HARVEST RESTAURANT GROUP, LLC; CHESTER GRABOWSKI; and ROBERT J. MOORE, Plaintiffs, vs. THOMAS P. ADACH; TECHTON, LLC: STRUCTURAL WORKSHOPS, LLC and JOSEPH DIPOMPEO Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003929-24 CIVIL ACTION On Appeal From: SUPERIOR COURT OF NEW JERSEY MORRIS COUNTY: LAW DIVISION DOCKET NO. MRS-L-002542-19
STRUCTURAL WORKSHOPS, LLC, JOSEPH DIPOMPEO, THOMAS P. ADACH, and TECHTON, LLC Third-Party Plaintiffs, vs. KRZAK CONSTRUCTION, Third-Party Defendant	SAT BELOW: Hon. Louis S. Sceusi, J.S.C. (retired T/A on recall) Hon. Jonathan W. Romankow, J.S.C.

BRIEF OF PLAINTIFFS-APPELLANTS HARVEST RESTAURANT GROUP, LLC; CHESTER GRABOWSKI; AND ROBERT J. MOORE

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(R. 2:6-8)

PREFATORY STATEMENT

In or about 2014, Plaintiff Harvest Restaurant Group ("Harvest") entered into a lease to rent property located at in Westfield, the purpose of which was to renovate the property and build an addition in order to operate a restaurant known as Addams Tavern. The project was substantial, with costs exceeding $1 million. In October 2014, Harvest retained Defendants Structural Workshop LLC and Joseph DiPomepeo (the "SW Defendants") to create the structural design drawings for the project. The SW Defendants' contract contained limitation of liability and waiver of consequential damages provisions, which capped the SW Defendants' liability to $50,000. The project was completed in 2016 and the restaurant opened for business.

In August 2016, the landlord, Tarta Luna LLC, filed suit against Harvest alleging that the construction crated an unsafe condition. The landlord submitted an expert report which concluded that the SW Defendants' structural design was flawed because the wrong building code was used, which did not take into account the increased loads created by the addition to the building. The Trial Court thereafter retained its own expert engineer who agreed that the SW Defendants had used the wrong building code and resulted in an inadequate design plan. Thereafter, the Court held a plenary hearing where the SW Defendants testified on Plaintiffs' behalf.

Following the hearing, Judge DuPuis's issued a detailed opinion that held "[b]ased upon the testimony provided, the court is convinced there is an immediate

safety risk to the general public" caused by the SW Defendants' use an incorrect building code and improper weight load measurements. All the engineers, including the Court appointed expert (other than Mr. DiPompeo), opined that the SW Defendants' conduct deviated from acceptable engineering standards and caused the risk to the general public. Plaintiffs were forced close the restaurant, renovate using the correct building code, and were damaged by the additional renovation costs and one year of lost profits, which resulted in the filing of this litigation.

New Jersey public policy requires the invalidation of a limitation of liability provision where the protected party's conduct creates a public safety danger and/or where the protected party is a licensed professional who breached their professional standards. Given the importance of the limitation of liability provision, both parties filed multiple motions for partial summary judgment to determine whether the provision is enforceable. On February 12, 2025, Judge Sceusi, J.S.C. issued a decision that held that the SW Defendants' limitation of liability provision was enforceable, reasoning that because Plaintiffs were allegedly sophisticated businessmen and the $50,000 cap was sufficient to compel performance in light of the $9,500 fee paid by to the SW Defendants.

Plaintiffs sought reconsideration because Judge Sceusi's decision did not include any analysis of the public policy exceptions argued in their briefs and rendered his decision without oral argument, despite the parties request for such

argument. Specifically, Plaintiffs argued that Judge Sceusi did not address the arguments that such a provision cannot be enforced where (i) a party's conduct creates a public safety danger or (ii) where the party is a licensed professional with a duty of care owed to the public and deviates from the acceptable standards of that profession. Nevertheless, on April 16, 2025, Judge Sceusi denied Plaintiffs' motion for reconsideration the same reasons provided in his earlier decision.

The underlying decisions by Hon. Louis Sceusi, J.S.C. ignores this public policy and is relies on an improperly narrow and conflated interpretation of the law governing limitation of liability provisions. Judge DuPuis' decision made clear that the SW Defendants conduct here fits squarely within both public policy exceptions and thus, Judge Sceusi erred in failing to follow binding precedent, including from Hubner v. Spring Valley Equestrian Ctr., 203 N.J. 184, 191 (2010); Marcinczyk v. State of New Jersey Police Training Comm'n, 203 N.J. 586, 594 (2010); Wilson ex rel. Manzano v. City of Jersey City, 209 N.J. 558, 581 (2012); and Lucier v. Williams, 366 N.J. Super. 485, 495 (App. Div. 2004). If New Jersey's public policy for the invalidation of a limitation of liability provision where the protected party's conduct created a public safety danger has any merits or meaning then it must apply here.

PROCEDURAL HISTORY

Plaintiffs filed their Complaint on December 3, 2019. Pa0001. The SW Defendants filed their Answer on January 2, 2020. Pa0062. SW filed a motion for partial Summary Judgment on December 22, 2020. Pa0078. By Order dated February 19, 2021, the motion was denied without prejudice. Pa0082. SW filed a motion for reconsideration on March 3, 2021. Pa0085. By Order dated April 1, 2021, SW's motion for reconsideration was denied. Pa0089. On April 27, 2021, the SW Defendants filed a Notice of Motion for Leave to Appeal the Order denying Summary Judgment. Pa0092. By Order dated May 24, 2021, the motion for leave to appeal was denied. Pa0094. After completion of substantial discovery, on January 16, 2023, the SW Defendants refiled its Motion for Partial Summary Judgment. Pa0095. By Order dated February 3, 2023, the motion for partial summary judgement was denied. Pa0099 On March 28, 2023, the SW Defendants filed another motion for leave to appeal. Pa0102.

Following the completion of expert discovery, on November 1, 2024, Plaintiffs filed a motion for partial summary judgment seeking to invalidate the SW Defendants' limitation of liability provision as violative of New Jersey public policy. Pa0105. On November 7, 2024, the SW Defendants filed their own motion for partial summary judgment seeking an order declaring that its limitation of liability provision is enforceable. Pa0978.

On February 12, 2025, Hon. Louis S. Sceusi, J.S.C. (retired T/A on recall), without having heard oral argument, issued an order and statement of reasons (i) denying Plaintiffs' motion for partial summary judgment and (ii) granting the SW Defendants' motion for partial summary judgment. Pa1041. As it relates to the limitation of liability provision at issue in this motion for leave, Judge Sceusi held as follows:

> The damages are not so minimal compared with the expected compensation. The SW Defendants' liability was to be capped at $50,000 and they were to be compensated $9,500 for their services. The contract limited their liability to more than five (5) times their expected compensation. These facts align with the cases which upheld the limitation of liability clauses. Compare Marbro, 297 N.J. Super. at 417-18 (upholding limitation of liability clause where liability was the "total fee for services rendered under the construction contract"); and Valhal Corp. v. Sullivan Associates, Inc., 44 F.3d 195 (3d Cir. 1995) (upholding limitation of liability clause where liability was seven (7) times the amount due on the contract); with Lucier v. Williams, 366 N.J. Super. 485, 493 (App. Div. 2004) (rejecting the limitation of liability clause as unconscionable where the cap on liability was one-half of the expected compensation, there were no negotiations leading up to the contract's preparation, and the bargaining position between the parties was grossly disparate) (relying heavily on the standards set in Marbro and Valhal).
>
> Though their liability may be limited, it is still worth more than five (5) times their expected compensation on the contract. For this reason alone, the clause is not tantamount to an exculpation clause. For the same reason, the Court finds that the limitation of liability clause was not sufficient to disincentivize the SW Defendants from acting diligently.

Pa1052.

On February 25, 2025, Plaintiffs filed a motion for reconsideration of the Court's February 12, 2025 order and statement of reasons (the "SJ Decision"). Pa1055. In its motion, Plaintiffs argued that reconsideration was warranted because (i) the Court failed to hear oral argument, which Plaintiff was entitled to as of right and (ii) the Court's February 12, 2025 order and statement of reasons did not consider two public policy arguments raised by Plaintiff, which were (a) that the creation of a public safety danger warrants the invalidation of a limitation of liability provision and (b) licensed professionals in New Jersey cannot limit their liability when their actions deviated from the acceptable standard of care for such professionals.

On April 11, 2025, the Court heard oral argument for Plaintiffs' motion for reconsideration, as well as for all issues raised by the underlying motions for partial summary judgment. Pa1079. Thereafter, on April 16, 2025, the Court issued an order and statement of reasons denying Plaintiffs' motion for reconsideration (the "Reconsideration Decision"). Pa1079. In its decision, the Court rejected Plaintiffs' arguments and held that neither the public safety exception nor the professional negligence exception to the enforcement of limited liability provisions applied to the facts of this case. Pa1087-1090.

On May 1, 2025, Plaintiffs filed a motion for leave to appeal the SJ Decision and the Reconsideration Decision. Pa1091. On May 27, 2025, this Court denied

Plaintiffs' motion for leave, holding that "Movant has not demonstrated sufficient justification to overcome the strong policies disfavoring piecemeal review of litigation." Pa1095 (citation omitted). Thereafter, on August 4, 2025, the parties appeared before the Hon. Jonathan Romankow for trial. At that appearance the parties entered into an Order of Final Judgment Upon Consent Pursuant to R. 4:42-2 and R. 2:2-3. Pa1097. Specifically, the order provides as follows:

1. Judgment shall be and is hereby entered against defendants/third-party plaintiffs Structural Workshop, LLC and Joseph DiPompeo and in favor of plaintiffs' claims against them in the amount of $50,000.00.

2. Judgment shall be and is hereby entered against third-party defendants Krzak Construction, and in favor of defendants/third-party plaintiffs Structural Workshop, LLC and Joseph DiPompeo's claims against them in the amount of $15,000.00.

3. Subject to Paragraph 5 below, Structural Workshop LLC's February 18, 2025 Offer of Judgment is withdrawn.

4. The interlocutory orders of The Hon. Louis S. Sceusi, J.S.C. Retired T/A on Recall, for partial summary judgment dated February 12, 2025, and motion for reconsideration dated April 16, 2025, with respect to the enforcement of the limitation of liability clause (the "Limitation of Liability Orders") are preserved for appeal by plaintiffs Harvest Restaurants Group, LLC Chester Grabowski and Robert J. Moore, as an appeal as of right from a final judgment of the Superior Court Trial Division pursuant to the Rules Governing Appellate Practice in the Supreme Court and the Appellate Division of the Superior Court (See Whitfield v. Bonanno Real Estate Grp., 419 N.J. Super. 547 (App. Div. 2011), R. 2:2-3 (Comment 2.2.3) and R. 4:42-2 (comment 2)).

5. In the event the Limitation of Liability Orders are reversed on appeal, this Order Of Final Judgment Upon Consent shall be vacated, Defendant Structural Workshops LLC's February 18, 2025 Offer of

> Judgment shall be reinstated, and the matter will proceed to trial for a determination by jury on liability and damages as directed by the Appellate Division.

Pa1097.

STATEMENT OF FACTS

On or about October 15, 2003, Harvest entered into a 20-year lease agreement with Tarta Luna, LLC ("Tarta Luna") to rent its premises at 115 Elm Street, Westfield, New Jersey (the "Premises") to operate a restaurant on the premises to be known as "C. Adams Tavern." (Pa0002 at ¶¶5-6). The building at 115 Elm St. was originally built in 1905 and the neighboring building (125 Elm St.) was built in 1900, with the properties sharing a wall. (Pa0549). To renovate the Premises, on or about June 4, 2014, Harvest entered an agreement the architecture firm Techton. (Pa0002 at ¶7). In addition, on or about September 29, 2014, Harvest entered into an Agreement with SW to provide engineering services for the project. (Pa0002 at¶8). In October 2014, Westfield granted preliminary and final major site approval to Harvest and in February 2015, Harvest began construction on the Project. (Pa0029). Construction was completed by November 2016, when a certificate of occupancy was issued by Westfield. (Pa0029).

DiPompeo was the engineer of record for the reconstruction project and the additional work at 115 Elm. St. (Pa0554). DiPompeo's responsibilities included creating the structural design drawings for the project, which was permitted under

IBC 2009 New Jersey Edition and the Rehabilitation Subcode NJA 5:23-6. (Pa0554). The architectural drawings identified the project as one for "Rehabilitation and addition", and according to the Rehabilitation Subcode, "[w]here a project is a reconstruction project, which includes repair, renovation, or alteration work, then the work in each such category shall comply with the requirements for that category of work." (Pa 0554-555). Because some building elements were to remain, and some were new, this project appeared to fall under varying categories under the Rehabilitation Subcode, defining it as a reconstruction project with elements as an addition project, which thus subjected it to the current building code (IBC 2009 Edition). (Pa0555). As Harvest's expert, Tara Pase explains:

> Based on the increase in height from 22.55' to 35.79' by removing the flat roof and building up a new gabled roof structure, the structural elements of the existing building qualify it as an addition and calculations verifying the existing structural elements should have been performed by the engineer of record, Mr. DiPompeo. The change of height and roof structure also significantly increases the wind forces on the main wind force resisting system of the building, which should have been analyzed to the wind pressure standards associated with the 2009 IBC and ASCE 7-05, and drastically changes the seismic load and dynamic building response which should have likewise been analyzed for the entire building. Based on the evidence reviewed, Mr. DiPompeo did not do an analysis of the entire building lateral system, but instead calculated shear on only three shear walls of the rear addition of the building for a simplistic, localized analysis; additionally, he did not account for torsional effects in his analysis.

(Pa0555).

On August 17, 2016, Tarta Luna filed a complaint and order to show cause seeking to prevent the opening of the restaurant, alleging that the construction created an unsafe condition. (Pa0029). Initially, the Court permitted the restaurant to open on November 10, 2016. (Pa0029). Thereafter, the Court appointed a neutral expert, Warren Pro, to opine on the safety of the construction. (Pa0549). Warren Pro's report, dated August 22, 2017, concluded in part that the addition to the building was not code compliant and had structural deficiencies, particularly with respect to the later stability of the property. (Pa0549). The Trial Court also heard testimony from Glenn Kustera (Warren Pro), Anthony Pagnotta and George Sincox (retained by Tarta Luna), as well as DiPompeo and Richard Christie (on behalf of Harvest). (Pa 0549). The report by WarrenPro (dated August 22, 2017) opined that Mr. DiPompeo's design was "not code compliant and has potentially serious structural deficiencies particularly with regard to the lateral stability of the building." WarrenPro's investigation found that the addition increased the design load greater than 5%. (Pa0555-556).

