IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

CENTEX/WORTHGROUP, LLC,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

Ct. App. No. 32,331
Otero County
CV-2007-397

APPELLANT'S BRIEF IN CHIEF

Civil Appeal from the Twelfth Judicial District Court
The Honorable Jerry H. Ritter

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SUMMARY OF THE PROCEEDINGS

This appeal arises from a contract dispute relating to the renovation and expansion of the Inn of the Mountain Gods Resort and Casino in Otero County, New Mexico.

In February 2002, the Apache Tribe of Mescalero, owner of the Inn of the Mountain Gods ("Owner"), selected Appellant Centex/Worthgroup, LLC ("Centex") to be the designer and builder for the renovation and expansion project. R.P. 839. Centex subcontracted with Appellee Worthgroup Architects, L.P. for certain architectural and design services. *Id.* Worthgroup Architects, in turn, subcontracted with Appellee Terracon, Inc. for "Design/Engineering and Consulting Services," including geotechnical engineering services, related to a structurally critical, mechanically stabilized earth retaining wall. R.P. 731.

The retaining wall failed shortly after its construction was completed, causing significant damage to nearby structures on the Resort. R.P. 825. Centex incurred nearly $7 million in redesign and construction costs to repair the damage. R.P. 826. Centex subsequently sued Worthgroup Architects and Terracon for breach of contract, negligence, and negligent misrepresentation relating to its flawed design and engineering of the wall. R.P. 1-11. Worthgroup Architects counterclaimed for breach of contract, indemnity, and attorneys' fees, and sought a declaratory judgment that its liability to Centex was fully extinguished by payment

of the policy limits under a professional liability insurance policy it held jointly with Centex. R.P. 646-665. Worthgroup Architects also moved for summary judgment on those same bases. R.P. 612-622. Terracon, which was not a party to the contracts between Centex and Worthgroup Architects or Centex and the Owner, sought summary judgment claiming that it was a third-party beneficiary of the Centex/Worthgroup Architects agreement. R.P. 682-690. The district court granted summary judgment without opinion in favor of Worthgroup Architects and Terracon on June 19, 2012. R.P. 1380. Centex timely noticed this appeal on July 18, 2012. R.P. 1382-1383.

FACTUAL BACKGROUND

A. The Contracts

This case involves two contracts: one between the Owner and Centex (the "Design/Build Agreement") and one between Centex and Worthgroup Architects (the "Architect Agreement"). Terracon is not a party to either contract.

1. The Design/Build Agreement

In February 2002, the Owner and Centex entered into the Design/Build Agreement, which governed the work that Centex was to perform in renovating and expanding the Resort. R.P. 839-886. Among other obligations, the Design/Build Agreement made Centex responsible for the "[p]reparation of design development documents consisting of drawing and other documents to fix and

describe the size and character of the Work as to structural, mechanical, and electrical systems" and "[p]reparation of all Drawings and Specifications setting forth the requirements for construction of the Work" (the "Design Work"). Design/Build Agreement § VI.D; R.P. 851-852. Centex was further required to retain the services of "competent design professionals as Subcontractor(s)" to assist with those tasks. *Id.* § VI.A; R.P. 851.

Section IX of the Design/Build Agreement obligated Centex to indemnify the Owner for damages or losses arising out of Centex's or its "subcontractors'" negligence in performance of the contract work that were attributable to bodily injury or damage to preexisting property. Design/Build Agreement § IX; R.P. 858. Section IX specifically limited Centex's liability for negligence in the design work, however, providing that, rather than seeking recovery from Centex, "Owner shall look solely to designers employed on the Project and their insurers in the event of any loss, injury or damages due to the [design] causes set forth above." *Id.*

To effectuate that limitation on Centex's liability for design work, the Agreement obligated Centex to "require its design professional Subcontractor(s) to obtain and maintain professional errors and omissions coverage with respect to design services" in an amount of not less than $3million "for each such design professional Subcontractor." Design/Build Agreement § VI.F; R.P. 852. In exchange, the Owner agreed that it would "limit [Centex'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 above described professional errors and omissions insurance carrier." *Id.*

2. *The Architect Agreement*

Two months after entering into the Design/Build Agreement with Owner, Centex subcontracted with Worthgroup Architects for architectural design services (the "Architect Agreement"). R.P. 889-915. The Architect Agreement required Worthgroup Architects to complete the Design Work identified by the Design/Build Agreement, including the retaining wall. Architect Agreement ¶ 1.3.1; R.P. 890. The Agreement, however, specifically excluded all "geotechnical engineering *** services" from the scope of the Design Work. Architect Agreement Ex. A; R.P. 908.

The Architect Agreement spelled out Worthgroup Architects' potential liability to Centex for the design work. The Agreement provided that "[r]edesign costs and additional construction costs of Centex *** required to correct the [Worthgroup Architects'] errors or omissions" in designing the project "shall be the responsibility of [Worthgroup Architects]." Architect Agreement § 1.4.2(b); R.P. 891. In addition, the Agreement was explicit that Worthgroup Architects' obligation to reimburse Centex for any such costs did "not preclude the pursuit of available insurance proceeds" by Centex. *Id.*

The Architect Agreement also contained an indemnity provision in favor of Centex that required Worthgroup Architects to "indemnify [Centex] and Owner from and against all damages, *** to the extent arising out of or resulting from [Worthgroup Architects'] acts or omissions in carrying out its obligations under this Agreement, including but not limited to, liability incurred by [Centex] *** pursuant to the provisions of the [Design/Build] Agreement." Architect Agreement § 9.10.1; R.P. 905-906.

To comply with its obligation under the Design/Build Agreement to ensure that design subcontractors maintained a sufficient professional liability policy, Centex required in the Architect Agreement that Worthgroup Architects maintain a $3 million professional liability policy. Architect Agreement ¶ 8.3; R.P. 903. The Agreement went further, however, and also required Worthgroup Architects to maintain a number of additional insurance policies, including a $2,000,000 excess liability policy. Architect Agreement ¶¶ 8.1.1 & Ex. C; R.P. 903, 913.

3. Relationship Between The Two Contracts

The Architect Agreement included a so-called "flow-down" clause that incorporated certain terms of the Design/Build Agreement by reference, but only with respect to the "Design Work." Architect Agreement ¶ 1.3.2; R.P. 890. Under that clause, "except as otherwise provided" in the Architect Agreement, Worthgroup Architects held the same obligations and rights toward Centex that

Centex held under the Design/Build Agreement toward the Owner. *Id.* The Architect Agreement also required Centex to enforce the provisions of the Design/Build Agreement when it would be "for the benefit of the Project as a whole and/or [Worthgroup Architects]," and when doing so would "preserve the rights of [Worthgroup Architects]" under the Design/Build Agreement. *Id.* § 3.4; R.P. 898.

