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
D-1215-CV-2007-00397

APPELLEE TERRACON, INC.'S ANSWER BRIEF

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

FACTUAL BACKGROUND 1

The Design/Build Agreement Limits Liability for Design Defects to Proceeds of a $3 Million Professional Liability Insurance Policy 1

The Architect Agreement Includes Worthgroup's Design Subcontractors and Incorporates by Reference All Terms of the Design/Build Agreement 2

The Architect Agreement Requires its Terms be Read Consistently with the Design/Build Agreement and Contemplates Changes in Scope of Design Work 4

Terracon is a Design Subcontractor or Consultant of Worthgroup 5

Centex Conceded the Agreements are Clear and Unambiguous and there are No Material Disputes of Fact 6

ARGUMENT 7

I. CENTEX'S NEW ARGUMENTS ON APPEAL MUST BE DISREGARDED. 7

II. TERRACON IS A THIRD PARTY BENEFICIARY TO THE AGREEMENTS. 11

A. Standard of Review 11

B. Terracon is a Member of a Class of Third Party Beneficiaries Expressly Identified in the Architect Agreement. 11

C. Centex Waived Any Argument that the Contracts are Ambiguous or that Questions of Material Fact Exist to Preclude Summary Judgment 14

D. Centex Cannot Rely on Parol Evidence to Vary the Terms of the Clear and Unambiguous Agreements 15

E. Worthgroup's Design Services Under the Architect Agreement Included Terracon's Design of the MSE Wall 20

F. Centex's New Arguments on Appeal [BIC 28-34] Must be Disregarded and Do Not Require Reversal 23

III. CENTEX IS BARRED AS A MATTER OF LAW FROM RECOVERING DAMAGES AGAINST WORTHGROUP OR TERRACON BECAUSE CENTEX RECEIVED THE PROCEEDS OF THE $3 MILLION PROJECT E & O POLICY. 28

A. Standard of Review 28

B. The Limitation of Liability Clause Flowed Down to the Architect Agreement and Limits Recovery to the Project E & O Policy Obtained by Worthgroup as the Design Subcontractor 28

C. Centex's Arguments that the Flow Down Provision did not Include the Limitation of Liability Provision are Without Merit. 34

D. Centex's Arguments that the Limitation of Liability Clause is Inconsistent with the Indemnity Provisions are Without Merit. 36

E. Centex's Arguments that the Limitation of Liability Provision Applies to Proceeds from Other Insurance Policies are Without Merit. 38

F. Centex's Argument that it Did Not Receive Payment under the Project E & O Policy for Design Errors is Without Merit. 41

CONCLUSION 42

STATEMENT OF COMPLIANCE
WITH RULE 12-213(F) NMRA 44

TABLE OF AUTHORITIES

New Mexico Cases

Boatwright v. Howard,
1985-NMSC-009, 102 N.M. 262, 264, 694 P.2d 518 11

Brown v. Am. Bank of Commerce,
1968-NMSC-096, 79 N.M. 222, 441 P.2d 75 8,9

Callahan v. New Mexico Federation of Teachers-TVI,
2010-NMCA-004, 147 N.M. 453, 224 P.3d 1258 20

Chisos, Ltd v. JKM Energy, LLC,
2011-NMCA-026, 150 N.M. 315, 258 P.3d 1107 18-19

County of Los Alamos v. Martinez,
2011-NMCA-027, 150 N.M. 326, 258 P.3d 118 14,41

Crow v. Capitol Bankers Life Ins. Co.,
1995-NMSC-018, 119 N.M. 457, 891 P.2d 1206 24,29

Dow v. Chilili Coop. Assoc.,
1986-NMSC-084, 105 N.M. 52, 728 P.2d 462 19,36-37

Espinosa v. United of Omaha Life Ins. Co.,
2006-NMCA-075, 139 N.M. 691, 137 P.3d 631 17,29,39

Fleet Mortg. Corp. v. Schuster,
1991-NMSC-046, 112 N.M. 48, 811 P.2d 81 8

Fort Knox Self Storage, Inc. v. W. Techs., Inc.,
2006-NMCA-096, 140 N.M. 233, 142 P.3d 1 30

Gallagher v. Santa Fe Employees Fed. Credit Union,
2002-NMCA-088, 132 N.M. 552, 52 P.3d 412 7

Handmaker v. Henry,
1999-NMSC-043, 128 N.M. 328, 992 P.2d 879 10

Hasse Contracting Co. v. KBK Fin., Inc.,
1998 NMCA-038, 125 N.M. 17, 956 P.2d 816,
aff'd on other grounds,
1999- NMSC-023, 127 N.M. 316, 980 P.2d 641 31-32,34-35

H-B-S P'ship v. Aircoa Hospitality Servs., Inc.,
2005-NMCA-068, 137 N.M. 626, 114 P.3d 306 29-30

Hoge v. Farmers Market & Supply Co. of Las Cruces,
1956-NMSC-044, 61 N.M. 138, 296 P.2d 476 11-12

Home and Land Owners, Inc. v. Angel Fire Resort Operations, L.L.C.,
2003-NMCA-070, 133 N.M. 733, 69 P.3d 243 7

In re T.B.,
1996-NMCA-035, 121 N.M. 465, 13 P.2d 272 7

K.R. Swerdfeger Construction v. Board of Regents,
University of New Mexico,
2006-NMCA-117, 140 N.M. 374, 142 P.3d 962 25,37-38

Leyba v. Whitley,
1995-NMSC-066, 120 N.M. 768, 907 P.2d 172 13

Luxton v. Luxton,
1982-NSMC-087, 98 N.M. 276, 648 P.2d 315 40

Matney v. Evans,
1979-NMCA-064, 93 N.M. 182, 598 P.2d 644 18,20

Medina v. Sunstate Realty, Inc.,
1995-NMSC-002, 119 N.M. 136, 889 P.2d 171 21-22

Montoya v. Mentor Corp.,
1996-NMCA-067, 122 N.M. 2, 919 P.2d 410 11,28

Nearburg v. Yates Petroleum Corp.,
1997-NMCA-069, 123 N.M. 526, 943 P.2d 560 8,15,29,36,39

New Mexico v. Colonial Penn Ins. Co., et al.,
1991-NMSC-048, 112 N.M. 123, 812 P.3d 777 25

Ocana v. American Furniture Co.,
2004-NMSC-018, 135 N.M. 539, 91 P.3d 58 8,10

One Cessna Aircraft v. Cessna Int'l Finance Corp., et al.,
1977-NMSC-007, 90 N.M. 40, 559 P.2d 417 21

Oschwald v. Christie,
1980-NMSC-136, 95 N.M. 251, 620 P.2d 1276 16,22

Piano v. Premier Distrib. Co.,
2005-NMCA-018, 137 N.M. 57, 107 P.3d 11 28

Pollock v. State Highway and Transp. Dep't,
1999-NMCA-083, 127 N.M. 521, 984 P.2d 768 8

Rangel v. Save Mart, Inc.,
2006-NMCA-120, 140 N.M. 395, 142 P.3d 983 40

Richardson v. Farmers Ins. Co.,
1991-NMSC-052, 112 N.M. 73, 811 P.2d 571 15

Rivera v. Amer. Gen. Fin. Svcs., Inc.,
2011-NMSC-033, 150 N.M. 398, 259 P.3d 803 11,17,28

Romero v. Board of County Commissioners of County of Taos,
2011-NMCA-066, 150 N.M. 59, 257 P.3d 404 28

Roselli v. Rio Communities Serv. Station, Inc.,
1990-NMSC-018, 109 N.M. 509, 787 P.2d 428 10

Smith v. Klebanoff,
1972-NMCA-075, 84 N.M. 50, 499 P.2d 368 18,20

Spectron Dev. Lab., et al., v. American Hollow Boring Co.,
1997-NMCA-025, 123 N.M. 170, 936 P.2d 852 7,15,23,24,34,37

Starko, Inc. v. Presbyterian Health Plan, Inc.,
2012-NMCA-053, 276 P.3d 252, cert. granted,
2012-NMCERT-003, 293 P.3d 184 8-9

State v. Clifford,
1994-NMSC-048, 117 N.M. 508, 873 P.2d 254 17-18

State ex rel New Mexico v. Siplast, Inc.,
1994-NMSC-065, 117 N.M. 738, 877 P.2d 38 8-9,12,13,24,33

Tarin, Inc. v. Tinley,
2000-NMCA-048, 129 N.M. 185, 3 P.3d 680 23

Trujillo v. Treat,
1988-NMCA-017, 107 N.M. 58, 752 P.2d 250 18,20

United Nuclear Corp. v. Allstate Ins. Co.,
2011-NMCA-039, 149 N.M. 574, 252 P.3d 798 18-19,29-30,37