Following the submission of the various expert reports and plenary hearing with testimony, in a written decision dated December 12, 2017, Judge DuPuis held, among other things:

> It was [Mr. DiPompeo's] decision that the new code would not apply despite the 5% increase in loads, the 20% increase in mass and the fact that the building was unoccupied during construction. All of these

factors would mandate the use of the new code. [Mr. DiPompeo] offered no satisfactory explanation for how one could separate out the "old" and the "new" buildings given the fact that they form one contiguous whole. Admittedly, Harvest's architect and the Township building official seemed to concur in this incorrect judgment. While [Mr. DiPompeo] noted gravity loads from the front were transferred to the right and left sides of the building, [Mr. DiPompeo] offered no measurements in support thereof. No measurements were offered in support of [Mr. DiPompeo's] belief that the lintels carried the load from above the window to the sides of the windows via a bond beam. [Mr. DiPompeo] also testified that the lintels over the windows in the alley wall transferred the gravity load but offered no measurements to support his position. [Mr. DiPompeo] also admitted he did not do measurements for seismic forces such as wind and exterior and interior walls because he did not believe he needed to do them.

When deficiencies were first noted, [Mr. DiPompeo] wrote a letter saying a new independent structured wall would be constructed. In fact, the furring wall noted in the original plans was transformed into a load bearing wall. This was done by securing burn clips with tapcon screws into the terra cotta shared wall. There appears to be no thought given to the fact that it was a joint wall and such construction would affect fire safety. Shortly thereafter the nuts were ordered to be removed by Harvest experts. In fact they were not all removed. The bolts are still attached to the wall. Mr. Di Pompeo did not convince the court that these measures were safe. Mr. Di Pompeo also agreed the three lintels should not have been attached to the terra cotta wall. Mr., Di Pompeo did prepare measurements on October 14, 2016. However, there was no testimony as to the precise measurements made, only the conclusion [Mr. DiPompeo] reached was provided to the court.

[Mr. DiPompeo's] credibility was also harmed by the fact that he permitted the drawings to be submitted with "boilerplate calculations with notations such as "XXPSF." These omitted specifics had to do with the wind load on the interior and exterior walls and the deflection limit of the roof, tile floor and wood floor. [Mr. DiPompeo] admit[ted] he did not do much of the calculations and while he did do some, they were not submitted to the town. The entire procedure appears somewhat haphazard and causes the court to question the support for his opinions.

> [Mr. DiPompeo's], of course, has a bias towards his employer and in causing as little harm to Harvest as possible.

(Pa0055-56).

Specifically, the Court in the Tarta Luna Order held that "[b]ased upon the testimony provided, the court is convinced there is an **immediate safety risk to the general public and the employees of 115 Elm Street**." (Pa00056) (Emphasis added). In addition, the Court concluded in the Tarta Luna Order that "[t]he court finds there is a substantial likelihood of damage to the building and **public safety** which cannot be addressed by monetary damages." (Pa0057) (Emphasis added). Finally, in balancing the hardships, the Court in the Tarta Luna Order concluded that "public safety is of upmost importance and causes the balance of hardships to weigh in the favor of Plaintiff." (Pa0057).

Based on the Tarta Luna Order's findings of fact and conclusions of law, Judge DuPuis ordered that beginning on December 15, 2017, Addams Tavern was to be closed and "shall not open without further court order." (Pa0057; see also Pa0003 at ¶17). Pursuant to the Court's decision, the restaurant, which had been opened for business as of November 10, 2016, shut down on December 15, 2017 and did not reopen until December 13, 2018. (Pa0003 at ¶18).

ARGUMENT

I. THIS MATTER IS RIPE FOR FINAL APPEAL

This matter was scheduled for trial on August 4, 2025. (Pa1097). However, at the trial call, the parties entered into a Final Consent Judgment, So Ordered by Judge Romankow. (Pa1097). Under applicable New Jersey law and the express terms of the Final Consent Judgment, this matter is deemed final such that this appeal may be presented to the Court.

While an "order . . . consented to by the attorneys for each party . . . is . . . not appealable" Winberry v. Salisbury, 5 N.J. 240, 255, 74 A.2d 406 (1950), cert. denied, 340 U.S. 877, 71 S.Ct. 123, 95 L.Ed. 638 (1950), that general rule does not apply to Final Consent Judgments as in this matter. Specifically, there is, however, an exception to this general rule against appealability where parties to a consent judgment reserve the right to appeal an interlocutory order "by providing that the judgment would be vacated if the interlocutory order were reversed on appeal[.]" Janicky v. Point Bay Fuel, Inc., 410 N.J. Super. 203, 207 (App. Div. 2009); see also Mt. Hope Dev. Assocs. v. Mt. Hope Waterpower Project, L.P., 154 N.J. 141, 149, 712 A.2d 180 (1998); Capital Fin. Co. of Del. Valley v. Asterbadi, 398 N.J. Super. 299, 307, 942 A.2d 21 (App.Div.), certif. denied, 195 N.J. 521, 950 A.2d 907 (2008); Arias v. Figueroa, 395 N.J. Super. 623, 627, 930 A.2d 472 (App. Div.), certif. denied, 193 N.J. 223, 936 A.2d 969 (2007); Pressler, Current N.J. Court Rules, comment

2.2.3 on R. 2:2-3 (2010) ("If, however, the consent judgment reserves a single issue for appeal, the settlement of all other issues will not preclude appeal of the trial court's order on the reserved issue.").

In N.J. Sch. Constr. Corp. v. Lopez, 412 N.J. Super. 298 (App. Div. 2010), this Court upheld a consent judgment as appealable under similar circumstances because "[i]f the final Appellate Court to hear the appeal reverses, modifies or otherwise disturbs the order denying summary judgment, th[e] stipulated settlement that [was] part of the consent judgment [would be] vacated. . . . And [TWF] would not be obligated to carry out the terms of the settlement." The same logic must apply to this appeal. As such, this appeal should be deemed an appeal of a final judgment or order.

II. STANDARD OF APPELLATE REVIEW

An appeal of orders granting summary judgment are reviewed de novo. Davis v. Devereux Found., 209 N.J. 269, 286 (2012).

III. THE TRIAL COURT ERRED BY RULING THAT THE SW DEFENDANTS' LIMITATION OF LIABILITY PROVISION IS ENFORCEABLE (Raised Below at Pa1041, Pa1079)

In the decisions below, the Trial Court relied on an outdated law division decision, (Marbro v. Borough of Tinton Falls, 297 N.J. Super 411 (Law. Div. 1996)),

which itself relies on a case based on Pennsylvania law. See Valhal, 44 F. 3d 195).[1] To support its contention that the limitation of liability provision is not enforceable, it is respectfully submitted that this Court's decision in Lucier[2] changed the framework of a Court's analysis of a limitation of liability provision, as Judge Kennedy explained in the unpublished case of West Essex v. Construction Design Technologies, N.J. Super., ESX-L-10272-07 (Law Div. 2009) (Pa0778).

Thus, based on this changed legal landscape, the two issues presented by this appeal are as follows: First, how does the public safety exception apply in cases between private commercial parties where one party's conduct creates a public safety danger? Second, what is the scope of the professional negligence exception for these limitation of liability clauses where the factual record supports the professional's deviation from the acceptable standard of care?

Under New Jersey law, it is well-established that exculpatory contracts (including limitation of liability clauses) will not be enforced where they are contrary to public policy. Marcinczyk, 203 N.J. at 594. Under New Jersey law, "[a]n agreement is against public policy if it is injurious to the interest of the public,

[1] We contend that Marbro and Valhal are outdated cases that no longer reflect the standard of the law and were decided under Pennsylvania law. Moreover, in Valhal, the court noted that Pennsylvania does not have a general policy disfavoring limitation of liability clauses and, unlike New Jersey, does not impose any special duties on licensed professionals to protect the general public. Valhal, 44 F.3d at 202, 207.

[2] Lucier is the only published Appellate Division case controlling this issue.

contravenes some established interest of society, violates some public statute, is against good morals, tends to interfere with the public welfare or safety, or ... is at war with the interests of society and is in conflict with public morals." Id. (quoting Frank Briscoe Co. v. Travelers Indem. Co., 65 F.Supp.2d 285, 312 (D.N.J.1999)); see also Lucier, 366 N.J. Super. at 491.

Under New Jersey law, there are at least four different public policy exceptions to a limitation of liability provisions:

- New Jersey will invalidate exculpatory clause if injurious to the interest of the public or violates public statutes. Marcinczyk, 203 N.J. at 580.
- New Jersey Courts will not permit parties to contractually avoid liability where the party acts with negligent disregard or willful and wanton disregard that endangers the members of the public. Hubner, 203 N.J. at 184.
- Limitations of liability clauses are particularly disfavored with regard to professional services where people rely upon professional services provided for specialized knowledge. Lucier, 386 N.J. Super. at 485.
- New Jesey looks to express statements of public policy such as legislation. Id.; see also Stelluti v. Casapenn Enters, 408 N.J. Super. 435, 454 (App. Div. 2009).

In the SJ Decision, the Court did not address any of these public policy exceptions as the basis for its decision, instead looking only at the bargaining power of Plaintiffs vis-à-vis the SW Defendants and whether the $50,000 cap was sufficient in light of the fee paid to the SW Defendants. Pa1041. When the above public policy arguments were raised in Plaintiffs' reconsideration motion, the Court rejected

Plaintiffs arguments based on a fundamental misunderstanding of applicable law. Specifically, in its Reconsideration Decision, the Trial Court stated as follows:

> The Court is not inclined to invalidate the limitation of liability clause because, even if it considered Judge Dupuis' decision binding on this court, there is insufficient case law to support the findings that (a) the public safety hazard created by the SW Defendants invalidates the limitation of liability provision and/or (b) the SW Defendants deviated from the applicable standards of care such that they should not be entitled to rely on a limitation of liability provision. Simply stated, even viewing the facts in a light most favorable to Plaintiffs, the Court cannot grant the relief they seek because the law does not support it.

(Pa1091).[3]

However, the Trial Court's Reconsideration Decision makes clear that there is binding precedent that directly supports Plaintiffs' position that the limitation of liability provision here is not enforceable. In fact, the majority of Judge Sceusi decision is his effort to distinguish the case law that supports Plaintiffs' arguments. Thus, contrary to Judge Sceusi's opinion that contractual freedom permits parties contract limited risk through a limitation of liability provision, that right is and must be tempered by the establish public policy exceptions that this State has enumerated. As set forth below, based on the binding precedent of this State, each of these public

[3] While the Trial Court felt that the current case law was "insufficient" to invalidate the limitation of liability provision under the facts of this case, Plaintiffs believe the Lucier sufficiently controls.

policies are implicated by the facts of this case and warranted a declaration that the SW Defendants' limitation of liability provision is unenforceable as a matter of law.

A. The Trial Court Erred By Failing To Invalidate The Limitation Of Liability Provision Where The SW Defendants' Conduct Created A Public Safety Danger (Raised Below: Pa1051-1053; Pa1085-1086)

The Reconsideration Decision implores a myopic focus in its analysis of the cases cited by Plaintiff: Hubner, 203 N.J. 184, Marcinczyk, 203 N.J. 586, and Wilson, 209 N.J. 558. However, the Trial Court analysis missed the forest for the trees. Each of the cases cited by Plaintiff stand for the general proposition that party's cannot shield themselves from liability under a limitation of liability provision where their conduct creates a public safety danger.

In distinguishing Hubner, Marcinczyk, and Wilson from the facts present in this case, the Trial Court improperly focused on the three statutes at issues in those case (i.e., the Equine Act, the Tort Claims Act, the Emergency Telecommunications Statute) to determine that because the SW Defendants do not fall within the purview of the statutes in those cases, there is no basis to find its limitation of liability provision violates public policy under the public safety exception. While there is no dispute that these statutes are not implicated by the facts of this case, the Supreme Court's decisions in Hubner, Marcinczyk, and Wilson, were not limited in the manner suggested by the Trial Court. These cases provide the general framework for Courts to determine whether a specific limitation of liability policy can be voided

when public safety is at issue. Moreover, the Trial Court ignores that under N.J.S.A. 45:8-27, an engineer must be licensed to perform professional services; and must meet certain qualifications.

Specifically, the statute provides as follows:

> In order to **safeguard life, health and property, and promote the public welfare**, any person practicing or offering to practice professional engineering or professional land surveying in this State shall hereafter be required to submit evidence that he is qualified so to practice and shall be licensed as hereinafter provided.

(Emphasis added).

As Courts in New Jersey have repeatedly held, where there is a statutory duty to act in a certain way, one cannot limit its liability in the event it breaches such a duty. Chemical Bank of N.J. Nat. Ass'n v. Bailey, 296 N.J. Super. 515, 527 (App. Div. 1997); Lucier, 366 N.J. Super. at 495. Moreover, in Marcinczyk, a statute was central in confirming the public policy, i.e. the Tort Claims Act. In this case, a statute is also central – N.J.S.A. 45:8-27, which governs the licensing of engineers.

For example, Hubner and Wilson provides two examples of when limitation of liability protections (including statutory immunities) can be voided when a party's conduct creates a public safety danger. Thus, the same analytical framework should have been applied to SW Defendants' conduct, which Judge Dupuis held to have created a public safety danger that required an immediate closure of the restaurant.

There fact that the SW Defendants' limitation of liability is found in contract, as opposed to a statute, should have been irrelevant to the Trial Court's analysis. Rather, the import of Hubner and Wilson focus on the effect of the conduct of the party seeking to immunize itself from liability.

Moreover, the Trial Court's analysis of Marcinczyk improperly focused on the specific terms of the SW Defendants' limitation of liability provision when it held that "the contractual provision does not, as written, injure the public" and "[i]n the underlying motion, this Court concluded that the provision is within public policy." (Pa1087). But the Trial Court's analysis misinterprets the Supreme Court's decision in Marcinczyk. The analysis of whether a provision violates public policy is not limited to whether the clause itself injures the public, but also must addressed whether enforcement of such a clause "interfere[s] with the public welfare and safety." 203 N.J. at 594 (quoting Frank Brisco, 65 F. Supp. 2d at 312).

Here, the SW Defendants' limitation of liability interferes with public safety because it effectively immunizes the SW Defendants from the consequences of its errors in limiting its liability to $50,000. By way of example, had the structure of the restaurant failed when it was initially opened and a member of the general public was injured, Plaintiffs would be sued. Under these circumstances, Plaintiff would seek to add the SW Defendants as a third-party defendant. In that scenario, why

should the SW Defendants be able to limit their liability to $50,000 in the case of a bodily injury caused by its negligence?[4]

Moreover, the Trial Court's myopic focus on the statutes cited in Hubner, Marcinczyk, and Wilson, ignored the analytic framework provided by the Supreme Court. The analysis is not focused on a specific statute, but rather, where public policy is invoked to determine whether a limitation of liability clause is enforceable, Courts must look at any legislation and prior decisions to determine the interest of New Jersey. Marcinczyk, 203 N.J. at 594 ("The source of public policy **in this case is a statute** ….") (Emphasis added).

Here, Trial Court's stated that "Plaintiffs do not give any statutory provisions that might apply to Defendants … similar to the ones in the Equine Act" (Pa1087). However, Plaintiff expressly cited N.J.S.A. 45:8-27, as the legislative intent that demonstrates why engineers who endanger public safety should not be entitled to rely on a limitation of liability provision. Specifically, N.J.S.A. 45:8-27provides that "[i]n order to **safeguard life, health and property**, and promote the public welfare, any person practicing or offering to practice professional engineering … shall hereafter be required to submit evidence that he is qualified so to practice and shall

[4] While the SW Defendants may argue that under these facts the injured person may have a claim against them or that any such claim may be subject to an indemnity provision in the parties' contract, what is not in dispute is that the SW Defendants may point to the limitation of liability provision in response to any third-party complaint as outlined above.

be licensed as hereinafter provided." (Emphasis added). However, the Trial Court ignored this statute in its assessment of the public safety exception.