The scope of the flow-down clause and the accompanying incorporation of rights under the Design/Build Agreement was further limited by the Architect Agreement's Order of Precedence Clause, Architect Agreement § 9.11; R.P. 906. That Clause provided, in relevant part, that if the two agreements could not be read harmoniously, the Architect Agreement controlled "unless the [Design/Build] Agreement imposes a higher standard or greater requirement on the parties." *Id.*

4. Architects' Subcontract with Terracon

More than a year after executing the Architect Agreement, Worthgroup Architects hired Terracon to provide "design engineering services" for the new, mechanically stabilized retaining wall at the Resort. R.P. 735. The agreement between Worthgroup Architects and Terracon was separate and apart from both the Architect and the Design/Build Agreements, to which Terracon was not a party.

Terracon's scope of work under the subcontract was "to undertake the following engineering services for the *** retaining wall: Review of geotechnical

information to identify engineering properties of on-site soils for retaining wall design ***; Review of site geometry, and topographic conditions ***; [and] Engineering analyses for the design of the wall, including analyses for internal and external stability, and global stability analyses[.]" R.P. 738 (Terracon proposal); R.P. 740 (Contract incorporating proposal by reference). Terracon agreed these services would be provided "under the supervision of a registered professional engineer." R.P. 738.

5. Insurance Policies Obtained under the Contracts

In connection with Centex's obligations under the Design/Build Agreement, Centex and Worthgroup Architects jointly obtained a $3 million project-specific professional policy from Lexington Insurance (the "Project Policy"). R.P. 1304-1326. Both Centex and Worthgroup Architects were named insureds under that policy, and were protected from damages caused by either party's "Breach of Professional Duty." R.P. 1304, 1307. A covered breach was defined as any "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." R.P. 1310. The professional services covered by the policy include services "as an architect *** [or] construction manager." R.P. 1312. Worthgroup Architects also maintained the

excess liability insurance required by the Architect Agreement. R.P. 926 (referring to excess liability policy 4628578).

B. The Failure of the Retaining Wall

The mechanically stabilized earth retaining wall was an integral part of the Project, intended to restrain the earth along the front perimeter of the hotel entrance and three levels of underground parking. R.P. 825. The retaining wall also was to support numerous associated structures such as parking access ramps, the entry driveway, and sidewalks. *Id.* Worthgroup Architects and Terracon were solely responsible for the wall's design and engineering, and one of Terracon's geotechnical engineers issued and stamped the Technical Scope of Work and associated drawings necessary for the wall's construction. R.P. 1072-1090. Construction of the wall was completed by September 2004, but it began to fail seven months later. R.P. 5. That failure necessitated extensive remediation, a redesign, and additional construction efforts by Centex during its performance of the Project. R.P. 6. Centex retained a new design firm and implemented a redesign plan for the wall and associated structures at its own expense, while simultaneously undertaking significant repair work to adjacent structures to repair damage caused by the Wall's failure. R.P. 6. Centex incurred nearly $7 million in remediation, redesign and additional construction costs to correct Worthgroup Architects' and Terracon's faulty work. R.P. 7.

C. Centex's Insurance Claim

When the Owner demanded that Centex either correct the design and complete the wall or forfeit the outstanding contract balance and retainage, Centex noted that its liability for design errors under the Design/Build Agreement was limited to the amounts that Centex "recovers from the designers" or any of their insurers. R.P. 916. The Owner maintained that construction management issues caused or contributed to the failure, and that Centex was obligated to complete the project in accordance with the Design/Build Agreement notwithstanding the limitation of liability. *See* R.P. 916; R.P. 1348.

Centex submitted a claim to Lexington Insurance Company for the $3 million Project Policy to compensate for costs incurred in the repair of the mechanically stabilized wall. R.P. 887.

In April 2006, Lexington paid the $3 million policy limit of the Project Policy to reimburse Centex as an insured. In doing so, it did not seek a release from Worthgroup Architects. R.P. 923, 926. While the policy was designed to cover both negligent construction management by Centex and negligent design by Worthgroup Architects, Lexington's payout did not specify for which of those breaches of duty the policy payment was made. R.P. 923.

Months later, as part of an insurance renewal process, Worthgroup Architects demanded a letter from Lexington stating that that the $3 million insurance

payment was made for Centex's "construction defects or specific construction management claims" and not for any liability on the part of Worthgroup Architects. R.P. 924. Worthgroup Architects reiterated to its insurance broker that the Project Policy claim was paid "for actions directly related to construction management issues *** and was not based on design related issues," and thus that Worthgroup Architects "did not directly benefit from the claim being paid." R.P. 925. At the same time, Worthgroup Architects put its excess liability carrier on notice regarding the unpaid portion of the claim relating to the retaining wall. R.P. 926-928.

D. The District Court Proceedings

Centex brought this action against Worthgroup Architects and Terracon for breach of contract, negligence, and negligent misrepresentation related to their work on the failed retaining wall. *See* R.P. 7-10. Worthgroup Architects counter-claimed for declaratory judgment, breach of contract, and indemnification, and then moved for summary judgment. R.P. 612-622A, 646-665. In support of its motion for summary judgment, Worthgroup Architects asserted that, because the Limitation of Liability Clause in the Design/Build Agreement prohibited recovery for design errors beyond available insurance proceeds and because that provision had been incorporated into the Architect Agreement through the flow-down clause,

Worthgroup Architects' liability had been extinguished by the payment of policy limits under the $3 million Project Policy. R.P. 618-622.

Terracon joined in Worthgroup Architects' motion for summary judgment, contending that it was an intended third-party beneficiary of the contract between Centex and Worthgroup Architects because the Architect Agreement defines "Design Architect" to include, "where appropriate[,] design subcontractors, consultants and agents of [Worthgroup Architects]." Architect Agreement ¶ 1.1.6; R.P. 889. Accordingly, Terracon argued that the payment of the policy limits of the Project Policy extinguished Terracon's liability to Centex to the same extent that it did for Worthgroup Architects. R.P. 685-690.

Centex maintained that Worthgroup Architects was not entitled to summary judgment and, in fact, would be liable under the plain terms of the contract for any additional available insurance, without regard to insurance proceeds, when Centex proved negligence. R.P. 830-834. Centex also argued that material disputes of fact precluded summary judgment with respect to Terracon because evidence indicated that Terracon's work on the retaining wall was not "design work," but rather "geotechnical engineering services," which are excluded from the Architect Agreement's scope. R.P. 930-931.