United Properties Ltd Co. v. Walgreen Properties, Inc.,
2003-NMCA-140, 134 N.M. 725, 82 P.3d 535 15

V.P. Clarence Co., v. Colgate,
1993-NMSC-022, 115 N.M. 471, 853 P.2d 722 19-20

Valdez v. Cillessen & Son, Inc.,
1987-NMSC-015, 105 N.M. 575, 734 P.2d 1258 8-9,12,23-24

W.P. McKinney v. R.D. Davis,
1972-NSMC-077, 84 N.M. 352, 503 P.2d 332 11,14-15

WXI/Z Southwest Malls v. Mueller,
2005-NMCA-046, 137 N.M. 343, 110 P.3d 1080 15,27,42

Cases from Other Jurisdictions

American Home Assur. Co. v. Merck & Co., Inc.,
462 F.Supp.2d 435 (S.D.N.Y. 2006) 19

Florida Power & Light Company,
763 F.2d 1316 (11th Cir. 1985) 13

Flying Phoenix Corp. v. Creative Packaging Mach., Inc.,
681 F.3d 1198 (10th Cir. 2012) 10

Great Am. Ins. Co. of New York v. Western States Fire Protection Co.,
730 F. Supp.2d 1308 (D. N.M. 2009) 8-9,12

Industrial Indem. Co. v. Wick Construction Co.,
680 P.2d 1100 (Alaska 1984) 32

LWT, Inc., v. Childers,
19 F.3d 539 (10th Cir. 1994) 21

Montoya v. Espanola Public School Dist. Bd. of Educ.,
861 F.Supp.2d 1307 (D. N.M. 2012) 11,14-15

Norfolk Southern Rwy. Co., v. Kirby,
543 U.S. 14, 125 S.Ct. 385 (2004) 13

Plum Creek Wastewater Authority v. Aqua-Aerobic Systems, Inc.,
597 F.Supp.2d 1228 (D. Colo. 2009) 32-33

THI of New Mexico at Hobbs Center, LLC v. Spradlin,
893 F. Supp. 2d 1172 (D. N.M. 2012) 8-9

Tribble & Stephens Co. v. RGM Constructors, L.P.,
154 S.W.3d 639 (Tex. Ct. App. 2004) 35

United States ex rel. Quality Trust, Inc. v. Cajun Contractors, Inc.,
486 F. Supp. 2d 1255 (D. Kan. 2007) 32,35

United Tunneling v. Havens Construction Co.,
35 F.Supp.2d 789 (D. Kan. 1998) 32

Valhal Corp. v. Sullivan Assocs.,
44 F.3d 195 (3rd Cir. 1995) 30

Vigil v. Burlington Northern and Santa Fe Ry. Co.,
521 F.Supp.2d 1185 (D. N.M. 2007) 17-18

Werner Enterprises, Inc., v. West Wind Maritime International,
554 F.3d 1319 (11th Cir. 2009) 13

Other Authorities

Restatement (Second) of Contracts § 203(c) (1981) 8

Rule 1-056(E) NMRA 18,19

Rule 12-216(A) NMRA 1996 7

FACTUAL BACKGROUND

The Design/Build Agreement Limits Liability for Design Defects to Proceeds of a $3 Million Professional Liability Insurance Policy

On February 14, 2002, Centex/Worthgroup, LLC ("Centex") entered into a Design/Build Construction Contract ("Design/Build Agreement") with Inn of the Mountain Gods Resort and Casino ("Owner") for the design and construction of an expansion and renovation to the Owner's resort and casino in Mescalero, New Mexico ("Project"). **[RP 839-886]**. Centex hired Worthgroup Architects, P.C. ("Worthgroup") as the architect and Centex Construction Co., Inc. as the general contractor on the project. **[RP 839]**. The Owner directly retained the project geotechnical engineer—Vinyard & Associates, and a project construction manager—Rider, Hunt, Levett & Bailey. **[RP 624, 1113-1116]**.

The Design/Build Agreement expressly limits Centex's potential liability to the Owner for design defect claims to the proceeds of a $3 million project specific professional liability insurance policy:

> 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 an amount not less than $3,000,000. **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). The Agreement defines a "Subcontractor" as "a person or entity that has a direct contract with the Design/Builder to perform a portion of the Work at the site" **[RP 853 § VII.A.1]** and a "Sub-subcontractor" as "a person or entity that has a direct or indirect contract with a Subcontractor to perform a portion of the Work at the site." **[RP 853 § VII.A.2]**.

The Design/Build Agreement expressly limits Centex's indemnity obligation to the Owner for any design errors to the proceeds of the professional liability insurance policy required by the limitation of liability clause **[RP 858 § IX]**, and contains a mutual waiver of consequential damages. **[RP 865 § XIV.I]**.

The Architect Agreement Includes Worthgroup's Design Subcontractors and Incorporates by Reference All Terms of the Design/Build Agreement

On April 2, 2002, Centex entered into a "Contract Agreement–Architectural Services" ("Architect Agreement") with Worthgroup to provide design services on the Project. **[RP 889-915]**. The Architect Agreement defines "Design Work" to include all work set forth in Section VI of the Design/Build Agreement and "such additional work and services as are required under this Subcontract." **[RP 889 ¶ 1.1.2]**. The Architect Agreement defines the "Design Architect" to be Worthgroup **and its design subcontractors, consultants and agents [RP 889 ¶ 1.1.6]**, and expressly states that the Agreement is binding on persons in privity of contract with the Design Architect. **[RP 905 ¶ 9.9]**.

The Architect Agreement expressly incorporates by reference all terms of the Design/Build Agreement: "The Design Architect shall perform the Design Work in strict accordance and fully compliance with the terms of the [Design/Build] Agreement (which is hereby incorporated by reference)." **[RP 890 ¶ 1.3.1]**. The Agreement contains a "flow down" provision affording Worthgroup and its design subcontractors such as Terracon all rights against Centex that Centex has against the 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 ....

[RP 890 ¶ 1.3.2]. In addition, Centex was required to enforce the provisions of the Design/Build Agreement for the benefit of and to protect the rights of Worthgroup and its design subcontractors **[RP 898, ¶ 3.4]**, and to indemnify them from and against all damages, including reasonable attorney's fees, arising out of or resulting from Centex's acts or omissions in carrying out its obligations under the Architect Agreement. **[RP 905-906 ¶ 9.10.2]**.

Similarly, Worthgroup agreed to indemnify Centex from and against all damages and reasonable fees, "**pursuant to the provisions of the [Design/Build] Agreement,**" arising out of or resulting from the Design Architect's acts or omissions in performing the Design Work. **[RP 905-906 ¶ 9.10]** (emphasis added). By and through the Architect Agreement, Worthgroup agreed to provide the $3

million professional errors and omissions policy referenced in and required by the Design/Build Agreement. **[RP 903 ¶ 8.3]**.

Worthgroup obtained a $3,000,000 Architects & Engineers Professional Liability Policy from Lexington Insurance Company to cover the design work at the Project (the "Project E & O Policy"). **[RP 888]**. Centex was named as an additional insured under that Policy. ***[Id.]*** Lexington has paid Centex the full limits of $3,000,000 under the Project E & O Policy for alleged damages incurred in repairing the mechanically stabilized earth retaining wall (the "MSE Wall"). **[RP 745]**.[1]

The Architect Agreement Requires its Terms be Read Consistently with the Design/Build Agreement and Contemplates Changes in Scope of Design Work

The Architect Agreement, which is governed by New Mexico law, instructs that its terms must be considered complementary to those of the Design/Build Agreement and the terms of both agreements should be read together if possible. **[RP 907 ¶ 9.12.3; RP 906 ¶ 9.11]**.

[1] Centex and its other subcontractors designed and built the surface grading and drainage at the Project, including over the wall. Following a local failure in a portion of the wall, Terracon gave written warning nearly a year prior to the wall's failure that excessive surface irrigation water and natural precipitation, if not corrected, would adversely impact the wall's integrity.

The parties anticipated there would be changes to the scope of the Design Work to be provided by Worthgroup under the Architect Agreement, as they expressly agreed that the scope of work could be modified through written change orders and other amendments. **[RP 890-891 ¶¶ 1.4(c) & (f); RP 896 ¶ 2.2; RP 899 ¶ 4.2.1.1-2; RP 904 ¶ 9.3]**. The original scope of work set forth in the Architect Agreement did not include design of the MSE Wall and the Architect Agreement was subsequently amended by written change order to include the design of the MSE Wall with the scope of the Design Work. **[RP 3 ¶ 7]**.