B. The Trial Court Erred By Failing To Invalidate The Limitation Of Liability Provision Where The SW Defendants' Conduct Deviated From The Acceptable Standard Of Care For New Jersey Licensed Engineers (Raised Below: Pa1051-1053; Pa1086-1089)

The second exception proffered by Plaintiffs to the Trial Court was that a limitation of liability provision is unenforceable where a licensed professional acts in a manner that is outside the acceptable professional standards of care. In support of this argument, Plaintiff relied Lucier, 366 N.J. Super. at 495 and the unpublished Law Division opinion in West Essex v. Construction Design Technologies, N.J. Super. ESX-L-10272-07 (Law Div. 2009). The Trial Court, however, committed a reversible error when it rejected the clear law that supports Plaintiffs' argument.

First, the Court improperly focused on the differential between the damages cap of $50,000 and the $9,500 fee paid to the SW Defendants as the basis to find that the cap does not "immunize" the SW Defendants "from liability for their own negligent actions."

Second, the Trial Court wrongly rejected Plaintiffs' argument that Lucier demands that the Court compare the difference between the liability created by the professional as to the cap on damages. Despite the Trial Court acknowledging that Lucier asks that a court "consider the 'disparity between the consequences of negligence between Defendant and the Plaintiff'", the Trial Court was swayed by

the fact that the fact that Lucier cites that older cases of Marbro, 297 N.J. Super. 411 and Valhal, 44 F. 3d 195, which the Court found "compelling."[5] But Lucier citation to these older cases illustrates the opposite: the Court in Lucier cited these older cases as a means to differentiate its decision from the old framework that it was rejecting.

Moreover, the Court's focus on the purported "equal bargaining power" between Plaintiffs and the SW Defendants rejects the holding of Lucier, which finds that licensed professionals and their clients cannot be on equal bargaining power as a matter of law, regardless of whether the client is an individual homeowner, or, as is the case here, an experienced restaurant group. The "bargaining power" analysis considered by the Court is irrelevant to the holding in Lucier as presents a different public policy argument than what Plaintiffs raised. Plaintiff relied on Lucier (and West Essex) for the proposition that even where parties may have equal bargaining or are considered sophisticated, New Jersey public policy will not permit a licensed professional to shield itself from liability or limit its liability when the services provided deviated from the accepted standard of care. In Lucier, the Appellate Division relied on a newly enacted statute concerning home inspector licensing as part of its basis to invalidate the limitation of liability policy. As set forth above,

[5] Valhal was decided under Pennsylvania law, which, unlike New Jersey law, does not impose a special duty on licensed professional to protect the general public. 44 F. 3d at 207.

engineers have a similar licensing requirement, which is done to ensure the general welfare. Similarly, the statute in Lucier required $5 million for insurance coverage, and in this case, the SW Defendants had a $2 million policy.

Third, the Trial Court's focus on whether the limitation of liability clause is an exculpation clause again presents an overly narrow approach. While not binding, the Law Division decision in West Essex v. Construction Design Technologies, N.J. Super., ESX-L-10272-07 (Law Div. 2009) (Pa0778), drafted by former Appellate Division Judge Kennedy (shortly before his ascendance to the Appellate Division), demonstrate how Lucier changed the framework of analysis for limitation of liability provisions concerning a professional's failure to comply with the applicable standard of care. As Judge Kennedy explained in West Essex:

> Citizens who engage the professional services of an architect are at a disadvantage in bargaining power in that they are neither qualified nor capable to evaluate the professional quality of the services they hope to receive. They must necessarily rely on the skills of the architect and the consequences of professional failure can only become apparent after the after the architect's completion plans have been followed by actual construction. At that point, the consumer's damages caused by a faulty architectural design are often far greater than the cost of preparing the plan. Id. at *8-9.

There, like here, the Plaintiff could be viewed as a sophisticated entity who had the ability to review its contract with the architect and engage counsel. However, unlike the Trial Court in this case, Judge Kennedy understood that special position licensed professionals have in this State and the severe consequences that can occur

when they fail to abide by the professional standards required. It is those severe consequences that, for licensed professionals, require that their otherwise enforceable limitation of liability provision be invalidated.

IV. ALTERNATIVELY, THE TRIAL COURT ERRED WHEN IT FAILED TO HOLD THAT MATERIAL QUESTIONS OF FACT CONCERNING THE SW DEFENDANTS' CONDUCT PRECLUDED A GRANTING OF PARTIAL SUMMARY JUDGMENT (RAISED BELOW: PA1089-1090)

While the Trial Court acknowledged in Point III of its Reconsideration Decision that Plaintiffs presented an alternative argument that asserted that questions of material fact existed that precluded summary judgment, the Trial Court did not actually analyze such disputed facts. Instead, the Trial Court conflated all the elements of the enforcement of limitation of liability provision into an question of bargaining power of contracting parties. Such analysis however, was improper and constitutes reversible error.

Specifically, even if the Trial Court were not convinced that the SW Defendants' limitation of liability provision should be invalidated, it was still reversible error to grant the SW Defendants partial summary judgment on this issue where numerous factual disputes existed which are determinative of whether this clause can be enforced. As an initial matter, it is respectfully submitted that whether the $50,000 cap on liability is appropriate is a factual question for the jury. In this case, the SW Defendants were aware that they were being engaged to provide

professional engineering services for the construction of a large restaurant that would, eventually, serve the general public and would costs hundreds of thousands of dollars to build. Reasonable jurors could easily find that under these circumstances, $50,000 was tantamount to an exculpation provision, especially where the SW Defendants were required to obtain insurance to cover such losses and thus were, in effect, only responsible for the insurance premium payments.

Similarly, jurors could disagree as to what size damages cap is sufficient to ensure performance and makes a limitation of liability provision enforceable. Is it $40,000, $50,000 or $200,000? The determination of sufficiency is fact intensive, and includes looking at the scope of the project, the nature of the risk involved, the potential for damages, and the costs that could be incurred in the event that something goes wrong. Each of these factors presented a disputed fact that should have been left for the jury.

Similarly, the SW Defendants disputed whether their conduct caused a public safety danger or constituted professional negligence. With those facts in dispute, at a minimum, Judge Sceusi should have let the jury decide if the SW Defendants created a public safety danger and/or acted negligently such that the limitation of liability provision should be invalidated. Instead, the Trial Court summarily dismissed any of these factual disputes and upheld the provision on extremely narrow grounds.

CONCLUSION

Accordingly, Plaintiffs respectfully request that this Court grant their motion for leave to appeal the Trial Court's granting of partial summary judgment in favor of the SW Defendants.

NAGEL RICE LLP

By: 

DATED: October 6, 2025 Bradley L. Rice

Superior Court of New Jersey

Appellate Division

Docket No. A-003929-24

HARVEST RESTAURANT GROUP, LLC, CHESTER GRABOWSKI and ROBERT J. MOORE, *Plaintiffs,* vs. THOMAS P. ADACH, TECHTON, LLC, STRUCTURAL WORKSHOPS, LLC and JOSEPH DIPOMPEO, *Defendants.* *(For Continuation of Caption See Inside Cover)*	:	CIVIL ACTION ON APPEAL FROM A FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MORRIS COUNTY DOCKET NO. MRS-L-002542-19 Sat Below: HON. LOUIS S. SCEUSI, J.S.C. (retired T/A on recall) HON. JONATHAN W. ROMANKOW, J.S.C.

BRIEF FOR *AMICUS CURIAE* AMERICAN COUNCIL OF ENGINEERING COMPANIES OF NEW JERSEY

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STRUCTURAL WORKSHOPS, LLC, JOSEPH DIPOMPEO, THOMAS P. ADACH and TECHTON, LLC, *Third-Party Plaintiffs,*	:
vs.	:
KRZAK CONSTURCTION, *Third-Party Defendant.*	:

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IDENTITY OF THE APPLICANT

The American Council of Engineering Companies ("ACEC") is a national non-profit trade association of the engineering industry, representing nearly than 5,500 firms throughout the country. Founded in 1909, ACEC's mission is to advance America's prosperity, health, safety and welfare through legislative advocacy and business education services on behalf of the engineering industry. ACEC is organized into 51 state and regional member organizations. ACEC's member firms employ more than 600,000 engineers, architects, surveyors, scientists and other specialists responsible for more than $213 billion of private and public infrastructure and development projects annually. ACECNJ, the New Jersey member organization of ACEC, represents over 90 firms totaling over 5,000 employees. Formed in 1958, ACECNJ is a leading business practice and policy advocate for consulting engineering firms in New Jersey. ACECNJ member firms ("Members") provide professional services to public and private clients at all levels, including federal, state, and local governments, as well as private developers, institutions, and the general public.

STATEMENT OF INTEREST OF AMICI CURAE

Pursuant to its Constitution and Bylaws, ACECNJ's Executive Committee is authorized to approve participation in litigation that presents issues of broad and continuing importance to the engineering profession, including disputes

implicating the enforceability of contractual limitation of liability provisions. ACECNJ has been granted leave to participate as amicus curiae in prior litigated engineering related disputes, and has appeared as a friend of the court in various other cases adjudicated before the Appellate Division of the New Jersey Superior Court.

ACECNJ's mission is to advance the engineering profession for the public good through government and legislative advocacy, outreach to client groups, business practice education for our member firms and the encouragement of students pursuing engineering careers. As part of that mission, ACECNJ routinely provides input on contract provisions affecting engineering practice. The decision below involves a legal issue that is fundamental to the professional and economic sustainability of engineering firms statewide. As such, ACECNJ therefore has a strong and direct interest in the outcome of this case that has potentially wide-ranging implications for the design and engineering profession in New Jersey.

ACECNJ and its Members have a vital stake in the enforceability of contractual limitation of liability clauses, which serve to allocate professional risk fairly and predictably. Such provisions are indispensable to the economic stability of design practices and to ensuring that qualified professionals can

continue providing essential services to both public and private clients in New Jersey.

PRELIMINARY STATEMENT

The significance of this appeal to New Jersey's engineering profession cannot be overstated. This case, arising from the trial court's well-reasoned grant of partial summary judgment to Defendants-Respondents, Structural Workshops, LLC and Joseph DiPompeo (collectively, "SW"), presents a question of substantial legal and practical importance: whether the limitation of liability clause (the "Limitation Clause") of the parties' engineering services contract is enforceable under New Jersey law. The Court's resolution of this issue will have far-reaching implications for the stability of contractual relationships, the availability of professional services, and the broader public interest in predictable and equitable risk allocation within the construction industry.

Plaintiffs-Appellants, Harvest Restaurant Group, LLC, Chester Grabowski and Robert J. Moore (collectively, "Harvest"), who own and operate fourteen restaurants, entered a contract with Defendants-Respondents Structural Workshops, LLC and Joseph DiPompeo (collectively, "SW") in which Harvest retained SW to provide structural engineering services and agreed to the Limitation Clause therein ("the SW Contract").

Harvest, a sophisticated commercial entity, freely entered into the SW contract and has acknowledged that the agreement was not one of adhesion. Having accepted the benefits of that bargain, Harvest now seeks to avoid its corresponding obligations by arguing that the trial court erred in enforcing the Limitation of liability clause ("Limitation Clause"), an argument that effectively invites this Court to rewrite the parties' negotiated agreement in its favor. Limitation of liability provisions, however, serve well-recognized and legitimate business purposes. They allow parties to proportion financial exposure to the professional's fee, prevent the imposition of disproportionate liability for services rendered in good faith, and promote predictability and stability within the professional services marketplace. These provisions thus reflect sound public policy by ensuring that engineering professionals can continue to offer their services at reasonable rates without the risk of catastrophic, uninsurable losses.

In addition to conflating exculpatory clauses with limitation of liability provisions, Appellant incorrectly asserts that parties may not contractually limit liability where their conduct allegedly implicates public safety. Limitation of liability provisions such as the one at issue here do not absolve a party from responsibility but merely cap recoverable damages between contracting parties.

For clarity, the enforcement of a limitation of liability clause as between the contracting parties does not insulate an engineer from liability to third-parties who suffer personal injury or property damage. For example, if a restaurant patron were injured due to a design error by the engineer, that individual would not be bound by the limitation of liability clause in the owner-engineer contract. Thus, the public interest remains fully protected even when courts enforce limitations of liability provisions between private contracting parties.

Moreover, owners and developers who desire greater protection from potential losses arising out of claims of professional negligence have several commercially reasonable options available to them: owners can procure owner's protective professional indemnity policies; pay for either increased-practice policy limits or project-specific insurance coverage; and/or retain independent consultants to perform peer reviews or quality assurance assessments. As between the parties, owners are often better positioned both financially and in terms of bargaining power to allocate risk through such mechanisms. Without enforceable limitation of liability clauses, numerous engineering firms would lose access to affordable insurance or be forced out of business, triggering higher project costs that would ultimately be borne by New Jersey taxpayers. Reversing the trial court's sound decision would undermine settled precedent, unsettle the reasonable expectations of contracting parties statewide, and send a harmful

message to ACECNJ's members and the wider design and engineering community.

PROCEDURAL HISTORY AND STATEMENT OF THE FACTS

American Council of Engineering Companies of New Jersey adopts Respondent's Procedural History and Statement of Facts.

ARGUMENT

1. ACECNJ's Application To Appear As Amicus Should Be Granted

Rule 1:13-9 establishes a "liberal standard for permitting amicus appearances." K.D. v. A.S., 462 N.J. Super. 619, 633 (App. Div. 2020); *see also* Pfizer v. Director, Div. of Taxation, 23 N.J. Tax 421, 424 (Tax Ct. 2007). Permitting an amicus curiae to participate in an appeal is appropriate when a potential exists for a decision to have "broad implications" in terms of its scope and subsequent applicability. Taxpayers Ass'n of Weymouth Twsp. v. Weymouth Twsp., 80 N.J. 6, 17 (1976).

Under the Rule, leave to appear as *amicus curiae* should be granted when the Court determines that: (1) the motion is timely; (2) the applicant's participation will assist in the resolution of an issue of public importance; and (3) no party to the litigation will be unduly prejudiced thereby. R. 1:13-9(a).

Given ACECNJ's mission and its role as an advocate on behalf of its engineering Members, ACECNJ's insight and expertise will meaningfully assist the Court in resolving the important legal issues presented on this appeal. Accordingly, ACECNJ's participation in this appeal is appropriate and the requirements of Rule 1:13-9 are fully satisfied.