The district court heard argument on the summary judgment motions on February 23, 2012. R.P. 1278-1285. On June 19, 2012 the district court issued a

minute order granting Defendants-Appellees' motions for summary judgment, stating only that "it is the finding and conclusion of the Court that there are no disputed issues of material fact and that Defendants are entitled to judgment as a matter of law in accordance with their motions." R.P. 1380.

SUMMARY OF ARGUMENT

Because the plain text of the Design/Build and Architect Agreements entitles Centex to compensation from the Defendants-Appellees' insurance policies and because substantial evidence establishes that genuine issues of material fact remain, the district court erred in granting Worthgroup Architects' and Terracon's motions for summary judgment.

1. The district court's ruling defies the plain and straightforward textual command in the Architect Agreement that Worthgroup Architects was to remain responsible to Centex, beyond the amount of their joint Project Policy, for any redesign and additional construction costs that Centex incurred because of Worthgroup Architects' design errors. That express contractual commitment governs for two reasons. First, the flow-down clause in the Architect Agreement, by its terms, does not displace specific provisions in the Architect Agreement defining the relationship between Worthgroup Architects and Centex. The contract thus leaves fully intact the provision establishing Worthgroup Architects' liability to Centex for design-work errors. Second, the parties specifically agreed in the

Order of Precedence Clause that, in the event of disagreement between the two Agreements, the terms of the Architect Agreement would control unless the Design/Build Agreement "imposes a higher standard or greater requirement on the parties." Architect Agreement ¶ 9.11; R.P. 906.

2. Worthgroup's reliance on the Limitation of Liability Clause in the Design/Build Agreement is textually foreclosed for yet another reason. The Design/Build Agreement required Centex's sub-contractor designers to maintain "professional errors and omissions coverage" for their design services "in an amount *not less than* $3,000,000." Design/Build Agreement § VI.F; R.P. 852 (emphasis added). The provision thus is a floor, not a cap. And while the Design/Build Agreement limited Centex's liability to the Owner to sums collected from insurance covering professional liability, the Agreement nowhere limits the recovery of insurance proceeds to only one $3 million policy. The contract's plain text thus leaves Centex free to pursue any insurance proceeds available to cover Worthgroup Architects' design errors.

3. Terracon's arguments are triply foreclosed. In addition to those two mistaken readings of the Agreements' text, the text of the Limitation of Liability Clause specifically excludes non-design work, and "geotechnical engineering" activities are specifically defined as not constituting design work. Design/Build Agreement § VI.F; R.P. 852 (liability limitation applies only to "design services");

Architect Agreement Ex. A; R.P. 908 (design work "excludes *** geotechnical engineering"). Furthermore, Terracon presented no evidence that any professional liability insurance under which it is insured has been exhausted, which would be required to obtain the benefit of any limitation.

ARGUMENT

I. THE ARCHITECT AGREEMENT IS EXPLICIT THAT PAYMENT OF ONE POLICY'S LIMITS DOES NOT EXTINGUISH WORTHGROUP ARCHITECTS' LIABILITY

A. Standard Of Review

This Court reviews issues of contract interpretation *de novo*. *Rivera v. American Gen. Fin. Servs., Inc.*, 2011-NMSC-033, ¶ 27, 150 N.M. 398, 259 P.3d 803; *Thompson v. Potter*, 2012-NMCA-014, ¶ 12, 268 P.3d 57. With respect to the question whether a genuine issue of material fact precludes summary judgment, this Court "view[s] the facts in the light most favorable to the party opposing the summary judgment and indulge[s] all reasonable inferences in favor of a trial on the merits." *Smith v. Durden*, 2012-NMSC-010, ¶ 5, 276 P.3d 943 (internal quotation marks and citations omitted).

B. The Architect Agreement Does Not Cap Worthgroup Architects' Liability For Design Errors

The Architect Agreement must be interpreted in accordance with its unambiguous text because this Court "enforce[s] the clear language of the contract and cannot make a new agreement for the parties." *Nearburg v. Yates Petroleum*

Corp., 1997-NMCA-069, ¶ 23, 123 N.M. 526, 943 P.2d 560. This requires that "every word or phrase must be given meaning and significance according to its importance in the context of the whole contract." *Aspen Landscaping, Inc. v. Longford Homes of New Mexico, Inc.*, 2004-NMCA-063, ¶ 14, 135 N.M. 607, 92 P.3d 53.

The district court's grant of summary judgment impermissibly wrote out of the contract the provision and words from the Architect Agreement most directly on point in this particular dispute, in violation of the settled rule that "specific terms and exact terms are given greater weight than general language[.]" Restatement (Second) of Contracts § 203(c) (1981).

First, the Architect Agreement makes Worthgroup Architects fully liable for the redesign and construction costs that Centex incurred due to Worthgroup Architects' errors. It provides that:

> Redesign costs and additional construction costs of [Centex] *** required to correct [Worthgroup Architects'] errors or omissions shall be the responsibility of [Worthgroup Architects] (which responsibility shall not preclude the pursuit of available insurance proceeds on account thereof).

Architect Agreement ¶ 1.4.2(b); R.P. 891. Nothing in that provision caps Worthgroup Architects' liability for the expenses its negligence occasioned, regardless of whether insurance proceeds are available. Quite the opposite, the provision specifically allows, but does not require, Centex to pursue insurance

proceeds in addition to seeking repayment from Worthgroup Architects directly. *See id.* Indeed, if the Agreement were meant to strictly limit Centex to insurance proceeds, it would not confine the insurance policies' discussion to a parenthetical and optional alternative avenue for recovery.

Second, the structure of the Architect Agreement confirms that its broad liability provision governs. To begin with, just as paragraph 1.4.2(b), *supra*, holds Worthgroup Architects fully responsible for redesign and construction costs incurred by Centex, paragraph 1.4.2(e) renders Centex equally responsible for any redesign costs incurred by Worthgroup Architects to correct a construction problem caused by the construction contractor's errors. Worthgroup's and the district court's reading of the contract, by contrast, renders the liability provisions unequal in their operation. R.P. 891.[1]

In addition, in paragraphs 9.10.1 and 9.10.2 of the Architect Agreement, Centex and Worthgroup Architects negotiated a reciprocal broad indemnity, with Worthgroup Architects indemnifying Centex "from and against all damages, *** to the extent arising out of or resulting from [Worthgroup Architects'] acts or omissions in carrying out its obligations under this Agreement, including, but not limited to, liability incurred by [Centex] *** pursuant to the provisions of the

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[1]Paragraph 1.4.2(e) provides that "Costs of redesign to correct a construction problem occurring through errors or omissions of the [construction contractor] shall be paid by [Centex] to [Worthgroup Architects.]" R.P. 891.

