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Too Sophisticated for Your Own Good: Missouri, Sophisticated Parties and . . . the Economic Loss Rule?

*Purcell Tire & Rubber Co. v. Executive Beechcraft, Inc.*¹

I. INTRODUCTION

In *Purcell Tire and Rubber Co. v. Executive Beechcraft, Inc.*, the Missouri Supreme Court held that the “express negligence” rule² is inapplicable to liability limitations in contracts between sophisticated parties with claims of purely economic losses.³ Although the decision does not explicitly determine whether the case presented a contract or tort claim, the result clearly follows from the treatment of the case as a pure contract action. Consequently, the decision parallels the typical result reached under the application of the more well-known “economic loss rule”⁴ and appropriately preserves the fundamental distinctions between contract and tort law in cases involving sophisticated parties.

II. FACTS AND HOLDING

Purcell involved a breach of contract claim based on the allegedly negligent performance of an airplane inspection.⁵ Before closing on the purchase of a used Beechjet 400 airplane, Purcell Tire and Rubber Company (“Purcell”) contacted Executive Beechcraft, Inc. (“Beechcraft”) about performing an inspection of the airplane.⁶ In response, Beechcraft faxed a three-page Aircraft Pre-Purchase Survey contract to Purcell.⁷ Every provision of the contract appeared in eleven point font on the front side of each page.⁸ The initial contract provisions stated that the survey did not assure the aircraft’s airworthiness nor did it provide any express or implied warranties about the aircraft’s condition or the remaining useful life of it or its components.⁹ Over the

1. 59 S.W.3d 505 (Mo. 2001).

2. The rule states that enforceable negligence liability limitations require use of the terms “‘negligence,’ or ‘fault’ or their equivalents so that a clear and unmistakable waiver occur[s].” *Alack v. Vic Tanny Int’l of Mo., Inc.*, 923 S.W.2d 330, 332 (Mo. 1996).

3. *Purcell*, 59 S.W.3d at 510-11.

4. *See infra* Part V.

5. *Purcell*, 59 S.W.3d at 507.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* The contract’s first paragraph stated:

AIRCRAFT PRE-PURCHASE SURVEY

The following is a list of items that will be checked in order to complete an

next two pages the contract then listed the items on the aircraft to be surveyed.¹⁰ After listing these items, the contract provided a pre-purchase pricing schedule indicating a cost of \$1,250 for the described survey of the aircraft Purcell was considering.¹¹ Finally, directly above the signature line, the last paragraph of the contract stated:

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.¹²

Purcell's president read the agreement, signed it, and faxed it back to Beechcraft without requesting any changes in the contract.¹³ Beechcraft then performed the survey, prepared a report, and discussed the findings with Purcell.¹⁴ Purcell then proceeded to purchase the aircraft for \$2,080,000.¹⁵ Within a few months of purchase, however, Purcell discovered an oil leak in the plane that caused extensive damage.¹⁶ Beechcraft never made any mention of an oil leak to Purcell in the survey or otherwise.¹⁷

Purcell then sued Beechcraft in Clay County Circuit Court on breach of contract and negligence claims, seeking damages of \$372,458.¹⁸ The circuit court granted Beechcraft's motion for summary judgment and ruled that the

Aircraft Pre-Purchase Survey. This survey is a statement of aircraft condition at that time. It is NOT however, a statement of airworthiness.

Executive Beechcraft makes no guarantee or warranty, either express or implied, concerning the condition or the remaining useful life of the aircraft, it's [*sic*] systems, avionics or other installed equipment.

If the items listed below do not meet your needs for a pre-purchase survey, Executive Beechcraft, Inc. will be happy to perform an inspection in accordance with the manufacturers inspection programs or Federal Aviation Administration FAR's.

Id. (alteration in original).

10. *Id.* at 508.

11. *Id.*

12. *Id.* (alteration in original).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

contract limited liability to the \$1,250 contract price of the survey.¹⁹ Purcell then appealed this decision to the Missouri Court of Appeals for the Western District and the Missouri Supreme Court ordered the appeal transferred.²⁰

On appeal, Purcell argued that contract provisions that limit liability for acts of negligence violate public policy and that *Schaffer v. Property Evaluations, Inc.*²¹ and *Weindel v. DeSoto Rural Fire Protection Ass'n*²² mandate that such liability limitations are only enforceable if “bargained for.”²³ Purcell contended that because no specific negotiations over the liability limitation in question occurred, it was not “bargained for” or enforceable.²⁴

In a unanimous decision, the Missouri Supreme Court rejected Purcell’s argument and found the liability limitation enforceable.²⁵ Citing *Alack v. Vic Tanny International of Missouri, Inc.*,²⁶ the court reaffirmed that “[c]lear, unambiguous, unmistakable and conspicuous limitations of negligence liability do not violate public policy,” and to the extent they imply that parties only agree to terms specifically negotiated over, the court held that *Weindel* and *Schaffer* should no longer be followed.²⁷

III. LEGAL BACKGROUND

A. Negligence Liability Limitations in General

According to the Restatement (Second) of Contracts, parties may *limit* the legal duties owed to each other through contract just as they may *impose* additional duties on each other through contract.²⁸ One such form of modification, pre-injury negligence liability limitations, are neither uncommon

19. *Id.*

20. *Id.*; see also *Purcell Tire & Rubber Co. v. Executive Beechcraft, Inc.*, No. WD 58041, 2000 WL 1744502 (Mo. Ct. App. Nov. 28, 2000), *aff'd*, 59 S.W.3d 505 (Mo. 2001).

21. 854 S.W.2d 493 (Mo. Ct. App. 1993), *abrogated by Purcell*, 59 S.W.3d 505.

22. 765 S.W.2d 712 (Mo. Ct. App. 1989), *abrogated by Purcell*, 59 S.W.3d 505.

23. *Purcell*, 59 S.W.3d at 509.

