IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

CENTEX/WORTHGROUP, LLC,

Plaintiff-Appellant,

v. No. 32,331

WORTHGROUP ARCHITECTS, L.P. and TERRACON, INC.,

Defendants-Appellees.

ANSWER BRIEF OF WORTHGROUP ARCHITECTS, L.P.

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY
JERRY H. RITTER, JR., District Judge

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Statement of Compliance: I certify in accordance with Rule 12-213 NMRA that this brief was prepared using a fourteen-point, proportionally spaced typeface with Microsoft Word 2010 and that the body of the brief contains 8,487 words.

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INTRODUCTION

On one point, all agree: "A party cannot invoke only the beneficial part of a contract while eschewing its obligations. Rather, parties to a contract . . . must accept the burdens of the contract along with the benefits." **[BIC 26]** (citation and internal punctuation omitted). That truth is a basic precept of contract interpretation and of simple fairness. It is in a nutshell the reason why the district court's decision to enforce the parties' duties under the contracts should be affirmed.

Centex/WorthGroup, LLC (Design/Builder) brought this action for damages based on alleged errors or omissions in the design of a mechanically-stabilized-earth retaining wall. Design/Builder has availed itself of the benefit, however, of the three-million dollar contractual remedy to which the parties agreed. Having obtained that benefit, Design/Builder seeks to avoid the correlative burden to enforce a limitation of liability for the benefit of its subcontractor, WorthGroup Architects, L.P. (Design Architect). Design/Builder's argument stands the law of contracts on its head. Rather than applying the contracts' complementary terms, Design/Builder seeks to jettison the burdens on the theory that they conflict with the contracts' benefits. The district court was correct to enforce the unambiguous terms of the parties' contracts limiting both Design/Builder's and Design Architect's liability. The order granting summary judgment should be affirmed.

ARGUMENT

THE DISTRICT COURT CORRECTLY ENFORCED THE LIMITATION OF LIABILITY

A. Standard of Review

This Court's review of the order granting summary judgment is de novo. *ConocoPhillips Co. v. Lyons*, 2013-NMSC-009, ¶ 8, 299 P.3d 844. "Summary judgment is proper when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Id.* (citation and internal quotation marks omitted).

Design/Builder notes that all reasonable inferences in favor of a trial on the merits are indulged in determining whether there is a genuine issue of material fact that would preclude summary judgment. **[BIC 14]** (citing *Smith v. Durden*, 2012-NMSC-010, ¶ 5, 276 P.3d 943). It does not articulate any factual issue, however, that would preclude summary judgment for Design Architect. To the contrary, it treats the issues of contract interpretation as between itself and Design Architect as a matter of law appropriate for resolution by this Court. **[BIC 14]** (citing *Rivera v. Am. Gen. Fin. Servs., Inc.*, 2011-NMSC-033, ¶ 27, 150 N.M. 398, 259 P.3d 803 ("Contract interpretation is a matter of law that we review de novo.")). In the absence of a showing that the contracts' meaning depends on an unresolved factual issue, this Court, like the district court, may properly decide the meaning of the parties' contracts:

> [I]n the event the parties do not offer evidence of the facts and circumstances surrounding execution of the agreement and leading to conflicting interpretations as to its meaning, the court may resolve any ambiguity as a matter of law by interpreting the contract using accepted canons of contract construction and traditional rules of grammar and punctuation.

Mark V, Inc. v. Mellekas, 1993-NMSC-001, ¶ 13, 114 N.M. 778, 845 P.2d 1232.

B. The Parties' Contracts

1. Applicable canons of contract interpretation

Contract interpretation in New Mexico is not a matter of mere manipulation of legalistic text. It is nothing more or less than a search for the purpose and intent of the parties who exchanged contractual promises. "This has long been the rule in New Mexico: The primary objective in construing a contract is to ascertain the intention of the parties." *Cont'l Potash, Inc. v. Freeport-McMoran, Inc.*, 1993-NMSC-039, ¶ 54, 115 N.M. 690, 858 P.2d 66 (citation and internal quotation marks omitted); *accord Rivera*, 2011-NMSC-033, ¶ 26 ("New Mexico's general principles of contract law . . . requir[e] courts to 'give effect to the intent of the parties.'") (quoting *Cont'l Potash, Inc.*, 1993-NMSC-039, ¶ 54).

As a means to the end of effectuating the parties' intent, the Court employs familiar canons of construction. "The purpose, meaning and intent of the parties to a contract is to be deduced from the language employed by them; and where such language is not ambiguous, it is conclusive." *ConocoPhillips Co.*, 2013-NMSC-009, ¶ 23. The Court construes the contract "as a harmonious whole" and gives

"every word and phrase meaning and significance according to its importance in the context of the whole contract." *City of Albuquerque v. BPLW Architects & Eng'rs, Inc.*, 2009-NMCA-081, ¶ 14, 146 N.M. 717, 213 P.3d 1146 (citation and internal quotation marks omitted).

The parties' intent should also be ascertained in a manner consistent with the basic precept already mentioned—that a party "must accept the burdens of the contract along with the benefits." *WXI/Z Sw. Malls v. Mueller*, 2005-NMCA-046, ¶ 11, 137 N.M. 343, 110 P.3d 1080; *accord Nearburg v. Yates Petroleum Corp.*, 1997-NMCA-069, ¶ 21, 123 N.M. 526, 943 P.2d 560 ("'[Courts] do not like to see a party to a contract getting something for nothing.'") (quoting 3A Arthur L. Corbin, *Corbin on Contracts* § 748, at 465 (1960)). Thus, in applying a contract made at arm's length, the Court's duty is "to enforce the terms of the contract which the parties made for themselves," *WXI/Z Sw. Malls*, 2005-NMCA-046, ¶ 11, including any mechanisms chosen by the parties for resolving their disputes. *Rivera*, 2011-NMSC-033, ¶ 56.

2. The governing contracts

The parties agree that this appeal hinges on the interrelationship between two contracts, referred to as the Design/Build Agreement **[RP 839-86]** and the Architect Agreement **[RP 889-915]**. *See* **[BIC 2]**. The two contracts are concerned with a single construction project at the Inn of the Mountain Gods Resort and

Casino, and their terms are closely intertwined. **[RP 839, 889, 915]**. An adequate understanding of the contracts' terms requires more attention than is given to them in the Brief in Chief.