Terracon is a Design Subcontractor or Consultant of Worthgroup

On May 5, 2003, Worthgroup entered into a subcontract with Terracon to provide design engineering services for the MSE Wall as contemplated by the Architect Agreement, as amended by change order. **[RP 3; RP 731-741]**. Thus, Terracon became part of the "Design Architect" as defined in the Architect Agreement. **[RP 889 ¶ 1.1.6]**. Not only did Terracon attain all rights and remedies afforded to the Design Architect under the Architect Agreement, but Terracon's contract with Worthgroup contains a limitation of liability provision capping Terracon's potential liability for its design work on the Project to one-hundred thousand dollars ($100,000.00). **[RP 740]**. Terracon's contract provided it was to be paid $28,000 for its design services related to the MSE wall. **[RP**

739]. Conversely, Centex was to be paid $135,169,000 for its services. **[RP 844-845]**.

Centex Conceded the Agreements are Clear and Unambiguous and there are no Material Disputes of Fact

Notwithstanding that Centex received the full $3 million proceeds from the Project E & O Policy, Centex pursued claims against Worthgroup and Terracon for damages arising out of the alleged defective design of the MSE Wall. Worthgroup and Terracon moved for summary judgment on the limitation of liability provision incorporated by reference into the Architect Agreement. **[RP 612-681, 682-745]**. In the briefing below, Centex conceded the Design/Build Agreement and the Architect Agreement are clear and unambiguous and there are no disputes of material fact as to those agreements. **[RP 1195]**. On June 19, 2012, after extensive briefing and oral argument, the district court agreed, finding there are no disputed issues of material fact and granting summary judgment:

> This matter comes before the court on Worthgroup Architects, L.P.'s Motion for Summary Judgment filed August 26, 2011, and Terracon, Inc.'s joinder therein filed September 13, 2011. The matter came before the Court for oral argument on February 27, 2012, and supplemental briefing followed. Now having considered all of the pleadings and arguments of counsel, it is the finding 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.

[RP 1380-1381]. The district court directed counsel to prepare a form of judgment for entry by the court. ***[Id]***. Centex filed its notice of appeal on July 18, 2012, before the district court approved or entered judgment.

ARGUMENT

I. CENTEX'S NEW ARGUMENTS ON APPEAL MUST BE DISREGARDED

The normal rules of preservation of errors apply to appeals from summary judgment. *Spectron Dev. Lab., et al., v. American Hollow Boring Co.*, 1997-NMCA-025, ¶¶ 30-32, 123 N.M. 170, 936 P.2d 852; see also Rule 12-216(A) NMRA 1996 (issue must be preserved by invoking ruling of district court). Appellate review is of "the case litigated below, not the case that is fleshed out for the first time on appeal." *In re T.B.*, 1996-NMCA-035, ¶13, 121 N.M. 465, 13 P.2d 272. Thus, arguments not advanced below on summary judgment are not considered on appeal. See *Home and Land Owners, Inc. v. Angel Fire Resort Operations, L.L.C.*, 2003-NMCA-070, ¶¶ 7-8 and 23, 133 N.M. 733, 69 P.3d 243(refusing to consider new argument on appeal about contract interpretation not raised below). Likewise, facts and conclusions based on facts not presented to the district court will not be considered on appeal. *Gallagher v. Santa Fe Employees Fed. Credit Union*, 2002-NMCA-088, ¶ 15, 132 N.M. 552, 52 P.3d 412.

Centex's Brief in Chief is replete with new arguments and authorities that Centex did not present to the district court in its briefing on summary judgment. Indeed, only four (4) of the thirty-three (33) legal authorities cited by Centex on appeal were cited in Centex's briefs below,[2] and Centex makes numerous new arguments not raised below, including:

- The new argument based on Restatement (Second) of Contracts § 203(c) (1981) regarding interpreting specific and general terms of a contract. **[BIC 15]**.
- The new argument based on the alleged reciprocal indemnity obligations of the parties under the Architect Agreement. **[BIC 16-17]**.
- The new argument claiming the flow-down provision only incorporated "select provisions of the contract." **[BIC 17-19]**.
- Numerous new arguments regarding Terracon's status as a third party beneficiary based on new authorities, or contract provisions, that were never made to the district court. **[BIC 28-34]**; *Fleet Mortg. Corp. v. Schuster*, 1991-NMSC-046, ¶ 4, 112 N.M. 48, 811 P.2d 81; *Valdez v.*

[2] The only cases Centex cites on appeal that it cited below are *Brown v. Am. Bank of Commerce*, 1968-NMSC-096, 79 N.M. 222, 441 P.2d 75; *Nearburg v. Yates Petroleum Corp.*, 1997-NMCA-069, 123 N.M. 526, 943 P.2d 560, *Ocana v. Amer. Furniture Co.*, 2004-NMSA-018, 135 N.M. 539, 91 P.3d 58; and *Pollock v. State Highway and Transp. Dep't*, 1999-NMCA-083, 127 N.M. 521, 984 P.2d 768. While it cited *Nearburg* below, Centex cites it in support of different arguments and legal propositions on appeal. **[RP 1195; BIC 14, 32, 39 & 40]**.

Cillessen & Sons, Inc., 1987-NMSC-015, ¶ 36, 105 N.M. 575, 734 P.2d 1258; *THI of New Mexico at Hobbs Center, LLC v. Spradlin*, 893 F. Supp. 2d 1172, 1188-1189 (D. N.M. 2012); *Brown v. American Bank of Commerce*, 1968-NMSC-096, ¶ 12, 79 N.M. 222, 441 P.2d 751; *Starko, Inc. v. Presbyterian Health Plan, Inc.*, 2012-NMCA-053, ¶ 81, 276 P.3d 252, cert. granted, 2012-NMCERT-003, 293 P.3d 184; *Great Am. Ins. Co. of New York v. Western States Fire Protection Co.*, 730 F. Supp.2d 1308 (D. N.M. 2009) and *State ex rel New Mexico v. Siplast, Inc.*, 1994-NMSC-065, ¶¶ 11, 16, 117 N.M. 738, 877 P.2d 38.[3]

- The new argument concerning alleged general and conditional contractual definition based on *Valdez*. **[BIC 29]**
- The new argument purportedly based on the "Successors and Assigns" provision of the Architect Agreement. **[BIC 30-31]**
- The new argument based on Terracon's status as a sub-subcontractor. **[BIC 31-32]**
- New arguments of alleged questions of fact based on *Starko, Inc.* and *Valdez*. **[BIC 32]**

[3] Although Terracon cited some of these cases for different legal propositions, Centex did not cite or discuss these decisions below.

- The new argument about Terracon's alleged contractual rights based on *Flying Phoenix Corp. v. Creative Packaging Mach., Inc.*, 681 F.3d 1198, 1201 (10th Cir. 2012). **[BIC 33 & 40]**
- The new argument that the limitation of liability clause does not apply to services "antecedent to the design." **[BIC 34]**.
- The new argument that the Court should construe the unambiguous contract provisions in favor of Centex as the non-movant on summary judgment. **[BIC 37]**
- The new argument that Terracon's services did not fall within the "flow down" provision. **[BIC 37]**.
- The new argument about the weight of alleged factual disputes based on *Roselli v. Rio Communities Serv. Station, Inc.*, 1990-NMSC-018, ¶ 16, 109 N.M. 509, 787 P.2d 428, *Handmaker v. Henry*, 1999-NMSC-043, ¶ 22, 128 N.M. 328, 992 P.2d 879, and *Ocana v. American Furniture Co.*, 2004-NMSC-018, ¶ 22, 135 N.M. 539, 91 P.3d 58. **[BIC 37]**.

Centex waived these new arguments and authorities by not raising them below, and this Court should disregard them on appeal. Notwithstanding, Terracon substantively responds to them in sections II(F) and III(C-E) below.

II. TERRACON IS A THIRD PARTY BENEFICIARY TO THE AGREEMENTS

A. Standard of Review

Interpretation of an unambiguous contract is a question of law that this Court reviews de novo. *Rivera v. Amer. Gen. Fin. Svcs., Inc.*, 2011-NMSC-033, ¶27, 150 N.M. 398, 259 P.3d 803. Under New Mexico law, a party's status as a third-party beneficiary pursuant to the terms of an unambiguous contract "is a question of law, not fact." *Montoya v. Espanola Public School Dist. Bd. of Educ.*, 861 F.Supp.2d 1307, 1312 (D. N.M. 2012) (citing *Boatwright v. Howard*, 1985-NMSC-009, 102 N.M. 262, 264, 694 P.2d 518); see also *W.P. McKinney v. R.D. Davis*, 1972-NSMC-077, 84 N.M. 352, 353, 503 P.2d 332 (determining whether plaintiff was a third party beneficiary as a matter of law pursuant to the terms of the unambiguous contract). "In reviewing the grant of summary judgment in a case where there are no disputed issues of material fact, this Court considers whether the trial court correctly interpreted the relevant law." *Montoya v. Mentor Corp.*, 1996-NMCA-067, ¶ 5, 122 N.M. 2, 919 P.2d 410.