2. This Court Should Continue To Recognize Parties' Freedom To Contract

It is axiomatic that services of engineering firms including those of ACECNJ's members are governed by contract law. The doctrine of freedom of contract is a foundational principle of New Jersey law. Marcinczyk v. State of N.J. Police Training Com'n, 203 N.J. 586, 592 (2010). This means the courts shall enforce contracts negotiated at arm's-length between parties of balanced bargaining power. Marcinczyk, at 592–93; Vasquez v. Glassboro Serv. Ass'n., Inc., 83 N.J. 86, 101 (1980). "Pursuant to that doctrine, parties bargaining at arms-length may generally contract as they wish . . . ." Marcinczyk, 203 N.J. at 592-93. Courts are loath to "rewrite contracts to favor a party, for the purpose of giving that party a better bargain." Ibid. Only where a contract provision is truly unconscionable or violates public policy will a court strike that provision. Ibid. Engineering firms and their respective clients must be able to rely on such contractual terms to promote both economic efficiency and fairness within the construction and design industries.

A limitation of liability clause is a type of contract term commonly defined as a "provision by which the parties agree on a maximum amount of damages recoverable for a future breach of the agreement," see Limitation of Liability Definition, Black's Law Dictionary (7th ed. 1999), reflecting the parties' agreed allocation of risk between them. For clarity, a limitation of liability clause is distinct from an exculpatory clause, which "reliev[es] a party from any liability resulting from a negligent or wrongful act." Marcinczyk, 203 N.J. at 588; see also Valhal Corp. v. Sullivan Assocs., 44 F.3d 195, 202 (3d Cir. 1995) (explaining that an "exculpatory clause immunizes a person from the consequences of his/her negligence," whereas, pursuant to a limitation on liability clause, a person "remains liable for [his or her] own negligence and continues to be exposed to liability up to [the damages] ceiling" set forth in the agreement. Such provisions are entirely consistent with New Jersey's longstanding policy favoring freedom of contract and judicial respect for the negotiated allocation of risk between sophisticated parties.

3. This Court's Framework for Analyzing Limitation of Liability Provisions Is Clear

The thrust of Appellant's argument is that this Court's 2004 decision in Lucier v. Williams, 366 N.J. Super. 485 changed the framework of a court's analysis of a limitation of liability provision". As this Court made clear in the

unpublished 2011 decision in 66 VMD Assocs., LLC, 2011 WL 3503160, which reaffirmed the enforceability of such provisions under New Jersey law, Appellant's argument is without merit.

While New Jersey's Appellate Division first addressed the issue in Lucier, it more recently clarified the governing framework in 66 VMD Assocs. In 66 VMD Assocs., a developer retained an environmental consultant to create a remediation plan for a contaminated parcel it was acquiring. 2011 WL 3503160, at *1-2. The parties' contract included a limitation of liability provision capping the consultant's damages at $25,000. The consultant was paid $19,826 for services rendered. When the developer later discovered that the actual cost of remediation far exceeded the consultant's estimates, he sued the consultant, seeking damages of $2 million after a prospective sales contract on the property fell through. Ibid. The consultant moved for summary judgment based on the limitation of liability clause in the contract, which the trial court granted. The New Jersey Appellate Division affirmed, emphasizing the doctrine of freedom to contract. Id. at *1 & 5-7. The Court enforced the limitation of liability, capped at $25,000, explaining that the cap provided "sufficient economic compulsion to complete the work diligently," as it exceeded the total contract price of $19,826.35 by approximately twenty-five percent. Id. at *4.

Outlining the appropriate analytical framework, 66 VMD Assocs., cites Marbro, Inc. v. Borough of Tinton Falls, 297 N.J.Super. 411, 417 (Law Div.1996) for the proposition that Courts "have traditionally upheld contractual limitations of liability, but also explained that this "tenet [] is limited." See, 66 VMD Assocs., 2011 WL 3503160 at *3. In Marbro, the plaintiff sued FRA, an engineering company, for damages arising from FRA's consulting services. 297 N.J.Super. at 414–15. FRA relied on a contractual provision, similar to the Limitation Clause at issue here, arguing that its liability could not exceed $32,500. Id. at 415. The trial judge agreed, finding that the provision provided adequate economic compulsion because FRA stood "to lose its total fee for services." Id. at 418

The court in Marbro, in turn, relied heavily on the Third Circuit's decision in Valhal Corp. v. Sullivan Assocs., Inc., 44 F.3d 195 because as of that time, there had been "no reported New Jersey decision on [the] issue." Marbro, 297 N.J.Super. at 415. In Valhal, the plaintiff sued an architecture firm for $2,000,000 resulting from negligently prepared architecture plans. 44 F.3d at 198–200. Applying Pennsylvania law, the Third Circuit upheld the defendant's limitation of liability clause, reasoning that the firm was not "immunize[d] ... from the consequences of its own actions," because it remained "exposed to

liability which is seven times the amount of the remuneration under [the] contract." Id. at 204.

The 66 VMD Assocs court contrasted the holdings in Marbro and Valhal cases with the holding in Lucier. See, 66 VMD Assocs., 2011 WL 3503160 at *3-4. In Lucier, the plaintiffs were a young married couple and first-time home buyers who engaged the services of the defendant to perform a home inspection. Lucier, 366 N.J. Super. at 488. At no point in the home-buying process were the couple represented by counsel. Id. at 489. The parties' agreement contained a provision limiting the defendant's liability to $500 or half of the fees paid to the defendant, whichever sum was smaller. Id. at 489. This ultimately amounted to a cap of $192.50. The plaintiffs certified that they felt some of the contract language was "unfair and confusing," but that the inspector claimed the agreement was a "standard contract" for home inspections done in New Jersey, and that the plaintiffs would have to sign the agreement "as-is" or not at all. Ibid. The inspector did dispute this. Ibid. When the plaintiffs sued the inspector after purchasing the house in question and discovering significant roof leaks that the inspector had not reported and which required $8,000 to $10,000 in repairs, the inspector successfully moved for partial summary judgment to enforce the liability cap. Id. at 490. On appeal, this court reversed and held that the "limitation of liability" clause was akin to an exculpatory clause and

unenforceable. The Appellate Division invalidated the clause because the liability cap was "'so minimal compared with the expected compensation, that the concern for the consequences of a breach [were] drastically minimized.' Id. at 495 (quoting Valhal, 44 F.3d at 204).

The 66 VMD Assocs court explained that a limitation of liability is unenforceable "where it is unconscionable or violates public policy." 66 VMD Assocs., 2011 WL 3503160 at *3-4 citing Marcinczyk, supra, 203 N.J. at 593–94; Lucier, supra, 366 N.J. Super at 491. Although unconscionability defies precise definition, it is generally described as the antithesis of appropriate "business ethic," or a lack of "good faith, honesty in fact, and ... fair dealing." Kugler v. Romain, 58 N.J. 522, 543–44 (1971). In evaluating the validity of a contract alleged to be unconscionable, the court should consider factors including "the subject matter of the contract, the parties' relative bargaining positions, the degree of economic compulsion motivating the 'adhering' party, and the public interests affected by the contract." Rudbart v. North Jersey Dist. Water Supply Comm'n., 127 N.J. 344, 356, cert. denied, 506 U.S. 871 (1992).

4. Applying this Court's Framework, the Limitation of Liability Provision is enforceable and Trial Court's Decision Should Be Affirmed

Like some contracts entered into by other ACECNJ Members, the SW Contract contained a limitation of liability clause. In this case, the Limitation Clause in the SW Contract provides:

> In recognition of the relative risks, rewards and benefits of the project to both the Client and Engineer, the Client agrees that, to the fullest extent permitted by law, Engineer's total liability to the Client, for any and all injuries, claims, losses, expenses, damages or claim expenses arising out of this agreement, from any cause or causes, shall not exceed the total amount of $50,000 or the amount of fees paid to the Engineer under this agreement (whichever is greater). Such causes include, but are not limited to, Engineer's negligence, errors, omissions, strict liability, breach of contract or breach of warranty.

Here, the Limitation Clause is enforceable because it was negotiated by parties of comparable sophistication, is not adhesive in nature, and represents a reasonable allocation of risk while maintaining an appropriate incentive for professional diligence.

Appellant's argument improperly conflates exculpatory clauses with limitation of liability provisions and misstates the law. Exculpatory clauses that absolve a party from all responsibility for harm to others are unenforceable

where they endanger public welfare. By contrast, limitation of liability provisions, like the one here, merely cap damages between sophisticated parties in privity of contract and are routinely upheld. Importantly, such provisions do not shield an engineer from liability to third-parties as asserted by Appellant. If, for example, a restaurant patron were injured due to a design error, that individual, who is not in privity of contract with the engineer, would not be bound by the contract's limitation clause. Aronsohn v. Mandara, 98 N.J. 92 (1984); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965). Enforcement of the clause therefore promotes contractual fairness without compromising public safety.

Importantly, the Limitation Clause at issue does not absolve SW of liability, as an exculpatory clause would; rather, it merely limits that liability to an amount mutually agreed upon by the parties. SW remained fully accountable for its own professional negligence up to that limit of $50,000, which was more than 400% greater than its total fee of $9,950. This ratio demonstrates the commercial reasonableness of the clause and confirms that SW had every incentive to perform its services diligently and in accordance with the applicable standard of care.

CONCLUSION

Few engineering firms could continue operating if required to assume unlimited liability on relatively modestly compensated projects. Absent enforceable limitation of liability provisions, many would lose access to affordable insurance or be driven from the marketplace altogether. Accordingly, it is respectfully requested that the court grant the present motion for leave to appear as *amicus curiae* and affirm the trial court's sound decision.

ZETLIN & DE CHIARA LLP
Attorneys for Proposed Amicus Curiae American Council of Engineering Companies of New Jersey

By: */s/ Timothy F. Hegarty*
Timothy F. Hegarty

Dated: November 5, 2025

HARVEST RESTAURANT GROUP, LLC; CHESTER GRABOWSKI and ROBERT J. MOORE, Plaintiffs, v. THOMAS P. ADACH; TECHTON, LLC; STRUCTURAL WORKSHOPS, LLC and JOSEPH DiPOMPEO, Defendants, --- STRUCTURAL WORKSHOPS, LLC; JOSEPH DiPOMPEO; THOMAS P. ADACH, and TECHTON, LLC Third-Party Plaintiffs, v. KRZAK CORPORATION, Third-Party Defendant	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003929-24T2 CIVIL ACTION On Appeal From: SUPERIOR COURT OF NEW JERSEY LAW DIVISION, MORRIS COUNTY DOCKET NO. MRS-L-2542-19 SAT BELOW: Hon. Louis S. Sceusi, J.S.C. (retired and t/a on recall) Hon. Jonathan W. Romankow, J.S.C.

BRIEF OF DEFENDANTS-RESPONDENTS STRUCTURAL WORKSHOP, LLC AND JOSEPH DiPOMPEO, P.E.

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PREFATORY STATEMENT

This matter, on appeal from the trial court's grant of partial summary judgment to Defendants-Respondents Structural Workshops, LLC and Joseph DiPompeo (collectively, "SW"), presents this Court with single question: whether the limitation of liability clause (the "Limitation Clause") of the parties' engineering services contract is enforceable.

This is not a borderline case. Plaintiffs-Appellants, Harvest Restaurant Group, LLC, Chester Grabowski and Robert J. Moore (collectively, "Harvest"), who own and operate fourteen restaurants, freely entered a contract with SW for structural engineering services and agreed to the Limitation Clause therein. Harvest does not claim that the parties' contract was one of adhesion, because it was not. Harvest concedes that it is a sophisticated entity, because it is. And Harvest effectively presents no argument that the Limitation Clause's liability cap of $50,000—roughly five times SW's fee—trivializes the risks of breaching the parties' contract or SW's standard of care, because to do so would offend common sense and ignore caselaw. Under well-established law, these factors and the undisputed facts compel the enforceability of the Limitation Clause.

Accordingly, SW respectfully requests that this Court affirm the trial court's grant of partial summary judgment holding the Limitation Clause enforceable.

PROCEDURAL HISTORY

SW agrees with the substance of the procedural history in Harvest's brief (Pb4-Pb8),[1] but must make two points of clarification.

First, in its procedural history, Harvest neglects to explain why SW's first two motions for partial summary judgment (filed on December 22, 2020, and January 16, 2023, respectively) were denied. Both motions were denied without prejudice as premature, because discovery was not complete. See Driscoll Const. Co. v. State, 371 N.J. Super. 304, 317 (App. Div. 2004). The merits of SW's motion were not reached until February 13, 2025, when SW's renewed motion for partial summary judgment was granted by the Honorable Louis S. Sceusi, J.S.C. (retired and t/a on recall) and then reaffirmed on April 16, 2025, with the court's denial of Harvest's motion for reconsideration.

Second, the court's February 13, 2025, order granted partial summary judgment to SW on two issues, holding (1) that the Limitation Clause in SW's contract with Harvest is enforceable, and (2) that a Waiver of Consequential Damages in the same contract was likewise enforceable (Pa1040-Pa1041). Only the first aspect of the court's order is on appeal, as Harvest neither mentioned

[1] Plaintiff's Brief = Pb
Plaintiff's Appendix = Pa
Defendant's Appendix = Da
Transcript of Reconsideration Motion Hearing of April 11, 2025 = 1T

the Waiver of Consequential Damages aspect in its Amended Case Information Statement, nor briefed the issue. See State v. Shangzhen Huang, 461 N.J. Super. 119, 125 (App. Div. 2018), aff'd o.b., 240 N.J. 56, 56 (2019) (holding that an issue not briefed on appeal is deemed abandoned).

STATEMENT OF FACTS

Harvest Restaurant Group, LLC, is a New Jersey limited liability company that owns and operates fourteen restaurants throughout northern New Jersey and employs approximately 1200 team members (Pa1; Pa982; Pa1033). Plaintiffs Grabowski and Moore own Harvest Restaurant Group (Pa1).

On or about October 15, 2003, Harvest entered into a twenty-year lease agreement with Tarta Luna Properties, LLC ("Tarta Luna"), to rent the premises at 115 Elm Street, Westfield, New Jersey (Pa982; Pa1033). Mr. Grabowski, as Harvest Restaurant Group's CEO, negotiated the terms of the lease (Pa839, 72:9-72:16). The lease contemplated extensive repairs and renovations, including the finishing of the second floor; a new basement; a twenty-foot, two-story addition to the back of the property; and a gabled roof (Pa982; Pa1033). Harvest intended to operate a bar and restaurant, to be known as “C. Adams Tavern," on the renovated premises (Pa982; Pa1033).

Years later, in June of 2014, Harvest entered into an agreement with Defendants Techton, LLC, and its principal architect, Tomasz P. Adach (collectively, "Techton"), to provide architectural services for the renovation project (Pa2).

Then, on or about September 29, 2014, Harvest entered into a contract with SW to provide professional structural engineering design services for the project ("the SW Contract") (Pa1; Pa19). Per the SW Contract, for a proposed fee of $9,950.00 (the total amount SW was ultimately paid), SW was to provide the structural design of the project "modifications and additions" (Pa422-Pa423; Pa984-Pa986; Pa1036). SW's scope of services also included three site visits; three conference calls; review of all provided documents; progress prints as required; signed and sealed structural drawings; review of any required submittals, shop drawings, and Requests for Information ("RFIs"); and a reasonable amount of coordination with the architect, owner and contractor (Pa422-Pa423; Pa984-Pa986; Pa1036).