[Design/Build] Agreement[.]" Architect Agreement ¶ 9.10.1; R.P. 905-906. Centex, in turn, indemnified Worthgroup Architects "from and against all damages *** to the extent arising out of or resulting from [Centex's] acts or omissions in carrying out its obligations under this Agreement." *Id.* ¶ 9.10.2; R.P. 906. In that reciprocal indemnity, Worthgroup Architects expressly agreed in Paragraph 9.10.1 that its indemnity obligation included, "but [was] not limited to," liability incurred by Centex pursuant to the Design/Build Agreement. In other words, Worthgroup Architects expressly agreed that its responsibility to compensate Centex for additional costs resulting from Worthgroup Architects' acts and omissions was not limited to liabilities Centex incurred pursuant to the provisions of Design/Build Agreement. Accordingly, even if Centex's liability to the Owner is limited under the Design/Build Agreement, Worthgroup Architects' liability to Centex is not so limited.

Third, the flow-down clause, incorporating select provisions of the Design/Build Agreement into the Architect Agreement, offers Worthgroup Architects no help. The Clause does not alter the plain meaning of the specific provisions allocating liability between Centex and Worthgroup Architects. That is because the provision in the flow-down clause that Worthgroup Architects shall "have all rights toward [Centex] which [Centex] has under the [Design/Build] Agreement towards the Owner" has an important qualification: it operates only

"except as otherwise provided herein." Architect Agreement ¶ 1.3.2; R.P. 890. By its own terms, then, the Clause excludes from incorporation any provision that contradicts the obligations that the Architect Agreement specifically imposes—including, but not limited to, Section 1.4.2(b)'s express direction concerning Worthgroup Architects' unqualified liability to Centex.

When, as here, a flow-down clause expressly limits the particular rights and obligations that are incorporated from a prime contract, courts must give that limitation its full effect. *See Hasse Contracting Co. v. KBK Fin., Inc.*, 1998-NMCA-038, ¶¶ 5, 27, 125 N.M. 17, 956 P.2d 816 (noting that a subcontract "generally incorporate[d] the terms of the contract between the owner *** and the general contractor" but not fully, because it incorporated general contract provisions only "[i]nsofar as they are not inconsistent with the terms and conditions of" the subcontract); *see also United States ex rel. Quality Trust, Inc. v. Cajun Contractors, Inc.*, 486 F. Supp. 2d 1255, 1263-1265 (D. Kan. 2007) (refusing to incorporate federal regulations applicable to prime contract into subcontract through flow-down clause where clause did "not purport to establish a full correlative position between the parties to the prime contract and parties to the subcontract"); *Tribble & Stephens Co. v. RGM Constructors, L.P.*, 154 S.W.3d 639, 664-666 (Tex. Ct. App. 2004) (flow-down clause expressly limited to performance

of subcontractor's work did not incorporate general "condition precedent" clause from prime contract).

Moreover, reading the flow-down clause as supplanting the Agreement's specific allocation of liability to Worthgroup Architects for *all* of Centex's redesign and additional construction costs would leave the specific provision allocating liability to Worthgroup Architects with no work to do. The intervention of the Limitation of Liability Clause as Worthgroup Architects proposes would mean that Paragraph 1.4.2(b)'s assignment of comprehensive responsibility would never be triggered. But a court may not read a contract so as to render any provision "virtually meaningless." *Nearburg*, 1997-NMCA-069, ¶ 28 ("In interpreting a contract, the court must consider the contract as a whole and give significance to each part."). Instead, the Limitation of Liability Clause is confined to the Design/Build Agreement because its purpose is to define Centex's liability to the Owner. The Clause does not un-write what the Architect Agreement explicitly says about Worthgroup Architects' liability to Centex for additional construction costs to fix an error.

Fourth, the Order of Precedence clause in the Architect Agreement textually confirms that the Design/Build Agreement cannot import a lower standard of liability than that provided under the Architect Agreement. In that Clause, the parties specifically agreed that no provision in the Design/Build Agreement would

be given effect over a provision in the Architect Agreement that "impose[d] a higher standard or greater requirement on the parties." Architect Agreement ¶ 9.11; R.P. 906. In other words, the Architect Agreement governs the relationship between Centex and Worthgroup Architects, and 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. Reading the flow-down provision and the Design/Build Agreement as Worthgroup Architects suggests would invert that order of precedence.

That is because the Design/Build Agreement limited Centex'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." Design/Build Agreement § VI.F; R.P. 852. If it were included within the flow-down provision (which it was not), then it would limit Worthgroup Architects' liability to Centex to whatever sums Centex is able to collect from Worthgroup Architects' insurance covering professional liability claims.

Accordingly, that clause (as transmogrified under the flow-down provision to apply to Centex and Worthgroup Architects) would supplant, rather than "complement[]" the allocation of liability that Centex and Worthgroup Architects specifically crafted to govern their own relationship. Architect Agreement ¶ 9.11;

R.P. 906. The flow-down provision would limit liability for design errors to pursuit of available insurance proceeds, Design/Build Agreement § VI.F; R.P. 852. But the Architect Agreement specifically imposes a higher standard of responsibility, providing for full liability on the part of Worthgroup Architects for redesign and construction costs caused by its errors, without regard to insurance proceeds, Architect Agreement ¶ 1.4.2(b); R.P. 891, and without limitation to Centex's liability under the Design/Build Agreement, *id.* ¶ 9.10.1; R.P. 905-906. The two provisions cannot coexist, and for that reason, the Order of Precedence Clause dictates that the flow-down provision does not apply to limit liability. Instead, the parties specifically agreed that the higher-standard provisions of the Architect Agreement controlled over any non-complementary, lower-standard provision of the Design/Build Agreement. That order of precedence must be given effect. *See Espinosa v. United of Omaha Life Ins. Co.*, 2006-NMCA-075, ¶ 26, 139 N.M. 691, 137 P.3d 631 ("When a contract or agreement is unambiguous, we interpret the meaning of the document and the intent of the parties according to the clear language of the document, and we enforce the contract or agreement as written.").

Finally, Worthgroup Architects is not entitled to judgment on its breach of contract claim for the same reason that its motion for summary judgment on Centex's claims should have been denied. Worthgroup Architects claims that

Centex breached its contract by not enforcing the Design/Build Agreement for the benefit of Worthgroup Architects. R.P. 622. But because the Limitation of Liability Clause does not provide any rights to Worthgroup Architects, Centex did not breach the provision requiring it to "preserve the rights of [Worthgroup Architects] thereunder." Architect Agreement ¶ 3.4; R.P. 898. Moreover, Centex did not breach the Architect Agreement by repairing the wall, which was required "for the benefit of the Project as a whole," Architect Agreement ¶ 3.4; R.P. 898, to prevent it from endangering persons, damaging the remainder of the Resort, and shutting down the facility, R.P. 826. Because the Limitation of Liability Clause benefits only Centex, not Worthgroup Architects, and because the repairs were essential to the safe progress of the Project as a whole, Centex breached no commitment to Worthgroup Architects.

