EXCULPATORY CONTRACTUAL PROVISIONS AND THIRD PARTY TORT LIABILITY

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HYPOTHETICALS

A. The Exculpatory Clause Exists in the Contract Between the Plaintiff and Another Entity; the Defendant is Not a Party to the Contract.

Plaintiff is a tenant in an industrial facility.

Contained within the lease contract is a waiver of

subrogation which reads:

> Each party waives rights of subrogation against the other with respect to any insured risk to the extent such waiver does not invalidate such insurance or reduce the proceeds. Defendant is a property management company retained by the landlord to manage the industrial facility.

Defendant is not a party to the lease contract.

The industrial facility suffers a fire which causes

substantial damage to plaintiff's personal property.

Plaintiff sues defendant claiming that the fire resulted

from the defendant property management company's

negligent failure to properly maintain the heating

system.

B. The Exculpatory Clause Exists in the Contract Between the Defendant and Another Entity; the Plaintiff is <u>Not</u> a Party to the Contract.

Plaintiff is a tenant in a warehouse facility. The

landlord contracts with the defendant, a roofing

company, to install a new roof on the warehouse.

Contained within the contract for the installation of the

roof is an exculpatory clause which reads:

> Contractor warrants to Owner that Contractor will repair any leaks resulting from defects in the materials or workmanship in the roofing services performed by Contractor ... for a period of 20 years ... Owner's

remedies and Contractor's liability shall be limited to Contractor's repair of the roof.

* * *

This warranty agreement is understood to be the complete and exclusive agreement between the parties ... This express limited warranty contains the sole and exclusive remedy of owner against contractor ...

The roof fails resulting in substantial water damage to plaintiff's personal property. Plaintiff sues the roofing contractor claiming that the roof failure and resulting water damage resulted from the defendant roofing contractor's negligent failure to properly install the roof.

I. A DEFENDANT CANNOT GAIN THE BENEFIT OF EXCULPATORY CONTRACTUAL PROVISIONS CONTAINED WITHIN A CONTRACT TO WHICH IT IS NOT A PARTY; NOR CAN A DEFENDANT SUBJECT A PLAINTIFF TO EXCULPATORY CONTRACTUAL PROVISIONS CONTAINED WITHIN A CONTRACT TO WHICH THE PLAINTIFF IS NOT A PARTY.

II. EXCULPATORY CLAUSES MUST BE STRICTLY AND NARROWLY CONSTRUED.

III. THE PRESENCE OF INSURANCE IS NOT AN EXCUSE.

IV. AVOID RELYING ON THIRD PARTY BENEFICIARY STATUS TO ESTABLISH DUTY.

I. A DEFENDANT CANNOT GAIN THE BENEFIT OF EXCULPATORY CONTRACTUAL PROVISIONS CONTAINED WITHIN A CONTRACT TO WHICH IT IS NOT A PARTY; NOR CAN A DEFENDANT SUBJECT A PLAINTIFF TO EXCULPATORY CONTRACTUAL PROVISIONS CONTAINED WITHIN A CONTRACT TO WHICH THE PLAINTIFF IS NOT A PARTY.

A defendant can be expected to seek to gain the benefit of the exculpatory terms contained within the lease contract between the plaintiff and the landlord in Hypothetical "All or in the roofing contract between the defendant and the landlord in Hypothetical "B".

In both situations, the plaintiff can argue that the terms and conditions of the contract at issue are enforceable against and for the benefit of only the parties to the contract. In Hypothetical "A", the defendant is not a party to the lease contract. In Hypothetical "B", the plaintiff is not a party to the roofing contract. Accordingly, the fact that the lease contract between plaintiff and defendant in Hypothetical "All and the roofing contract between the landlord and defendant in Hypothetical "B" contain exculpatory provisions should not preclude the plaintiff's tort claims in either scenario.