The SW Contract expressly excluded from SW's scope of services: architectural, MEP, soils, and site engineering services; means and methods of construction / job safety; meetings and field visits beyond those specified; construction phase services; special inspections; as-built drawings, and invasive

probing or testing, among other exclusions (Pa422-Pa423; Pa984-Pa986; Pa1036).

Construction began in February 2015, and C. Adams Tavern opened on November 10, 2016 (Pa2). However, litigation between Harvest and Tarta Luna (the "Tarta Luna Litigation") (UNN-C-101-16) ultimately forced the restaurant's temporary closure (Pa28-Pa59; Pa982-Pa983; Pa1034). By order and written opinion entered on December 12, 2017, the Honorable Katherine R. Dupuis, P.J.Ch., found that the premises were not compliant with the applicable building code and enjoined Harvest from continuing to occupy or operate in the building except as necessary to conduct repairs (Pa56-Pa59).

Harvest filed this lawsuit against Techton and SW seeking to recover costs related to the reconstruction of the renovations, including direct and consequential damages (Pa1-Pa7). Harvest's Complaint asserts a single count of “Engineering Malpractice” and a single count of “Breach of Contract” against SW (Pa5-Pa7). Ultimately, as asserted in amended answers to interrogatories, Harvest alleged $600,000 in direct damages for the "Repair Cost to Retrofit Premises Complaint With Code," and a total of approximately $1.6 million in various consequential damages,[2] including lost profits (Pa983; Pa1035-Pa1036).

[2] As previously noted, the SW Contract contained a Waiver of Consequential Damages ("including, without limitation, loss of use or loss of profits" and "regardless of whether such claim is based upon alleged breach of contract,

The SW Contract's Limitation Clause, set forth in Section 12.0 of the contract's General Terms and Conditions, provides:

> G. In recognition of the relative risks, rewards and benefits of the project to both the Client and Engineer, the Client agrees that, to the fullest extent permitted by law, Engineer's total liability to the Client, for any and all injuries, claims, losses, expenses, damages or claim expenses arising out of this agreement, from any cause or causes, shall not exceed the total amount of $50,000 or the amount of fees paid to the Engineer under this agreement (whichever is greater). Such causes include, but are not limited to, Engineer's negligence, errors, omissions, strict liability, breach of contract or breach of warranty.
>
> [Pa427-Pa428.]

Mr. Grabowski, as CEO of Harvest Restaurant Group, signed the SW contract on October 1, 2014, and initialed each page of the Standard Terms and Conditions attached to the contract (Pa21-Pa26; Pa986; Pa1036). At a deposition taken on June 22, 2022, Mr. Grabowski testified to his general familiarity with contract negotiations (Pa839, 72:9-16; Pa841, 89:11-22), as well as his sole responsibility in negotiating and executing the Techton and SW project contracts (Pa837-Pa841, 62:5-25 to 89:22). As to the SW Contract, Mr.

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willful misconduct, or negligent act or omission" (Pa986)) that the trial court held enforceable; that aspect of the court's order has not been appealed.

Grabowski testified that he had the opportunity to read the contract and have it reviewed by an attorney:

> Q. . . . with respect to the Structural Workshop contract, did you have an opportunity to have that reviewed by an attorney?
> **A. That's correct, I did have an opportunity to have it reviewed.**
> Q. And did you?
> **A. No. I did not.**
> Q. And that was by your free will?
> **A. Yes.**
>
> [Pa839, 71:2-10 (emphasis added).]

He also stated that he had an opportunity to negotiate the contract terms:

> Q. . . . with regard to Structural Workshop's contract, you had the opportunity to negotiate any specific term in that contract, correct?
> **A. Again, I don't know the legal answer to that, but I'm assuming I could have.**
> Q. Well, you negotiated the terms of your lease, correct?
> **A. Correct.**
> Q. All right.
> So you're familiar with being able to negotiate contracts between two business entities, correct?
> **A. Yes.**
>
> . . . .
>
> **A. But I think I know what your question is. You know, could I have asked to change**

things? Yeah, I could have asked.

[Pa839, 72:3-24 (emphasis added).]

When specifically asked whether he had an opportunity to read the Limitation Clause before initialing the page and signing the contract, or whether he raised any objection to the clause, Mr. Grabowski testified as follows:

Q. I do want to go over one more paragraph, and it's the last paragraph on this page.

It says, paragraph G, "In recognition of the relative risks and rewards and benefits of the project to both the client and the engineer, the client agrees that to the fullest extent permitted by law, engineer's total liability to the client for any and all injuries, claims, losses, expenses, damages or claim expenses arising out of this agreement, from any cause or causes, shall not exceed the total amount of $50,000 or the amount of fees paid to the engineer under this agreement (whichever is greater). Such causes include, but are not limited to, engineer's negligence, errors, omissions, strict liability, breach of contract, or breach of warranty."

Did I read that correctly?

A. Yes, sir.

Q. Did you have an opportunity to review that provision prior to initialing and signing this contract?

A. Yes, sir. I don't recall reading it, but I did have the opportunity to read it.

Q. All right.

And if you had read it and posed any objection, did you — strike that.

Do you have a recollection of posing

7 any objection to this provision?
8 **A. Did I object to this provision?**
9 Q. Correct.
10 **A. No, I did not.**
11 Q. All right.
12 **A. Not that I recall.**
13 Q. And you're aware that you had an
14 opportunity to object to that provision, correct?
15 **A. Yes**

[Pa840, 87:4 to 88:15 (emphasis added).]

Mr. Grabowski testified that he "expected" both Harvest and SW to "be bound by the terms of" the SW Contract (Pa839, 70:2-9).

During Mr. Grabowski's deposition, he was also shown a JZN Engineering, Geotechnical Engineering Services Proposal dated May 16, 2018, for soil boring samples and a Jensen Hughes Proposal for Fire Protection Engineering Services, both of which were submitted to Harvest for services rendered during reconstruction of the project (Pa842, 110:19 to 111:18; 116:7 to 117:1). Both proposals contained limitation of liability clauses (Pa843, 113:10-22; 116:7 to 117:1). Mr. Grabowski testified that he was unaware that the JZN Engineering Proposal contained a limitation of liability clause, but that he expected to be bound by all of the terms of the contract (Pa843, 114:3-12). Regarding the Jensen Hughes Proposal, Mr. Grabowski testified that he did not reject the limitation of liability clause and expected both Harvest and Jensen Hughes to be bound by the terms of the proposal (Pa844, 117:2-8).

At the close of expert discovery and expiration of the discovery end date, on November 1, 2024, Harvest filed a motion for partial summary judgment on liability against SW and seeking the invalidation of the Limitation Clause and waiver of consequential damages (Pa105; Pa1042). SW cross-moved for partial summary judgment on November 7, 2024, seeking enforcement of the Limitation Clause and waiver of consequential damages (Pa978-Pa979). On February 13, 2025, the trial court granted SW's motion for partial summary judgment, enforcing both the Limitation Clause and waiver of consequential damages, and denied Harvest's own motion for partial summary judgment (Pa1040-Pa1041). The issues were so clear-cut to the trial court that it made its decision without holding oral argument (Pa1040-Pa1041).

On February 25, 2025, Harvest filed a motion for reconsideration of the trial court's order granting summary judgment on the enforcement of the Limitation Clause only (Pa1057). Harvest's motion did not take issue with the court's order to the extent it granted enforcement of the waiver of consequential damages clause or denied Harvest's own motion for partial summary judgment on professional negligence (Pa1057). The trial court held oral argument and considered all of Harvest's arguments raised on the motion for reconsideration, as well as arguments that could have been made on the original motion (1T). On April 16, 2025, the trail court denied Harvest's motion for reconsideration,

concluding once again that the Limitation Clause was valid and enforceable (Pa1077-Pa1091).

Harvest now appeals the trial court's orders enforcing the Limitation Clause.

LEGAL ARGUMENT

I. THE TRIAL COURT CORRECTLY RULED THAT THE LIMITATION ON LIABILITY PROVISION IN THE PARTIES' CONTRACT IS ENFORCEABLE

In point III[3] of their brief, Harvest asserts that the trial court erred in ruling the Limitation Clause of the parties' contract enforceable, arguing that two "exceptions"—one for "public safety," and another for "professional negligence"—required the court to rewrite the parties' agreement to Harvest's benefit. These arguments contradict the very precedent Harvest implores this Court to follow and rest on legal misstatements and misplaced analogies. For the reasons below, SW respectfully requests that this Court reject these arguments and affirm the trial court's judgment in SW's favor.

A basic tenet of our law is the doctrine of freedom of contract. Marcinczyk v. State Police Training Comm'n, 203 N.J. 586, 592 (2010).

[3] Points I and II of Harvest's brief assert that this matter is ripe for appeal, and that a de novo standard of review is applicable here, respectively. SW agrees with both assertions.

"Pursuant to that doctrine, parties bargaining at arms-length may generally contract as they wish . . . ." Id. at 592-93. It is therefore a "fundamental proposition" of law that "contracts will be enforced as written." Lucier v. Williams, 366 N.J. Super. 485, 491 (App. Div. 2004). "Ordinarily, courts will not rewrite contracts to favor a party, for the purpose of giving that party a better bargain." Ibid. Only where a contract provision is truly unconscionable or violates public policy will a court strike that provision. Ibid.

A limitation of liability clause is a "provision by which the parties agree on a maximum amount of damages recoverable for a future breach of the agreement," Black's Law Dictionary 939 (7th ed. 1999), reflecting the parties' agreed allocation of risk between them. This is distinct from an exculpatory clause, which "reliev[es] a party from any liability resulting from a negligent or wrongful act." Id. at 588 (emphasis added); see also Valhal Corp. v. Sullivan Assocs., 44 F.3d 195, 202 (3d Cir. 1995) (explaining that an "exculpatory clause immunizes a person from the consequences of his/her negligence," whereas, pursuant to a limitation on liability clause, a person "remains liable for [his or her] own negligence and continues to be exposed to liability up to [the damages] ceiling" set forth in the agreement (emphasis added)).

Consistent with freedom of contract, New Jersey "courts have traditionally upheld contractual limitations of liability[,] . . . 'as long as the

limitation is not violative of public policy.'" Marbro, Inc. v. Borough of Tinton Falls, 297 N.J. Super. 411, 417 (Law Div. 1996) (quoting Moreira Constr. Co., Inc., v. Moretrench Corp., 97 N.J. Super. 391, 394 (App. Div. 1967), aff'd, 51 N.J. 405 (1968)). Of particular relevance here, courts have routinely upheld limitations of liability clauses in professional services contracts. See, e.g., id. at 418. By contrast, exculpatory clauses are generally disfavored by courts, which are more likely to find such clauses unenforceable where the parties are not on equal bargaining terms, or in professional services contexts. Lucier, 366 N.J. Super. at 492, 496.

In assessing the enforceability of a limitation of liability clause, courts consider general contract principles—including the clause's clarity, the presence (or absence) of adhesion, and the parties' relative bargaining power—as well as a factor specific to such clauses:

> We also focus our inquiry on whether the limitation is a reasonable allocation of risk between the parties or whether it runs afoul of the public policy disfavoring clauses which effectively immunize parties from liability for their own negligent actions. Valhal, supra, 44 F.3d at 202-04; Marbro, supra, 397 N.J. Super. at 416-18, 688 A.2d 159. To be enforceable, the amount of the cap on a party's liability must be sufficient to provide a realistic incentive to act diligently. Valhal, supra, 44 F.3d at 204; Marbro, supra, 297 N.J. Super. at 416, 688 A.2d 159.
>
> [Ibid.]

A. The Limitations Clause is enforceable because the parties were of equal bargaining power, the contract was not one of adhesion, and the clause provided a realistic incentive to act diligently.

Courts have consistently upheld limitations of liability clauses in professional service contracts where the damages cap equaled or exceeded a substantial fee, just like the Limitation Clause at issue here.

In Marbro, 297 N.J. Super. at 418, an engineer contracted to design a public park project sought to enforce, against the Borough of Tinton Falls, a clause limiting the engineer's liability to $32,500, the total amount of its fee. The court held the clause enforceable, noting that the Borough was a sophisticated party capable of having the terms reviewed by counsel; rejecting the Borough's argument that it was somehow "powerless to negotiate the terms of this agreement"; and concluding that "[t]he agreed-upon cap provided adequate incentive to perform." Id. at 418-19.

In reaching this decision, the Marbro court relied heavily on the Third Circuit Court of Appeal's opinion in Valhal, 44 F.3d at 204. There, the federal court enforced a $50,000 cap in favor of the defendant architect, rejecting the plaintiff's argument that "the $50,000 limitation is nominal when compared to the final verdict" of $1,000,000. Ibid. The court explained that the significance of the cap in relation to the damages suffered in that particular case was not the "proper measure." Ibid. Rather, "[t]he inquiry must be whether the cap is so

minimal compared to [the architect's] expected compensation as to negate or drastically minimize [the architect's] concern for the consequences of a breach of its contractual obligations." Ibid. The $50,000 cap, being seven times the architect's expected fee, easily met that test. "One c[ould] not seriously argue" that such a cap "insulates [a party] from liability." Ibid.

New Jersey's Appellate Division embraced this analysis first in Lucier, 366 N.J. Super. at 492, and more recently in an unpublished decision enforcing a $25,000 cap that was held to provide "sufficient economic compulsion to complete the work diligently" because it exceeded the total contract price of an environmental consulting agreement by $5,000. 66 VMD Assocs., LLC v. Melick-Tully & Assocs., P.C., No. A-4008-09T3, 2011 N.J. Super. Unpub. LEXIS 2164, *10 (App. Div. Aug. 11, 2011), certif. denied, 209 N.J. 96 (2011). (Da4).

In contrast, Lucier—which Harvest claims cited Marbro and Valhal only to reject those decisions (Pb23)—dealt with a "limitation of liability" clause setting a damages ceiling so low that it was "tantamount to an exculpation clause." 366 N.J. Super. at 495. The plaintiffs in that case were a young married couple and first-time home buyers who engaged the services of the defendant to perform a home inspection. Id. at 488. At no point in the home-buying process were the couple represented by counsel. Id. at 489. The parties' agreement

contained a provision limiting the defendant's liability to $500 or half of the fees paid to the defendant, whichever sum was smaller. Id. at 489. This ultimately amounted to a cap of $192.50. The plaintiffs certified that they felt some of the contract language was "unfair and confusing," but that the inspector claimed the agreement was a "standard contract" for home inspections done in New Jersey, and that the plaintiffs would have to sign the agreement "as-is" or not at all. Ibid. The inspector did not dispute this. Ibid.

When the plaintiffs sued the inspector after purchasing the house in question and discovering significant roof leaks that the inspector had not reported, the inspector successfully moved for partial summary judgment to enforce the liability cap. Id. at 490.

On appeal, this court reversed and held that the "limitation of liability" clause was akin to an exculpatory clause and unenforceable, explaining:

> We do not hesitate to hold it unenforceable for the following reasons: (1) the contract, prepared by the home inspector, is one of adhesion; (2) the parties, one a consumer and the other a professional expert, have grossly unequal bargaining status; and (3) the substance of the provision eviscerates the contract and its fundamental purpose because the potential damage level is so nominal that it has the practical effect of avoiding almost all responsibility for the professional's negligence. Additionally, the provision is contrary to our state's public policy of effectuating the purpose of a home inspection contract to render reliable evaluation of a home's fitness for purchase and holding professionals to certain industry standards.