B. Terracon is a Member of a Class of Third Party Beneficiaries Expressly Identified in the Architect Agreement

Centex would have this Court require a person or entity be specifically named in a contract before third party beneficiary status could arise. That is not the law. A contract may be made "by two or more people so that a third party or

third parties will be beneficiaries of the agreement." *Hoge v. Farmers Market & Supply Co. of Las Cruces*, 1956-NMSC-044, 61 N.M. 138, 296 P.2d 476, 479 . "The paramount indicator of third party beneficiary status is a showing that the parties to the contract intended to benefit the third party, either individually **or as a member of a class of beneficiaries.**" *Valdez v. Cillessen & Son, Inc.*, 1987-NMSC-015, 105 N.M. 575, 581, 734 P.2d 1258, 1264 (emphasis added). That intent may be derived from the unambiguous language of the agreement itself. *Id.*

Here, Centex specifically alleged in its Complaint that the parties on this Project were intended third party beneficiaries of the Project contracts. **[RP 9-10]**. Moreover, the Architect Agreement established a specific class of persons who would be third-party beneficiaries to the contract as it expressly defined "Design Architect" to include Worthgroup and its "design subcontractors, consultants and agents." **[RP 889]**. It is undisputed that Terracon was a design subcontractor to Worthgroup on this Project. Such references in construction contracts afford third party beneficiary status to subcontractors on the project. See *e.gs.*, *Siplast, Inc.*, 877 P.2d at 40; *Great American Ins. Co. of New York v. Western States Fire Protection Co.*, 730 F.Supp.2d 1308, 1319-1321 (D. N.M. 2009). Similarly, it is undisputed that Terracon entered into a subcontract with Worthgroup, and the Architect Agreement explicitly conferred contract rights to all parties in privity with Worthgroup on the Project. **[RP 905 § 9.8]**.

Thus, Terracon has the same rights to enforce the Architect Agreement, including the flow down limitation of liability provision, as any signatory to the agreement. *Leyba v. Whitley*, 1995-NMSC-066, ¶11, 120 N.M. 768, 907 P.2d 172 (holding third party beneficiary "is accorded traditional contract remedies with respect to the bargain intended for his or her benefit."). Those remedies include enforcing contractual limitations of liability. *See, e.gs.*, *Siplast, Inc.,* 877 P.2d at 40-42 (holding claims against subcontractor barred by limitation of liability provision in contract between owner and general contractor limiting recovery to insurance proceeds); *Norfolk S. Rwy. Co., v. Kirby*, 543 U.S. 14, 35, 125 S.Ct. 385 (2004) (enforcing limitation of liability clause in ocean carrier bill of lading to limit liability of downstream third party beneficiary railroad for damage to cargo suffered in derailment); *Werner Enterprises, Inc., v. West Wind Maritime Int'l*, 554 F.3d 1319, 1325-26 (11th Cir. 2009) (enforcing limitation of liability provision against shipper in contract with intermediary limiting third party beneficiary common carrier's liability to owner for damage to cell phones caused in transit on truck); *Florida Power & Light Co.,* 763 F.2d 1316, 1321 (11th Cir. 1985) (interpreting Florida law) (intended third party beneficiary is "entitled to the protective umbrella of the limitation of liability clause and the indemnity provision in the contract"). Therefore, as a third-party beneficiary, Terracon may enforce the

limitation of liability provision limiting its liability for design services to the $3 million Project E & O Policy.

C. Centex Waived Any Argument that the Contracts are Ambiguous or that Questions of Material Fact Exist to Preclude Summary Judgment

Centex reverses itself on appeal when it argues that the Design/Build Agreement and the Architect Agreement are not clear and unambiguous. **[BIC 27-28 & 32]**. Contrary to Centex's present claims on appeal, all parties unequivocally argued below that the Architect Agreement is clear and unambiguous, and Centex expressly disclaimed any argument on summary judgment based on the existence of any question of material fact:

> Defendants filed their replies in support of the Summary Judgment Motions stating Centex/Worthgroup raised no dispute as to the material facts of this case. However, the Summary Judgment Motions to which Centex/Worthgroup responded are not based upon disputes of material fact, but disputes as to contract interpretation. Centex/Worthgroup does not argue the Design/Build Agreement or the Architect Agreements are ambiguous because Centex/Worthgroup believes the meaning is clear within the express wording of each contract.

[RP 1195]. Thus, Centex stipulated to the facts set forth in the motions as undisputed, and they are not reviewable on appeal. *County of Los Alamos v. Martinez*, 2011-NMCA-027, ¶ 16, 150 N.M. 326, 258 P.3d 118 (barring county from raising fact issue as to whether contracts were subject to mandatory bargaining under CBA where issue was not raised in district court). Terracon's status as a third party beneficiary under the unambiguous Architect Agreement is

therefore, a question of law. *Espanola Public School Dist. Bd. of Educ.*, 861 F.Supp.2d at 1312; *W.P. McKinney,* 1972-NSMC-077, 84 N.M. at 353, 503 P.2d 332. Centex cannot now argue that questions of fact exist to defeat summary judgment. *Spectron Dev. Lab.*, 1997-NMCA-025, ¶¶ 29-32, 123 N.M. 170, 936 P.2d 852 (party precluded from asserting arguments on appeal that were waived below).

D. Centex Cannot Rely on Parol Evidence to Vary the Terms of the Clear and Unambiguous Agreements

As set forth above, Terracon's rights as a third party beneficiary solely arise pursuant to the terms of the unambiguous contracts. Interpretation of an unambiguous contract is a question of law. *Nearburg v. Yates Petroleum Corp.*, 1997-NMCA-069, ¶7, 123 N.M. 526, 943 P.2d 560. "Absent ambiguity, provisions of a contract need only be applied, rather than construed or interpreted." *Richardson v. Farmers Ins. Co.*, 1991-NMSC-052, 112 N.M. 73, 74, 811 P.2d 571, 572. Where, as here, the parties concede the agreements are unambiguous, the Court should not examine evidence beyond the four corners of the document to interpret its meaning, and the Court "may not rewrite obligations that the parties have freely bargained for themselves[.]" *WXI/Z Southwest Malls v. Mueller*, 2005-NMCA-046, ¶11, 137 N.M. 343, 110 P.3d 1080 (quoting *United Properties Ltd Co. v. Walgreen Properties, Inc.*, 2003-NMCA-140, ¶10, 134 N.M. 725, 82 P.3d 535). Because Centex agreed the contracts are clear and unambiguous, Centex

could not offer below, and cannot offer on appeal, parol evidence to vary the terms of these agreements or to create some illusory question of fact.

Centex points solely to the inadmissible speculation of its paid expert with no foundation or personal knowledge, purporting to interpret whether or not Terracon's services fell within the scope of the Architect Agreement. **[BIC 33-38]**. That affidavit completely ignores Centex's admission that, after the execution of the Design/Build and Architect Agreements, "[t]he specific design responsibility for the MSE Wall and the parking structure were added to the Design Subcontract [a/k/a Architect Agreement] by subsequent change order." **[RP 3 ¶ 7]**. Lommler's affidavit was simply irrelevant and was properly disregarded by the district court. The issue is not whether the design of the MSE wall was geotechnical engineering services, but whether, as admitted by Centex, the design of the MSE wall was added to the Architect Agreement. *Oschwald v. Christie*, 1980-NMSC-136, 95 N.M. 251, 253, 620 P.2d 1276, 1278 (immaterial factual issues do not create triable issues sufficient to avoid summary judgment)..

Lommler's affidavit does not mention the Design/Build Agreement, the Architect Agreement, or the contracts for services of the geotechnical engineer of record Vinyard & Associates. Neither Centex nor Lommler explain how Worthgroup could subcontract design responsibility for services that it supposedly had no contractual obligation to perform. Not only did Centex admit the Architect

Agreement was amended by change order to include the MSE wall, but Centex expressly admitted on summary judgment that "Terracon, Inc. ("Terracon") entered into a subcontract with WGA, whereby Terracon would serve as the design engineer for the MSE Wall." **[RP 825 ¶ 28]**. Centex and Lommler further omit that before the change order adding the MSE wall to the scope of work, the Architect Agreement provided that Centex was responsible to provide geotechnical engineering services. **[RP 908]**. After the change order adding the MSE wall to the Architect Agreement, Worthgroup subcontracted with Terracon. **[RP 91, 735-741]**. Clearly, had the contracts not been amended by change order to include responsibility to design the MSE wall, Terracon's subcontract would have been with Centex rather than Worthgroup. This course of performance is consistent with Centex's admissions below, and no contrary admissible evidence exists.

