

IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 25-0480

MICHAEL JOHNSON and TERESA JENISCH,

Plaintiffs/Appellants/Cross-Appellees.

v.

SPIRE HOME INSPECTION, LLC and KEVIN KIVELA,

Defendants/Appellees/Cross-Appellants.

MONTANA TRIAL LAWYERS ASSOCIATION'S AMICUS BRIEF

On Appeal from the Montana Fourth Judicial District Court, Missoula County,
Honorable John W. Larson Presiding.

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I. STATEMENT OF THE ISSUES

A. Whether a contractual provision in a home inspection agreement that limits the inspector's liability for negligent inspection to a refund of the inspection fee is, in substance, an unenforceable exculpatory clause prohibited by Mont. Code Ann. § 28-2-702 and Montana public policy, rather than a valid liquidated damages provision.

B. Whether a fee-refund clause that is not based on any pre-breach estimation of anticipated losses, bears no reasonable relationship to the foreseeable harm from a negligent inspection, and caps recovery at a nominal amount can be enforced as liquidated damages rather than stricken as unconscionable, penal, or exculpatory in effect.

C. Whether genuine issues of material fact regarding the nature of the bargaining process, the adhesive character of the home inspection contract, the disparity in sophistication and bargaining power between the inspector and the consumer, the difficulty of estimating damages at the time of contracting, and the reasonableness of the stipulated amount preclude summary judgment enforcing the fee-refund clause as a matter of law.

II. STATEMENT OF THE CASE

This appeal arises from the timely appeal of an Order granting summary judgment to the Defendant/Appellee. MTLA otherwise defers to the parties' positions on the statement of the case.

III. STATEMENT OF FACTS

The Appellants' Brief states the relevant factual case background, which will not be repeated here.

IV. SUMMARY OF ARGUMENT

The fee-refund provision in the home inspection contract at issue operates as an exculpatory clause, not a true liquidated damages provision. Montana law renders exculpatory clauses that exempt a party from liability for its own negligence void as against public policy. By capping the inspector's exposure to a de minimis refund of the inspection fee itself, the clause effectively immunizes the inspector from the financial consequences of negligent performance. Calling such a cap a "liquidated damages" provision does not change its legal character. The substance is that the inspector's liability for negligence is reduced to a nominal sum, which is functionally indistinguishable from an unlawful exculpation.

Liquidated damages provisions serve a different and legitimate function: they allow parties of relatively equal bargaining power to pre-agree on a reasonable estimate of the nonbreaching party's expectancy damages where those damages

would be difficult to quantify after breach. Proper liquidated damages are tethered to a good-faith effort to approximate anticipated loss, and they substitute a stipulated amount for a later, fact-intensive damages inquiry. Such clauses must contain a reasonable projection of anticipated or actual harm.

Where a purported liquidated damages provision is untethered to such an approximation, it is not a liquidated damages provision at all. For example, provisions that set an unreasonably large sum are penalties. And provisions that set an unreasonably small sum are unconscionable or functionally exculpatory. Where—as here—a provision insulates a party from the consequences of its negligence rather than a breach, it is especially suspect.

A fixed cap equal to or less than the inspection fee, in the context of potential six-figure home-repair losses, bears no reasonable relationship to anticipated damages. It instead strips the consumer of the core protection sought from the inspection: protection against catastrophic, undisclosed defects. Courts across jurisdictions recognize this distinction and strike inspection-fee caps in home inspection contracts as impermissible exculpatory clauses.

Montana’s statutory regulation of home inspectors requires formal training, registration, and a minimum of \$100,000 in errors-and-omissions coverage. *See* Mont. Code Ann. § 39-9-212. This confirms a legislative judgment that negligent inspections can inflict major financial harm. A contractual provision that caps

liability at the inspection fee directly undercuts that policy and defeats reasonable consumer expectations.

