

SUPREME COURT OF TEXAS

James Construction Group, LLC and Primoris Services Corporation v. Westlake Chemical Corporation

James Construction · No. No. 20-0079 · Decided May 20, 2022

SUMMARY

This partial dissent addresses whether a contractual provision waiving consequential damages and stating that no claim shall be made for such damages constitutes both a damages waiver and a covenant not to sue. Justice Boyd concludes that Westlake breached the covenant by asserting consequential-damages claims and that James should recover the attorney's fees incurred in defending those claims. The dissent agrees that Westlake's oral notice did not substantially comply with the contract's written-notice requirement and that Westlake could not recover replacement costs.

CASE DETAILS

COURT	Supreme Court of Texas
WRITING FOR THE COURT	Justice Jeffrey S. Boyd; Justice Blacklock; Justice Huddle
JURISDICTION	Texas
DECIDED	May 20, 2022
DOCKET	No. 20-0079
DISPOSITION	other
PROCEDURAL POSTURE	Petition for review from the Court of Appeals for the Fourteenth District of Texas. Justice Boyd dissented in part from the Texas Supreme Court's disposition concerning the contractual consequential-damages provision.
PRECEDENTIAL VALUE	Nonprecedential as to the dissenting analysis; the opinion is a partial dissent.
PARTIES	James Construction Group, LLC, Primoris Services Corporation v. Westlake Chemical Corporation

TOPICS

[contract interpretation](#)[contracts](#)[damages](#)[construction law](#)[appellate procedure](#)

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the contractual language providing that no claim shall be made for consequential damages constitutes a covenant not to sue, in addition to a waiver of consequential damages.
2. Whether breach of that covenant would permit James to recover attorney's fees incurred in defending Westlake's consequential-damages claims.
3. Whether oral notice could constitute substantial compliance with the contract's written-notice requirement.
4. Whether Westlake could recover the costs incurred when it replaced James after providing oral rather than written notice.

HOLDINGS

1. Oral notice cannot constitute substantial compliance with a contractual written-notice requirement.
2. Westlake could not recover the costs it incurred when it replaced James because its oral notice failed to substantially comply with the contract's written-notice requirement and the contract did not otherwise authorize recovery of those costs.
3. The contract's statement that "no claim shall be made" for consequential damages constituted a covenant not to sue for such damages, separate from the mutual waiver of consequential damages.
4. Because Westlake breached the covenant not to sue for consequential damages, James was entitled to the jury's award of attorney's fees incurred in defending against Westlake's consequential-damages claims.

KEY QUOTATIONS

"But I conclude that the parties' agreement that "no claim shall be made" for consequential damages constitutes a covenant not to sue for such damages." (at 1)

"The difference between these provisions is paramount because the mutual waiver of consequential damages simply bars recovery, while the promise not to sue constitutes a covenant that, if breached, enables the other party to recoup its costs incurred in defending that suit." (at 2)

"Because Westlake breached the contract's covenant not to sue for consequential damages, I would reverse the court of appeals' contrary holding and reinstate the jury's award of the attorney's fees James incurred in defending against Westlake's claims for consequential damages." (at 3)

FACTUAL BACKGROUND

The parties' contract stated that neither party would be liable to the other for consequential damages and that no claim would be made for such damages. Westlake asserted a claim against James seeking damages that, in Justice Boyd's view, were consequential damages, and James incurred attorney's fees defending against those claims. The jury awarded James those fees, but the court of appeals rejected the award as to the consequential-damages provision.

PROCEDURAL HISTORY

Westlake asserted claims against James, including claims for consequential damages, and the jury awarded James attorney's fees incurred in defending against those claims. The court of appeals held that the consequential-damages provision did not support that award. The case reached the Supreme Court of Texas on James's petition for review. Justice Boyd would have reversed the court of appeals on that issue and reinstated the jury's attorney-fee award.

DISPOSITION

other

CASES CITED

- Enter. Leasing Co. of Hous. v. Barrios, 156 S.W.3d 547, 549 (Tex. 2004)
- Neece v. A.A.A. Realty Co., 322 S.W.2d 597, 600 (Tex. 1959)

OPINION

James Construction Group, LLC and Primoris Services Corporation v. Westlake Chemical Corporation

PER CURIAM.