Not only is Lommler's affidavit irrelevant to this issue, but it is inadmissible on numerous grounds. First, the Architect Agreement is unambiguous and such extraneous parol evidence is inadmissible to determine the intent of the parties. *Rivera*, 2011 NMSC-033 at ¶27; *Espinosa v. United of Omaha Life Ins. Co.*, 2006-NMCA-075, ¶27, 139 N.M. 691, 137 P.3d 631. Second, an expert may not state his opinion as to legal standards or conclusions, nor may he state legal conclusions drawn by applying the law to the facts. *State v. Clifford*, 1994-NMSC-048, 117 N.M. 508, 513, 873 P.2d 254, 259 ("Expert opinion testimony that seeks to state a

legal conclusion is inadmissible."); *Vigil v. Burlington Northern and Santa Fe Ry. Co.*, 521 F.Supp.2d 1185 (D. N.M.2007) (same). Third, on summary judgment, an expert affidavit must explain how the expert arrived at his opinions, "setting forth such supportive facts as would be properly admissible in evidence." *Trujillo v. Treat*, 1988-NMCA-017, 107 N.M. 58, 61, 752 P.2d 250, 253 (holding affidavit insufficient as to cause of death where it omitted facts crucial to the determination); *Smith v. Klebanoff*, 1972-NMCA-075, 84 N.M. 50, 53, 499 P.2d 368, 371 (trial court properly disregarded expert affidavit on summary judgment because it was not based on admissible facts in evidence); *Matney v. Evans*, 1979-NMCA-064, 93 N.M. 182, 185, 598 P.2d 644, 647 (trial court properly disregarded expert affidavit because the expert's conclusions as to the sequence of events in an accident were not based on admissible facts); Rule 1-056(E) NMRA (Affidavit offered in response to motion for summary judgment "must set forth specific facts showing that there is a genuine issue for trial").

Finally, Lommler's proposed testimony is inadmissible as it lacks any foundation and constitutes pure speculation. Lommler was not privy to the contracting process and has no personal knowledge of the parties' intent in negotiating, drafting, and amending their contracts. *See Chisos, Ltd v. JKM Energy, LLC*, 2011-NMCA-026, ¶16, 150 N.M. 315, 258 P.3d 1107 (holding contract must be interpreted according to the parties' intent when agreement was

made); *United Nuclear Corp. v. Allstate Ins. Co.*, 2011-NMCA-039, ¶11, 149 N.M. 574, 252 P.3d 798 (holding primary goal when interpreting contract is to ascertain intent of contracting parties "at the time they executed the contract."). Lommler was retained as an expert long after the contracts were signed and long after the MSE wall was designed and constructed. *See* Rule 1-056(E) NMRA ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."); and *American Home Assur. Co. v. Merck & Co., Inc.*, 462 F.Supp.2d 435, 449 (S.D.N.Y. 2006)(An expert who "had nothing to do with the negotiating, drafting or performance of . . . [the specific contract]," may not testify as to its meaning.).

For these reasons, Lommler's affidavit is inadmissible or otherwise ineffective to raise any material questions of fact sufficient to overcome summary judgment. While Terracon objected to this parol evidence, even if considered it does not create a material question of fact and does not provide a basis for reversal of summary judgment. **[RP 1096-1100]**. "A party may not simply argue such facts might exist, nor may it rest upon the allegations of the Complaint." *Dow v. Chilili Coop. Assoc.*, 1986-NMSC-084, 105 N.M. 52, 54-55, 728 P.2d 462, 464; *V.P. Clarence Co., v. Colgate*, 1993-NMSC-022, 115 N.M. 471, 472, 853 P.2d 722, 723 (briefs and arguments of counsel are not evidence upon which court can

rely in summary judgment proceeding). Instead, the non-moving party "must come forward and establish with admissible evidence that a genuine issue of material fact exists." *Callahan v. New Mexico Fed. of Teachers*-TVI, 2010-NMCA-004, ¶ 11, 147 N.M. 453, 224 P.3d 1258. Centex did not do so.

E. Worthgroup's Design Services Under the Architect Agreement Included Terracon's Design of the MSE Wall

Centex takes diametrically opposed positions on whether Terracon's engineering services fall under the terms of the Architect Agreement. On the one hand, Centex claims the design of the MSE Wall falls under the Architect Agreement, which explains why Centex sued Worthgroup for the alleged defective design of the MSE Wall. "The Architect Agreement required Worthgroup Architects to complete the Design Work identified by the Design/Build Agreement, including the retaining wall." [e.g. **BIC 4**]). On the other hand, to avoid the limitation of liability flowing from the Agreement, Centex claims Terracon's design services for the MSE Wall were not part of Worthgroup's design work under the Architect Agreement. **[BIC 34]**. These contradictory positions are irreconcilable. Centex's pleadings, and the uncontroverted evidence in the record demonstrate that Terracon's work fell within the scope of design services under the Architect Agreement. Centex affirmatively alleged in its Complaint that the Architect Agreement was amended to include design of the MSE Wall:

> Centex/Worthgroup entered into a design subcontract [Architect Agreement] with Defendant WG Architects dated April 2, 2002 ("Design Subcontract") whereby Defendant WG Architects agreed to perform the overall design of the Project. **The specific design responsibility for the MSE Wall** and the parking structure **were added to the Design Subcontract [Architect Agreement] by subsequent change order.**"

[RP 3 ¶ 7] (emphasis added). Centex further alleged that Worthgroup subcontracted with Terracon to design the MSE Wall: "Defendant WG Architects subsequently subcontracted the responsibility for the design of the MSE Wall to Defendant Terracon" **[RP 3 ¶ 8]**, and that Worthgroup breached the Architect Agreement as a result of alleged deficiencies in the design of the MSE Wall. **[RP 8-9]**. These admissions are binding on Centex. *One Cessna Aircraft v. Cessna Int'l Fin. Corp., et al.*, 1977-NMSC-007, 90 N.M. 40, 42, 559 P.2d 417, 419 (admissions in pleadings are binding); see also *LWT, Inc., v. Childers*, 19 F.3d 539 (10th Cir. 1994)(allegations in complaint are evidentiary admissions).

These admissions are actually supported by uncontroverted record evidence. The Architect Agreement specifically anticipated that there would be changes in the scope of the Design Work and that such changes would be effected by change order. **[RP 890-91 ¶¶ 1.4(c) & (f); RP 896 ¶ 2.2; RP 899 ¶ 4.2.1.1-2; & RP 904 ¶ 9.3]**. Most important, it is undisputed that when the MSE wall was added to the project, the Architect Agreement was amended through a change order to include Terracon's engineering services related to the MSE Wall. **[RP 3 ¶ 7]** It is well-

settled law that parties to contracts are permitted to amend contracts after they are entered into. See *Medina v. Sunstate Realty, Inc.*, 1995-NMSC-002, 119 N.M. 136, 138, 889 P.2d 171, 173.

Centex's efforts to re-characterize Terracon's design work as falling outside the scope of the Architect Agreement are unavailing and do not raise a material question of fact. Those engineering services clearly became part of the Architect Agreement when it was amended. See *Oschwald*, 1980-NMSC-136, 95 N.M. at 253 (immaterial factual issues do not create triable issues sufficient to avoid summary judgment).

Moreover, Centex's claims against Terracon underscore Centex's admissions that Terracon's work fell within Worthgroup's design services. Even though Centex and Terracon are not signatories to the same contract, Centex asserted a breach of contract claim against Terracon, alleging that Centex is a third-party beneficiary to Worthgroup's contract with Terracon. **[RP 9 ¶ 29]**. That Centex could pursue Terracon as a third-party beneficiary under the interrelated Project contracts, but Terracon cannot defend using the terms of those same contracts is inexplicable. Accordingly, summary judgment should be affirmed.

F. Centex's New Arguments on Appeal [BIC 28-34] Must be Disregarded and Do Not Require Reversal

The only argument Centex advanced below as to Terracon's status as a third-party beneficiary was based on Lommler's affidavit **[RP 930, 944-45]**, and the only authority upon which Centex relied was *Tarin, Inc. v. Tinley*, 2000-NMCA-048, ¶ 13, 129 N.M. 185, 3 P.3d 680, cited solely for the proposition that Terracon bore the burden of proof. **[RP 944]**. For purposes of appeal, Centex waived all other arguments and authorities concerning Terracon's status as a third-party beneficiary, and this Court should disregard them. *Spectron Dev. Lab.*, 1997-NMCA-025, ¶¶ 29-32 (party may not assert arguments on appeal that were waived in the district court). In any event, none of these new arguments have merit. Nor do they support, let alone require, reversal of summary judgment.