24. *Id.*

25. *Id.* at 511. Judge Duane Benton wrote the opinion of the court, joined by Chief Justice Stephen J. Limbaugh, Jr., and Judges John C. Holstien, Michael A. Wolff, William J. Price, Jr., and Paul J. Simon (of the Missouri Court of Appeals, Eastern District, sitting specially). Judge Ronnie L. White concurred in a separate opinion, joined by Judge Michael A. Wolff. Judge Laura Denver Stith did not participate.

26. 923 S.W.2d 330 (Mo. 1996).

27. *Purcell*, 59 S.W.3d at 509 (citing *Alack*, 923 S.W.2d at 337).

28. RESTATEMENT (SECOND) OF CONTRACTS ch. 8, top. 4, introductory note (1979).

nor per se void as violations of public policy.²⁹ Section 195(2) of the Restatement provides:

A term exempting a party from tort liability for harm caused negligently is unenforceable on grounds of public policy if (a) the term exempts an employer from liability for injury in the course of his employment; (b) the term exempts one charged with a duty of public service from liability to one whom that duty is owed for compensation for breach of that duty, or (c) the other party is similarly a member of a class protected against the class to which the first party belongs.³⁰

The Restatement explains, however, that the list provided is not intended to be exhaustive and provides: “[i]f, for example, a statute imposes a standard of conduct, a court may decide on the basis of an analysis of the statute, that a term exempting a party from liability for failure to conform to that standard is unenforceable.”³¹

Notwithstanding the Restatement provisions, courts often continue to strictly construe contracts prospectively exempting a party from liability for future negligent acts on two public policy grounds.³² First, public policy justifies heightened scrutiny because such contracts often constitute contracts of adhesion between parties with unequal bargaining power.³³ Second, if courts unquestioningly enforced such limitations, they would amount to “a license to be negligent.”³⁴ Elaborating on this second point, the courts note that because a primary purpose of the law is to furnish legal remedies for injuries received, an agreement that essentially imposes a penalty for seeking such a remedy undermines a fundamental objective of the law.³⁵ These concerns have prompted at least one jurisdiction to prohibit parties from contracting out of the common law duty to exercise ordinary care.³⁶ Most jurisdictions, however, reject such a broad prohibition and reserve judicial discretion to enforce a negligence liability limitation based upon whether or not it violates public policy under the particular circumstances of each case.³⁷

29. 57A AM. JUR. 2D *Negligence* § 49 (1989).

30. RESTATEMENT (SECOND) OF CONTRACTS § 195(2)(a)-(c) (1979).

31. *Id.* § 195 cmt. a (1979).

32. 17A AM. JUR. 2D *Contracts* § 297 (1991).

33. *Id.*

34. *Id.*

35. *Id.*

36. 57A AM. JUR. 2D *Negligence* § 49 (1989) (citing *Papakalos v. Shaka*, 18 A.2d 377 (N.H. 1941)).

37. *Id.*

B. Negotiation and Consideration of Negligence Liability Limitations in Missouri

In *Weindel v. DeSoto Rural Fire Protection Association, Inc.*,³⁸ the Missouri Court of Appeals for the Eastern District considered the validity of negligence liability limitations in the context of a negligence claim by a mobile home owner against a volunteer rural fire protection association.³⁹ The mobile home owner, Weindel, purchased a \$12.50 fire tag entitling Weindel's property to firefighting services.⁴⁰ Upon purchase, the mobile home owner received a metal fire tag to place on the property and a signed receipt.⁴¹ After the mobile home burned down due to the association's failure to provide firefighting services, Weindel sought \$17,500 in damages against the association.⁴² The association claimed that Weindel could not pursue a damage claim because the back of the receipt given to Weindel contained a provision preventing any suit by a tag holder.⁴³ Citing the Missouri Supreme Court's decision in *Rock Springs Realty, Inc. v. Waid*,⁴⁴ the Eastern District acknowledged that while agreements releasing one party from the consequences of its own negligence do not *per se* violate public policy, such a release or covenant not to sue requires its own separate consideration.⁴⁵ The court determined that the fire tag fee only served as consideration for the association's promise to provide firefighting services.⁴⁶ Therefore, the agreement to release the association from all contract or tort claims lacked separate consideration.⁴⁷ In addition to this finding, the court stated: "[t]here can be no release unless there exists *at the time of the claimed release* a bona fide controversy concerning [a] defendant's legal liability on some issue in dispute between the parties."⁴⁸ Because no such controversy existed when Weindel received the receipt and because the limitation provision

38. 765 S.W.2d 712 (Mo. Ct. App. 1989), *abrogated by* Purcell Tire & Rubber Co. v. Executive Beechcraft, Inc., 59 S.W.3d 505 (Mo. 2001).

39. *Id.* at 713.

40. *Id.*

41. *Id.*

42. *Id.* at 714.

43. *Id.* at 715.

44. 392 S.W.2d 270 (Mo. 1965).

45. *Weindel*, 765 S.W.2d at 715 (citing *Passer v. United States Fid. & Guar. Co.*, 577 S.W.2d 639, 648 (Mo. 1979); *Lugena v. Hanna*, 420 S.W.2d 335, 338 (Mo. 1967); *Gee v. Nieberg*, 501 S.W.2d 542, 544 (Mo. Ct. App. 1973)).

