 1997).

In Monsanto, a chemical manufacturer that produced materials containing PCBs entered into a “Special Undertaking” with its customer, Gould Electronics, Inc. (“Gould”). Monsanto required the “Special Undertaking” prior to making the sale. That very specific agreement, as excerpted by the Eastern District, states:

Buyer hereby covenants and agrees that with respect to any and all PCB’s [sic] sold or delivered by or after the date hereof and in consideration of any such sale or delivery buyer shall defend, indemnify and hold harmless Monsanto, its present, past and future directors, officers, employees and agents, from and against any such sale or delivery. Buyer shall defend, indemnify and hold harmless Monsanto, its present, past and future directors, officers, employees and agents, from and against any and all liabilities, claims, damages, penalties,

actions, suits, losses, costs and expenses arising out of or in connection with the receipt, purchase, possession, handling, use, sale or disposition of such PCB's [sic] by, through or under Buyer, whether alone or in combination with other substances, including, without implied limitation, any contamination of or adverse effect on humans, marine and wildlife, food animal feed [sic] or the environment by reason of PCB's [sic]."

Id. at 316. This is an indemnity agreement arising from an action –the sale– occurring in the past. It is not a release for *future* negligence committed by Monsanto. It is inapplicable to this case.

In essence, the contracting parties in Monsanto were contractually acknowledging the inherent dangers of PCBs and were contractually agreeing that any damages due to contamination or adverse effect to humans, animals or plants from the chemicals purchased by Gould would be borne by Gould. Their agreement released Monsanto from losses arising out of or in connection with the receipt, purchase, possession, handling, use, sale or disposition of PCBs by, through, or under Gould. Monsanto's only potential liability came from the manufacture and distribution of the PCBs. The indemnity agreement dealt with losses occurring after the sale and distribution of the chemicals to Gould and did not address negligence.

The situation in this case is completely distinguishable. Here, Purcell contracted with Beech to perform specific checks as outlined on the Aircraft Pre-Purchase Survey, including in-depth log book review and oil leak checks. (L.F. 60-62). Beech attempts to rely on a clause that does not specify the conduct to which the purported liability-limiting clause applies. The

Monsanto clause specifically states what conduct is covered by the liability-limiting language and does not contemplate any future (post-agreement) acts that Monsanto might have taken. Monsanto is inapplicable.

Beech also argued below that Malan Realty Investors, Inc. v. Harris, 953 S.W.2d 624 (Mo. banc 1997) applies to this case. “The sole issue on appeal [in Malan was] whether the defendant had effectively waived her right to a jury trial.” Id. at 624. Malan too is inapplicable to a purported release for *future* negligence.

The Court in Malan observed and restated that a party may eliminate his or her right to bring an action for personal injuries that may be sustained as a result of future negligent acts. Id. at 626. However, as Alack v. Vic Tanny Int’l of Mo., Inc., 923 S.W.2d 330 (Mo banc 1996), teaches:

The best policy is to follow our previous decisions and those of other states that require clear, unambiguous, unmistakable, and conspicuous language in order to release a party from his or her own future negligence. The exculpatory language must effectively notify a party that he or she is releasing the other party from claims arising from the other party's own negligence. Our traditional notions of justice are so fault-based that most people might not expect such a relationship to be altered, regardless of the length of an exculpatory clause, unless done so explicitly. General language will not suffice. Alack at 337. (Underline added).

Beech agreed, citing Alack, that clear and explicit language in a contract is required to absolve a person from liability for future acts of negligence. (Resps. W.D. Brief at 10). Beech

also agreed that its contract does not contain the words “negligence” or “fault” as required by Alack. Id.

2. The Liability-Limitation Clause is Unenforceable Since No Separate Consideration was Given for It.

“An agreement to terminate or release one from a contract is a new contract which must be supported by new consideration.” Weindel v. DeSoto Rural Fire Protection Association, Inc., 765 S.W. 2d 712, 715 (Mo. App. E.D. 1989).

Liability limitation clauses contained in inspection agreements such as the one at issue here are unenforceable as the case of Schaffer v. Property Evaluations, Inc., 854 S.W.2d 493 (Mo. App. E.D. 1993), illustrates. In Schaffer, plaintiffs entered into a contract to purchase a house. Plaintiffs hired defendant Property Evaluations to inspect the house. Property Evaluations sent plaintiffs its standard inspection order agreement containing boilerplate language nearly identical in claimed effect, though more clearly written, to the language in Beech’s pre-purchase survey agreement and instructed plaintiffs to review the agreement. The inspection agreement stated: “The Company’s liability for any Client post-inspection claims is limited to a maximum of the inspection fee paid.” Id. at 494 (court’s emphasis deleted). The inspection fee was \$153. The inspection report prepared after the inspection of the house stated that the concrete foundation walls were “in overall satisfactory structural condition.” Id.

After purchasing the house, plaintiffs discovered that the walls were structurally unsound and had to be replaced. Plaintiffs’ expert testified repairs would cost between \$20,000 to \$25,000.

The Schaffer court held that plaintiffs executed a form contract presented by Property Evaluations and that there was no indication that the terms of the contract were bargained for.

The court ruled that no separate consideration supported the limitation of liability. Accordingly, the court affirmed the trial court's decision not to enforce the exculpatory clause.

On appeal, Property Evaluations contended that the trial court erred in refusing to instruct the jury that plaintiffs' recovery should be limited to \$153. The Court of Appeals disagreed, relying heavily upon Weindel v. DeSoto Rural Fire Protection Association, 765 S.W.2d 712 (Mo. App. E.D. 1989).