First, Centex's reliance on *Valdez* for the false proposition that a general contractual definition cannot convey third-party beneficiary status is misplaced. Centex's argument is directly contrary to the law and is not supported by *Valdez*. "The paramount indicator of third party beneficiary status is a showing that the parties to the contract intended to benefit the third party, either individually **or as a member of a class of beneficiaries.**" *Valdez*, 1987-NMSC-015, 105 N.M. at 581 (emphasis added). There was no individual or identifiable class of beneficiaries identified in the contract at issue in *Valdez*. Rather, the reference was generically

to workmen's compensation insurance, which as the court noted, contained no provision identifying which parties' workmen were to be covered:

> In the present case nothing in either of the [defendant's] contracts indicates which workmen were to be protected by the workmen's compensation provisions of those contracts.

Valdez, 1987-NMSC-015, 105 N.M. at 581. Conversely, here, the Architect Agreement specifically defines Worthgroup to include its design subcontractors and consultants, and includes all parties in privity with Worthgroup on this Project. See *Siplast, Inc.*, 877 P.2d at 40. These are specific classes of third-party beneficiaries that include Terracon. Moreover, Centex conceded below that the contracts at issue are clear and unambiguous. *Spectron Dev. Lab.*, 1997-NMCA-025, ¶¶ 29-32.

Second, Centex suggests that the "Successors and Assigns" provision should simply be read out of the Architect Agreement. **[BIC 30-31]**. That clause provides in relevant part: "This 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." **[RP 905 ¶ 9.9]**. New Mexico law requires the Court to give meaning to this provision and to interpret it in the context of the entire agreement and not in isolation. *Crow v. Capitol Bankers Life Ins. Co.*, 1995-NMSC-018, 119 N.M. 457, 891 P.2d 1206. When read in context, the Successors and Assigns clause clearly refers to parties with whom Centex and Worthgroup are in privity

with **on this specific project.** Centex's suggestion that this clause applies to parties with whom Centex and Worthgroup may contract with **on all future projects** for an infinite period of time is both absurd and unreasonable. The "law favors reasonable rather than unreasonable interpretation." *New Mexico v. Colonial Penn Ins. Co., et al.*, 1991-NMSC-048, 112 N.M. 123, 130, 812 P.3d 777.

Furthermore, Centex fails to cite any legal authority that would justify eliminating the clause from the contract even if the Court adopted its proposed expansive definition. See *K.R. Swerdfeger Constr. v. Board of Regents, Univ. of New Mexico*, 2006-NMCA-117, ¶ 23, 140 N.M. 374, 142 P.3d 962 (Due to New Mexico's strong public policy in favor of freedom of contract agreements are not void unless they are clearly contrary to what the legislature or judicial decision has declared to be public policy.). The only reasonable reading of this provision is that Centex and Worthgroup intended to confer contract rights upon the entities with whom they are in privity with on the project. There is no dispute that Worthgroup is in privity with Terracon.

Third, Centex's new argument that Terracon's status as a third-party beneficiary of the Architect Agreement requires altering the terms of the Design/Build Agreement is without merit. Centex provides no legal support for such a proposition and it deliberately conflates the language of the agreements. The operative "flow down" provision at issue is found in the Architect Agreement

– not the Design/Build Agreement. The flow down provision in the Architect Agreement provides that the "**Design Architect**" [defined as Worthgroup and Terracon] "shall have all rights toward the Design/Builder which the Design/Builder has under the D/B Agreement towards the Owner", which includes the limitation of liability provision. **[RP 890 ¶¶ 1.3.1 & 1.3.2]**. This "flow down" provision is not restricted to "Subcontractors," which term is not even found in the provision.

The provision in the Design/Build Agreement cited for the first time by Centex on appeal required Centex to provide flow down provisions to its subcontractors in those separate agreements, but the clause itself is not a flow down provision. Although the clause supports the notion that it was Centex's intent to flow down its rights against the Owner at the time it contracted with Worthgroup, nowhere does it restrict the flow down of rights to a subcontractor. In fact, it specifically states that such contract rights should ultimately flow down to sub-subcontractors as well. If the district court had found the $3 million limitation of liability inapplicable to Terracon, it would have resulted in the application of Terracon's more restrictive $100,000 limitation of liability provision. **[RP 740; RP 1109-1110]**.

Similarly, contrary to Centex's urging, the Design/Build Agreement only required Worthgroup, as the design "Subcontractor," to obtain the $3 million

Project E & O Policy to cover design errors. The Design/Build Agreement does not impose this obligation on sub-subcontractors, and Centex does not claim that it entered into a design subcontract with Terracon. Therefore, Centex's argument that Terracon had some separate obligation to procure a $3 million design liability policy under the Design/Build Agreement is wholly unsupported and without merit. See *WXI/Z Southwest Malls*, 2005-NMCA-046, at ¶11 (the court "may not rewrite obligations that the parties have freely bargained for themselves[.]").

Finally, Centex's new argument that Terracon's services were not part of the flow down provision ignores the plain language of the Architect Agreement and is belied by the uncontroverted evidence. The flow down provision is very broad, as it expressly: (1) incorporates by reference the entire Design/Build Agreement; (2) covers the Design Work, which is defined as "all work set forth in the Section VI of the D/B Agreement **and such additional work and services as are required under this Subcontract,**" **[RP 890, ¶ 1.3.2; RP 889, ¶ 1.1.2]**, which necessarily includes the change order to add Terracon's design of the MSE Wall; and (3) confers upon Worthgroup [defined to include design subcontractors such as Terracon] all rights against Centex that Centex had against the Owner with respect to the Design Work under the Design/Build Agreement.

III. CENTEX IS BARRED AS A MATTER OF LAW FROM RECOVERING DAMAGES AGAINST WORTHGROUP OR TERRACON BECAUSE CENTEX RECEIVED THE PROCEEDS OF THE $3 MILLION PROJECT E & O POLICY

A. Standard of Review

Interpretation of an unambiguous contract is a question of law that this Court reviews de novo. *Rivera v. Amer. Gen. Fin. Svcs., Inc.*, 2011-NMSC-033 at ¶27. "In reviewing the grant of summary judgment in a case where there are no disputed issues of material fact, this Court considers whether the trial court correctly interpreted the relevant law." *Montoya v. Mentor Corp.*, 1996-NMCA-067, ¶ 5, 122 N.M. 2, 919 P.2d 410. This Court may affirm the trial court for any reason, even those not relied on by the trial court. *Piano v. Premier Distrib. Co.*, 2005-NMCA-018, ¶ 17, 137 N.M. 57, 107 P.3d 11. Thus, this Court should affirm a district court's grant of summary judgment if the district court was correct for any reason. *Romero v. Board of County Comm'rs of County of Taos*, 2011-NMCA-066, ¶ 7, 150 N.M. 59, 257 P.3d 404.

B. The Limitation of Liability Clause Flowed Down to the Architect Agreement and Limits Recovery to the Project E & O Policy Obtained by Worthgroup as the Design Subcontractor

Centex asks this Court to read the limitation of liability provision out of the Architect Agreement, even though it is expressly incorporated by reference into the Architect Agreement, because it purportedly conflicts with an indemnity provision

in the Architect Agreement. Centex ignores both the contract language itself and the general law of contract interpretation in New Mexico.

Both by contract and by law the terms of the Design/Build Agreement and the Architect Agreement must be construed consistently with one another. The Architect Agreement expressly provided that the terms of both agreements should be read together: "[i]t is the intention of the parties that all the terms of all documents are to be considered as complementary." **[RP 906 ¶ 9.11]**. It was the explicit intention of the parties that the terms of the agreements be construed consistent with one another if possible.

Even absent this express dictate, New Mexico law requires the parties' agreements be construed as a harmonious whole to effectuate the intentions of the parties by interpreting the plain language of the agreements. *See Espinosa*, 2006-NMCA-75 at ¶¶26-27; *Crow*, 1995-NMSC-018, 119 N.M. at 457. A court cannot ignore or change contract language for the benefit of one party and to the detriment of another, *Nearburg.*, 1997-NMCA-069, ¶23, and this Court should construe the contracts to provide meaning to each provision: "We consider the plain language of the relevant provisions, giving meaning and significance to each word or phrase within the context of the entire contract, as objective evidence of the parties' mutual expression of assent." *United Nuclear Co., v. Allstate Ins. Co.*, 2011-

NMCA-039, ¶11, 149 N.M. 574, 252 P.3d 798 (quoting *H-B-S P'ship v. Aircoa Hospitality Servs., Inc.*, 2005-NMCA-068, ¶19, 137 N.M. 626, 114 P.3d 306).