. . . .

> We can assume that the contract price here, a little under $ 400, is typical of fees charged for this service. If, upon the occasional dereliction, the home inspector's only consequence is the obligation to refund a few hundred dollars (the smaller of fifty percent of the inspection contract price or $ 500), there is no meaningful incentive to act diligently in the performance of home inspection contracts.
>
> [Id. at 493-94.]

Here, the facts of this case, and the limitation of liability clause at issue, fall squarely within the scope of Marbro, Valhal, and 66 VMD, and well outside of Lucier:

First, according to the undisputed facts, the parties' contract was not one of adhesion. Mr. Grabowski testified that he could have negotiated the agreement's terms or had them reviewed by an attorney; he chose not to (Pa835). This is a far cry from the situation in Lucier, where the plaintiff, as a first-time homebuyer, did not have counsel, did not negotiate the terms, and indeed was told directly by the defendant that the agreement could only be accepted as-is or refused entirely.

Unsurprisingly, Harvest does not argue in their brief that the parties' contract was one of adhesion.

Second, and relatedly, the parties here were not of unequal bargaining power or sophistication. Harvest owns and operates fourteen restaurants and employs approximately 1200 people. It had the means and opportunity to seek the advice of counsel when contracting with SW.

Harvest, tellingly, does not argue that it was of lesser bargaining power, conceding that it "could be viewed as a sophisticated entity who had the ability to review its contract with the architect and engage counsel" (Pb24).

Instead, Harvest claims that Lucier held "that licensed professionals and their clients cannot be on equal bargaining power as a matter of law" and that the "'bargaining power' analysis considered by the [trial court here] is irrelevant to the holding in Lucier" (Pb23). This argument is a bold mischaracterization of the Lucier, considering that decision devoted three paragraphs to detailing how the "bargaining position between the parties"—"consumers" on one side, and a "professional expert" on the other—"was grossly disparate." Lucier, 366 N.J. Super. at 493-94. The Lucier court could not have made clearer that the bargaining power of the parties, according to the particular facts of that case (e.g., the defendant's twenty years of experience inspecting thousands of homes) and the particular dynamics of home inspection contracts, was a significant basis for its decision. Moreover, Harvest's suggestion that licensed professionals are always of greater bargaining power than non-professional clients is, frankly,

fantastical. Many licensed professionals make their living in part by accepting unfavorable contract terms imposed by businesses with immense resources, rather than risk losing work.

Third, the $50,000 liability cap at issue here plainly satisfies the criteria set forth in Lucier, that "[t]o be enforceable, the amount of the cap on a party's liability must be sufficient to provide a realistic incentive to act diligently." 366 N.J. Super. at 492 (citing Valhal, 44 F.3d at 204; Marbro, 297 N.J. Super. at 416). The $50,000 cap represents more than five times SW's fee ($9,950) for the project, a greater (and proportionally greater) sum than those seen in Marbro and 66 VMD, and similar to the cap seen in Valhal, all of which were held enforceable. "One can not seriously argue" that such a cap "insulates [SW] from liability," Valhal, 44 F.3d at 204, or "render[s] the underlying purpose of the contract worthless." Lucier, 366 N.J. Super. at 494.

Yet again, Harvest effectively presents no counterargument. Nothing in its brief explains why the possibility of SW losing five times its substantial fee is generally insufficient to incentivize diligent conduct. The arguments they do present are, respectfully, distractions. This includes Harvest's extensive arguments devoted to supposed errors in reasoning on the part of the trial court (Pb14-Pb19). "[I]t is well-settled that appeals are taken from orders and judgments and not from opinions, oral decisions, informal written decisions, or

reasons given for the ultimate conclusion." Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001). Certainly where, as here, an order or judgment is being reviewed de novo, the trial court's reasoning is immaterial to the reviewing court's analysis.

Harvest's more substantial error is conflating limitations of liability clauses and exculpation clauses. Although Harvest acknowledges that distinction in passing (Pb24), its argument rests on refusing to honor it, including by misstating caselaw. For example, Harvest cites Chemical Bank of New Jersey, N.A. v. Bailey, 296 N.J. Super. 515, 527 (App. Div. 1997), and Lucier, 366 N.J. Super. at 495, for the proposition that courts have "repeatedly held, where there is a statutory duty to act in a certain way, one cannot limit its liability in the event it breaches such a duty" (Pb19) (emphasis added). But Chemical Bank addressed an "exculpatory clause," 296 N.J. Super. at 527, while Lucier addressed a provision that was "tantamount to an exculpation clause" such that it "warrant[ed] application of the same policy considerations." 366 N.J. Super. at 495. The clause at issue here is undeniably not "tantamount to an exculpation clause."

B. Harvest's "public safety exception" argument is unsupported by law.

In point III. A. of their brief, Harvest argues that the limitation clause is unenforceable under a "general proposition that party's [sic] cannot shield themselves from liability under a limitation of liability provision where their conduct creates a public safety danger" (Pb18). However, all three cases Harvest cites in support of this argument—Hubner v. Spring Valley Equestrian Center, 203 N.J. 184 (2010); Marcinczyk, 203 N.J. 586; and Wilson ex rel. Manzano v. City of Jersey City, 209 N.J. 558 (2012)—are inapplicable here because they involved exculpatory agreements or statutes, not limitation clauses.

In Hubner, 203 N.J. at 188, our Supreme Court considered whether the plaintiff's claims, which stemmed from a horse-riding accident at the defendant's facility, were barred by the Equine Activities Liability Act, N.J.S.A. 5:15-1 to -12. The Court expressly declined to address the validity of a contractual release of liability and held that the Act "operates as a complete bar to plaintiff's claim." Ibid.

Similarly, in Wilson, 209 N.J. at 562-63, the Court considered the scope of the 9-1-1 immunity statute, N.J.S.A. 52:17C-10, holding that it extended immunity for negligence to 9-1-1 operators and their municipal employers, with an exception for "wanton and willful" conduct that was expressly written into the statute.

Finally, in Marcinczyk, 203 N.J. at 589, the Court held invalid an "exculpatory agreement that a police recruit was required to execute" by a police academy as a condition of participation in the academy's training program. The agreement did not cap the academy's liability, but rather completely prohibited the recruit from making any claim for money damages for any injury sustained in training. Id. at 590-91.

These cases have no bearing on the matter presently before this Court. Whatever principles Harvest is attempting to draw from these cases and apply here, that reasoning cannot overcome caselaw (Lucier, Valhal, Marbro, and 66 VMD) that does address the issue at hand and runs contrary to Harvest's position.

Furthermore, Harvest's policy arguments that the limitation clause "interferes with the public welfare and safety" are groundless.

First, Harvest offers a hypothetical: what if the structure of the restaurant had failed when it was initially opened and a member of the public was injured? (Pb20). The injured party would sue Harvest, and SW would either be added as a third-party defendant, as Harvest suggests (Pb20), or it would be a direct defendant along with Harvest. Harvest rhetorically asks: "In that scenario, why should the SW Defendants be able to limit their liability to $50,000 in the case of a bodily injury caused by its negligence?" (Pb20-Pb21).

This is an imaginary problem not capable of occurring in reality. The general public is not party to Harvest's agreement with SW and did not agree to any limitation on SW's liability. It cannot be enforced against members of the public. The public is not prejudiced in any way by the parties' Limitation Clause. Contrary to Harvest's argument, SW's potential liability to Harvest up to $50,000, along with the potential unlimited liability to an injured member of the public, is a more than adequate incentive to act diligently.

Moreover, to the extent that Harvest is arguing that SW could benefit from the limitation of liability clause in such a case if SW were a third-party defendant and not a direct defendant (Pb21), the court should reject this argument. Nothing would stop a court from ruling that the Limitation Clause does not apply to damages caused to a third-party and is enforceable only as to Harvest's own property damages.

Second, Harvest contends that the limitation of liability clause somehow conflicts with N.J.S.A. 48:8-27, which provides for the licensing of engineers "in order to safeguard life, health and property" (Pb19, Pb21). Specifically, Harvest says the statute exhibits "the legislative intent that demonstrates why engineers who endanger public safety should not be entitled to rely on a limitation of liability provision" (Pb21) (emphasis added).

This argument is equally unpersuasive. Nothing in the statute suggests a public policy against contractual risk allocation between commercial entities. Moreover, accepting Harvest's argument requires accepting that enforcement of the Limitation Clause does, in fact, conflict with a public safety interest. As discussed, the Limitation Clause does not prejudice the public's interests at all.

In short, Harvest's "public safety exception" argument is not supported by fact, logic, or law, and is contrary to existing caselaw that permits limitations clauses like the one at issue here, as distinct from truly exculpatory clauses.

C. Harvest's reliance on the unpublished West Essex decision is misplaced.

In point III. B. of their brief, Harvest argues "that a limitation of liability provision is unenforceable where a licensed professional acts in a manner that is outside the acceptable professional standards of care" (Pb22). The arguments for this position are largely addressed above. To reiterate, courts have repeatedly accepted limitations of liability clauses in professional services contracts. Such clauses always protect against liability for conduct that falls "outside the acceptable professional standards of care," as professionals generally cannot be held liable otherwise, making the basic premise of Harvest's argument contrary to established law. However, one point, Harvest's reliance on the unpublished Law Division decision in West Essex v. Construction Design

Technologies, N.J. Super., ESX-L-10272-07 (Law Div. 2009) (Pa778), remains to be addressed.

While, respectfully, Harvest's arguments related to the West Essex decision are not entirely clear, the thrust of Harvest's position is that Lucier as interpreted by West Essex "changed the framework of analysis for limitation of liability provisions concerning a professional's failure to comply with the applicable standard of care" (Pb24). More specifically, that Lucier/West Essex changed the framework to such a degree that a conventional "'bargaining power' analysis" is "irrelevant" in cases involving professional services contracts (notwithstanding that the Lucier court performed such an analysis), and consideration of "whether [a] limitation of liability clause is an exculpation clause . . . presents an overly narrow approach" (notwithstanding that the Lucier court treated this as a central issue) (Pb23-Pb24).

For several reasons, the West Essex decision does not offer compelling support for Harvest's position. First, the liability cap in that case, while substantial, was equal to the defendant's $130,227.25 fee. Here, the cap is roughly five times SW's fee. Second, the reasoning of the West Essex decision itself is shaky, especially as to that decision's view of Marbro. West Essex's discussion of Marbro begins with the possible implication that the limitations

clause in Marbro was not contained within a professional services contract or did not apply to professional negligence:

> [I]n Marbro the engineering firm had two contracts with the municipality: a construction services contract, which contained a liability limit equal to its fees and a design contract which contained no such limitation. Thus, Marbro did not deal with a contractual ceiling applicable, as here, to a professional's design services and its construction supervision services which, if upheld, would leave the victim utterly without recourse except for the return of fees paid for faulty services.
>
> [Pa790.]

However, the "construction services" contract at issue in Marbro was a construction phase "engineering services contract," and the limitation of liability clause specifically limited liability for "professional negligen[ce]." Marbro, 297 N.J. Super. at 414-15. To the extent that the West Essex court was only reasoning that the plaintiff Borough in Marbro was not limited to recovering the defendant's fee, due to the existence of the design contract that contained no limitation clause, this is pure speculation, as no liability under the design contract had been established when the Marbro court rendered its decision. Thus, the Marbro court held the limitation clause enforceable while understanding the possibility that the Borough could fail to prove any liability under the design contract, and be limited to recovering the construction phase

fees it paid to the defendant. The Marbro court accepted that possibility, and Lucier cited Marbro positively, as previously discussed.

The West Essex decision then states:

> Marbro's holding that a professional engineer's contractual liability limitation does not run afoul of public policy is of questionable authority given the Appellate Division's later invocation of public policy to refuse enforcement of a similar limitation in a home inspection contract in Lucier. It would indeed be anomalous to hold that a licensed, registered architect performing professional design services upon which a client relies in spending huge sums of money, may put a cap on his liability whereas a home inspector may not do so, as a matter of "public policy."
>
> [Pa791-Pa792.]

The difference in results between Marbro and Lucier is not "anomalous." The cases are simply, and significantly, distinguishable. The contract in Lucier was one of adhesion, while the contract in Marbro (and here) was not. The parties in Lucier were of grossly disparate bargaining positions, while the parties in Marbro (and here) were not. The cap in Lucier was less than the amount of the defendant's fee, while the cap in Marbro (and here) was not. Furthermore, the fee itself in Lucier was very small, only a few hundred dollars. As the Lucier court explained, the home inspector's business was a "high volume operation," relying on thousands of minor, low-paying jobs. Lucier, 366 N.J. Super. at 495. The loss of any single one of those fees would be so insignificant that limiting

liability to a portion of one such fee "drastically minimized" the home inspector's concern for the consequences of his negligence. Ibid. (quoting Marbro, 297 N.J. at 418). That is simply not the case for professional engineers in general.

In short, this court should not embrace the reasoning of West Essex or the arguments in Harvest's brief. Both are directly contrary to the framework this court embraced in Lucier.

For the foregoing reasons, SW respectfully requests that this Court find the Limitation Clause enforceable and affirm the trial court's grant of partial summary judgment to SW.

II. PARTIAL SUMMARY JUDGMENT IN SW'S FAVOR WAS NOT PREMATURE

In point IV of its brief, Harvest argues in the alternative that disputed questions of material fact precluded a grant of summary judgment to SW on the enforceability of the limitations clause, and thus that the trial court committed reversable error by doing so (Pb25). This argument directly conflicts with applicable caselaw and must be rejected.

Rule 4:46-2(c) provides that a motion for summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions

on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." A fact is only "material" if it can affect the outcome of an issue under the governing law. Matter of R.S., 258 N.J. 58, 79 (2024)

Notably, Harvest itself thought the Limitation Clause's enforceability was an issue suitable for summary judgment when it moved for an order declaring the Limitation Clause invalid (Pa804). More importantly, there was no genuine dispute of material fact in this case. The facts essential to assessing the nature of the contract, its formation, and the parties' respective bargaining power, for the purpose of determining the Limitation Clause's enforceability, were undisputed, as previously discussed herein. In fact, the testimony of plaintiff, Mr. Grabowski, forms the undisputed factual basis for finding the Limitation Clause to be enforceable. Harvest presents no argument to the contrary.

However, Harvest contends that "whether the $50,000 cap on liability is appropriate is a factual question for the jury" (Pb25). Every case on this issue demonstrates otherwise. The West Essex, Lucier, Marbro, Valhal, and 66 VMD decisions all determined the enforceability of limitations clauses on motions for summary judgment. The Marbro court specifically rejected a similar argument in that case:

> [T]he Borough contends that the "reasonableness" of the liability cap is a matter which must be considered by the jury. This court disagrees. If this matter were submitted to a jury, the jury would have to rewrite the terms and conditions of the contract at issue, notwithstanding the fact that the parties have already agreed upon its precise terms. The law will not permit this result. Kampf v. Franklin Life Insurance Co., 33 N.J. 36, 43, 161 A.2d 717 (1960). Furthermore, the construction of a written contract is ordinarily the function of a court, and should not be left to a jury unless the terms are unclear or ambiguous. Bedrock Foundations Inc. v. Geo. H. Brewster & Son, Inc., 31 N.J. 124, 133, 155 A.2d 536 (1959); Anthony L. Petters Diner, Inc. v. Stellakis, 202 N.J. Super. 11, 27, 493 *A.*2d 1261 (App. Div. 1985); Trucking Emp. of North Jersey, etc. v. Vrablick, 177 N.J. Super. 142, 149, 425 A.2d 1068 (App. Div. 1980). Since the subject limitation of liability clause is clear and unambiguous, it need not be submitted to a jury for construction.
>
> [297 N.J. Super. at 421.]