(a) The Design/Build Agreement

The Design/Build Agreement was executed by Centex/WorthGroup, LLC as "Design/Builder" and by the Inn of the Mountain Gods Resort and Casino as "Owner." **[RP 839, 876-77]**. Design/Builder (Centex/WorthGroup, LLC) should not be confused with Centex Construction Company, Inc., which was the "Builder" performing the construction work on the project. **[RP 839]**. The Design/Build Agreement also specifically named WorthGroup Architects, L.P. as the "Designer," and the firm of Rider Hunt Levett & Bailey as the Owner's "Construction Manager." ***[Id.]***. Owner agreed to pay Design/Builder the contract sum of $135,169,000.00 to perform the Design/Build Agreement. **[RP 844-45 (§ V.A)]**. The parties agreed that Owner would make progress payments during the course of the work, but that Owner could in some circumstances withhold a "retainage" in an amount sufficient to protect Owner. **[RP 846-48 (§§ V.E, V.F)]**.

The contract provision of central importance to this case is Section VI, entitled "Design Responsibility." **[RP 851-53 (§ VI)]**. Section VI charged Design/Builder with the ultimate responsibility "to both design and build the Work." **[RP 851 (§ VI)]**. It further required, however, that Design/Builder was to

hire "competent design professionals as Subcontractor(s)" for "the design phase of the Work." **[RP 851 (§ VI.A)]**.

Section VI specifically anticipated the risk of errors or omissions by a design professional subcontractor in the design of the Project. To protect both Design/Builder and Owner against that risk, Section VI directed Design/Builder to require its design professional subcontractor(s) to obtain at least $3,000,000 in professional errors and omissions insurance coverage with respect to the design services:

> In addition to all other insurance requirements set forth in this Agreement, *Design/Builder shall require its design professional Subcontractor(s) to obtain and maintain professional errors and omissions coverage with respect to design services in accordance herewith.* Professional errors and omissions insurance shall be endorsed to provide contractual liability coverage if reasonably obtainable. Certificates of such coverage shall be furnished along with other certificates of insurance, and *such coverage shall be for each such design professional Subcontractor in an amount not less than $3,000,000.*

[RP 852 (§ VI.F)] (emphasis added).

Of critical importance to this appeal, Section VI not only required the $3,000,000 of insurance coverage to protect Design/Builder and Owner in case of a design-related loss, but it also expressly limited Design/Builder's liability for design errors or omissions to whatever proceeds Owner could collect from the professional errors and omissions insurance just mentioned:

> Owner agrees that it will *limit Design/Builder liability to Owner for any errors or omissions in the design* of the Project to *whatever sums Owner is able to collect from the above described professional errors and omissions insurance carrier.*

[RP 852 (§ VI.F)] (emphasis added).

As for the "other insurance requirements" referred to in Section VI.F, those requirements were set out in Section VIII. **[RP 854-58]**. Design/Builder was required to obtain property insurance for the entire work at the site, in the amount of the contract sum (initially $135,169,000.00), on an "all-risk policy form" covering a wide variety of perils, but "without duplication of coverage." **[RP 856 (§ VIII.C.1)]**; *see* **[RP 844 (§ V.A)]**. The parties again limited Design/Builder's liability in the event of loss, specifying that "*Owner shall bear all risk of loss* to the property that may occur and agrees to *look solely to the proceeds of insurance* in the event of a loss." **[RP 856 (§ VIII.C.1)]** (emphasis added).

Section VIII further required Design/Builder to obtain general liability insurance covering many other possible claims, including workers' compensation claims, personal injury claims, and claims for tangible property loss—but excluding claims for damages for loss "to the Work itself." **[RP 854-55 (§ VIII.A)]**. The requisite general liability insurance thus did not duplicate other insurance covering loss "to the Work itself." **[*Id.*]**. In particular, it did not duplicate the professional errors and omissions insurance coverage with respect to design services, which was required by Section VI.F. **[*Id.*]**.

In connection with the requirement of general liability insurance, Design/Builder agreed to indemnify Owner against claims for injuries to persons or property "other than the Work itself." **[RP 858 (§ IX)]**. Once again, however, the parties reiterated the limitation of Design/Builder's liability, expressly providing that it did not extend to liability for design errors or omissions and that Owner's recourse for a design-related loss was to the proceeds of the professional errors and omissions insurance described in Section VI.F:

> Notwithstanding the foregoing or anything else to the contrary appearing herein and *except to the extent provided in Section VI.F* herein, it is understood and agreed that *the obligations of the Design/Builder under this Section IX shall not extend to liability for the errors or omissions in the design* arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, designs or specifications, or (2) the giving of or the failure to give directions or instructions by the designers employed on the Project, it being understood that *Owner shall look solely to designers employed on the Project and their insurers in the event of any loss, injury, or damage due to the causes set forth above.*

[*Id.*] (emphasis added).

As previously noted, Design/Builder and Owner explicitly contemplated that Design/Builder would hire subcontractors to perform portions of the work, including the design work. **[RP 851 (§ VI.A), 853-54 (§ VII)]**. Each subcontractor was to assume the same obligations to Design/Builder that Design/Builder owed to Owner under the Design/Build Agreement. **[RP 854 (§ VII.C)]**. Correlatively, each subcontractor, unless the subcontract specifically provided otherwise, was to

enjoy the benefit of the same rights against Design/Builder that Design/Builder enjoyed against Owner:

> *Each subcontract agreement . . . shall allow to the Subcontractor*, unless *specifically provided otherwise* in the subcontract agreement, *the benefit of all rights*, remedies and redress *against the Design/Builder that the Design/Builder*, by the [Design/Build Agreement], *has against the Owner.*

[*Id.*] (emphasis added).

A clear and consistent pattern emerges from the liability and insurance provisions of the Design/Build Agreement taken as a whole. In regard to a full range of foreseeable risks, the parties provided for: (1) insurance coverage to minimize the risk of loss; and (2) a limitation of liability to minimize the risk of litigation. In this way the parties were "demonstrating 'normal' business foresight in *avoiding liability and allocating it to an insurer*." *State ex rel. Regents of NMSU v. Siplast, Inc.*, 1994-NMSC-065, ¶ 15, 117 N.M. 738, 877 P.2d 38 (emphasis added, citation and indentation omitted). A loss due to a design-related error was one of many risks that the parties addressed through an insurance remedy in lieu of a damages remedy. Design/Builder thus chose voluntarily to protect itself, Owner, and its subcontractors from the risk of liability or loss as a result of design errors or omissions. **[RP 852 (§ VI.F), 854 (§ VII.C)]**.