46. *Id.*

47. *Id.*

48. *Id.* at 715-16 (quoting *Aiple v. S. Side Nat'l Bank*, 442 S.W.2d 145, 151 (Mo. Ct. App. 1969)) (internal quotation marks omitted).

was not supported by separate consideration, the court allowed Weindel to recover against the association despite the negligence liability limitation.⁴⁹

The Eastern District again confronted the issue of liability limitations in contracts in *Schaffer v. Property Evaluations, Inc.*⁵⁰ In *Schaffer*, homeowners sought \$15,000 in damages for a home inspector's failure to disclose a water leakage problem.⁵¹ At the time of contract, the homeowners signed a standard form inspection order agreement which limited the inspection company's liability for post-inspection claims to the \$153 inspection fee.⁵² The Eastern District began its analysis in *Schaffer* by noting the similarity between the case before it and *Weindel*.⁵³ The court then determined that none of the contract provisions were "bargained for," and that, absent any specific negotiation over the liability limitation provision, that provision lacked separate consideration and could not be enforced.⁵⁴

C. The Express Negligence Rule

The Missouri Supreme Court addressed the validity of negligence liability limitation provisions in *Alack v. Vic Tanny International of Missouri, Inc.*⁵⁵ In *Alack*, a health club member brought a negligence claim against the health club seeking \$17,000 in damages for an injury he allegedly suffered while using a piece of health club equipment.⁵⁶ Upon joining the health club, the member signed a two-page, seventeen paragraph contract containing what the court characterized as "a general exculpatory clause" purporting to release the health club from "any and all claims."⁵⁷ Because the clause was printed on the back of the contract, the court determined that the limitation did not "conspicuously stand out."⁵⁸ Further, the court concluded that the negligence liability limitation did not insulate the health club from liability because it did not "use the word 'negligence' or 'fault' or their equivalents so that a clear and unmistakable waiver occurred."⁵⁹ This requirement has been referred to as the "express negligence" rule.⁶⁰ As a result of the failure to include this language, the court

49. *Id.* at 716.

50. 854 S.W.2d 493 (Mo. Ct. App. 1993), *abrogated by* Purcell Tire & Rubber Co. v. Executive Beechcraft, Inc., 59 S.W.3d 505 (Mo. 2001).

51. *Id.* at 493-94.

52. *Id.* at 494.

53. *Id.*

54. *Id.* at 495.

55. 923 S.W.2d 330 (Mo. 1996).

56. *Id.* at 332.

57. *Id.* at 332-33.

58. *Id.*

59. *Id.* at 332.

60. *See* Purcell Tire & Rubber Co. v. Executive Beechcraft, Inc., 59 S.W.3d 505,

found the exculpatory clause was ambiguous and, therefore, unenforceable.⁶¹ The court did not, however, completely foreclose the ability to limit negligence liability. The *Alack* court noted that, although traditional notions of justice seem contrary to limitations on remedies, a party may avoid liability for its future negligence by placing “clear, unambiguous, unmistakable, and conspicuous language” to that effect in a contract.⁶² To be effective, the limitation provision “must effectively notify” the other party that he or she is waiving the right to pursue claims of negligence against the first party.⁶³ The court did, however, express a limitation on its holding: “This case does not involve an agreement negotiated at arms length between sophisticated commercial entities. Less precise language may be effective in such situations, and we reserve any such issues.”⁶⁴

D. Sophisticated Parties and the Freedom of Contract

Over the past several years, the Missouri Supreme Court has consistently enforced freedom of contract by allowing sophisticated parties to make bad bargains and even waive fundamental rights.⁶⁵ Common examples of parties’ freedom of contract include contracting to waive the right to a jury trial or

511 (Mo. 2001) (White, J., concurring); *see, e.g.*, *Fina, Inc. v. ARCO*, 16 F. Supp. 2d 716 (E.D. Tex. 1998), *rev’d*, 200 F.3d 266 (5th Cir. 2000); DWIGHT G. CONGER ET AL., CONSTRUCTION ACCIDENT LITIGATION § 6:3 (1990).

61. *Alack*, 923 S.W.2d at 332.

62. *Id.* at 337.

63. *Id.*

64. *Id.* at 338 n.4.

65. *See Malan Realty Investors Inc. v. Harris*, 953 S.W.2d 624, 626 (Mo. 1997); *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493, 497 (Mo. 1992). In *Malan*, the lessor filed petition for possession of a commercial retail property and for breach of contract. *Malan*, 953 S.W.2d at 624. The lessee surrendered possession of the property and filed an answer and counterclaim for breach of contract. *Id.* The defendant lessee requested a jury trial and the plaintiff lessor filed a motion to enforce the jury trial waiver in the lease. *Id.* The trial court enforced the waiver and entered judgment for the lessor after a bench trial. *Id.* Considering the enforceability of the waiver as the sole issue on appeal, the court concluded that the right to a jury trial could be waived by contract and that the lessee knowingly and voluntarily waived her right to a jury trial. *Id.* at 627-28. In *High Life*, an alcoholic beverage distributor brought a breach of contract action against a wine cooler wholesaler for wrongful termination of a distribution agreement. *High Life Sales Co.*, 823 S.W.2d at 494. The wholesaler sought to enforce a forum selection clause requiring legal action to be brought in Kentucky. *Id.* at 495. On appeal, the court determined that forum selection clauses are enforceable unless unfair or unreasonable. *Id.* at 497.

agreeing to a forum selection clause.⁶⁶ This freedom of contract also gives sophisticated parties the ability to limit future remedies.⁶⁷

In considering the enforceability of a contract provision, the “character and quality of negotiations are relevant in determining whether an agreement is an adhesion contract.”⁶⁸ If this consideration demonstrates a contract created by two sophisticated parties, “[c]ourts [will] enforce the objective terms of contracts between [them], without regard to the parties’ subjective intent.”⁶⁹ Further, in a contract between sophisticated businesses, “[t]he character and quality of negotiations do not vary the terms of a written contract.”⁷⁰ Courts may also refuse to enforce a provision if it fixes damages to disproportionate amounts and works as a penalty.⁷¹ Finally, courts may consider ambiguity as a reason for invalidating a liability limitation.⁷² The ambiguity of a liability limitation depends upon the particular circumstances of the contract.⁷³ To this end, “[l]anguage that is ambiguous to an unsophisticated party may not be ambiguous to a sophisticated commercial entity.”⁷⁴ Nevertheless, in contracts between sophisticated parties with purely economic damages at issue, courts rarely find liability limitations unconscionable.⁷⁵

66. See *Malan*, 953 S.W.2d at 627-28; *High Life Sales Co.*, 823 S.W.2d at 497.

67. See *Malan*, 953 S.W.2d at 627-28; *High Life Sales Co.*, 823 S.W.2d at 497; *Warner v. Southwestern Bell Tel. Co.*, 428 S.W.2d 596, 601-02 (Mo. 1968); *Liberty Fin. Mgmt. Corp. v. Beneficial Processsing Corp.*, 670 S.W.2d 40, 49 (Mo. Ct. App. 1984).