In Hypothetical "A", the defendant is not a party to the lease contract between plaintiff and the landlord. The defendant did not give any consideration for the contract nor can it receive any benefit from the contract by seeking to apply a provision of it against plaintiff, when the provision was intended for the sole benefit of the landlord and when only the landlord gave consideration for it. In Hypothetical "B", the plaintiff is not a party to the contract between the landlord and the defendant. There was no meeting of the minds between the plaintiff and the defendant, and the plaintiff received no consideration from the defendant in exchange for agreeing to limit its rights to seek recompense for tortious injury. See W.F.R. Ribbon, Inc. v. Centimark Corp., No. 1994-C-3942 (C.C.P. Northampton County, June 28, 1996), attached as Exhibit "A". Under Pennsylvania law, no contract exists in the absence of a meeting of the minds between the parties to the contract and an intent by the parties to enter

into a contract. Irma Hosiery Co. v. Home Indem. Co., 276 F.2d 212 (3d Cir. 1960) (applying Pennsylvania law), citing Benner v. Fire Association of Philadelphia, 229 Pa. 75. 78 A. 44 (1910); First Nat. Bank of Verona v. Walsh, 349 Pa. 241, 37 A.2d 130 (1944).

II. EXCULPATORY CLAUSES MUST BE STRICTLY AND NARROWLY CONSTRUED.

A plaintiff's claims should not be barred by the terms and conditions of a contract to which the defendant is not a party. Similarly, a plaintiff's claims should not be barred by the terms and conditions of a contract to which it is not a party.

A plaintiff should ask a Court to construe contractual provisions such as those presented in Hypotheticals "All and 11B11 as exculpatory clauses. A waiver of subrogation provision is an exculpatory clause. Federal Ins. Co. v. Richard I. Rubin & Co., Inc., No. Civ. A. 92-4177, 1993 WL 489771 (E.D. Pa. Nov. 1993) (Buckwalter, J.), attached as Exhibit "B"; PPG Industries, Inc. v. Ashland Oil Co.-Thomas Petroleum Transit Div., 592 F.2d 138, 145 (3d Cir. 1978) (finding the intent and effect of a waiver of subrogation provision to be exculpatory).

Pennsylvania courts take a dim view of exculpatory clauses in general. Gallagan v. Arovitch, 421 Pa. 301, 219 A.2d 463 (1966). These clauses are to be construed literally and against the party claiming the benefit. Crew v. Bradstreet, 134 Pa. 161, 19 A. 500 (1890). Moreover, the exculpatory clause must be explicit as to the conduct to be excused. Morton v. Ambridge Borough, 375 Pa. 161, 101 A.2d 661 (1954).

In Pennsylvania, exculpatory clauses are only valid under three conditions: "First, the clause must not contravene public policy. Secondly, the contract must be between persons relating entirely to their own private affairs and thirdly, each party must be a free bargaining agent to the agreement so that the contract is not one of adhesion." Topp Copy Products, Inc. v. Singletar, 533 Pa.

468, 626 A.2d 98, 99 (1993) citing Princeton Sportswear Corp. v. H. & M. Assoc., 510 Pa. 189, 507 A.2d 339 (1986); Employers Liability Assurance Corp. v. Greenville Businessmen's Assoc., 423 Pa. 288, 224 A.2d 620 (1966).

The court in Topp Copy also held that an exculpatory clause would be unenforceable unless the language is clear that a person is being relieved of liability for his own acts of negligence. In interpreting such clauses, the court provided certain guiding standards: (1) the contract language must be construed strictly, since exculpatory language is not favored by the law; (2) the contract must state the intention of the parties with the greatest particularity, beyond doubt by express stipulation, and no inference from words of general import can establish the intent of the parties; (3) the language of the contract must be construed, in cases of ambiguity, against the party seeking immunity from liability; and (4) the burden of establishing immunity is upon the party invoking protection under the clause. Id., citing Dilks v. Flohr Chevrolet, 411 Pa. 425, 192 A.2d 682 (1963).