C. No Contract Limits Worthgroup Architects' Liability To Payment Of The Project Policy

While the district court misstepped in importing the Design/Build Agreement's Limitation of Liability Clause into the Architects Agreement, it compounded its error by misreading that Clause's plain language. Both the Design/Build Agreement and the Architect Agreement authorize the pursuit of *all* available insurance proceeds, regardless of the number of policies from which those proceeds are paid.

The Design/Build Agreement required Centex to mandate that each design

subcontractor "obtain and maintain professional errors and omissions coverage with respect to *design services*" of not less than $3 million. Design/Build Agreement § VI.F; R.P. 852 (emphasis added). The Architect Agreement, in turn, required Worthgroup Architects to provide a professional liability policy for design errors in the amount of $3 million, as well as other insurance. Architect Agreement ¶¶ 8.1.1, 8.3; R.P. 903. That professional liability insurance requirement under the Architect Agreement is distinct from the "Professional Liability insurance provided by [Centex]" under the Design/Build Agreement (the Project Policy), *id.* ¶ 8.1.1; R.P. 903, which insured Centex's construction management, as well as Worthgroup Architects' design services, in the amount of $3 million. R.P. 1304.

Nothing in either contract limits Worthgroup Architects' liability for design errors to what can be recovered from that one Project Policy. *First*, the Architect Agreement itself specifically and unqualifiedly authorizes the "pursuit of available insurance proceeds," not limited to any particular policy or to a single recovery. Architect Agreement ¶ 1.4.2(b); R.P. 891.

Second, Exhibit C to the Architect Agreement specifies that *all* of Worthgroup Architects' liability policies, including its professional liability policies, "shall be primary and non-contributory to any other insurance that may be available to [Centex]." That means that the policies required under Exhibit C,

including the excess liability policy that also covered design errors, R.P. 926, could not be offset with other insurance available to and paid to Centex, like the Project Policy.

Third, the indemnity provision in the Design/Build Agreement reiterates the limitation of liability for design errors, but specifically allows the Owner (and, if applied through the flow down provision, Centex) to "look solely to designers employed on the Project *and their insurers*" collectively in the event of any loss due to certain design errors. Design/Build Agreement § IX; R.P. 858 (emphasis added). Accordingly, the indemnity provision provides no basis to limit Worthgroup Architects' liability to the amount paid out under the Project Policy.

Finally, the Limitation of Liability Clause itself restricts recovery to all insurance coverage available for design errors, not only to the mandatory $3 million floor of such coverage that was required. *See* Design/Build Agreement § VI.F; R.P. 852. Although it states that liability is limited to "whatever sums Owner is able to collect from the above described professional errors and omissions insurance carrier," the "above described" clause refers to whatever combination of insurers covers design errors in an amount "not less than $3,000,000." Design/Build Agreement § VI.F; R.P. 852. Where, as here, Worthgroup Architects holds insurance covering design errors in more than one policy, *see* R.P. 926 (noting that design errors are also covered under a separate

policy besides the Project Policy), nothing in the Design/Build Agreement limits recovery to only one of several policies covering design errors. The $3 million thus is a baseline, not a ceiling.

Because the Project Policy was supplied by Centex and covered *both* construction management and design errors, exhaustion of that policy does not preclude exhaustion of other policies held by Worthgroup Architects in accordance with its obligation to maintain at least $3 million of specifically *design-error* insurance as well as other insurance under the Architect Agreement, and the numerous provisions in both contracts allowing pursuit of any insurance proceeds.

Indeed, until this litigation, Worthgroup Architects had consistently maintained that claims under the Project Policy had not been paid for design errors, but for other professional liability causes, and Worthgroup Architects highlighted that exhaustion of the Project Policy did not exhaust its responsibility to provide $3 million in design-error insurance. The professional services covered by the Project Policy included both the named insureds' (Centex and Worthgroup Architects') services "as an architect *** [or] construction manager." R.P. 1312. When the insurance company paid the policy limits, it did not request a release of Worthgroup Architects related to their design services coverage. R.P. 926. And as part of an insurance renewal process, Worthgroup Architects demanded a letter stating that the insurance payment was made for "construction defects or specific

construction management claims" and not for any liability on the part of Worthgroup Architects. R.P. 924. Worthgroup Architects later reiterated to its insurance broker that the Project Policy claim was paid "for actions directly related to construction management issues," not design issues, and thus that Worthgroup Architects "did not directly benefit from the claim being paid." R.P. 925.

Having maintained all along that the Project Policy covered construction management errors, not design errors, Worthgroup Architects' current position that the policy satisfied the mandatory design-error coverage lacks any basis in the record. And, to the extent that Worthgroup Architects' argument means that it declined to maintain an independent, minimum $3 million policy specifically for its own professional liability and design errors, as required under the Architect Agreement, then it has not held up its end of the contractual bargain under the Design/Build Agreement's Limitation of Liability Clause and cannot therefore cloak itself in any limitation of liability under that clause. A party cannot invoke only the beneficial part of a contract while eschewing its obligations. Rather, "[p]arties to a contract *** must accept the burdens of the contract along with the benefits." *See WXI/Z Southwest Malls v. Mueller*, 2005-NMCA-046, ¶ 11, 137 N.M. 343, 110 P.3d 1080.

Finally, a limitation of liability to insurance proceeds would require complete disregard of the Architect Agreement's express imposition of liability on

Worthgroup Architects for *all* of Centex's redesign and construction costs. Because this Court "may not alter or fabricate a new agreement for the parties," and must "enforce *** as written" that plain term of the parties' agreement, *Ponder v. State Farm Mut. Auto. Ins. Co.*, 2000-NMSC-033, ¶ 11, 129 N.M. 698, 12 P.3d 960, the district court erred in granting summary judgment to Worthgroup Architects on the ground that its liability was extinguished by payment of the proceeds of one Project Policy that did not even exclusively cover design errors.