68. *Purcell Tire & Rubber Co. v. Executive Beechcraft, Inc.*, 59 S.W.3d 505, 510 (Mo. 2001) (citing *Peters v. Employers Mut. Cas. Co.*, 853 S.W.2d 300, 301 (Mo. 1993)).

69. *Id.* (citing *Emerick v. Mut. Benefit Life Ins. Co.*, 756 S.W.2d 513, 518 (Mo. 1988)).

70. *Id.* (citing *Craig v. Jo B. Gardner, Inc.*, 586 S.W.2d 316, 324 (Mo. 1979)).

71. See, e.g., *Interthem, Inc. v. Structural Sys., Inc.*, 504 S.W.2d 64, 66 (Mo. 1974); *Plymouth Sec. Co. v. Johnson*, 335 S.W.2d 142, 152 (Mo. 1960).

72. See *J.E. Hathman, Inc. v. Sigma Alpha Epsilon Club*, 491 S.W.2d 261, 264 (Mo. 1973).

73. See *id.*

74. *Alack v. Vic Tanny Int’l of Mo., Inc.*, 923 S.W.2d 330, 338 n.4 (Mo. 1996).

75. See *Roy A. Elam Masonry, Inc. v. Fru-Con Constr. Corp.*, 922 S.W.2d 783, 790 (Mo. Ct. App. 1996); *World Entertainers, Inc. v. Midcoast Aviation Serv., Inc.*, 713 S.W.2d 606, 610-11 (Mo. Ct. App. 1986); *Liberty Fin. Mgmt. Corp. v. Beneficial Data Processing Corp.*, 670 S.W.2d 40, 49-50 (Mo. Ct. App. 1984); cf. *Bracey v. Monsanto Co.*, 823 S.W.2d 946, 948-50 (Mo. 1992).

In *Monsanto*, the court considered an unconscionability challenge to a purchase contract provision limiting a farmer’s recovery for crop damage against a herbicide manufacturer to either the purchase price of the herbicide or replacement herbicide. *Monsanto*, 823 S.W.2d at 947-50. The farmer claimed the limitation caused the warranty provided in the contract to fail its essential purpose under the Missouri Uniform Commercial Code, MO. REV. STAT. § 400.2-719(2) (1986). The court determined the unconscionability of the provision required consideration of Missouri Revised Statutes

IV. INSTANT DECISION

A. *The Principal Opinion*

In *Purcell Tire & Rubber Co. v. Executive Beechcraft, Inc.*, the Missouri Supreme Court considered the enforceability of a liability limitation provision in a contract between sophisticated parties.⁷⁶ Purcell argued that the liability limitation was unenforceable for five reasons.⁷⁷ First, Purcell contended that the liability limitation violated public policy.⁷⁸ Second, Purcell argued that the liability limitation was invalid as not “bargained for” and supported by its own consideration.⁷⁹ Third, Purcell asserted that no controversy existed at the time of contract.⁸⁰ Fourth, Purcell contended that the liability limitation constituted an unlawful penalty for breach of contract.⁸¹ Finally, Purcell argued that the ambiguous language of the limitation provision rendered it unenforceable.⁸²

Before addressing each of Purcell’s arguments, the court addressed the sophistication of the parties.⁸³ The court initially noted Purcell’s position among the top four commercial tire dealers in the country.⁸⁴ Further, the court noted that Purcell’s president, a former pilot, had participated in fifteen plane purchases and fourteen pre-purchase plane inspections prior to the transaction in question.⁸⁵ Turning to Beechcraft, the court recognized that, as a general aviation business, it routinely performed pre-purchase inspections for plane purchasers.⁸⁶ In addition, Beechcraft offered more comprehensive inspections (at additional cost) than the inspection contracted for in the instant case.⁸⁷ For

Section 400.2-719(2) and (3) in conjunction. Subsection (3) states that “[c]onsequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitations of consequential damages *for injury to the person in the case of consumer goods* is prima facie unconscionable but limitations of damages where the loss is commercial is not.” MO. REV. STAT. § 400.2-719(3) (1986) (emphasis added). The court did not, however, make a finding of unconscionability, but rather remanded the case to the trial court to determine the issue of unconscionability. *Monsanto*, 823 S.W.2d at 950.

76. 59 S.W.3d 505 (Mo. 2001).

77. *Id.* at 509-11.

78. *Id.* at 509.

79. *Id.*

80. *Id.* at 510.

81. *Id.*

82. *Id.*

83. *Id.* at 508.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

all of these reasons, the court determined both Purcell and Beechcraft to be sophisticated parties.⁸⁸

After determining that the contract in question involved sophisticated parties, the court addressed each of Purcell's contentions.⁸⁹ First, Purcell argued that the *Alack* decision required courts to strictly scrutinize tort liability limitations because "[o]ur traditional notions of justice are so fault based that most people might not expect them to be altered."⁹⁰ The court's response also cited *Alack*, noting that negligence liability limitations do not violate public policy if they provide effective notice of the release.⁹¹ The court further pointed out that the *Alack* court specifically reserved deciding the applicability of the "express negligence" rule⁹² to sophisticated parties.⁹³ The court consequently found that enforcing the provision in the instant case did not violate public policy because the language of the liability limitation constituted a "clear, unambiguous, unmistakable" notice of the waiver "conspicuously located directly above the signature."⁹⁴

Finding no violation of public policy in the enforcement of the provision, the court turned to Purcell's contention that the liability limitation was not "bargained for" and supported by separate consideration as required by the *Weindel* and *Schaffer* decisions.⁹⁵ After reviewing precedent holding that the written terms of a contract bind sophisticated parties,⁹⁶ the court distinguished the case before it from *Weindel* and *Schaffer*.⁹⁷ The court distinguished *Weindel* on the grounds that it involved an attempt by one party to add a liability limitation *after* the parties had already reached an agreement, and thus constituted an unenforceable unilateral amendment to the agreement.⁹⁸ In contrast, the liability limitation in *Purcell* formed part of the original agreement.⁹⁹

Furthermore, in *Schaffer*, the court refused to enforce a liability limitation in a form contract against an unsophisticated party because the provision failed to give adequate notice of waiver due to the absence of the terms "negligence"

88. *Id.* at 509.