The Design/Build agreement between Centex and the Owner required Centex's design Subcontractor to obtain a $3 million project specific errors and omissions policy to cover the design work on the project. **[RP 852]**. Worthgroup was Centex's design Subcontractor, and Worthgroup obtained the required $3 million Project E & O Policy for its design work. **[RP 631]**. The Design/Build Agreement further contained a limitation of liability provision that limited Centex's liability to the Owner "for any errors or omissions in the design of the Project to whatever sums the Owner is able to collect from the above described professional errors and omissions insurance carrier [the $3 million Project E & O Policy]." **[RP 852]**. There is no dispute that such a limitation of liability is enforceable in a construction contract. See *Fort Knox Self Storage, Inc. v. W. Techs., Inc.*, 2006-NMCA-096, ¶¶ 15 & 22, 140 N.M. 233, 142 P.3d 1 (enforcing $50,000 limitation of liability provision in geotechnical engineering firm's contract noting that "clauses limiting liability 'are a fact of everyday business and commercial life'") (quoting *Valhal Corp. v. Sullivan Assocs.*, 44 F.3d 195, 204 (3rd Cir. 1995)).

Centex and Worthgroup freely entered into the Architect Agreement whereby they agreed that Worthgroup's design subcontractors and consultants

would be bound by, and have rights under, the Agreement. Terracon was one of Worthgroup's design subcontractors. Centex and Worthgroup further agreed, without any exception, restriction or limitation, that all of the terms in the Design/Build Agreement were incorporated by reference into the Architect Agreement. That necessarily included the limitation of liability provision. **[RP 889 ¶ 1.1.4]**.

The Architect Agreement further conferred upon Worthgroup and its design subcontractors all rights against Centex that Centex had against the Owner under the Design/Build Agreement, including the right to enforce the limitation of liability provision for claims arising out of the design work on the Project: "the Design Architect [Worthgroup and Terracon] shall, except as otherwise provided herein, have all rights toward the Design/Builder [Centex] which the Design/Builder [Centex] has under the Design/Build Agreement towards the Owner." **[RP 890 ¶ 1.3.2]**. Thus, Centex contractually agreed to limit any recovery for design defects against Worthgroup and Terracon to the proceeds of the $3 million Project E & O Policy. Had this limitation of liability provision not applied, Terracon's more restrictive $100,000 limitation of liability provision would have been triggered. **[RP 740; 1109-1110]**.

These types of "flow down" clauses are routinely used on construction projects to limit the liability of subcontractors. New Mexico recognizes the

validity of flow down clauses in construction contracts. *Hasse Contracting Co., Inc., v. KBK Fin., Inc.,* 1998-NMCA-038, ¶27, 125 N.M. 17, 956 P.2d 816 (holding subcontract incorporated terms of prime contract between the owner and general contractor). Flow down clauses incorporate provisions of a general contract into a subcontract. *U.S. ex. rel. Quality Trust, Inc. v. Cajun Contractors, Inc.,* 486 F.Supp.2d 1255, 1263 (D. Kan. 2007). Such clauses mean that "the same rights and duties should flow equally from the owner down through the general contractor to the subcontractor, as well as flowing from the subcontractor up through the general contractor to the owner." *United Tunneling v. Havens Constr. Co.,* 35 F.Supp.2d 789, 795 (D. Kan. 1998). Flow down clauses commonly "flow down" limitation of liability provisions, or other similar types of limitation provisions, to subcontractors on a construction project. 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."); *Indus. Indem. Co. v. Wick Constr. Co.,* 680 P.2d 1100, 1104 (Alaska 1984) (holding limitation of liability clause in prime contract was incorporated into subcontract through flow down clause to protect the subcontractor from liability for actual damages incurred by the general contractor); *Plum Creek Wastewater Auth. v. Aqua-Aerobic Sys., Inc.,* 597 F.Supp.2d 1228, 1234 (D. Colo. 2009) (holding flow down provision in prime contract coupled with incorporation

provision of subcontract bound subcontractor to forum selection clause in the prime contract).

New Mexico courts have enforced similar provisions in construction contracts limiting liability of sub-consultants to available insurance proceeds. See *New Mexico State Univ. v. Siplast, Inc.*, 1994-NMSC-065, 877 P.2d at 42. *Siplast* involved a construction project where a university entered into an agreement with a general contractor, which contained a waiver of rights for all damages "to the extent covered by Insurance obtained.'" *Siplast, Inc.,* 877 P.2d at 40. The general contractor then entered into a subcontract with Siplast to provide roofing materials. *Id.* When a fire damaged the property, the university and its insurer sued the general contractor and Siplast for negligently causing the fire. The court dismissed the university's claims finding that "the owner and the contractor waived their rights for damages covered by the property insurance, except rights to proceeds." *Id.* at 42.

As in *Siplast*, Centex required Worthgroup to obtain the $3 million Project E & O Policy and agreed to limit any damages resulting from the design work of Worthgroup and its design subcontractors such as Terracon to the proceeds of that policy. The flow down provision of the Architect Agreement permits Worthgroup and Terracon to enforce the limitation of liability to the insurance proceeds. The district court properly interpreted these contracts to bar Centex from recovering

any additional damages from Worthgroup or Terracon. Accordingly, summary judgment should be affirmed.

C. Centex's Arguments that the Flow Down Provision did not Include the Limitation of Liability Provision are Without Merit

The district court properly determined that the flow down provision of the Architect Agreement included the limitation of liability provision. Centex tries unsuccessfully, by way of new arguments on appeal, to carve some exceptions into the flow down provision. Centex cannot do so.

First, Centex waived any argument that the "flow down" provision only incorporated limited terms from the Design Build Agreement by failing to raise such argument in the district court. *Spectron Dev. Lab.*, 1997-NMCA-025, ¶¶ 29-32, 123 N.M. 170, 936 P.2d 852 (arguments not presented to district court on motion for summary judgment are waived for purposes of appeal). Centex did not cite any of the authorities upon which it now relies in its summary judgment briefing in the district court. **[BIC 18]**. It should not be permitted to raise new issues, supported by new authorities, on appeal.

Second, Centex grossly distorts the holding in *Hasse Contracting Co.*, 1998 NMCA-038, ¶¶ 5, 27, as the court held the exact opposite of what Centex contends. Contrary to Centex's representation, *Hasse* held that the flow down provision at issue:

> **...does generally incorporate the terms of the contract between the owner (the State) and the general contractor (Corn Construction) to the Purchase Order**.

Id. (emphasis added). Nowhere in the decision did the court determine that the flow down provision was limited as Centex contends. Thus, *Hasse* provides no support for Centex here.

Third, the other new authorities upon which Centex relies for these arguments are inapposite, as they found the contracts at issue were ambiguous as to the meaning of the flow down provision. *See Quality Trust, Inc.*, 486 F. Supp. 2d at 1255; *Tribble & Stephens Co. v. RGM Constr., L.P.*, 154 S.W.3d 639 (Tex. Ct. App. 2004). Here, the parties agreed below that the Design/Build Agreement and the Architect Agreement are clear and unambiguous. Even if applicable, these decisions merely determined the "flow down" provisions at issue in those cases were confined to those provisions that related to the scope of services provided by the subcontractor. Here, the limitation of liability provision directly related to the design services provided by Worthgroup and its design consultants and is confined to the $3 million errors and omissions policy covering that design work. Thus, even if these new non-binding authorities were considered, the limitation of liability provision still flows down to the Architect Agreement, which included Terracon's services.

D. Centex's Arguments that the Limitation of Liability Clause is Inconsistent with the Indemnity Provisions are Without Merit

Contrary to Centex's arguments, the indemnity provisions do not trump the limitation of liability provision in the Architect Agreement. These provisions are not mutually exclusive, but can easily be read consistently together. The indemnity provisions obligate Worthgroup to indemnify Centex for any damages Centex incurs as a result of errors in the design work performed by Worthgroup. That indemnity obligation, however, is capped by the limitation of liability provision, whereby Centex agreed to limit any recovery for design-related defects to the proceeds of the $3 million Project E & O Policy covering design work. Reading the indemnity provisions in a complementary fashion with the limitation of liability provision gives force and effect to both provisions. Conversely, Centex's proposed interpretation focuses solely on the indemnity provision and reads the limitation of liability provision completely out of the parties' contract. Because Centex's reading of these contract provisions eviscerates an essential term of the contracts and renders the limitation of liability provision meaningless, that interpretation should be rejected. *Nearburg*, 1997-NMCA-069, ¶23.

Furthermore, there is no admissible evidence in the record that Centex incurred damages greater than the $3 million it has already been reimbursed for by Lexington to remedy the MSE Wall. *Dow*, 1986-NMSC-084, 105 N.M. at 54-55

("A party may not simply argue such facts might exist, nor may it rest upon the allegations of the Complaint.").