Nothing about this case warrants different treatment.

Finally, Harvest argues that SW "disputed whether their conduct caused a public safety danger or constituted professional negligence," and "[w]ith those facts in dispute," the trial court should have allowed the jury to decide if SW "created a public safety danger and/or acted negligently such that the limitation of liability provision should be invalidated" (Pb26). Neither question is "material" to the Limitation Clause's enforceability. In addition to finding no support in caselaw, Harvest's argument turns the concept of a limitation of liability clause on its head, because these routinely enforced clauses are written

precisely in anticipation of potential liability for negligence. Simply put, these questions are not and cannot be material to the enforceability of a limitation of liability clause.

SW therefore asks that this Court reject Harvest's argument and affirm the trial court's order granting partial summary judgment.

CONCLUSION

For the foregoing reasons, SW respectfully requests that this Court find the Limitation Clause enforceable and affirm the trial court's grant of partial summary judgment to SW.

THOMPSON BECKER, LLC
Attorneys for Defendants-Respondents,
Joseph DiPompeo, P.E. &
Structural Workshops, LLC

/s/ John H. King
By: _____
John H. King, Esq.

Dated: November 4, 2025

HARVEST RESTAURANT GROUP, LLC; CHESTER GRABOWSKI; and ROBERT J. MOORE, Plaintiffs, vs. THOMAS P. ADACH; TECHTON, LLC: STRUCTURAL WORKSHOPS, LLC and JOSEPH DIPOMPEO Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003929-24 CIVIL ACTION On Appeal From: SUPERIOR COURT OF NEW JERSEY MORRIS COUNTY: LAW DIVISION DOCKET NO. MRS-L-002542-19
STRUCTURAL WORKSHOPS, LLC, JOSEPH DIPOMPEO, THOMAS P. ADACH, and TECHTON, LLC Third-Party Plaintiffs, vs. KRZAK CONSTRUCTION, Third-Party Defendant	SAT BELOW: Hon. Louis S. Sceusi, J.S.C. (retired T/A on recall) Hon. Jonathan W. Romankow, J.S.C.

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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PREFATORY STATEMENT

The Defendants Structural Workshop LLC and Joseph DiPomepeo (the "SW Defendants") were well aware that when they contracted to provide engineering services tor Plaintiffs Harvest Restaurant Group LLC ("Harvest"), Chester Grabowski and Robert Moore (collectively "Plaintiffs") that the scope of the project in renovating an existing historic building and constructing a new addition would involve substantial monetary investment and costs. The SW Defendants protected themselves through the procurement of a multi-million dollar insurance policy for this very reason.

The SW Defendants proceeded to negligently perform their engineering services by using the wrong building code and failing to conduct all required measurements to determine if the addition and renovation could withstand the additional weight loads created by the construction. Then, after a plenary hearing, a trial court concluded that the SW Defendants' engineering design was negligently designed and implemented, which caused an immediate closure of the restaurant because the design and construction created a substantial public safety hazard. It then took Plaintiffs a full year and almost one-million dollars in additional construction and operating costs to retrofit the restaurant to comply with the proper building code and meet the required weight thresholds.

It is New Jersey's long-standing principle that exculpatory clauses and limitation of liability clauses are invalid if the underlying conduct triggering the clause is injurious to the public and/or the underlying conduct represents the negligently performed services of a recognized professional. That is exactly what this case represents.

ARGUMENT

I. THIS COURT'S DECISION IN LUCIER MADE CLEAR THAT A LIMITATION OF LIABILITY ANALYSI REQUIRES TWO SEPARATE PRONGS: (I) UNCONSCIONABILITY AND (II) PUBLIC POLICY

The SW Defendants ask this Court to employ an outdated and overly narrow analytical framework to determine whether the parties' limitation of liability clause is enforceable pursuant to the underlying facts of the parties' relationship. Relying primarily on Pre-Lucier decisions, which are based on Pennsylvania Law, not New Jersey law, the SW Defendants argue that the only determination a Court should make is whether a limitation of liability clause is unconscionable using three factors.[1]

[1] The factors of unconscionability are: (i) was the contract one of adhesion; (ii) did the parties have unequal bargaining power; and (iii) whether the damages cap is sufficient to encourage performance. (SW Defendants Br. at 1, 13-15 (citing Marbro v. Borough of Tinton Falls, 297 N.J. Super 411 (Law. Div. 1996), Valhal Corp. v. Sullivan Associates, Inc., 44 F.3d 195 (3d Cir. 1995), and 66 VMD Assocs., LLC v. Melick-Tully & Assocs., P.C., 2011 WL 3503160, *3 (App. Div. Aug. 11, 2011)).

While there is no dispute that conscionability of a limitation of liability clauses is one analysis to determine enforceability; conscionability is not the only analytical step required. Specifically, in this Court's published decision of Lucier v. Williams, 366 N.J. Super. 485 (App. Div. 2004), this Court made clear that a limitation of liability clause will not be enforced based on two separate analyses, either one standing alone being sufficient to void the provision: (i) whether the clause is unconscionable and (ii) does the clause separately violate any public policy of New Jersey. The SW Defendants brief specifically cites the relevant section of Lucier that evidences both alternative approaches:

> Applying these principles to the home inspection contract before us, we find the limitation of liability provision unconscionable. We do not hesitate to hold it unenforceable for the following reasons: (1) the contract, prepared by the home inspector, is one of adhesion; (2) the parties, one a consumer and the other a professional expert, have grossly unequal bargaining status; and (3) the substance of the provision eviscerates the contract and its fundamental purpose because the potential damage level is so nominal that it has the practical effect of avoiding almost all responsibility for the professional's negligence. **Additionally**, the provision is contrary to our state's public policy of effectuating the purpose of a home inspection contract to render reliable evaluation of a home's fitness for purchase and holding professionals to certain industry standards.

(SW Br. at 16-17 (quoting Lucier, 366 N.J. Super. at 493-494) (Emphasis added)). Specifically, this Court's use of the word "additionally" makes clear that the three-part unconscionability analysis is separate and distinct from the state public policy analysis.

Accordingly, the proper framework for analyzing any limitation of liability clause is to both address whether it is unconscionable and whether, even if conscionable, it nevertheless violates New Jersey public policy. As set forth below, the Trial Court here committed reversible error by (i) rejecting the proper analysis of an adequate damages cap indicating unconscionability and (ii) by focusing solely on the unconscionability argument while ignoring the separate public policy bases to invalidate the limitations of liability clause.

II. THE LIMITATION OF LIABILITY CLAUSE IS UNCONSIONABLE AS IT DAMAGES CAP IS UNRELATED TO THE EXPOSURE OF INADEQUATE PERFORMANCE AND AT A MINIMUM REPRESENTS A MATERIAL DISPUTED FACT

Even before turning to whether public policy warrants an exception to the enforcement of the parties' limitation of liability provision, it is respectfully submitted that the Trial Court erred in the manner in which it evaluated whether the $50,000 damages cap was a sufficient deterrent to negligent performance. Both the Trial Court and the SW Defendants adopt a very limited interpretation of this analysis by focusing solely on the disparity between the fee paid to the professional and the capped amount of damages, an interpretation specifically rejected by Lucier. Plaintiffs submit that this Court should not adopt such a myopic focus and instead encourage trial courts to conduct a thorough analysis of all relevant facts to determine whether a damages cap is sufficient in light of all the risk posed by the work agreed upon.

As this Court stated in Lucier, for a limitation of liability provision to be "enforceable, the amount of the cap on a party's liability must be sufficient to provide a realistic incentive to act diligently." 366 N.J. Super at 492. (citing Valhal, 44 F.3d at 204 and Mabro, 297 N.J. Super at 416). Among the factors this Court considered in determining whether the limitation of liability contract was enforceable in Lucier included **both** (i) the disparity between the fee paid and the cap[2] **and** (ii) whether the damages cap is "**grossly disproportionate to the potential loss** to the home buyer if a substantial defect is negligently overlooked." Id. at 494. (Emphasis added). Specifically, this Court acknowledge that "[t]he impact upon the home buyer can be indeed monumental, considering issues such as habitability, health and safety, and financing obligations." Id. at 494. The Court ultimately concluded that the disparity between the consequences of negligence to the home inspector and the home buyer was very substantial. Lucier, moreover, rejected the claim that there is a difference between an exculpation clause and limitation of liability clause holding that "[i]t is immaterial to our analysis that this provision did not completely bar any cause of action against CAL and Vasys, or that Lucier expressly agreed to it." Id.

[2] This dispute it at best subject to the facts in the case. Here, would the disparity allow the enforcement of the limitation if the cap was $20,000, $30,000, etc.? Only a full factual hearing could determine the appropriateness of such a cap.

Here, despite the clear language in Lucier, the Trial Court rejected Plaintiffs' request that it evaluate not just the difference between the damages cap and fee paid to the SW Defendants but also the disparity between the damages cap and the potential (and actual) harm that could and did occur. (Pa1051, Pa1087). Specifically, the Trial Court stated as follows in the reconsideration decision:

> Plaintiffs urge the Court to consider the "disparity between the consequences of negligence between the Defendant and the Plaintiff." Lucier v. Williams, 366 N.J. Super. 485, 492 (App. Div. 2004). The Court disagrees that this is the standard and reiterates that the appropriate question is whether the limitation is "so minimal compared with the expected compensation." Lucier, supra, 366 N.J. Super. at 494-95 (citing Marbro, Inc. v. Borough of Tinton Falls, 297 N.J. Super 411, 418 (App. Div. 1996) and Valhal Corp. v. Sullivan Associates, Inc., 44 F.3d 195 (3d Cir. 1995)). The fact that Lucier relies on Marbro and Valhal in its analysis is compelling. See Lucier, supra, 366 N.J. Super. at 492, 495.

(Pa1087).[3]

As such, given the clear language in Lucier, Plaintiffs submit that the Trial Court committed reversible error in finding the limitation of liability provision enforceable where the Trial Court failed to consider the consequence of the SW Defendants' negligence on the Plaintiff.

[3] As discussed *infra*, the SW Defendants and Trial Court's reliance on Mabro and Valhal is misplaced and should not be followed by this Court as these cases were decided under Pennsylvania law, which does not impose any special duty on licensed professionals, as does New Jersey.

Plaintiffs respectfully believe that the unpublished case of West Essex v. Construction Design Technologies, N.J. Super. ESX-L-10272-07 (Law Div. 2009) (Unpublished) (Pa0783), decided by Judge Kennedy prior to his appointment to the Appellate Division provides the correct analysis of the Lucier decision holding as follows:

> By contrast, in Lucier, Judge Lisa, writing for the court, suggested a more expansive measure of reasonableness. While the Appellate Division held the home inspection limitation of liability limitation to violate public policy, it also found the clause unconscionable because it bore no relation to the quantum of damage the homeowner might suffer. Judge Lisa noted that "such excessively restricted damage allowance is grossly disproportionate to the potential loss to the home buyer if a substantial defect is negligently overlooked. The impact upon the home buyer can be indeed monumental, considering issues such as habitability, health and safety, and financing obligations." 366 N.J. Super. at 494
>
> Lucier's application of a broader standard against which to measure the reasonableness of a contractual liability ceiling undercuts, to a substantial degree, the vitality of Mabro in a circumstance such as that at bar.

(Pa0791) (Emphasis in original).

III. EVEN IF THE PARTIES' LIMITATION OF LIABILITY IS CONSCIONABLE THE TRIAL COURT FAILED TO PROPERLY APPLY THE PUBLIC POLICY ANALYSIS UNDER THE FACTS OF THIS CASE

The Trial Court, both in ruling on the parties' motions for partial summary judgment and Plaintiffs' motion for reconsideration, limited its analysis to whether the limitation of liability clause was or was not unconscionable. In the summary

judgment decision, Judge Sceusi framed his decision based on "[t]he key question [being] whether the cap is so minimal compared with the expected compensation" (Pa1051).[4] Nowhere in its decision did the Trial Court address the separate public policy arguments raised by Plaintiffs.

In its reconsideration decision, the Trial Court once again turned to a conscionability analysis for its review of the public policy arguments raised by Plaintiffs. (Pa1087). Specifically, the Court looked solely at whether the cap at issue amounted to an exculpation of liability – again focusing on the same third factor of unconscionability. (Pa1087-88). The only lip service the Trial Court gave Plaintiffs in its public policy arguments was to distinguish Plaintiff's reliance on Hubner v. Spring Valley Equestrian Ctr., 203 N.J. 184 (2010), Marcinczyk v. State of New Jersey Police Training Comm'n, 203 N.J. 586, 594 (2010), and Wilson ex rel. Manzano v. City of Jersey City, 209 N.J. 558, 581 (2012), because those cases were based on the existence of certain statutes not present in the underlying case and assuming incorrectly that there is no statute at issue in a case against an engineer. (Pa1085-86). This rejection of Plaintiffs' analogy, however, did not address the underlying argument that where the State sets forth a public policy (here being public

[4] The Trial Court held that there was no unequal bargaining power between Plaintiffs and the SW Defendants despite the fact that neither of the individual Plaintiffs, and Mr. Grabowski in particular, were or ever were professional engineers. (Pa1052).

safety when it comes to the work of professional engineers), then it is incumbent on the Court to address that public policy in determining whether the limitation of liability clause is enforceable.

Thus, even if the Court is correct in finding the limitation of liability clause at issue in this case is not unconscionable, that holding does not address whether the clause should be invalidated because it violates New Jersey public policy. As set forth in Plaintiffs' opening brief, under New Jersey law, there are at least four different public policy exceptions to a limitation of liability provisions:

- New Jersey will invalidate exculpatory clause if injurious to the interest of the public or violates public statutes. Marcinczyk, 203 N.J. at 580.
- New Jersey Courts will not permit parties to contractually avoid liability where the party acts with negligent disregard or willful and wanton disregard that endangers the members of the public. Hubner, 203 N.J. at 184.
- Limitations of liability clauses are particularly disfavored with regard to professional services where people rely upon professional services provided for specialized knowledge. Lucier, 386 N.J. Super. at 485.
- New Jesey looks to express statements of public policy such as legislation. Id.; see also Stelluti v. Casapenn Enters, 408 N.J. Super. 435, 454 (App. Div. 2009).

As is clear in the cited case law, none of the public policy exceptions have anything to do with the three-factor conscionability analysis. In this case, Plaintiff pointed the Trial Court to two separate public policies that warrant an invalidation

of the clause, or at a minimum, a remand of this matter to a jury to determine whether the facts of the case meet the legal public policy that would permit invalidation.