In Weindel, plaintiffs purchased a fire tag from defendant for a \$12.50 fee. Subsequently, a fire started in Plaintiff's home. Defendant was late in responding to the fire because firefighters mistakenly believed that plaintiffs had not purchased a fire tag. Plaintiff's home was destroyed and they sued the defendant for negligence. The jury found in favor of Plaintiffs and awarded the value of the lost home. Id. at 716. On appeal, defendant claimed that plaintiffs were not entitled to damages as a result of exculpatory language contained in the fire tag receipt. The Weindel court held:

An agreement to exempt or exonerate one from the consequences of his own negligence is not against public policy. One dealing with private interests may bargain for his exoneration from the consequences of his ordinary negligence in arriving at the meeting of minds necessary to the formation of a contract. A release or covenant not to sue requires consideration. In addition, an agreement to terminate or release one from a contract is a new contract which must be supported by new consideration. In the present case, the release was not supported by new consideration, [plaintiffs] agreed to pay \$12.50 in exchange for [defendant]'s promise to perform firefighting services. [Plaintiffs] further agreement to release [defendant] from all contract or tort claims was not supported by new consideration by [defendant].

Weindel, 765 S.W.2d at 715 (court's own emphasis).

In the present case, it is clear that the contractual limitation of liability was not bargained for by the parties. The testimony of Bob Purcell demonstrates that there was absolutely no bargaining at all. Purcell's President simply called Beech's office and requested a pre-purchase aircraft inspection. (L.F. 85; 106-107). Purcell mainly talked to Beech's secretary, Tida. (L.F. 85; 106-107). Purcell talked to only one other person at Executive Beechcraft who merely verified the scheduling of the inspection. (L.F. 85; 106-107). Defendant's secretary faxed Purcell its standard aircraft survey agreement and asked Purcell to sign it and return it. (L.F. 85; 122). Purcell signed and returned the aircraft survey agreement less than 24 hours after it was sent. (L.F. 85; 106-107; 121-123). There is no evidence in the record that the liability limitation clause was ever mentioned before the agreement was signed. There cannot be bargaining without a discussion. Accordingly, no separate consideration supported the liability-limitation clause.

3. Liability Limitation Clause is Unenforceable Because No Controversy Existed at the Time the Agreement Was Signed.

Both Schaffer and Weindel held that "there can be no release unless there exists at the time of the claimed release a bona fide controversy concerning . . . some issue in dispute between the parties." Weindel, 765 S.W.2d at 715 (quoting Aiple v. South Side National Bank, 442 S.W.2d 145, 151 (Mo. App. E.D. 1969); Schaffer, 854 S.W.2d at 495.

No controversy existed at the time Purcell and Executive Beechcraft entered into the agreement. Defendant had not even started its inspection at the time the agreement was signed. Accordingly, the contractual limitation of liability is unenforceable.

4. The Contractual Limitation Is An Unenforceable Penalty.

The liability limitation clause is nothing more than a unenforceable penalty. In a footnote, the Schaffer court further directed the parties' attention to Samson Sales, Inc. v. Honeywell, Inc., 465 N.E.2d 392 (Ohio 1984). In Samson Sales, the Ohio Supreme Court addressed the enforceability of an exculpatory clause in a burglar alarm contract which limited the defendant's liability to \$50. Schaffer, at 495. Samson Sales entered into a contract with Morse Signal Devices whereby Morse installed a burglar alarm system at Samson Sales' pawn shop in exchange for \$1500 at the time of installation and an additional \$150 per month for five years. Honeywell purchased Morse and assumed responsibility under the agreement. While the contract was in force, a burglary occurred at Samson Sales' store, but Honeywell refused to pay more than \$50 toward the loss, which Samson Sales claimed was \$63,303. The court, using a liquidated-damages analysis, held that the contract "fails to evince a conscious intention of the parties to consider, estimate, or adjust the damages that might reasonably flow from the negligent breach of the agreement." Id. at 394. Noting that Samson Sales clearly had not paid \$10,500 for the mere possibility of recouping \$50 if Honeywell provided no service under the contract, the court held that the nominal amount set forth in the contract was an unenforceable penalty.

In Missouri, a liquidated-damages provision is not enforceable unless the property forfeited is a reasonable forecast of just compensation for harm caused by a breach of contract and it is difficult or impossible to estimate that harm accurately. Hawkins v. Foster, 897 S.W.2d 80, 85 (Mo. App. S.D. 1995). A penalty clause is unenforceable. Id. at 85. In the case of any doubt, the tendency is to construe a contractual provision for payment of specified

damages for a breach of contract as punitive in nature. Wilt v. Waterfield, 273 S.W.2d 290, 295 (Mo. 1955).

Here, it is clear that the amount paid by Purcell for the inspection services (slightly more than \$1,250.00) has no relationship to the potential damages and evinces no intention of the parties to consider, estimate, or adjust the damages that might reasonably flow from Executive Beechcraft's negligence or breach of contract which exceeded Three Hundred Seventy Two Thousand Four Hundred Fifty-Eight Dollars (\$372,458.00). (See L.F. 4). The parties did not ever discuss possible damages or difficulty in estimating possible damages before the agreement was signed. (L.F. 85; 106-107). The nominal amount of recovery which the contractual limitation purports to allow clearly is an unenforceable penalty.

III. CONCLUSION

The purported liability-limiting clause relied upon by Beech is unenforceable. For each and every forgoing reason, this Court should reverse the trial judge's entry of partial summary judgment and remand this case for trial on the merits.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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

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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 5,107 words according to the word count of Corel Word Perfect Version 8.

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