(b) The Architect Agreement

The Architect Agreement was written and executed with the rights and duties of Owner and Design/Builder under the Design/Build Agreement in mind. Indeed, the Design/Build Agreement was "incorporated by reference" into the Architect Agreement, and Design Architect assumed the obligation to perform the "Design Work" for which Design/Builder was ultimately responsible pursuant to Section VI of the Design/Build Agreement. **[RP 889 (§ 1.1.2), 890 (§ 1.3.1)]**. Design Architect's fee for its basic services under the Architect Agreement was $4,605,000.00. **[RP 898 (§ 4.1)]**.

In accordance with Section VII.C of the Design/Build Agreement, the parties agreed that, except as otherwise provided in the Architect Agreement, Design Architect would have the same rights and duties to Design/Builder as Design/Builder had to Owner under the Design/Build Agreement:

> In respect of the Design Work, the *Design Architect shall*, except as *otherwise provided* herein, *have all rights toward the Design/Builder which the Design/Builder has under the [Design/Build] Agreement towards the Owner* and the Design Architect shall, to the extent permitted by applicable laws and except as provided herein, assume all obligations, risks and responsibilities toward the Design/Builder which the Design/Builder has assumed towards the Owner in the [Design/Build] Agreement with respect to the Design Work.

[RP 890 (§ 1.3.2)] (emphasis added). Moreover, above and beyond this assignment of Design/Builder's rights and duties to Design Architect, the Architect Agreement

further imposed on Design/Builder the affirmative duty to enforce the provisions of the Design/Build Agreement for the benefit of Design Architect:

> *The Design/Builder shall enforce the provisions of the [Design/Build] Agreement for the benefit of the Design Architect in such manner which will preserve the rights of the Design Architect thereunder* and/or which will be for the benefit of the Project as a whole and/or the Design Architect and [Centex Construction Company, Inc.].

[RP 898 (§ 3.4)] (emphasis added).

In accordance with Section VI.F's requirement of at least $3,000,000 of professional errors and omissions insurance coverage with respect to design services, the Architect Agreement required Design Architect to obtain professional liability insurance coverage in that amount: "The Design Architect will provide a Project Policy for Professional Liability insurance with Limits of Liability of $3,000,000 per occurrence and $3,000,000 Aggregate." **[RP 903 (§ 8.3)]**. The same "Professional Liability" insurance coverage in the amount of $3,000,000 per occurrence and $3,000,000 aggregate was listed in a certificate of all insurance coverage, attached as Exhibit C to the Architect Agreement. **[RP 913]**.

Separately, in accordance with the requirement of general liability insurance under Section VIII.A of the Design/Build Agreement, the Architect Agreement required Design Architect to obtain liability insurance covering a variety of claims, including commercial general liability insurance, automobile liability insurance,

excess liability insurance, workers' compensation insurance, and employer's liability insurance. **[RP 903 (§ 8.1.1), 913]**.

The Architect Agreement provided for a "Design Control Budget," under which responsibility for individual line item costs was allocated between Design/Builder and Design Architect. **[RP 890-92 (§ 1.4.2)]**. One such line item assigned responsibility to Design Architect for such additional design or construction costs as were "*required*" to correct Design Architect's errors or omissions, with the qualification that such responsibility did not exclude the remedy of available insurance proceeds:

> Redesign costs and additional construction costs of the Design/Builder . . . *required* to correct the Design Architect's errors or omissions shall be the responsibility of the Design Architect (*which responsibility shall not preclude the pursuit of available insurance proceeds on account thereof*).

[RP 891 (§ 1.4.2(b))] (emphasis added). A countervailing line item assigned responsibility to the builder, Centex Construction Company, Inc., for additional costs incurred to correct a problem due to the builder's errors or omissions. **[RP 891 (§ 1.4.2(e))]**. Neither line item purported to exclude or negate the overall limitation of the parties' liability to available insurance proceeds. Rather, the parties expressly acknowledged that Design Architect's responsibility for such additional costs "shall not preclude" recourse to the remedy of insurance proceeds in lieu of damages. **[RP 891 (§ 1.4.2(b))]**.

The Architect Agreement also set forth mutual indemnification provisions. Design Architect agreed to indemnify Design/Builder and Owner from and against "all *damages* . . . to the extent arising out of or resulting from the Design Architect's acts or omissions in carrying out its obligations under this Agreement," including but not limited to "liability incurred by the Design/Builder . . . pursuant to the provisions of the [Design/Build] Agreement." **[RP 905-06 (§ 9.10.1)]** (emphasis added). Design/Builder agreed to indemnify Design Architect from and against "all damages" arising out of its acts or omissions under the Architect Agreement. **[RP 906 (§ 9.10.2)]**.

Finally, the Architect Agreement spoke directly to how the parties' contracts should be interpreted. First and foremost, "It is the intention of the parties that all the terms of all documents *are to be considered as complementary*." **[RP 906 (§ 9.11)]** (emphasis added). Only in the event that "such an interpretation is not possible" would it be necessary to consider individual contractual documents in an order of precedence. If a complementary reading was impossible, then the Design/Build Agreement would take precedence over the Architect Agreement where it imposed "a higher standard or greater requirement on the parties," and the Architect Agreement would otherwise take precedence. **[RP 906 (§ 9.11)]**. The Architect Agreement further provided that it was to be governed by New Mexico law. **[RP 907 (§ 9.12.3)]**.

C. Design/Builder Has Received the Benefit of the Full $3,000,000 in Professional Errors and Omissions Insurance Coverage

1. The parties obtained the professional errors and omissions insurance required by the contracts

Pursuant to both Section VI.F of the Design/Build Agreement and Section 8.3 of the Architect Agreement, Design Architect and Design/Builder jointly obtained an "Architects and Engineers Professional Liability Policy" issued by Lexington Insurance Company (Lexington), with the requisite limits of liability of $3,000,000 per occurrence and $3,000,000 aggregate. **[RP 1304-26]**. Design Architect and Design/Builder were both named as insureds. **[RP 1304]**. The policy covered sums for which an insured became legally obligated to pay as damages because of claims for a "Breach of Professional Duty," defined as "an error, omission or other act that causes liability in the performance or nonperformance of professional services to others by the insured or for which the insured is legally liable as a result of the performance of others." **[RP 1307 (§ I.A), 1310 (§ III.B)]** (emphasis omitted). The covered "professional services" were defined as "those services that the Insured is legally qualified to perform for others in their capacity as an architect, engineer, land surveyor, landscape architect, [or] construction manager." **[RP 1312 (§ III.L)]** (emphasis omitted).