II. THE CONTRACTS IMPOSE FULL LIABILITY FOR TERRACON'S GEOTECHNICAL ENGINEERING ERRORS

A. Standard Of Review

Several genuine issues of material fact exist that independently preclude the district court's grant of summary judgment to Terracon. This Court reviews a district court's grant of a motion for summary judgment *de novo*, viewing the facts in the light most favorable to the non-moving party, and "indulg[ing] all reasonable inferences in favor of a trial on the merits." *Smith v. Durden*, 2012-NMSC-010, ¶ 5, 276 P.3d 943. If more than "one reasonable conclusion can be drawn" from the facts presented below, or "if a fair minded factfinder *** could return a verdict for the [non-movant,]" a grant of summary judgment cannot stand. *McNeill v. Rice Eng'g and Operating, Inc.*, 2003-NMCA-078, ¶ 12, 133 N.M. 804, 70 P.3d 794 (alterations in original). That same standard of review governs questions concerning a party's status as a third-party beneficiary. *See Reyna Fin. Corp. v.*

Art Janpol Volkswagen, Inc., 1990-NMSC-097, ¶ 13, 110 N.M. 796, 800 P.2d 731.

B. Terracon Cannot Benefit From Any Limitation Of Liability For Design Errors

1. The District Court Erred in Concluding that Terracon Is a Third-party Beneficiary to the Architect Agreement

To overcome the "general rule" that "one who is not a party to a contract cannot maintain suit upon it," *Fleet Mortg. Corp. v. Schuster*, 1991-NMSC-046, ¶ 4, 112 N.M. 48, 811 P.2d 81, Terracon bore the burden of establishing that Centex and Worthgroup Architects specifically intended that the Architect Agreement would include Terracon as a third-party beneficiary. *Callahan v. New Mexico Fed'n of Teachers-TVI*, 2006-NMSC-010, ¶ 20, 139 N.M. 201, 131 P.3d 51; *Vigil v. State Auditor's Office*, 2005-NMCA-096, ¶ 20, 138 N.M. 63, 116 P.3d 854 ("[A] party claiming third-party-beneficiary status has the burden of showing that the parties 'to the contract intended to benefit him.'"). And because Terracon argued below that the terms of the Architect Agreement were unambiguous, *see* R.P. 749, it was required to make that showing based solely on that Agreement's express text. *Callahan*, 2006 NMSC-010, ¶ 20. Terracon failed in that task because the Agreement lacks any such explicit extension of its benefits to Terracon. At best, the argument creates issues of material fact that precluded summary judgment. *See Valdez v. Cillessen & Son, Inc.*, 1987-NMSC-015, ¶ 36, 105 N.M. 575, 734 P.2d 1258 (where contract is ambiguous, third-party

beneficiary status "become[s] a question of fact for the trier of fact to decide").

First, Terracon's reliance on the Agreement's definition of "Design Architect" was misplaced. That provision defines the covered architect as "Worth Group Architects, P.C., and includes, *where appropriate*, design subcontractors, consultants and agents of the Design Architect." Architect Agreement ¶ 1.1.6; R.P. 889 (emphasis added). That definition thus begs, rather than answers, the question of whether it is appropriate or not to deem Terracon part of the Design Architect team. The law is settled, moreover, that such a general and conditional contractual definition cannot convey third-party contractual rights in all cases. *See Valdez*, 1987-NMSC-015, ¶¶ 36-37 (even in specific contractual provisions, general references to "workmen" were insufficient to show intent to create third-party beneficiaries). That is doubly true here because the definition includes "design" subcontractors and consultants *only* "where [it might be] appropriate." Architect Agreement § 1.1.6; R.P. 889.

None of the specific provisions in the agreement upon which Terracon relied indicate one way or the other whether it would be "appropriate" to extend their terms to a third party like Terracon, much less that the parties intended any of those provisions to do so. *See* Architect Agreement ¶¶ 1.3.2, 1.4.2, 2.2, 8.3, 9.10.2; R.P. 890, 896, 903, 906. Nowhere does the Agreement name Terracon, identify the quid and the quo upon which Terracon would enter into the contract, or

outline any of the contours that would govern and that commonly accompany the creation of a third-party relationship. *See THI of New Mexico at Hobbs Center, LLC v. Spradlin*, 893 F. Supp. 2d 1172, 1188-1189 (D.N.M. 2012) (contract extended to third-party beneficiary where contract specifically named third party, expressly referred to third party's contractual benefits and responsibilities, and benefit to third party was essential purpose of the contract).

Second, Terracon invoked the Architect Agreement's "successors and assigns" clause, which provides in relevant part that "[t]his Agreement shall be binding on successors, assigns, and legal representatives of, and persons in privity of contract with, the Design/Builder and the Design Architect." Architect Agreement ¶ 9.9; R.P. 905. But if that were sufficient to create third-party beneficiary status, the Agreement would necessarily extend that same status to a host of persons and entities with which Centex and Worthgroup Architects come into contact in the course of their business—either during the term of the agreement or at any point in the future.

Such an open-ended extension of contractual rights would be truly anomalous under any circumstances, and would require far clearer textual direction before a court could infer such intent, *see Valdez*, 1987-NMSC-015, ¶ 37. Here, that reading is foreclosed because it would be inconsistent with the Architect Agreement's separate requirement that Centex first approve any sub-

subcontractors that Worthgroup Architects wished to retain to provide the services required under the agreement. *See* Architect Agreement ¶ 2.1.2; R.P. 893.

Further, accepting the "successors and assigns" clause as the basis for Terracon's third-party beneficiary status is logically inconsistent with grounding that status in the definition of "Design Architect." Terracon is either a third-party beneficiary because it falls within the definition of "Design Architect," or because it is a "person in privity of contract with *** the Design Architect." Terracon cannot be both. Holding otherwise, as Terracon proposes, robs one section or the other of all "meaning and significance" in violation of New Mexico's longstanding rule that contracts are to be given "reasonable rather than unreasonable interpretations." *Brown v. American Bank of Commerce*, 1968-NMSC-096, ¶ 12, 79 N.M. 222, 441 P.2d 751.

Third, Terracon's effort to back itself into the Design/Build Agreement's Limitation of Liability Clause by claiming third-party beneficiary status under the Architect Agreement would require rewriting the Design/Build Agreement. Terracon is Centex's *sub-sub*contractor, not its subcontractor. Importantly, both terms are distinctly defined in the Design/Build Agreement, *see* Design/Build Agreement § VII.A; R.P. 853, and it is only Centex's "subcontractors" that enjoy the "benefit of all rights, remedies and redress against the Design/Builder that the Design/Builder *** has against the Owner." *Id.* § VII.C; R.P. 854. No similar

extension of rights is made for Centex's sub-subcontractors, *id.*, and thus Terracon's argument is a thinly veiled effort to obtain from a court what the contract textually denies it. New Mexico precedent is clear, however, that courts cannot "change contract language for the benefit of one party to the detriment of another." *Nearburg v. Yates Petroleum Corp.*, 1997-NMCA-069, ¶ 23, 123 N.M. 526, 943 P.2d 560; *see id.* ¶ 28 (courts "must consider the contract as a whole and give significance to each part").