Supreme Court of Texas ===== No. 20-0079 ===== James Construction Group, LLC and Primoris Services Corporation, Petitioners, v. Westlake Chemical Corporation, Respondent ===== On Petition for Review from the Court of Appeals for the Fourteenth District of Texas ===== JUSTICE BOYD, joined by Justice Blacklock and Justice Huddle, dissenting in part. I agree with the Court that substantial compliance can satisfy a written-notice requirement but oral notice cannot constitute substantial compliance. I also agree that Westlake cannot recover the costs it incurred when it replaced James because its oral notice failed to substantially comply with the contract's written-notice requirement and the contract did not otherwise entitle Westlake to recover those costs. But I conclude that the parties' agreement that "no claim shall be made" for consequential damages constitutes a covenant not to sue for such damages. Because I would reverse the court of appeals' holding as to the consequential-damages provision, I respectfully dissent in part. The contract plainly stated that neither party "shall be liable to the other for any consequential . . . damages . . . and no claim shall be made by either [party] for such damages." [Emphasis added.] The Court gives undue weight to the contractual language explicitly forbidding claims for consequential damages being "an independent clause." Ante at _____. This grammatically inconsequential detail pales in comparison to the binding power of the conjunctive "and," which links the waiver of consequential damages to the covenant not to sue for such damages, ensuring both are valid, independently enforceable provisions. The Court's rationales for its interpretation are unpersuasive. Its premier argument

relies on the title of the contract section at issue (“Waiver of Consequential Damages”), ante at ___, and disregards the fact that the substantive text of the section clearly records the parties’ more expansive intent. See *Enter. Leasing Co. of Hous. v. Barrios*, 156 S.W.3d 547, 549 (Tex. 2004) (“Although we recognize that in certain cases, courts may consider the title of a contract provision or section to interpret a contract, ‘the greater weight must be given to the operative contractual clauses of the agreement.’” (quoting *Neece v. A.A.A. Realty Co.*, 322 S.W.2d 597, 600 (Tex. 1959))). The contract spells out the parties’ agreement to both waive consequential damages and covenant not to sue for such damages. And if the section’s title does not fully capture this manifestation of intent, the contract’s text must nevertheless control. The difference between these provisions is paramount because the mutual waiver of consequential damages simply bars recovery, while the promise not to sue constitutes a covenant that, if breached, enables the other party to recoup its costs incurred in defending that suit. These provisions are not duplicative, as the Court’s reading would ensure; rather, they accomplish different goals and avoid surplusage and superfluity. The Court attempts to rely on the distinction between a “claim” and a “suit,” asserting that relinquishing “a claim to any consequential damages to which [the parties] may be entitled in the event of a lawsuit” is not the same as relinquishing “the right to bring a suit in the first place.” Ante at ___. But the contract bars both collecting consequential damages and making a claim for such damages. Westlake breached the contract when it asserted a claim against James for consequential damages. Finally, the Court errs by depending on the somewhat unpredictable line between direct and consequential damages, arguing that because a court might ultimately categorize damages as consequential when a party believed them to be direct, the contract here could not have barred suit for consequential damages. Ante at ___. But Westlake’s subjective belief that the damages it sought were direct, rather than consequential, was subject to judicial review and interpretation. To whatever extent judicial characterization of damages as direct or consequential impeded Westlake’s ability to safely predict whether it was violating a covenant when it sued James, that does not alter the contract’s plain language. Whether it knew or not, Westlake was suing for consequential damages, which its contract straightforwardly forbids. 3 Because Westlake breached the contract’s covenant not to sue for consequential damages, I would reverse the court of appeals’ contrary holding and reinstate the jury’s award of the attorney’s fees James incurred in defending against Westlake’s claims for consequential damages. Because the Court does not, I respectfully dissent. Jeffrey S. Boyd Justice

OPINION DELIVERED: May 20, 2022