89. *Id.*

90. *Id.* (quoting *Alack v. Vic Tanny Int'l of Mo., Inc.*, 923 S.W.2d 330, 337 (Mo. 1996)) (internal quotation marks omitted).

91. *Id.*; see discussion *supra* Part III.C.

92. See *supra* text accompanying notes 59-60.

93. *Purcell*, 59 S.W.3d at 509.

94. *Id.*

95. *Purcell*, 59 S.W.3d at 509; see *supra* Part III.B.

96. See *supra* Part III.D.

97. *Purcell*, 59 S.W.3d at 509.

98. *Id.*

99. *Id.*

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or “fault.”¹⁰⁰ In the present case, however, the court concluded that sophisticated party status deprived Purcell of the protection provided under *Schaffer*.¹⁰¹

The *Purcell* court then went further in its analysis of *Weindel* and *Schaffer*.¹⁰² The court stated that both of these cases preceded its decision in *Alack* and the court abrogated the two cases to the extent that they suggested that parties only agree to “bargained for” terms.¹⁰³ The court further rejected any suggestion from these cases that the liability limitation required separate consideration, finding adequate consideration for the liability limitation in *Purcell* from the inspection agreement fee.¹⁰⁴

Having rejected Purcell’s separate negotiation and consideration arguments, the court then considered Purcell’s “controversy requirement” argument.¹⁰⁵ Purcell again relied on *Weindel* and *Schaffer* for the proposition that a controversy must exist at the time of contracting for a liability limitation to be enforceable.¹⁰⁶ The court rejected this argument again on the grounds that *Alack* superseded *Weindel* and *Schaffer* and determined that future claims of negligence can be waived by contract.¹⁰⁷

After dismissing Purcell’s controversy requirement argument, the court next addressed Purcell’s contention that the liability limitation constituted an unconscionable penalty because it provided a disproportionately small recovery by limiting damages to the inspection fee.¹⁰⁸ The court responded that Missouri precedent only invalidated provisions fixing damage amounts when such a provision provided for “disproportionately large damages.”¹⁰⁹ Moreover, the court noted that in situations involving sophisticated parties and *purely economic damages*, courts rarely find liability limitations unconscionable, and the court saw no justification for such a finding here.¹¹⁰

Finally, the court addressed Purcell’s attempt to invalidate the liability limitation on the basis of ambiguity.¹¹¹ The court responded that “ambiguity depends on context,” and what may be ambiguous to an unsophisticated party is not necessarily ambiguous to a sophisticated party.¹¹² The contract in question

100. *See id.*

101. *See id.*

102. *Id.*

103. *Id.*

104. *Id.* at 509-10.

105. *Id.* at 510; *see supra* Part III.B.

106. *Purcell*, 59 S.W.3d at 510.

107. *Id.*

108. *Id.*

109. *Id.*; *see supra* Part III.D.

110. *Purcell*, 59 S.W.3d at 510; *see supra* Part III.D and text accompanying note

71.

111. *Purcell*, 59 S.W.3d at 510.

112. *Id.*; *see supra* Part III.C.

must be interpreted in its entirety, and “[t]he contract as a whole limited Beechcraft’s liability.”¹¹³ The court emphasized the contract’s explicit statement that the inspection provided no warranties and that an inspection providing warranties could be obtained at additional cost.¹¹⁴ Re-emphasizing the parties’ status as sophisticated parties to a commercial transaction, the court concluded that no ambiguity existed.¹¹⁵ Finding no basis for invalidating the liability limitation, the court affirmed the district court’s decision limiting Purcell’s recovery to the inspection fee.¹¹⁶

B. The Concurrence

In a concurring opinion, Judge White expressed his complete agreement with the majority opinion.¹¹⁷ He felt compelled, however, to write about the factual differences between *Purcell* and *Alack* and the ramifications of the *Purcell* decision on the “express negligence” rule.¹¹⁸ Judge White asserted that the current decision in no way disturbed the express negligence rule established by *Alack*.¹¹⁹

According to Judge White, three factors in *Purcell* “significantly limit the [c]ourt’s holding.”¹²⁰ To begin, Judge White observed that *Purcell* represented the “textbook example of a sophisticated contractor.”¹²¹ He continued by stating that, as the majority opinion correctly noted, damage waivers between sophisticated parties, such as those in *Purcell*, do not require as exacting a standard as those that are to be enforced against a consumer.¹²² Although sufficient in the present case, Judge White stated his belief that the provision in question would not satisfy the standard applicable to consumers like the *Alack* plaintiff.¹²³

Next, Judge White asserted that, in addition to the difference presented by the sophistication of the parties in the present case and *Alack*, the principal opinion’s reference to the *Bracey v. Monsanto Co.* decision¹²⁴ suggested a much stricter standard applies to personal injury claims, regardless of the parties’

113. *Purcell*, 59 S.W.3d at 510.

114. *Id.*

115. *Id.* at 510-11.

116. *Id.* at 511.

117. *Id.* (White, J., concurring).

118. *Id.* (White, J., concurring).

119. *Id.* (White, J., concurring).

120. *Id.* (White, J., concurring).

121. *Id.* (White, J., concurring).

122. *Id.* (White, J., concurring).

123. *Id.* (White, J., concurring).