No party has come forward with evidence of any other professional errors and omissions insurance policy providing coverage with respect to design services

rendered on the project. Although Design/Builder has alleged that other insurance might be available **[BIC 23-24]**, the record contains no evidence of the terms or scope of coverage of any such other insurance.

2. Design/Builder received the benefit of the $3,000,000 in insurance proceeds

After a dispute arose regarding the mechanically-stabilized-earth retaining wall, Owner resolved to withhold payment to Design/Builder of "up to $5 million in retainage." **[RB 634]**. Design/Builder protested Owner's withholding of the retainage and asserted that its "liability arising out of design errors and omissions is limited to amounts [Design/Builder] recovers from the designers or insurer's on the Owner's behalf." ***[Id.]***. Design/Builder nevertheless undertook to repair the retaining wall for the express purpose of persuading Owner to release the retainage:

> In an effort to mitigate the potential for further disputes and to get the subcontractors' retainage released as soon as possible, [Design/Builder] has proceeded with the MSE wall repair . . . . I can't emphasize enough how important an immediate release of retainage is to a prompt resolution of our dispute . . . .

[RB 634-35].

Design/Builder—acting on behalf of Design Architect as well as Design/Builder itself—notified Lexington of a claim by the "insureds" under the Architects and Engineers Professional Liability Policy. **[RP 1375-77]**. Design/Builder later demanded payment of the policy limits. **[RP 642]**. Lexington

paid $3,000,000, representing "the full policy limits available" under the Architects and Engineers Professional Liability Policy. **[RP 644]**.

D. The Two Complementary Contracts Limit the Liability of Design/Builder and Design Architect to Available Insurance Proceeds

Design/Builder's central argument on appeal is that "the Limitation of Liability Clause benefits only [Design/Builder], not [Design Architect]." **[BIC 22]**. Design/Builder acknowledges that "*the Design/Build Agreement limited [Design/Builder]'s 'liability to Owner for any errors or omissions in the design of the Project* to whatever sums Owner is able to collect from the . . . professional errors and omissions insurance carrier.'" **[BIC 20]** (emphasis added) (quoting **[RP 852 (§ VI.F)]**). Such an agreement to shift the risk of loss from the parties "to an insurance company in return for a premium payment" reflects "'normal' business foresight" on the part of the parties to a construction contract. *Siplast, Inc.*, 1994-NMSC-065, ¶ 15.

There is no dispute, moreover, that such a limitation of liability is "enforceable as long as [it is] 'reasonable and not so drastic as to remove the incentive to perform with due care.'" *Fort Knox Self Storage, Inc. v. W. Techs., Inc.*, 2006-NMCA-096, ¶ 15, 140 N.M. 233, 142 P.3d 1 (quoting *Valhal Corp. v. Sullivan Assocs.*, 44 F.3d 195, 204 (3rd Cir. 1995)). Nobody suggests that the limitation of Design/Builder's liability to $3,000,000 was in an way unreasonable

or unenforceable. *See id.* ¶¶ 15, 22 (enforcing $50,000 limitation of geotechnical engineering firm's liability and observing that "clauses limiting liability 'are a fact of everyday business and commercial life'") (quoting *Valhal Corp.*, 44 F.3d at 204); *accord Valhal Corp.*, 44 F.3d at 204 (enforcing $50,000 limitation of architectural firm's liability).

Even while embracing the benefit of the limitation of liability, however, Design/Builder seeks to deny that benefit to Design Architect. **[BIC 22]**. Its position flies in the face of New Mexico contract law. Design/Builder accepted the benefit of Design Architect's agreement to assume Design/Builder's "design responsibility" under Section VI of the Design/Build Agreement. **[RP 851-53 (§ VI), 889 (§ 1.1.2), 890 (§ 1.3.1)]**. A correlative burden of that bargain was that Design/Builder agreed to limit Design Architect's liability just as Owner had limited Design/Builder's liability. **[RP 854 (§ VII.C), RP 890 (§ 1.3.2), RP 898 (§ 3.4)]**. Design/Builder's position thus is at odds with the basic principle that it must "accept the burdens of the contract along with the benefits." *WXI/Z Sw. Malls*, 2005-NMCA-046, ¶ 11.

In three separate provisions, Design/Builder pledged to secure to Design Architect the benefit of the same rights that Design/Builder enjoyed against Owner. It agreed in the Design/Build Agreement that its subcontract with Design Architect would allow to Design Architect "the benefit of all rights, remedies and

redress against the Design/Builder that the Design/Builder . . . has against the Owner except as "*specifically provided* otherwise." **[RP 854 (§ VII.C)]** (emphasis added). It agreed in the Architect Agreement that Design Architect "shall, except as otherwise provided herein, have *all rights toward the Design/Builder which the Design/Builder has* under the [Design/Build] Agreement *towards the Owner*." **[RP 890 (§ 1.3.2)]** (emphasis added). Design/Builder further pledged in the Architect Agreement that it would "*enforce the provisions of the [Design/Build] Agreement for the benefit of the Design Architect* in such manner which will preserve the rights of the Design Architect thereunder." **[RP 898 (§ 3.4)]** (emphasis added).

There is no dispute that "flow-down" clauses are valid and enforceable, and a routine and integral part of a construction contract. Our Supreme Court's decision in *Siplast, Inc.* is illustrative. There, an owner and a contractor entered into a construction contract under which the owner's recovery was to be limited to available insurance proceeds. *Siplast, Inc.*, 1994-NMSC-065, ¶¶ 2, 16. The contract included flow-down provisions, which required that the insurance "include the interests of the various contracting parties." *Id.* ¶ 16 (citation and internal quotation marks omitted). The Supreme Court affirmed the district court's grant of summary judgment enforcing the limitation of liability as applied through the flow-down provisions to a subcontractor, Siplast: "The parties to the construction contract were limited in recovery for property damage to the proceeds of the insurance

required to be carried under the contract." *Id.* ¶¶ 16, 19; *accord Indus. Indem. Co. v. Wick Constr. Co.*, 680 P.2d 1100, 1103-06 (Alaska 1984) (holding that limitation of general contractor's liability to owner applied through flow-down clause to subcontractor and limited subcontractor's liability to general contractor); *United Tunneling Enters. v. Havens Constr. Co.*, 35 F. Supp. 2d 789, 797 (D. Kan. 1998) (holding that subcontractor enjoyed benefit of owner's waiver of liquidated damages against contractor because flow-down provision "plainly reflects that the parties intended that whatever the Owner required from or bestowed to Contractor, if applicable, would flow down to the Subcontractor").