Similarly, there is no conflict between the indemnity provision in the Design/Build Agreement and the limitation of liability clause. In fact, the indemnity provision specifically references the limitation of liability clause and limits Centex's indemnification obligations to the Owner for design defects to the recovery available under the limitation of liability clause. **[RP 858]**. Thus, according to the plain wording of the indemnity provision, Centex had no obligation to indemnify the Owner for design defect damages over and above the $3 million available insurance proceeds. *United Nuclear Co.,* 2011-NMCA-039, ¶11. The indemnification provision in the Design/Build Agreement is clearly in accord with the parties' agreement that Centex's liability to the Owner for any and design errors was limited to the proceeds of the Project E & O Policy. All of these terms flowed down into the Architect Agreement, similarly capping Worthgroup's and Terracon's liability to Centex for design errors to that insurance policy.

Centex's new argument on appeal regarding "reciprocal" indemnity obligations is improper and must be disregarded, as Centex did not make this argument below. *Spectron Dev. Lab.,* 1997-NMCA-025, at ¶¶ 29-32 (party precluded from asserting arguments on appeal which were waived in the district court). Regardless, Centex cites no authority for this argument and there is no

legal or factual basis precluding inconsistent indemnity obligations between construction and design services under the contracts. See *K.R. Swerdfeger Constr. v. Board of Regents, Univ. of New Mexico*, 2006-NMCA-117, ¶ 23, 140 N.M. 374, 142 P.3d 962 (agreements are enforceable unless they are clearly contrary to what the legislature or judicial decision has declared to be public policy). Parties may freely negotiate and limit risk for certain types of services differently than risk related to other types of services. Accordingly, the grant of summary judgment should be affirmed.

E. Centex's Arguments that the Limitation of Liability Provision Applies to Proceeds from Other Insurance Policies are Without Merit

As a last-ditch effort to avoid the clear and unambiguous language of the limitation of liability provision, Centex ignores the language specifically defining the insurance policy to which the limitation applies and spuriously argues that policy is simply a "floor" that does not bar Centex from pursuing damages that might be covered by other policies. This argument fails for myriad reasons.

First, Terracon was not required to purchase professional liability insurance under the limitation of liability provision, nor is Terracon's insurance to be taken into consideration for purposes of the cap on liability. The limitation of liability provision clearly specifies that the design "Subcontractor(s)" is to obtain the $3 million Project E & O Policy to cover any design errors. "Subcontractor" is a

defined term and means those parties in direct privity with Centex. **[RP 853]**. Because the Architect Agreement does not define the term "Subcontractors," it incorporates the definition of the Design/Build Agreement. **[RP 889 § 1.1.8]**. Worthgroup is Centex's design "Subcontractor" on this Project. Terracon is not a Subcontractor of Centex, as Terracon is not in direct privity with Centex. **[RP 853]**. Thus, the limitation of liability provision only required Worthgroup to purchase the errors and omissions policy to cover design errors. *Espinosa*, 2006-NMCA-075, ¶¶10-11 (an unambiguous contract must be construed consistently in accordance with its plain language).

Second, the only insurance policy identified in the limitation of liability clause is the $3 million Project E & O Policy to be obtained by Worthgroup and limits liability for design errors to that policy. The fact that Worthgroup may have been required to obtain a completely different insurance policy to provide excess insurance under the Architect Agreement—in addition to the $3 million Project E & O Policy—does not alter the result. Centex cannot alter the terms of the limitation of liability provision by arguments of counsel on appeal. *Nearburg*, 1997-NMCA-069, ¶23 (a court cannot change contract language for the benefit of one party and to the detriment of another).

Third, the limitation of liability clause specifically limits potential liability for design errors on the Project to "whatever sums Owner is able to collect from

the above described professional errors and omissions insurance carrier."

Centex's arguments about Worthgroup's excess insurance policy are nothing more than a red herring because the only insurance policy triggering the cap on damages is the $3 million Project E & O Policy. That is the only policy identified in the limitation of liability clause. Thus, the existence of any other insurance policies is irrelevant to the limitation of liability provision. Moreover, Centex never submitted any other insurance policies to the district court, and there is no evidence in the record that such a policy would provide coverage for this claim. *Rangel v. Save Mart, Inc.*, 2006-NMCA-120, ¶ 36, 140 N.M. 395, 142 P.3d 983 (it is the appellant's obligation to make sure the record is complete, and documents not part of the record will not be considered on appeal); *Luxton v. Luxton*, 1982-NSMC-087, 98 N.M. 276, 278, 648 P.2d 315 ("When the record is deficient, we indulge every presumption in support of the correctness of the trial court's decision.").

Similarly, the prefatory "In addition to all other insurance requirements set forth in this Agreement" language in the Design/Build Agreement does not impact the operative language of the limitation of liability provision. This language does not conflict with or enlarge the limitation of liability for any "errors or omissions in the design of the project" to the Project E & O Policy. It simply acknowledges that Centex had other insurance requirements to provide coverage for non-design

related claims, such as personal injury and/or property damage unrelated to the Work. **[RP 854-858 § VIII]**.

Once again, Centex never argued below that any of the other insurance requirements in the Design/Build Agreement covered this claim, nor did it provide the policies to the district court for a coverage determination. To the contrary, Centex admitted that its claims against Worthgroup and Terracon fall outside of these other insurance coverages: "This case is about damage to the Work itself before the project was complete...[i]n fact, there is no damage to persons or property other than to the work being alleged in this case." **[RP 931]**. Centex cannot take a contrary position on appeal. See *County of Los Alamos*, 2011-NMCA-027, ¶ 16 (facts stipulated to are not reviewable on appeal).

F. Centex's Argument that it Did Not Receive Payment under the Project E & O Policy for Design Errors is Without Merit

Centex's final argument on appeal is that the limitation of liability provision should not be enforced because Lexington paid the $3 million insurance proceeds under the Project E & O Policy in connection with **Centex's** negligence-not the alleged negligence of Worthgroup or its subcontracts. This argument is also unavailing because the limitation of liability provision expressly limits recovery to the amounts available under the professional errors and omissions policy **without regard to the specific reasons why the limits were paid**. It is undisputed that the $3 million Project E & O Policy insured both Worthgroup and Centex.

Worthgroup was a named insured under that policy and had up to $3 million in coverage for claims arising out of Worthgroup's professional design services on the Project as required by the Design/Build Agreement. It is further undisputed that claims of professional negligence against Worthgroup arising out of alleged design defects were tendered to Lexington Insurance Company. Lexington paid the entire $3 million policy limits to Centex to compensate it for alleged defects in the MSE Wall.

The fact that the liability insurance may also have been applicable to Centex's professional services, or that some portion of the payment made was attributed to its negligent services, is of no import and is irrelevant to whether or not Centex damages were capped.[4] There is no language in the limitation of liability provision that makes its enforcement contingent on the specific reasons why the proceeds were paid, and Centex cannot insert such language into the parties' agreement on appeal. *WXI/Z Southwest Malls v. Mueller*, 2005-NMCA-046, ¶11 (courts "may not rewrite obligations that the parties have freely bargained for themselves[.]"). Therefore, summary judgment should be affirmed.

CONCLUSION

For these reasons, grant of summary judgment should be affirmed.

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[4] Centex's argument that the $3 million was paid for its negligence is an admission that its negligence caused a minimum of $3 million in damage to the MSE Wall.

Dated: November 18, 2013

Respectfully Submitted,

SUTIN THAYER & BROWNE
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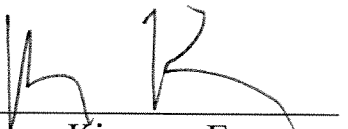
By 
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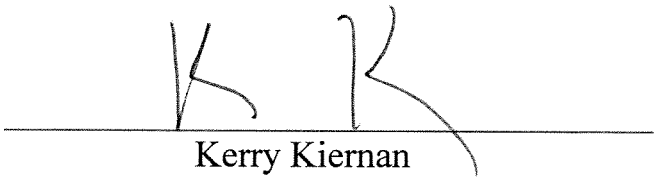
STATEMENT OF COMPLIANCE WITH RULE 12-213(F) NMRA

Undersigned counsel certifies that the body of this Answer Brief has a total of 9,787 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, postage prepaid, to all parties entitled to service of same, as required by Rule 12-202 NMRA, and addressed as follows on the 18th of November, 2013:

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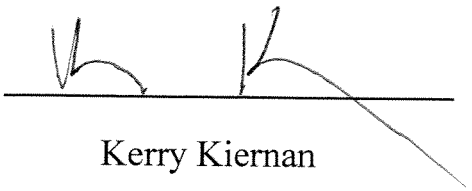

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