124. See *supra* Part IV and text accompanying note 71.

sophistication.¹²⁵ According to Judge White, the nature of Purcell's "negligence" claim constituted the dispositive factor in removing the case from the scope of the *Alack* decision.¹²⁶ In essence, Purcell claimed nothing more than Beechcraft's negligent performance of the inspection contracted for.¹²⁷ Judge White, therefore, reasoned that the parties in the instant case failed to present, and the court appropriately declined to address, the issue of whether or not the claim actually resulted from a tort or breach of contract.¹²⁸ In the end, Judge White considered this failure irrelevant because the liability limitation precluded further analysis of this "narrowly drawn cause of action."¹²⁹

In support of enforcing the limitation provision before the court, Judge White also relied on the contract's text, which stated that "Beechcraft's '*liability . . . under the agreement*' shall be limited to the cost of the inspection."¹³⁰ Consequently, Judge White regarded the liability limitation as broad enough to cover the specific claim presented by Purcell.¹³¹ Judge White concluded that Purcell's claim "undoubtedly arises '*under the agreement*,' regardless of whether it is formally considered a tort or contract liability."¹³² Judge White further reasoned that because the provision only limited liability "under the agreement," it represented a "much narrower provision than the provision at issue in *Alack*."¹³³ In contrast to the provision at question here, the *Alack* limitation purported to release the defendant from liability for personal injury claims without limiting liability to a breach of the agreement itself.¹³⁴ The provision in the instant case clearly and unequivocally stated that liability for a violation of the contract was limited to the contract price.¹³⁵

Considering the factual differences between *Alack* and the present case, Judge White reasoned that the principal opinion correctly determined that *Alack*'s "express negligence" rule did not prevent the enforcement of contracts between sophisticated parties which limit future liability without explicitly stating the terms "negligence" or "fault."¹³⁶ As the majority opinion correctly concluded, according to Judge White, the provision in question clearly and unmistakably limited Beechcraft's liability under the contract.¹³⁷

125. *Purcell*, 59 S.W.3d at 511 (White, J., concurring).

126. *Id.* (White, J., concurring).

127. *Id.* (White, J., concurring).

128. *Id.* (White, J., concurring).

129. *Id.* (White, J., concurring).

130. *Id.* (White, J., concurring).

131. *Id.* (White, J., concurring).

132. *Id.* (White, J., concurring).

133. *Id.* (White, J., concurring).

134. *Id.* (White, J., concurring).

135. *Id.* (White, J., concurring).

136. *Id.* at 512 (White, J., concurring).

137. *Id.* at 511-12 (White, J., concurring).

Judge White closed his concurrence with a note of caution: “[t]he court, however, is not presented with, and does not decide the question of whether this provision expressly, clearly and unmistakably disclaims liability for duties imposed not by explicit agreement, but by the general principles of tort law.”¹³⁸ Judge White consequently concluded by stating that the exception to the “express negligence” rule provided in the current decision extended no further than the specific factual circumstances presented in *Purcell*.¹³⁹

V. COMMENT

Given the clear conclusion of *Purcell* that the express negligence rule does not apply to sophisticated parties, what other guidance can parties such as *Purcell* and *Beechcraft* take from this decision? To begin, the majority opinion clearly indicates the court’s analysis of this claim as a breach of contract action, despite *Purcell*’s attempt to color the claim in tort by asserting *Beechcraft*’s “negligence” in performing the contract.¹⁴⁰ Judge White’s concurrence elaborated that the issue of whether the claim presented sounded in tort or in contract was not presented by the parties and, therefore, was appropriately not addressed by the court.¹⁴¹ Judge White’s concurrence, however, continued by stating that the failure to address the nature of the claim proved irrelevant because of the “narrowly drawn cause of action” presented.¹⁴² Judge White supported this conclusion by observing that *Purcell*’s claim unquestionably arose “under the agreement” between *Purcell* and *Beechcraft*.¹⁴³ Judge White further stated that the court was “not presented with, and does not decide the question of whether this provision expressly, clearly and unmistakably disclaims liability for duties imposed not by explicit agreement, but by the general principles of tort law.”¹⁴⁴ Considering the majority and concurring opinions together, only one logical conclusion can be drawn: the court undoubtedly regarded this action as an action in contract and not in tort. Upon recognizing the decision as one based strictly on a breach of contract claim, it becomes apparent that the court simply followed a well recognized legal principle: the so-called “economic loss rule” or, as some courts now refer to it, the “independent injury rule.”¹⁴⁵

138. *Id.* at 512 (White, J., concurring).

139. *Id.* (White, J., concurring).

140. *See supra* Parts II and IV.A.

141. *See supra* Part IV.B.

142. *See supra* Part IV.B.

143. *See supra* Part IV.B.

144. *See supra* Part IV.B.

145. *See Eastman Chem. Co. v. Niro, Inc.*, 80 F. Supp. 2d 712, 716 n.2 (S.D. Tex. 2000) (finding the “independent injury doctrine” a more appropriate title than “economic loss rule” because a “plaintiff standing in some contractual relationship with [a] defendant may sometimes recover under a tort cause of action despite suffering

Put succinctly, the economic loss rule states that “a party to a contract may not pursue a claim in tort for solely economic losses unless the party breaching the contract has committed a tort which is distinguishable from or independent of the breach of contract.”¹⁴⁶ Stated in a manner particularly applicable to the case at hand, “[t]he economic loss rule prohibits a negligence claim when the breach of duty is contractual and the harm incurred is the ‘result of failure of the purpose of the contract.’”¹⁴⁷ The imposition of tort liability requires a tort duty existing “independent of the contract and without reference to the specific terms of the contract.”¹⁴⁸ Consequently, “[m]erely alleging that the breach of contract duty arose from a lack of due care will not transform a simple breach of contract into a tort.”¹⁴⁹

The rationale of the rule rests on a recognition of the fundamentally different notions of duty embodied in contract law and tort law.¹⁵⁰ Tort law

exclusively from economic losses”). This Author prefers the term “independent duty rule” because, as articulated further in the discussion following, the rule should focus on the nature of the duty between the parties. The “economic loss rule” title implies a focus on the nature of the injury, that is, personal harm or purely economic loss, instead of the appropriate focus on the nature of the duty. The “independent injury rule” attempts to clarify this misconception, yet the quote at the beginning of this footnote applying that label also seems to prematurely focus on the nature of the injury in relation to the duty rather than analyzing the duty between the parties before addressing the nature of the harm suffered. The rest of the discussion, however, refers to the rule as the “economic loss rule” for consistency with the terminology used by the authorities cited and to avoid unnecessary confusion.