Design/Builder argues, however, that Design Architect cannot claim the benefit of the limitation of liability because two sections of the Architect Agreement conflict with the limitation of liability. **[BIC 14-22]**. It cites Section 1.4.2(b), which provides that, for purposes of the "Design Control Budget," redesign and construction costs that are "required" to correct Design Architect's errors or omissions are the responsibility of Design Architect. **[BIC 15]** (quoting **[RP 891]**). It also cites Section 9.10.1, by which Design Architect agreed to indemnify Design/Builder against "all damages," including but not limited to "liability incurred by [Design/Builder] . . . pursuant to the provisions of the [Design/Build] Agreement[.]" **[BIC 16-17]** (quoting **[RP 905-06]**).

Design/Builder's attempt to engineer a conflict in the contracts' provisions falls short of the mark. It is at odds with New Mexico's canon of construction requiring that a contract be construed "as a harmonious whole" so as to give "every word and phrase meaning and significance according to its importance in the context of the whole contract." *BPLW Architects & Eng'rs, Inc.*, 2009-NMCA-081, ¶ 14 (citation and internal quotation marks omitted). It likewise runs afoul of the parties' stated intention "that *all the terms of all documents are to be considered as complementary.*" **[RP 906 (§ 9.11)]** (emphasis added). In the effort to avoid the unambiguous language of Section VI.F, Design/Builder asserts that the limitation of liability and the Architect Agreement "*cannot coexist.*" **[BIC 21]** (emphasis added). In fact, not only can they *coexist*, but the Architect Agreement's provisions *depend* for their meaning on the limits of the parties' design responsibility in Section VI.F.

In particular, the allocation of responsibility for line item costs for purposes of the Design Control Budget in Section 1.4.2 necessarily operates within the parameters of the broader allocation of design responsibility among Design Architect, Design/Builder, and Owner in Section VI. This is clear from the language cited by Design/Builder in Section 1.4.2(b), which assigns responsibility to Design Architect only for such "[r]edesign costs and additional construction costs of the Design/Builder" as are "required" to correct Design Architect's errors

or omissions. **[RP 891]**. Additional costs that Design/Builder voluntarily chooses to assume—for whatever reason—are not costs that it is "required" to incur. ***[Id.]***.

The determination of which costs Design/Builder is "required" to incur can be made only by reference to the underlying terms of Design/Builder's design responsibility to Owner in Section VI. **[RP 851-53]**. In other words,

> [T]he . . . clause of the subcontract [allocating "required" additional costs] was not written so that it can even function apart from the terms incorporated from the prime contract. . . . The plain inference from these circumstance is that the parties did not intend for the [cost allocation] clause of the subcontract to be interpreted and applied apart from the interpretation and operation of the [design responsibility] clause in the prime contract.

United Tunneling Enters., 35 F. Supp. 2d at 796. Given that Owner limited the costs that Design/Builder was "required" to pay for design errors or omissions to available insurance proceeds, it follows that Design Architect's responsibility for "required" additional costs is commensurately limited to those proceeds. *See id.* at 797 ("If the Owner waived . . . damages against [the general contractor], then [the subcontractor] is not obligated under the subcontract to pay [the general contractor] any . . . damages."). In short, far from irreconcilably *conflicting*, the terms of the parties' responsibility for design-related losses under Section 1.4.2(b) are necessarily *predicated* on the terms of their responsibility for design-related losses under Section VI.

Design/Builder argues that to give Design Architect the benefit of the limitation of liability would leave Section 1.4.2(b) "with no work to do" because its allocation of costs "would never be triggered." **[BIC 19]**. That is not so. The cost allocations in Section 1.4.2 are fully operative within the bounds of the parties' underlying design responsibility in Section VI. In particular, Section 1.4.2(b) makes clear that Design Architect would not be entitled to draw insurance proceeds to correct its own mistakes. For example, if an error or omission by Design Architect required redesign costs of $1,000,000, Design Architect would not receive the insurance proceeds to pay for the redesign work even if Design Architect itself performed the work. Because Design Architect would be responsible for the $1,000,000 in additional costs, Design/Builder or Owner would be entitled to the insurance proceeds. **[RP 891 (§ 1.4.2(b))]**.

When the available insurance proceeds have been collected, however, neither Design Architect nor Design/Builder is responsible under Section 1.4.2(b) for additional costs in excess of the insurance proceeds, because the parties' liability is limited at that point and no such additional costs are "required." ***[Id.]***. By symmetry of reasoning, Section 1.4.2(e) would entitle Design Architect to additional compensation if a construction error required Design Architect to perform an additional $1,000,000 of design work, because the responsibility for the

additional cost would fall on Design/Builder's subcontracted builder, and Design/Builder would recover that cost from the builder. **[RP 891 (§ 1.4.2(e))]**.

Design/Builder has admitted that it voluntarily undertook the repair of the retaining wall for its own business purposes although it was not "required" to incur the additional costs which exceeded available insurance proceeds. Design/Builder informed the Owner that it was not liable for such additional costs because its "*liability* arising out of design errors and omissions *is limited* to amounts [Design/Builder] recovers from the designers or insurer's on the Owner's behalf." **[RB 634]** (emphasis added). It explicitly stated that the reason it was proceeding with the wall repair was to persuade the Owner immediately to pay "up to $5 million" that had been withheld as retainage:

> In an effort to mitigate the potential for further disputes and to get the subcontractors' retainage released as soon as possible, [Design/Builder] has proceeded with the MSE wall repair . . . . I can't emphasize enough how important an immediate release of retainage is to a prompt resolution of our dispute . . . .

[RB 634-35].

Design/Builder's stated desire to protect its goodwill with Owner while enhancing its cash flow undoubtedly was a legitimate business consideration. But the parties' contracts did not authorize Design/Builder to advance its commercial interests at the expense of Design Architect's contractual rights. Rather, as stated above, the Architect Agreement expressly required Design/Builder to "enforce the

provisions of the [Design/Build] Agreement for the benefit of the Design Architect in such manner which will preserve the rights of the Design Architect thereunder." **[RP 898 (§ 3.4)]**; *see Roberts Oil Co. v. Transamerica Ins. Co.*, 1992-NMSC-032, ¶ 47, 113 N.M. 745, 833 P.2d 222 (ruling that evidence that plaintiff insured "had *voluntarily made payments, assumed obligations, and incurred expenses*" without defendant insurers' consent gave rise to presumption that defendant insurers were thereby prejudiced) (emphasis added).