In extending third-party beneficiary status to Terracon, the district court not only ran roughshod over the Architect Agreements' text, but it also overlooked several genuine issues of material fact concerning the contracting parties' intent with respect to Terracon, such as whether the parties intended for Terracon to be a third-party beneficiary at all, and if so, whether the flow-down clause was intended to create rights for Terracon under the Design/Build Agreement that did not otherwise exist. Those questions of fact precluded the entry of summary judgment because "[w]hether the parties had the requisite intent [to create third-party beneficiaries] is a question of fact, appropriate for the trier-of-fact to decide," and certainly inappropriate for a court to decide on summary judgment. *Starko, Inc. v. Presbyterian Health Plan, Inc.*, 2012-NMCA-053, ¶ 81, 276 P.3d 252, *cert. granted*, 2012-NMCERT-003, 293 P.3d 184; *see Valdez*, 1987-NMSC-015, ¶ 37 (reversing summary judgment on breach of contract claim because question of

parties' intent to convey third-party beneficiary status created a genuine issue of material fact).

2. *The Limitation of Liability Clause Does Not Apply Because Terracon Performed "Geotechnical Engineering" Services*

Third-party beneficiaries have no greater entitlement to avail themselves of contractual rights than the contracting parties. Instead, they "step[] into the shoes" of contracting parties and "take[] on [the parties'] rights *and limitations*." *Flying Phoenix Corp. v. Creative Packaging Mach., Inc.*, 681 F.3d 1198, 1201 (10th Cir. 2012) (emphasis in original). Accordingly, Terracon's claim to third-party beneficiary status fails for another, independent reason: Terracon cannot show that it even falls within the scope of the contractual provisions that it now claims extinguished its liability to Centex. Specifically, Terracon was required to show that there was no genuine issue of material fact *both* with respect to its status as a third-party beneficiary to the Architect Agreement, *and* with respect to whether the Limitation of Liability Clause even applies to the type of services that it rendered on the Project. *See Great Am. Ins. Co. of New York v. Western States Fire Protection Co.*, 730 F. Supp. 2d 1308, 1322-1324 (D.N.M. 2009) (even though subcontractor was third-party beneficiary for purposes of contractual subrogation waiver, court was still required to conduct a "careful[] review [of] the subrogation waiver's language" to determine if it applied in favor of a subcontractor in the circumstances of the case); *State ex rel. New Mexico v. Siplast, Inc.*, 1994-NMSC-

065, ¶¶ 11, 16, 117 N.M. 738, 877 P.2d 38 (subcontractor entitled to summary judgment on insurer's subrogation claim only because subcontractor fit within contractual definition, *and* broad contractual waiver covered all of subcontractor's activities with respect to damages alleged).

The problem for Terracon is that the Limitation of Liability Clause applies only to "Design Work," and the Architect Agreement expressly excludes "geotechnical engineering" services from "Design Work." More specifically, the Design/Build Agreement's Limitation of Liability Clause applies only with respect to "errors or omissions committed in the design of the Project," not engineering services antecedent to the design work. *See* Design/Build Agreement § VI.F; R.P. 852. The "flow-down" clause in the Architect Agreement likewise expressly confines its operation to services performed "[i]n respect of the Design Work," Architect Agreement § 1.3.2; R.P. 890, which is defined as the "work set forth in Section VI of the [Design/Build] Agreement, and such additional work and services as are required under this Subcontract, all as more fully described in Exhibit A," *id.* § 1.1.2; R.P. 889. Exhibit A, in turn, reconfirms that the "Design Work excludes services not outlined above, specifically geotechnical engineering [services.]" R.P. 908.

Centex introduced substantial summary judgment evidence documenting that Terracon's work constituted geotechnical engineering services. Centex

introduced a letter from Worthgroup Architects' president stating that, while "Terracon note[d] that they are not the Geotechnical Engineer of Record, their work was not limited to the [mechanically stabilized retaining] Wall design," and, in fact, "[t]hey prepared a number of Supplemental Geotechnical Engineering Reports for Centex Construction. *** They are Geotechnical Engineers and experts in this area." R.P. 1036.

In addition, Centex introduced an affidavit from John Lommler, an expert in geotechnical engineering, in which he concluded that Terracon had performed geotechnical engineering services with respect to the mechanically stabilized retaining wall. R.P. 1054-1057. Based on his expert review of Terracon's responsibilities on the project as defined by its written scope of work, Mr. Lommler concluded:

> Terracon, Inc., as the designer and engineer for the [mechanically stabilized retaining wall] subject to this litigation *was performing as a geotechnical engineer*. The services provided within Terracon's proposal: 1) the design and engineering analysis; 2) the design parameters and calculations; 3) the specifications of the type of soils and materials to be used; 4) the determination of the type and location of drainage systems to be used; and 5) the oversight, inspection and approval responsibility for the materials and methods utilized for the [wall] construction *are all geotechnical engineering functions. As such, Terracon, Inc., and its engineer, Donald R. Clark, P.E., were performing geotechnical engineering services on this project.*

R.P. 1057 (emphasis added).[2]

Finally, Centex introduced deposition testimony from another geotechnical engineer retained to work on the Project's buildings, who attested that Terracon was the geotechnical engineer for the wall. R.P. 1206.

Terracon argued below that this "generic exclusion for geotechnical services" was intended to exclude only the "geotechnical engineer of record *** who had been hired for the project directly by the Owner" before the Architect Agreement was executed. R.P. 1106. But that is not what the Agreement says at all, and the contract's intent is determined by its plain language, which unqualifiedly excludes all geotechnical engineering services from the scope of design work, R.P. 908, regardless of who performs them.

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[2] Although Terracon challenged the admissibility of Mr. Lommler's affidavit, the district court did not strike the affidavit or any of Centex's summary judgment evidence. For good reason. Terracon's claim that the affidavit was inadmissible parol evidence was wrong. Mr. Lommler did not purport to divine the intentions of the parties outside the contractual text; he offered an expert analysis of whether Terracon's work fell within a pre-defined exclusion already contained in the agreements. Terracon's argument that Mr. Lommler lacked personal knowledge of the original design and construction of the project fares no better because the law is settled that an expert witness may gain personal knowledge by analyzing a project's plan and reports. *Pollock v. State Highway and Transp. Dep't*, 1999-NMCA-083, ¶ 19, 127 N.M. 521, 984 P.2d 768 (expert witness had admissible personal knowledge about traffic accident where he visited accident site and reviewed diagram from police report). Finally, Terracon argued that the parties specifically contemplated changes to the scope of Worthgroup Architects' responsibilities. Perhaps. But as Terracon acknowledged below (*see* R.P. 1108), no such change could occur without either Centex's or the Owner's consent, neither of which was ever given.