146. *Medalie v. FSC Sec. Corp.*, 87 F. Supp. 2d 1295, 1300 (S.D. Fla. 2000).

147. *Loughridge v. Goodyear Tire & Rubber Co.*, 192 F. Supp. 2d 1175, 1182-83 (D. Colo. 2002) (quoting *Town of Alma v. Azco Constr., Inc.*, 10 P.3d 1256, 1261 (Colo. 2000)).

148. *Conway v. Pac. Univ.*, 924 P.2d 818, 822 (Or. 1996) (quoting *Georgetown Realty, Inc. v. Home Ins. Co.*, 831 P.2d 7, 14 (Or. 1992)) (internal quotation marks omitted).

149. *Gen. Conference of Seventh-Day Adventists (Risk Mgmt. Servs.) v. AON Reinsurance Agency, Inc.*, 860 F. Supp. 983, 989 (S.D.N.Y. 1994) (quoting *Sommer v. Fed. Signal Corp.*, 583 N.Y.S.2d 957, 961 (N.Y. 1992)) (internal quotation marks omitted) (alteration in original); *see also Rich Prods. Corp. v. Kemutec Inc.*, 241 F.3d 915, 919 (7th Cir. 2001) (“[E]ven skillful pleading does not transform the damages sought into tort claims to make up for what hindsight shows was the lack [of sufficient contracting].”).

150. *See 2314 Lincoln Park W. Condo. Ass’n v. Mann, Gin, Ebel & Frazier, Ltd.*, 555 N.E.2d 346, 351 (Ill. 1990) (“It would appear that the concept of duty is at the heart of the distinction drawn by the economic loss rule.”). “The rationale of the economic loss rule is that tort law is not intended to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement.” *Sun Co. (R & M) v. Badger Design & Constructors, Inc.*, 939 F. Supp. 365, 371 (E.D. Pa. 1996) (quoting *Palco Linings, Inc. v. Pavex, Inc.*, 755 F. Supp. 1269, 1271 (M.D. Pa. 1990)) (internal quotation

recognizes the duties imposed as the result of the relationship between parties as members of society in general.¹⁵¹ Contract law, on the other hand, recognizes parties' ability to impose, define, and modify duties not on the basis of a relationship as members of society in general, but within the scope of a relationship created by an agreement between the parties.¹⁵²

Waivers, however, have been characterized as a hybrid of tort law and contract law, stemming from the inevitable co-mingling of the right to contract and the duty to take responsibility for one's actions.¹⁵³ This hybrid status has proven problematic to both attorneys and judges faced with applying and interpreting the economic loss rule in commercial litigation.¹⁵⁴ One common refrain against the enforcement of waivers suggests they induce negligent or intentional violations of duty.¹⁵⁵ While such an objection reflects legitimate public policy concerns, one must keep the fundamental difference between contract duty and tort duty in mind. To this end, one court articulated the policy behind the economic loss rule as follows:

Almost every breach of contract involves actions or inactions that can be conceived of as a negligent or intentional act. If left unchecked, the incessant tide of tort law would erode and eventually swallow contract

marks omitted).

151. *Strum v. Exxon Co., U.S.A.*, 15 F.3d 327, 330 (4th Cir. 1994). “[T]ort law prescribes duties governing one’s conduct vis-a-vis the general public, contract law enforces bargained-for obligations to a particular party.” *Tom Hughes Marine, Inc. v. Am. Honda Motor Co.*, 219 F.3d 321, 325 (4th Cir. 2000). “Tort duties are imposed upon parties ‘by the law itself, without regard to their consent to assume them,’ whereas ‘one need not enter into the obligation of a contract with another save by one’s own free will.’” *Id.* (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 1, at 4 (5th ed. 1984)).

152. *Strum*, 15 F.3d at 330. “[C]ontract law facilitates the right of societal members to arrange their own relationships and enforce them in accordance with their agreements.” *Tom Hughes Marine, Inc.*, 219 F.3d at 325 (citing RESTATEMENT (SECOND) OF TORTS § 4 cmt. c (1965)).

153. *See Bauer v. Aspen Highlands Skiing Corp.*, 788 F. Supp. 472, 474 (D. Colo. 1992) (citing *Heil Valley Ranch, Inc. v. Simkin*, 784 P.2d 781, 783-84 (Colo. 1989)).

154. *See Reeder R. Fox & Patrick J. Loftus, Riding the Choppy Waters of the East River: Economic Loss Ten Years Later*, 64 DEF. COUNS. J. 260, 260-70 (1997) (noting the uncertainty involving the application of the economic loss rule and commercial litigation); Paul J. Schwiep, *The Economic Loss Rule Outbreak: The Monster That Ate Commercial Torts*, 69-NOV FLA. B.J. 34, 34-42 (1995) (noting confusion among lawyers and judges about application of the economic loss rule in commercial litigation); Hon. Sheldon Gardner & Mathew Sheynes, *The Moorman Doctrine Today: A Look at Illinois' Economic-Loss Rule*, 89 ILL. B.J. 406, 406 (2001) (characterizing the expansion of the economic loss rule beyond its original scope as “unsettling”).