The scope of Design Architect's indemnification obligation in Section 9.10.1 is also consistent with—and indeed dependent on—the limits of the parties' design responsibility under Section VI. By its terms, Section 9.10.1 requires Design Architect to indemnify Design/Builder only for "damages." **[RP 905-06 (§ 9.10.1)]**. The term "damages" means "[m]oney claimed by, or *ordered to be paid* to, a person as compensation for loss or injury." *Black's Law Dictionary* 445 (9th ed. 2009) (emphasis added). As such, it does not extend to costs that Design/Builder incurs voluntarily without being legally *required* to incur them. *See id.*

Design/Builder points out that the indemnity obligation "included, 'but [was] not limited to,' liability incurred by [Design/Builder] pursuant to the Design/Build Agreement." **[BIC 17]** (quoting **[RP 906 (§ 9.10.1)]**). That is true. The indemnity obligation included not only damages liability incurred by

Design/Builder pursuant to its contract with Owner, but also damages liability incurred by Design/Builder to third parties, such as construction workers or hotel guests. But the universe of Design Architect's potential indemnity responsibility was at all times and events limited to "damages" for which Design/Builder was legally liable; the duty to indemnify did not extend to costs that Design/Builder assumed voluntarily. **[RP 905-06 (§ 9.10.1)]**. There is no inconsistency between Design Architect's duty to indemnify Design/Builder against damages and the limitation on the damages for which either Design/Builder or Design Architect could be held liable. *See Indus. Indem. Co.*, 680 P.2d at 1104-06 (rejecting contention that subcontractor's obligation to indemnify general contractor was inconsistent with limitation of subcontractor's liability flowing down from limitation of general contractor's liability).

If the parties had intended to divest Design Architect of the benefit of a contractual term as essential as the limitation of liability, they would have said so. Design/Builder knew perfectly well how to make exceptions to its contractual undertakings. It did so in the Design/Build Agreement, where it carved out an exception to its duty to indemnify Owner by stating: "*Notwithstanding the foregoing or anything else to the contrary appearing herein* and except to the extent provided in Section VI.F herein . . . ." **[RP 858 (§ IX)]** (emphasis added). Had Design/Builder and Design Architect intended to deprive Design Architect of

the benefit of the limitation of liability, it would have been a simple matter to say in similar fashion, "Notwithstanding anything to the contrary appearing in Section VI.F of the Design/Build Agreement . . . ." But the parties made no such exception in the Architect Agreement. Far from contradicting the limitation of liability, the parties specifically acknowledged it, providing in Section 1.4.2(b) for recourse to "available insurance proceeds." **[RP 891]**.

Design/Builder attempts to draw support from Section 9.11 of the Architect Agreement, arguing that "to the extent that any provisions of the Design/Build Agreement are incorporated into the Architect Agreement, they are operative only insofar as the Architect Agreement is either silent or imposes a lower standard of performance on the parties." **[BIC 20]**. But that argument ignores the essential terms of the provision that it purports to apply. Section 9.11 stresses the parties' intention that the terms of their contracts should be read as "complementary." **[RP 906 (§ 9.11)]**. That makes sense when it is recognized that the Architect Agreement explicitly incorporates the Design/Build Agreement by reference. **[RP 890 (§ 1.3.1)]**. In effect, the parties merged the Design/Build Agreement and the Architect Agreement into a single contract, so that no term takes precedence over another unless it "is not possible" to give effect to both. **[RP 906 (§ 9.11)]**. Section 9.11 may help resolve an ambiguity between two apparently conflicting terms, but

it cannot be used, as Design/Builder attempts to do, to create ambiguity where none existed.

Moreover, Design/Builder's invocation of Section 9.11 fails even on its own terms. By Design/Builder's interpretation, the Architect Agreement subjects it to a lower standard and lesser requirement because Design Architect assumed all of its design liability to Owner even while Design/Builder alone retained the benefit of the limitation of that liability. **[BIC 22]**. If that is so, however, then the Design/Build Agreement "imposes a higher standard or greater requirement on the parties" and therefore takes precedence over anything to the contrary in the Architect Agreement. **[RP 906 (§ 9.11)]**. The same result follows from a harmonious reading of Sections 3.4 and 9.11 of the Architect Agreement itself, because Section 3.4 independently holds Design/Builder to higher standard and greater requirement to "enforce the provisions of the [Design/Build] Agreement for the benefit of the Design Architect in such manner which will preserve the rights of the Design Architect thereunder." **[RP 898]**.

Design/Builder argues that "the Limitation of Liability Clause is confined to the Design/Build Agreement because its purpose is to define [Design/Builder]'s liability to the Owner." **[BIC 19]**. That argument fails to recognize that the terms of Section VI of the Design/Build Agreement which govern Design/Builder's "liability to the Owner" equally formed the basis of Design Architect's assumption

of liability to Design/Builder under the Architect Agreement. **[RP 889 (§ 1.1.2), 890 (§ 1.3.1)]**.

The central flaw in Design/Builder's position is its assumption that Design Architect took on the entire burden of Design/Builder's liability to Owner without the benefit of any qualification of that liability. **[BIC 17-22]**. Nowhere in the Brief in Chief does Design/Builder attempt to articulate a plausible purpose of such a one-sided arrangement. This is no minor shortcoming, given that the Court's overarching goal in interpreting the two contracts is to ascertain and give effect to the parties' purpose and intent. *Rivera*, 2011-NMSC-033, ¶ 26. To reiterate, the plain purpose of the twin requirements of professional errors and omissions insurance and the limitation of liability was to shift the risk of loss from the parties to an insurance company in return for a premium payment. *Siplast, Inc.*, 1994-NMSC-065, ¶ 15.

Design/Builder, as the prime contractor, negotiated with Owner both the adequacy of the $3,000,000 insurance remedy and the correlative limitation of liability. It undertook its obligations to Owner in consideration of an initial contract sum of $135,169,000.00. **[RP 844-45 (§ V.A)]**. Design Architect assumed Design/Builder's design responsibility to Owner only after the terms of the insurance remedy were fixed. It had no opportunity to negotiate or opine on the adequacy of the insurance remedy. It undertook its obligations to both

Design/Builder and Owner in consideration of a basic fee which, at $4,605,000.00, was a small fraction of the contract sum payable to Design/Builder and only slightly more than the insurance remedy that Design/Builder had negotiated. **[RP 898 (§ 4.1)]**.