As the court explained in Dilks, 192 A.2d at 688:

> Where a person claims that, under the provisions and terms of a contract, he is rendered immune from and relieved of any liability for negligent conduct on his part or on the part of his employees, the burden is on such person to prove (a) that such contractual provisions and terms do not contravene public policy and (b) that the provisions and terms of the contract clearly and unequivocally spell out the intent to grant such immunity and relief from liability. Absent such proof, the claim of immunity fails. (Emphasis in original).

Under the principles of interpretation as set forth in Topp Copy, the exculpatory provision in Hypotheticals "A" and "**B"** fail to pass muster and are unenforceable as against the plaintiff.

III. THE PRESENCE OF INSURANCE IS NOT AN EXCUSE.

A defendant seeking the benefit of an exculpatory provision, such as in Hypotheticals "A" and "B", is in essence seeking to excuse its own culpability by shifting the risk entirely onto the

plaintiff's insurance. A plaintiff should remind a Court that insurance is not a substitute for blame and responsibility. Warren City Lines, Inc. v. United Refining Co., 220 Pa. Super. 308, 287 A.2d 149 (1971). The fact that an injured party has obtained insurance "does not, under law or by the application of the simplest logic, insulate a tortfeasor from liability for his misconduct." Doyle v. South Pittsburgh Water Co., 414 Pa. 199, 199 A.2d 875, 882-883 (1964). A defendant ought not be allowed to hide behind the argument that the presence of insurance obviates the need to determine fault. A plaintiff's insurance coverage was never intended to substitute for finding fault, and a defendant's attempted use of the existence of insurance in such a manner should be seen as a misapplication of accepted tort law principles.

As the court reasoned in Warren City Lines, Inc., 287 A.2d at 151-52, when construing such a clause:

> The widespread use of property and liability insurance does not invalidate the policy argument against contracts transferring responsibility for the violation of public safety measures enacted or authorized by the legislature. If all that were involved was the shifting of ultimate loss from one insurer to another, we would not be concerned with the private transfer of risk by contractual agreement. It is an unescapable fact, however, that the party transferring the risk has no incentive to use reasonable care when it is held harmless for all losses resulting from its own negligence, and its insurer has no incentive to provide the transferor with loss prevention services or inspection. This creates a particularly dangerous situation for the public where (1) the party transferring the risk is better able to prevent the loss or reduce the risk associated with the loss, or (2) where the party to whom the risk has been transferred does not fully realize the responsibility which it has received. (Footnote omitted).

IV. AVOID RELYING ON THIRD PARTY BENEFICIARY STATUS TO ESTABLISH DUTY.

A plaintiff faced with the scenarios presented in Hypotheticals “A” and “B” should rely on common law principles to establish duty, if duty is at issue, and avoid relying on Restatement (Second) of Torts, § 324A (1965).

Restatement (Second) of Torts, § 324A states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Relying on Restatement (Second) of Torts, § 324A to establish duty leaves a plaintiff vulnerable to the argument that the plaintiff should be subject to the terms and conditions, including exculpatory provisions, contained within the contract upon which the plaintiff relies to establish duty. See 31 Tort & Ins. L.J. 785 (1996), attached as Exhibit "C".