155. 17A AM. JUR. 2D *Contracts* § 297 (1991).

law. This court believes that if tort law and contract law are to fulfill their distinctive purposes, they might be distinguished where it is possible to do so. The economic loss doctrine serves the basis for such a distinction.¹⁵⁶

The distinction, and thus the application of the rule, seems most appropriate in cases like *Purcell* because “contract law . . . is better suited than tort law for dealing with purely economic loss in the commercial arena.”¹⁵⁷ Particularly in the context of a commercial transaction between sophisticated parties, contract duties represent a commodity that can be exchanged, or altered, if the parties intend to do so.¹⁵⁸ This ability reflects the core concept of contract law:

The very notion of contract is the consensual formation of relationships with bargained-for duties. An essential corollary of the concept of bargained-for duties is bargained-for liabilities for failure to perform them. Important to the vitality of contract is the capacity voluntarily to define the consequences of the breach of a duty before the duty is assumed.¹⁵⁹

In *East River Steamship Corp. v. Transamerica Delaval, Inc.*,¹⁶⁰ the United States Supreme Court acknowledged the economic loss rule’s function in preserving parties’ ability to define contractual duties by stating that parties may contract to allocate risks by agreement without the special protections afforded under tort law in order to recover damages resulting from a breach of contract.¹⁶¹ The Washington Supreme Court further highlighted the utility of the rule when it stated that “[a] bright line distinction between the remedies offered in contract and tort with respect to economic damages also encourages parties to negotiate toward the risk distribution that is desired or customary. [Application of the

156. *Princess Cruises, Inc. v. Gen. Elec. Co.*, 950 F. Supp. 151, 155 (E.D. Va. 1996); *see also Hulse v. First Am. Title Co. of Crook County*, 33 P.3d 122, 139 (Wyo. 2001) (“Tort law proceeds from a long historical evolution of externally imposed duties and liabilities. Contract law proceeds from an even longer historical evolution of bargained-for duties and liabilities. The careless and unnecessary blanket confusion of tort and contract would undermine the carefully evolved utility of both.”) (quoting *Snyder v. Lovercheck*, 992 P.2d 1079, 1087 (Wyo. 1999)) (internal quotation marks omitted).

157. *Rich Prods. Corp. v. Kemutec Inc.*, 241 F.3d 915, 918 (7th Cir. 1995).

158. *See Wendell H. Holmes, The Freedom Not to Contract*, 60 TUL. L. REV. 751, 751-52 (1986).

159. *Snyder v. Lovercheck*, 992 P.2d 1079, 1087 (Wyo. 1999).

160. 476 U.S. 858 (1986).

161. *See id.* at 871-74.

economic loss rule] preserve[s] the incentive to adequately self-protect during the bargaining process.”¹⁶²

The *Purcell* decision recognizes contract law’s fundamental ability to allocate risks in agreements between sophisticated parties.¹⁶³ The court plainly regarded the case before it as one in which Purcell attempted to avoid the consequences of an unfavorable allocation of risk. This treatment is particularly evident in the court’s emphasis on Purcell’s sophistication and ability to contract for a higher level of inspection service.¹⁶⁴ Although it did not explicitly say so, the court appeared to follow the economic loss rule by deciding that Purcell’s claim, even characterized as one of negligence, arose only from the contractual relationship between Purcell and Beechcraft. Beechcraft obviously had no general duty as a member of society at large to perform pre-purchase inspections of planes. Beechcraft’s only duty to perform a pre-purchase plane inspection arose from the specific contractual relationship created between it and Purcell by virtue of their agreement.

Consequently, the *Purcell* court saw no reason to allow Purcell to gain recovery in addition to that provided by the contract into which it voluntarily entered. The decision correctly recognizes the inappropriateness of tort law remedies in cases where sophisticated parties are free to allocate the risk of economic loss through disclaimers or limitations of liabilities in a contract.¹⁶⁵ While there has been criticism of the application of the economic loss rule (and such concerns have prompted the creation of exceptions in some circumstances),¹⁶⁶ even those criticizing the rule would admit the propriety of its application in a case such as *Purcell*.¹⁶⁷

162. *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 881 P.2d 986, 992 (Wash. 1994).

163. *See supra* Part III.D.

164. *See supra* Part IV.A.

165. *See Rich Prods. Corp. v. Kemutec Inc.*, 241 F.3d 915, 919 (7th Cir. 1995).

166. *See Fox & Loftus, supra* note 154, at 268-71 (noting some of the exceptions to the economic loss rule); *Schwiep, supra* note 154, at 41-42 (advocating exceptions to and the proper application of the economic loss rule); *Gardner & Sheynes, supra* note 156, at 408-11 (describing the exceptions to the economic loss rule).

167. *Schwiep, supra* note 154, at 42 (“Intentional tort claims that allege no more than a breach of contractual obligations should be barred by the doctrine. This is because plaintiffs pressing such a claim are protected . . . by the contract. [In such cases the] plaintiff’s remedy [is] properly limited to those available under the contract. Defendant did no more than breach its contract, albeit intentionally, and so it is to the contract that a plaintiff must turn for its remedy. Incidentally, this is already the law of Florida (and most jurisdictions)” (footnote omitted)).

VI. CONCLUSION

The *Purcell* decision clearly establishes the inapplicability of the express negligence rule to liability limitation provisions between sophisticated parties in a commercial transaction. The court's opinion, however, failed to explicitly address whether the claim presented was a contract or tort claim. Nevertheless, the tone of the majority opinion and the concurrence of Judge White, considered together, plainly indicated the court's view of the action before it as a pure matter of contract law. The court clearly rejected *Purcell*'s attempt to recover under a tort claim simply by alleging a "negligent" breach of contract. As such, the decision can simply be viewed as consistent with the well-known economic loss rule. Whether explicitly adopting that doctrine or not, the *Purcell* decision recognizes the doctrine's purpose in distinguishing the fundamental differences between contract law and tort law. Consequently, the decision reaffirms the basic contract principle of allowing parties with sufficient knowledge and ability to negotiate the terms of a contract and to subsequently be bound by the terms of that agreement.

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