In view of the parties' relative bargaining positions and incentives embodied in these contract terms, the only purpose that could be served by passing along to Design Architect of all of the chaff (Design/Builder's design liability to Owner), but none of the wheat (the correlative limitation of that liability), would be to enrich Design/Builder at its subcontractor's expense. *See Indus. Indem. Co.*, 680 P.2d at 1106 ("[I]t is patently unreasonable for the general contractor to attempt to bind the subcontractor to the provisions of the general contract while the general contractor does not give the corresponding rights, remedies, and redress to the subcontractor.") (citation and internal quotation marks omitted). Nothing in either the Design/Build Agreement or the Architect Agreement supports the unreasonable assumption that the parties intended to give Design/Builder "something for nothing." *Nearburg*, 1997-NMCA-069, ¶ 21.

E. Design/Builder Is Barred from Recovery in Excess of the Insurance Proceeds Collected

1. The contracts required $3,000,000 in professional errors and omissions insurance coverage with respect to design services

There is no dispute that Design/Builder has already recovered $3,000,000 in insurance proceeds under the Architects and Engineers Professional Liability Policy, which covered professional errors and omissions with respect to design services. **[RP 644, 1307 (§ I.A), 1310 (§ III.B), 1312 (§ III.L)]**. Design/Builder argues, however, that the $3,000,000 of insurance coverage was "a baseline, not a ceiling." **[BIC 25]**. It argues that the parties' contracts "authorize the pursuit of *all* available insurance proceeds, regardless of the number of policies from which those proceeds are paid." **[BIC 22]**. It speculates that other insurance policies may have provided coverage for design errors and omissions. **[BIC 23-24]**. It implies that Design Architect's liability cannot be limited until all available insurance coverage has been exhausted, wherever and in whatever amount it may be. **[BIC 22-27]**.

Design/Builder has failed to raise a genuine issue of material fact precluding summary judgment for Design Architect. Its argument conflicts both with a straightforward reading of the parties' contracts and with the record on appeal.

The terms of the parties' two contracts, read as complementary, make clear that the professional liability insurance required by Section VI.F of the

Design/Build Agreement, the professional liability insurance required by Section 8.3 of the Architect Agreement, and the professional liability insurance listed in Exhibit C to the Architect Agreement were one and the same. **[RP 852, 903, 913]**. Other insurance requirements were set forth in Section VIII of the Design/Build Agreement and Section 8.1 of the Architect Agreement, but those requirements were not intended to duplicate the professional errors and omissions insurance coverage under Section VI.F and Section 8.3. **[RP 854-58, 903, 912-13]**.

Design/Builder attempts to cobble together a distinct requirement of one or more additional professional liability insurance policies providing unspecified amounts of additional coverage. **[BIC 23-25]**. But it has again ignored this Court's mode of contract interpretation, under which each word or phrase in a contract is to be given "meaning and significance according to its importance *in the context of the whole contract.*" *BPLW Architects & Eng'rs, Inc.*, 2009-NMCA-081, ¶ 14 (emphasis added, citation and internal quotation marks omitted). In the context of the Design/Build Agreement and the Architect Agreement taken together as a harmonious whole, the plain intent of Owner, Design/Builder, and Design Architect was to obtain $3,000,000 of professional errors and omissions insurance coverage with respect to design services in order to shift the risk of a design-related loss from the parties to the insurance company. **[RP 852 (§ VI.F), 903 (§ 8.3)]**; *see Siplast, Inc.*, 1994-NMSC-065, ¶ 15.

2. Design/Builder has raised no genuine issue of material fact regarding available insurance coverage

Design Architect and Design/Builder carried out the parties' intent to arrange for $3,000,000 in professional errors and omissions insurance by jointly obtaining coverage and naming themselves as insureds under the Architects and Engineers Professional Liability Policy. **[RP 1304-26]**. Design/Builder says that there is no basis in the record for determining that the policy "satisfied the mandatory design-error coverage." **[BIC 26]**. That assertion is in error. The terms of the Architects and Engineers Professional Liability Policy, which are part of the record, plainly provide the requisite $3,000,000 in coverage for professional errors and omissions with respect to design services. **[RP 1304-26]**; *see* **[RP 1333-35]**.

Design/Builder also suggests that Design Architect may not have held up its end of the contractual bargain because it may have failed to maintain the requisite $3,000,000 policy. **[BIC 26]**. That suggestion is belied by the record. Design/Builder concedes that it and Design Architect "jointly obtained" the Architects and Engineers Professional Liability Policy. **[BIC 7]**. Both were named as insureds, and the policy indisputably covered professional errors or omissions on Design Architect's part with respect to design services. **[RP 1304, 1307 (§ I.A), 1310 (§ III.B), 1312 (§ III.L)]**. Indeed, when Design/Builder submitted the claim by which it recovered $3,000,000 under the policy, it did so on behalf of both Design Architect and itself as insureds. **[RP 1375-77]**.

The parties have at different times offered conflicting characterizations of what type of defect—or, in other words, whose error—the $3,000,000 of insurance was paid to correct. Design/Builder argues that the $3,000,000 could have been paid to correct its own error as the "construction manager" **[BIC 7, 25]**—even though the Design/Build Agreement expressly identifies a third party, the firm of Rider Hunt Levett & Bailey, as the Construction Manager. **[RP 839]**. Both Design/Builder and Design Architect have offered differing accounts of why Lexington paid the insurance proceeds. *E.g.*, **[RP 924-25]**; *compare* **[2/23/12 CD 2:01:44-2:02:09]** (statement by Design/Builder's trial counsel that "when the three million dollars was paid by Lexington, it was paid for construction defects. . . . It wasn't paid for design errors."), *with* **[RP 1336]** (statement by Design/Builder's trial counsel that "[Design/Builder] has never alleged that there were construction defects that caused the failure of the retaining wall"). Those various characterizations are immaterial, however, for the simple reason that both Design/Builder's and Design Architect's liability is limited to "whatever sums" are collected from the professional errors and omissions insurance carrier, regardless of how those sums are characterized. **[RP 852 (§ VI.F)]**.