Summary judgment could not properly be entered for Terracon on that record because, "[i]f there [was even] the slightest doubt as to" whether the Clause applies, "summary judgment should [have been] denied." *Garcia-Montoya v. State Treasurer's Office*, 2001-NMSC-003, ¶ 7, 130 N.M. 25, 16 P.3d 1084; *see also J.R. Hale Contracting Co., v. Union Pac. R.R.*, 2008-NMCA-037, ¶ 27, 143 N.M. 574, 179 P.3d 579 ("We view the facts in a light most favorable to the party opposing the motion and we draw all reasonable inferences in support of a trial on the merits.").

The record here contains substantial (not "slight") evidence that Terracon's geotechnical engineering services fall squarely outside both the Architect Agreement's flow-down clause and the Design/Build Agreement's Limitation of Liability Clause, and thus that Terracon remains fully liable to Centex for any errors or omissions that occurred in connection with its geotechnical engineering work on the wall. The aggregate of that record thus more than sufficed to create a material fact issue on whether Terracon was entitled to limit its liability under the Design/Build Agreement. *See Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713, 242 P.3d 280 (all facts must be "view[ed] in a light most favorable to the party opposing summary judgment"); *see also Roselli v. Rio Communities Serv. Station, Inc.*, 1990-NMSC-018, ¶ 16, 109 N.M. 509, 787 P.2d 428 (reversing summary judgment where total weight of summary judgment

evidence was sufficient to create genuine issue of material fact).

In short, whether the district court impermissibly disregarded Centex's summary judgment evidence in its entirety or concluded that there was no genuine question of material fact, both were wrong and cannot be defended on this record. *See Handmaker v. Henry*, 1999-NMSC-043, ¶ 18, 128 N.M. 328, 992 P.2d 879 (courts must "examine the whole record for any evidence that places a genuine issue of material fact in dispute") (internal quotations and citation omitted); *Ocana v. American Furniture Co.*, 2004-NMSC-018, ¶ 22, 135 N.M. 539, 91 P.3d 58 ("A court reviewing a summary judgment motion may not weigh the evidence or pass on the credibility of the witnesses.").

C. Worthgroup Architects' Project Policy Does Nothing To Extinguish Terracon's Liability

Terracon's effort to avoid liability suffers from yet another flaw. Under the Design/Build Agreement's Limitation of Liability Clause, liability cannot be extinguished absent payment from Terracon's own professional liability policy. No such payment has been made.

The Design/Build Agreement's limitation of liability clause explicitly states that "[Centex] shall require its design professional *Subcontractor(s)* to obtain and maintain professional errors and omissions coverage with respect to design services[,] *** and such coverage *shall be for each such design professional Subcontractor in an amount not less than $3,000,000.*" Design/Build Agreement

§ VI.F; R.P. 852 (emphasis added). That provision means exactly what it says: *every* design professional subcontractor (and, under Terracon's theory, sub-subcontractor) was required to "obtain and maintain" its own separate $3 million professional liability insurance policy, and only after the proceeds of those policies had been paid out to compensate for damages incurred through any "errors or omissions in the design of the Project" could the subcontractors' liability be extinguished. *See* Design/Build Agreement § VI.F; R.P. 852 ("Owner agrees that it will limit *** liability to *** whatever sums [it] is able to collect from [Design/Builder's] professional errors and omissions insurance carrier.").

Terracon's argument tries to have its cake and eat it too, enjoying all the benefits of the Design/Build Agreement's Limitation of Liability Clause (as incorporated into the Architect Agreement), while avoiding the obligation to maintain and pay out a professional liability policy like every other subcontractor had to do under the Agreements. That is not how contract law works. A party cannot selectively pick and choose the pieces of a contract that it prefers, while omitting those it would like to avoid. *See Nearburg*, 1997-NMCA-069, ¶ 31 ("Parties to a contract agree to be bound by its provisions and must accept the burdens of the contract along with the benefits."); *WXI/Z Southwest Malls v. Mueller*, 2005-NMCA-046, ¶ 11, 137 N.M. 343, 110 P.3d 1808 (same).

Tellingly, Terracon's interpretation of the Limitation of Liability Clause

would, for all intents and purposes, read out of that Clause everything except for the single sentence that Terracon claims absolves it—and only it—of any responsibility to Centex. It is hornbook law, however, that the "language of the entire agreement should be construed together," *Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 1999-NMSC-006, ¶ 27, 127 N.M. 1, 976 P.2d 1, and that "courts may not rewrite obligations that the parties have freely bargained for themselves," *United Props. Ltd., v. Walgreen Props., Inc.*, 2003-NMCA-140, ¶ 10, 134 N.M. 725, 82 P.3d 545. If Centex and Worthgroup Architects intended for Terracon to "step[] into the[ir] shoes" as a third-party beneficiary, s*ee Flying Phoenix Corp. v. Creative Packaging Machinery, Inc.*, 681 F.3d at 1201, they certainly intended for it to do so with both feet and to take on both the contract's "rights *and limitations.*" *Id.*

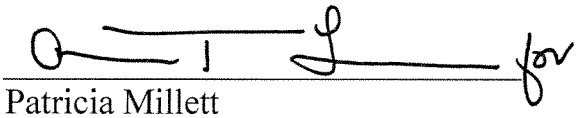
Because Terracon and its insurer have paid nothing to offset Centex's losses, Terracon is textually precluded from invoking the Design/Build Agreement's Limitation of Liability Clause, and the district court erred for that reason as well in granting summary judgment in Terracon's favor. *See Nearburg*, 1997-NMCA-069, ¶ 29 (reversing district court's decision based on contract interpretation where, "rather than applying the clear provisions of the contract, the district court's decision constituted rewriting of the contract").

CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment to Defendants-Appellees should be reversed and the case remanded for proceedings consistent with the Court's Opinion.

DATED: August 5, 2013

Respectfully submitted,



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STATEMENT OF COMPLIANCE WITH RULE 12-213(F) NMRA

Undersigned counsel certifies that the body of this Brief in Chief has a total of 8,855 words, is in 14-point font, is proportionally spaced, and complies with Rule 12-213(F) NMRA. The word processing program used to obtain the word count is Microsoft Word 2007.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by U.S. Mail to all parties entitled to service of same, as required by Rule 12-202 NMRA and addressed as follows on the August 5, 2013:

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