It is well established under Pennsylvania law that third party beneficiaries are bound by the same limitations in a contract as the signatories to that contract. General Acc. Ins. Co. of America v. Parker, 445 Pa. Super. 300, 665 A.2d 502 (1995), appeal denied, 544 Pa. 631, 675 A.2d 1249 (1996); Johnson v. Pennsylvania Nat. Ins. Cos., 527 Pa. 504, 508, 594 A.2d 296, 298299 (1991). "The third party beneficiary cannot recover except under the terms and conditions of the contract from which he makes a claim." Johnson, 594 A.2d at 298-299, citing Grim v. Thomas Iron Co., 115 Pa. 611, 8 A. 595 (1887). The rights of a third party beneficiary may rise no higher than the rights of the parties to the contract and they are vulnerable to the same limitations which may be asserted between the parties to the contract. Id., citing Jewelcor Jewelers & Distributors, Inc. v. Corr, 373 Pa. Super. 536, 542 A.2d 72, 80 (1988), appeal denied, sub nom., Graniewel Jewelers & Distributors, Inc. v. Corr, 524 Pa. 608, 569 A.2d 1367 (1989), citing Williams v. Paxson Coal Co., 346 Pa. 468, 31 A.2d 69 (1943). "When there is a contract, the right

of a beneficiary is subject to any limitation imposed by the terms of the contract. Restatement (Second) of Contracts, § 309, comment b (1981).

Rather, in order to establish a defendant's duty, a plaintiff should rely on the basic tort law principle that persons have a duty to act without negligence. Under Pennsylvania law contractors have a duty to act without negligence and to carry out their work in a careful and prudent manner. See St. Claire v. B&L Paving Co., 270 Pa. Super. 277, 411 A.2d 525, 526 (1979); Patraka v. Armco Steel Co., 495 F. Supp. 1013, 1020 (M.D. Pa. 1980); Hess v. Fuellgraf Elec. Co., 350 Pa. Super. 235, 504 A.2d 332 (1986). See also Aronsohn v. Mandara, 98 N.J. 92, 484 A.2d 675, 682 (1984). These cases hold that a contractor may be liable to a third-party who suffers damage as a result of the contractor's negligent workmanship.

The Aronsohn case, which applies New Jersey law, is instructive in the context of the hypotheticals presented. Plaintiffs had purchased a home in August 1975. In 1974 a patio was added to the rear of this home by defendant Mandara Masonry Corporation pursuant to a contract with the previous owners of the home. In 1978 plaintiffs noticed the patio was separating from the wall of the house, rising, and beginning to buckle. Plaintiffs commenced an action against defendant Mandara. The trial court granted defendant's motion to dismiss, finding that plaintiffs' claim was barred due to lack of privity with defendant. The Supreme Court of New Jersey reversed.

Specifically, with respect to the plaintiffs' negligence claim, the Supreme Court found that a contractor has a duty to parties other than the one with whom it has contracted to carry out its work in a careful and prudent manner. The court found that this principle can apply to make a contractor liable in tort to all those who may be injured by a negligently built structure. 484 A.2d at 682; citing Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965). In Schipper, the New Jersey Supreme Court extended the tort liability of a contractor to a lessee of a home that the contractor had sold to the lessee's

landlord. In so doing, the court held that "liability could be sustained under a theory of negligence in the absence of privity between the parties." 484 A.2d at 682. Accordingly, under New Jersey law, a contractor may be liable to third parties who suffer damages as a proximate result of a contractor's negligent workmanship. See also DeLos Santos v. Saddle Hill, Inc., 211 N.J. Super. 253, 511 A.2d 721, 730 (1986); Carter Lincoln-Mercury, Inc. v. EMAR Group, Inc., 135 N.J. 182, 638 A.2d 1288, 1294 (1994) .