Design/Builder hints that other insurance might still be available to cover design errors and omissions. **[BIC 23-24]**. The contention that other insurance could be available raises the question, however, of why Design/Builder has not simply made a claim for such insurance. When the district court posed this question at the hearing on the motion for summary judgment, Design/Builder's counsel stated that it was possible that Design/Builder could make another claim, although that would pose a coverage question:

> THE COURT: You say that the three million dollar insurance payout was not for design errors?
>
> [DESIGN/BUILDER'S COUNSEL]: Yes, sir.
>
> THE COURT: But there was an errors and omissions policy for three million. Why doesn't [Design/Builder] go make another claim for three million on the errors and omissions policy and get six total?
>
> [DESIGN/BUILDER'S COUNSEL]: *Well, it's possible we can do that.* And that's part of -- and *that's a coverage issue* that I think is not being fought in this court.
>
> . . .
>
> THE COURT: But there is three million for design errors. Why not go get that three million too? Why look to [Design Architect] to pay damages for design errors when you haven't even gone to get the insurance for those design errors?
>
> [DESIGN/BUILDER'S COUNSEL]: *Because I think that's a coverage question* and not a question about liability with regard to fault that we're here to decide.

[2/23/12 CD 2:11:54-2:12:18, 2:13:28-2:13:55] (emphasis added).

Design/Builder's admissions to the district court make two things clear: First, Design/Builder has not even exhausted its efforts to avail itself of the remedy that the parties' contracts provide for a design-related loss, which is to collect available insurance proceeds. **[RP 852 (§ VI.F)]**. Second, when pressed on the question of whether other insurance coverage for design errors actually exists, Design/Builder has admitted that it is not sure because that presents a coverage question. Design/Builder has not offered evidence of the terms of any other insurance policy, so the record on appeal is insufficient to enable the Court to opine on the scope of other possible coverage. *See, e.g., Sedillo v. N.M. Dep't of Pub. Safety*, 2007-NMCA-002, ¶ 21, 140 N.M. 858, 149 P.3d 955 (noting that appellant bears burden "to bring up a record sufficient for review of the issues [it] raises on appeal," and in absence of sufficient record, appellate court "will indulge in every presumption in support of the correctness of the trial court's decision") (citations and internal quotation marks omitted).

In short, Design/Builder's appellate speculation about other possible coverage provides no basis for disturbing the district court's grant of summary judgment. Design/Builder has failed to meet its burden to "set forth specific facts showing that there is a genuine issue for trial." Rule 1-056(E) NMRA. It is not enough for Design/Builder to argue that factual issues "might exist"; its burden in opposing the motion for summary judgment was to "adduce evidence to justify a

trial on the issues." *Horne v. Los Alamos Nat'l Sec., L.L.C.*, 2013-NMSC-004, ¶ 15, 296 P.3d 478 (citation and internal quotation marks omitted). Design/Builder has failed to meet that burden.

3. Design Architect's liability is limited to whatever insurance proceeds Design/Builder is able to collect

Design/Builder's speculation about other possible insurance coverage also reflects a more fundamental error in its interpretation of the limitation of liability. To reiterate, by operation of the flow-down provisions, Design Architect's liability for "any errors or omissions in the design of the Project" is expressly limited "to *whatever sums [Design/Builder] is able to collect* from the above described professional errors and omissions insurance carrier." **[RP 852 (§ VI.F)]** (emphasis added); *see* **[RP 854 (§ VII.C), 890 (§ 1.3.2), 898 (§ 3.4)]**. Contrary to Design/Builder's implication, the limitation of liability in Section VI.F is not defined as the maximum amount of coverage available under the "above described professional errors and omissions insurance," or, for that matter, the maximum amount of coverage that may be available when all arguably applicable policies are stacked. **[*Id.*]**. Rather, liability for design errors or omissions under the parties' contracts is limited to "whatever sums" are collected. **[*Id.*]**.

It is undisputed that the sum collected by Design/Builder was $3,000,000. **[RP 644]**. As previously stated, it is immaterial whether that sum is characterized as design-related, construction-related, or something else. The material fact is that

Design/Builder was able to collect that sum from the professional errors and omissions insurance carrier referred to in Section VI.F, namely, Lexington. **[*Id.*]**. Design Architect's liability for errors or omissions in the design of the Project is therefore limited to that sum. **[RP 852 (§ VI.F)]**.

As such, Design/Builder is barred from seeking damages against Design Architect apart from these insurance proceeds. The district court correctly granted summary judgment for Design Architect on Design/Builder's claims in this action. *See Siplast, Inc.*, 1994-NMSC-065, ¶¶ 16, 19 (enforcing limitation of liability, applicable to subcontractor through flow-down provisions, and affirming summary judgment for subcontractor); *Fort Knox Self Storage, Inc.*, 2006-NMCA-096, ¶¶ 22, 44 (holding that limitation of liability was enforceable and reversing trial court's refusal to enforce it).

F. Design/Builder Breached Its Duty to Enforce the Limitation of Liability for Design Architect's Benefit

Section 3.4 of the Architect Agreement required Design/Builder to "enforce the provisions of the [Design/Build] Agreement for the benefit of the Design Architect in such manner which will preserve the rights of the Design Architect thereunder." **[RP 898]**. By failing to enforce the limitation of Design Architect's liability to available insurance proceeds, Design/Builder breached the Architect Agreement.

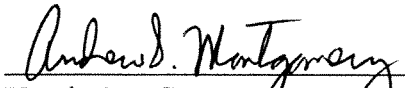
Design/Builder argues that the district court should not have granted summary judgment to Design Architect on its breach-of-contract claim "because the Limitation of Liability Clause does not provide any rights to [Design Architect]" and "benefits only [Design/Builder]." **[BIC 21-22]**. As discussed above, however, the Court should reject Design/Builder's attempt to avail itself of the benefits of the contracts while simultaneously avoiding the burdens. Design/Builder no doubt had good business reasons for voluntarily undertaking to repair the retaining wall and collecting the $3,000,000 of insurance proceeds. **[BIC 22]**. But that is no justification for ignoring its duty to enforce the limitation on Design Architect's liability. The district court correctly granted summary judgment on Design Architect's counterclaim for breach of the Architect Agreement.

CONCLUSION

The district court's order granting summary judgment for WorthGroup Architects, L.P. should be affirmed.

Respectfully submitted,

MONTGOMERY & ANDREWS, P.A.



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CERTIFICATE OF SERVICE

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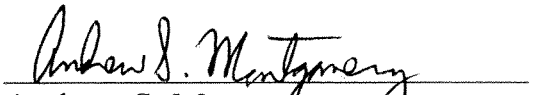

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