A. Building Safety Is A Clear Public Policy Of New Jersey To Protect The General Public

There can be no dispute that ensuring public safety is a clear public policy interest of the State. This public policy interest has been expressed in a myriad of different circumstances, including through statute (Marcinczyk, 203 N.J. at 580; Hubner, 203 N.J. at 184; Wilson, 209 N.J. at 581). Thus, like the statutes referenced in these other cases, here New Jersey's statutes concerning the licensing of engineers makes the public policy clear:

> In order to **safeguard life, health and property, and promote the public welfare**, any person practicing or offering to practice professional engineering or professional land surveying in this State shall hereafter be required to submit evidence that he is qualified so to practice and shall be licensed as hereinafter provided.

N.J.S.A. 45:8-27 (Emphasis added).

In fact, the New Jersey statutes are replete with examples where building safety is repeatedly stressed as a public policy goal of the State. See, e.g., N.J.S.A. 2A:42-115 (declaring substandard and deteriorating buildings poses a public safety threat and diminish health, safety, and property values in neighborhoods); N.J.S.A. 40:48-2 (entrusting municipalities to ensure building structures are properly regulated to preserve public health, safety and welfare). New Jersey Courts have also

repeatedly echoed this public policy goal. See, e.g., Dome Realty, Inc. v. City of Paterson, 83 N.J. 212 (1980); State v. Field, 107 N.J. Super. 107 (App. Div. 1969).

The Trial Court, however, did not grapple, at all, with this public policy and, most importantly, whether Judge DuPuis finding that the SW Defendants' conduct caused an immediate and grave public safety hazard warranted invalidation of the limitation of liability clause. This factual analysis is completely lacking by the Trial Cour's summary judgment and reconsideration decisions. What Plaintiffs asks this Court to make clear is that the separate public policy of ensuring public safety must be addressed when evaluating a limitation of liability provision. Plaintiffs believe that under the facts present here, the egregious safety danger posed must negate the otherwise acceptable limitation of liability.

The SW Defendants' distinction of Marcinczyk, 203 N.J. at 580; Hubner, 203 N.J. at 184; Wilson, 209 N.J. at 581 as "involve[ing] exculpatory agreements or statutes, not limitation clauses" (SW Defendants Br. at 21) is nothing more than a red herring.[5] As explained above, whether a limitation of liability clause is exculpatory or not is only related to its conscionability, not whether it violates public policy. Rather, what these cases demonstrate is that regardless of whether by contract or statute a party is given immunity from liability or even a cap on its damages,

[5] The Lucier case specifically held that there is no substantial difference between an exculpatory clause and a limitation of liability clause. 366 N.J. Super at 494 .

where that conduct creates a public safety danger, the contractual or statutory rights it may have been entitled no are extinguished for the benefit of the general public.

B. Public Policy Excludes Licensed Professionals From Enforcing Limitation Of Liability Provisions When They Commit Malpractice

Plaintiffs separately ask this Court to formally acknowledge and recognize the licensed professional exception to the enforcement of limitation of liability clauses, as was elegantly explained by Judge Kennedy in West Essex v. Construction Design Technologies, N.J. Super. ESX-L-10272-07 (Law Div. 2009). As noted in Plaintiffs' opening appeal brief, Judge Kennedy provided a fulsome rationale in West Essex as to why licensed professionals must be held to a higher standard that ordinary contractual parties when analyzing a limitation of liability provision. It is this learned professional basis that Judge Kennedy held that a licensed architect could not enforce its limitations clause where its work deviated from the accepted standards of the architectural profession.

Here, the underlying claim at issue is whether the SW Defendants deviated from the accepted standards of care for licensed engineers when they used the wrong building code and failed to conduct all necessary measurements for the design and construction of Plaintiffs' restaurant. Even if the Trial Court were correct in not adopting the conclusions of Judge DuPuis that the SW Defendants' conduct was a deviation from the standard of care, it is for the jury to decide whether malpractice

occurred. What Plaintiffs ask this Court is to affirm the public policy that certain licensed professionals, like engineers, cannot avoid the consequences of their malpractice through limitation of liability clauses, which often pale in comparison to the liability insurance these professionals separately maintain.

If New Jersey's public policy that invalidates such clauses if the result is injurious to the public and is based on a defendant's negligent acts has any meaning, then it must apply here where the SW Defendants' negligence caused a clear danger to the public, necessitating the closure of the restaurant. The Lucier Court clearly understood that the public policy violations are a separate basis for the invalidation of a limitation of liability clause in stating as follows:

> The limitation of liability clause here is also against public policy. First, it allows the home inspector to circumvent the state's public policy of holding professional service providers to certain industry standards.
>
> …
>
> As we have also stated, exculpation or limitation of liability clauses are particularly disfavored with regard to professional services.

Lucier, 366 N.J. Super. at 495, 499.

IV. DEFENDANTS' RELIANCE ON MARBO, VAHAL, AND 66VMD IS INAPPOSITE AS NONE DEALT WITH THE PUBLIC POLICY EXCEPTIONS TO ENFORCEMENT THAT ARE PRESENT HERE

As noted in footnote 1 of Plaintiffs' opening brief, neither Mabro nor Valhal can be considered the operative law regarding the analysis of limitation of liability clauses. As an initial matter, both were decided before Lucier. Moreover, both were

decided under Pennsylvania, not New Jersey law. In fact, as the Court in Valhal noted Pennsylvania does not have a general policy disfavoring limitation of liability clauses and, unlike New Jersey, does not impose any special duties on licensed professionals to protect the general public. Valhal, 44 F.3d at 202, 207.

Moreover, the SW Defendants' reliance on the unpublished decision of 66 VMD Assocs., LLC, 2011 WL 3503160 is equally unavailing. Like the Trial Court's error in conflating the conscionability analsys with a public policy analysis, 66 VMD address only the conscionability portion of the limitation of liability analytical framework. Specifically, as this Court explained:

> VMD relies on Lucier v. Williams, 366 N.J.Super. 485 (App.Div.2004), contending that limitation of liability clauses are unenforceable where the potential loss resulting from negligent performance greatly exceeds the limitation on damages. According to VMD, such a contract would provide no incentive to perform diligent work. VMD argues, therefore, that MTA's limitation of liability clause is unenforceable because it limited recovery to $25,000 despite potential damages "in excess of $3 million dollars.

2011 WL 3503160 at*3.

Specifically, the Court in VMD address only the unconscionable elements of the parties contract. Id. at **4-7(addressing bargaining power and the amount of the damages cap in relation to the fees at issue and whether it is exculpatory). As such, none of the main cases cited by the SW Defendants provides any support to affirm

the Trial Court's refusal to analyze the applicable public policy exceptions to the enforcement of a limitation of liability clause.

The SW Defendants here, and the amicus, assert that the Plaintiffs, as owners, are in a better position then the engineer to absorb the loss in a case such as this one. Plaintiffs respectfully disagree. Owners, like Plaintiffs here, often utilize all of their assets for the buildout or renovation of their business. When an engineer negligently causes a dramatic and extreme loss, an owner may (and likely will not) have the additional assets, funding or resources to engage in another building effort. The engineer, on the other hand, routinely applies for and obtains insurance coverage specifically to absorb such costs in the event of their negligence, just as the SW Defendants obtained in this case. To suggest otherwise is to ignore the reality of this type of contractual relationship.

What is proposed by the SW Defendants and the amicus, is in fact a blatant exculpation of engineers for their own malfeasance and negligence regardless of the consequences of such malfeasance by simply liming the liability to $50,000 regardless of the size of a project or the damages incurred. Such a result is clearly contrary to the public policy of the State of New Jersey.

CONCLUSION

Accordingly, Plaintiffs respectfully request that this Court reverse the Trial Court's granting of partial summary judgment in favor of the SW Defendants.

NAGEL RICE LLP

By: 

DATED: December 1, 2025 Bradley L. Rice

HARVEST RESTAURANT GROUP, LLC; CHESTER GRABOWSKI; and ROBERT J. MOORE, Plaintiffs, vs. THOMAS P. ADACH; TECHTON, LLC: STRUCTURAL WORKSHOPS, LLC and JOSEPH DIPOMPEO Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003929-24 CIVIL ACTION
STRUCTURAL WORKSHOPS, LLC, JOSEPH DIPOMPEO, THOMAS P. ADACH, and TECHTON, LLC Third-Party Plaintiffs, vs. KRZAK CONSTRUCTION, Third-Party Defendant	SUPERIOR COURT OF NEW JERSEY MORRIS COUNTY: LAW DIVISION DOCKET NO. MRS-L-002542-19 SAT BELOW: Hon. Louis S. Sceusi, J.S.C. (retired T/A on recall).

BRIEF ON BEHALF OF PLAINTIFFS, HARVEST RESTAURANT GROUP, LLC, CHESTER GRABOWSKI AND ROBERT J. MOORE, IN RESPONSE TO THE BRIEF FILED BY *AMICUS CURIAE* AMERICAN COUNCIL OF ENGINEERING COMPANIES OF NEW JERSEY

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PREFATORY STATEMENT

The *Amicus* Curiae American Council of Engineering Companies of New Jersey ("the Amicus") ask this Court to uphold a limitation of liability clause despite the fact that a Judge already determined that the defendant engineer's work deviated from the acceptable standard of care in the engineer industry and caused a public safety hazard so great it required the immediate closure of a restaurant. To support the protectionist position the Amicus takes on behalf of its members, the Amicus posits that although engineers would be liable if a third party, such as a restaurant patron, who is injured as a result of the engineer's negligence, there should be no additional liability beyond the damages cap to the benefit of the restaurant owner who must either perform the necessary repairs that would prevent the third party patron from being injured in the first place or to correct the negligent work done by the engineer that caused such an injury and recover the losses that the business suffered because of such corrective actions. In doing so, the Amicus ignores the fact that both circumstances involve the very same liability insurance policies protecting the engineer. In reality, then, it is insurance companies, and not engineers, that the Amicus seeks to protect.

To support its alarmist arguments, the Amicus incorrectly asserts that "owners are often better positioned both financially and in terms of bargaining power to allocate risk." We respectfully disagree. Owners often put all or significantly all

of their assets to build a project such as the Restaurant here and would not have sufficient assets to overcome the need to reconstruct and cure defects caused by the engineers' negligence. In fact, the Amicus ignores the reality that many businesses, especially restaurants, are small mom and pop businesses that are created by people seeking to fulfill a lifelong dream. The engineers, as a matter of routine, would have in place, as here, sufficient insurance to cover the losses they cause. This viewpoint was expressly made in West Essex v. Construction Design where Judge Kennedy stated, "This Court is unaware of any readily available insurance by which a litigant in Plaintiff's position may obtain coverage for the consequences of its architect's negligence."

In short, the Amicus is wrong as to the facts and the law.

ARGUMENT

I. THE AMICUS BRIEF FAILS TO CONSIDER NEW JERSEY PUBLIC POLICY IN CONSIDERING THE CLAUSE AT ISSUE

The Amicus brief relies predominantly on the unpublished appellate court decision of 66 VMD Associates v. Melick-Tully, 2011 WL 3503160 (App. Div. 2011) to support its position that the Trial Court's ruling should be affirmed. As set forth below, such reliance is misplaced under the facts of this case on appeal.

66 VMD Associates correctly identified that a limitation of liability provision is unenforceable under either of two theories: (1) where it is "unconscionable or (2) "violates public policy." 66 VMD's analysis is limited, however, as is the Amicus

herein to the issue of "unconscionability". Nowhere in that case is there a discussion of the New Jersey public policy that invalidates such clause where the acts of the engineers that "endanger the public".

As to the "unconscionability" test, the Amicus take great pain to assert that this case is a limitation of liability and not an exculpation clause.[1] But, as Lucier v. Williams, 366 N.J. Super 485 (App. Div. 2009) explains, the difference between a limitation clause and an exculpatory clause is often unclear and fact intensive. Lucier stated:

> "We also focus our inquiry on whether the limitation is a reasonable risk between the parties or whether it runs afoul of the public policy disfavoring clauses which effectively immunize parties from liability for their own negligent actions."

366 N.J. Super 493 (App. Div. 2004). Lucier stated that it was immaterial to its analysis that the provision did not completely bar any cause of action "because the

[1] The Amicus describes Plaintiff as a "sophisticated commercial entity", but as West Essex points out:

> "Citizens who engage the professional services of an architect are at a disadvantage in bargaining power in that they are neither qualified to nor capable of evaluating the professional quality of the services they hope to receive. They must necessarily rely on the skills of the architect, and the consequences of professional failure can only become apparent after the architect's completed plans have been followed by actual construction. At that point, the consumer's damages caused by a faulty architectural design are often far greater than the cost of preparing the plan."

limitation clause is tantamount to an exculpation clause and warrants applications of the same policy considerations." Id. at 495.

Here, there are three factors at play: the $9,500 fee paid to the engineer, the $50,000 cap, and the approximately $1 Million cost to correct the engineer's negligence. There is no factual dispute that Defendants here was fully aware of the size of the project. There is factual uncertainty, however, as to whether Defendant ever had exposure to the $50,000 cap or rather it being covered by its insurance. Further, at what point can a court unilaterally determine that there is adequate economic compulsion. Would the result be the same if the cap was lowered and, if so, to what? It is for this reason that Lucier holds that one must also look to the ultimate consequence stating:

> "Here, the home inspector held himself out as an expert and a professional. The disparity between the consequences of negligence to the home inspector and to the home buyer, like the physician and a patient, is very substantial."

Id. at 496.

The Amicus further fails to address Lucier's ruling that when evaluating the enforceability of contractual provisions, we need also look to express statements of public policy. Lucier specifically considered the Inspection Professional Licensing Act which required home inspector to "maintain $500,000 errors and omissions insurance." Id. at 497. Here, although the New Jersey Statute that licenses engineers

does not have a specific requirement to maintain insurance, the policy considerations are the same and as a matter of practice, engineers routinely obtain such insurance, as was done here.

The Amicus also places great reliance on Marbro Inc. v. Borough of Tinton Falls, 297 N.J. Super. 411 (Law Div. 1996) and Valhal Corp. v. Sullivan Associates, 44 F. 3d 195 (3 Cir. 1995). However, the Amicus fails to acknowledgethat Valhal and Marbro relied on Pennsylvania law where, unlike New Jersey law, no special duties are imposed on licensed professionals.

Finally, despite the Amicus' willingness to cite an unpublished case (66 VMD Associates), it strikingly omits any reference to West Essex v. Construction Design. West Essex not only held that the reasonableness of a limitation clause must relate to the damages Plaintiff has incurred; it clearly indicates that both Marbro and Valhal are no longer precedent in New Jersey.

CONCLUSION

Accordingly, Plaintiffs respectfully request that this Court reject the arguments of the Amicus. Licensed engineers in the State of New Jersey procure insurance to protect against the very type of risks that occurred in this case. Allowing them to further limit their exposure in cases where they acted negligently and create a public safety danger does not further the public policy goals of the State. Rather,

it undermines the duty this State imposes on engineers to perform their services with care and with the public's safety being paramount.

NAGEL RICE LLP

By: 

DATED: December 1, 2025 Bradley L. Rice