The St. Claire v. B&L Paving Co. case affirms that under Pennsylvania law a contractor has a duty to act without negligence and that a contractor owes this duty to parties who are within the foreseeable orbit of risk of harm who are strangers to the contract. 411 A.2d at 526. In the St. Claire case, defendant B&L Paving contracted with the Commonwealth of Pennsylvania to repave a portion of a road. The repaving took place on June 22 and 23, 1970. On June 24, 1970, B&L removed the warning signs it had erected while working on the road. B&L's work had created a drop-off of approximately six inches from the road surface to the shoulder of the road. On June 27, 1970, plaintiff's decedent was driving on the road when the right wheels of his vehicle dropped off the road surface on to the shoulder. Plaintiff's decedent lost control of his car, crossed the center line of the road, and collided with a vehicle traveling in the opposite direction. In reversing the lower court's grant of motion for summary judgment for B&L, the Pennsylvania Superior Court held that those who undertake an activity pursuant to a contract have both a self-imposed contractual duty and a social duty imposed by law to act without negligence. Id. at 526, citing Bisson v. John B. Kelley. Inc., 314 Pa. 99, 170 A. 139 (1934). This social duty extends to parties who, although strangers to the contract, are "within the foreseeable orbit of risk of harm." Id., citing Doyle v. South Pittsburgh Water Co., 414 Pa. 119, 207, 199 A.2d 875, 878 (1964); Printed Terry Finishing Co., Inc. v. City of Lebanon, 247 Pa. Super. 277, 372 A.2d 460 (1977).

A plaintiff should argue that a defendant is subject to the general duty imposed on all parties not to place others at risk of harm through their actions. See generally Burman v. Golay & Co., Inc., 420 Pa. Super. 209, 616 A.2d 657 (1992); Alumni Ass'n v. Sullivan, 369 Pa. Super. 596, 535 A.2d 1095 (1987). Only when the question of foreseeability is undeniably clear may a court rule as a matter of law that a particular defendant did not have a duty to a particular plaintiff. Alumni Ass'n v. Sullivan, 535 A.2d at 1098, citing Migyanko v. Thistlewaite, 275 Pa. Super. 500, 419 A.2d 12, 14 (1980); Palsqraf v. Long Island Railroad Co., 248 N.Y. 339, 162 N.E. 99, 100 (1928).

A defendant may be held liable for injury to another where that other falls within a foreseeable class of persons or parties. Brown v. Beaver Valley Motor Coach Co., 365 Pa. 578, 76 A.2d 403, 406 (1950); DiCosala v. Kay, 91 N.J. 159, 450 A.2d 508, 517 (1982) (the concept of duty does not require a specific forecasting of particularly identifiable victims or a precise prediction of the exact harm that may result, rather, a party may be liable to persons who fall within a zone of risk created by the particular tortious conduct). Foreseeability does not require that one must foresee the precise hazard or envision the harm in the detailed manner in which it occurred; it is enough if some harm of a like general character is foreseeable. Guffie v. Erie Strayer Co., 350 F.2d 378 (3d Cir. 1965) (applying Tennessee law).

In Hypotheticals “A” and “B” a plaintiff can argue that it belongs to a class of potential plaintiffs that was foreseeable at the time the defendant performed its work. In both hypotheticals, the defendant knew or should have known that it had to perform its work in a careful and workmanlike manner for the benefit of any and all present and future occupants of the building.

Research did not reveal a Pennsylvania case reconciling the apparent conflict between fundamental contract law principles and the principles of interpretation of exculpatory contractual provisions as set forth in Topp Copy, supra., and third party beneficiary principles as set forth in

Restatement (Second) of Contracts, § 309, comment b (1981) and as set forth in Johnson, supra. The Topp Copy case and the other cases requiring exculpatory contractual provisions to be strictly and narrowly construed support the position that a non-party to a contract containing such an exculpatory provision ought not to benefit from nor be subject to such a provision. Seemingly conversely, Restatement (Second) of Contracts, § 309, comment b (1981), Restatement (Second) of Torts, § 324A, the Johnson case and other cases holding that a third party beneficiary is bound by the same limitations in the contract as the signatories to that contract seem to suggest that a third party would be subject to the terms and conditions of an exculpatory provision contained within a contract even though the third party is not a party to the contract.

A plaintiff becomes vulnerable to the third party beneficiary arguments only when it must rely on the contract to establish a duty. Accordingly, a plaintiff can avoid this apparent pitfall by avoiding relying on the contract to establish a duty. This seems to be the best course of action for plaintiffs to take until such time as a court determines which doctrine shall prevail in the face of a conflict.

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