Finally, if the Court construes the provision as a liquidated damages provision, enforceability rests on underlying factual determinations that are inappropriate for resolution on summary judgment in the posture presented. Affirming would, therefore, provide an improper roadmap to lower courts. Although enforceability is framed as a question of law, it depends on fact-intensive issues: the nature of the bargaining process, whether the clause is part of an adhesion contract, whether the weaker party had any meaningful choice, whether the clause falls within that party's reasonable expectations, whether damages at the time of contracting were difficult to ascertain, and whether the stipulated amount represents a reasonable estimate of anticipated loss. Numerous courts recognize that assessing the reasonableness of a liquidated damages clause and the circumstances existing at contract formation is a fact-specific exercise that often requires factual development and, where disputed, fact-finder resolution. Before a court can classify a provision as a valid liquidated damages clause rather than an exculpatory or penalty provision, these predicate factual questions must be resolved in favor of the non-moving party on summary judgment.

V. STANDARD OF REVIEW

Summary judgment is an extreme remedy which should not be a substitute for a trial on the merits if a material factual controversy exists. *Putnam v. Cent. Mont. Med. Ctr.*, 2020 MT 65, ¶ 12, 399 Mont. 241, 246 P.3d 419; *Becker v. Rosebud Operating Servs.*, 2008 MT 285, ¶ 13, 345 Mont. 368, 191 P.3d 435. In order to obtain such an extreme remedy, the moving party must show no genuine issues of material fact exist and that it is entitled to judgment as a matter of law. Mont. R. Civ. P. 56; *Butler v. Domin*, 2000 MT 312, ¶ 19, 302 Mont. 452, 15 P.3d 1189. Given the extreme nature of summary judgment, under which parties can be stripped of their right to trial by jury, the evidence must always be “viewed in the light most favorable to the non-moving party, and all reasonable inferences are to be drawn...in favor of the party opposing summary judgment.” *McLeod v. State ex rel. Dept. of Transp.*, 2009 MT 130, ¶ 12, 206 P.3d 956, 350 Mont. 285 (emphasis added).

Once the moving party has met its burden, the party opposing summary judgment must present affidavits or other testimony containing material facts that raise a genuine issue as to one or more elements of its case. *Tin Cup Co. Water and/or Sewer Dist. v. Garden City Plumbing & Heating, Inc.*, 2008 MT 434, ¶ 22, 347 Mont. 468, 200 P.3d 60. The non-moving party must provide material and substantial evidence setting forth specific facts to raise a genuine issue of material fact. *Hiebert v. Cascade Co.*, 2002 MT 233, ¶ 21, 311 Mont. 471, 56 P.3d 848

(internal quotation and other citation omitted). “A material fact is a fact that involves the elements of the cause of action or defense at issue to an extent that necessitates resolution of the issue by a trier of fact.” *Schweitzer v. City of Whitefish*, 2016 MT 254, ¶ 9, 385 Mont. 142, 383 P.3d 735 (quoting *Roe v. City of Missoula*, 2009 MT 417, ¶ 14, 354 Mont. 1, 221 P.3d 1200).

A district court’s interpretation of the applicable law is reviewed for correctness. *Gardner-Park Cnty. Water & Sewer Dist. v. Knight*, 2024 MT 121, ¶ 12, 417 Mont. 1, 549 P.3d 1151 (citing *Newman v. Scottsdale Ins. Co.*, 20113 MT 125, ¶ 21, 370 Mont. 133, 301 P.3d 348.)

VI. ARGUMENT

A. The Fee Refund Provision at Issue Is an Exculpatory Clause, Not a Liquidated Damages Provision.

An exculpatory clause in a contract exempts one party from responsibility for its own negligence. Mont. Code Ann. § 28-2-702. Under Montana law, “all contracts¹ that have for their object, directly or indirectly, to exempt anyone from responsibility for the person’s own fraud, for willful injury to the person or property of another, or for violation of law, whether willful or negligent, are against the policy of the law.” *Id.*; *Miller v. Fallon Cty.*, 222 Mont. 214, 721 P.2d 342 (1986) (Any

¹This Court most recently addressed exculpatory clauses in *Zirkelbach Constr., Inc. v. DOWL, LLC*, 2017 MT 238, 389 Mont. 8, 402 P.3d 1244. The Court there held that a provision limiting contractual damages to \$50,000 remained “exposed to liability on the negligence claim.” ¶ 19. Put differently, the limitation only effected contractual damages, not tort damages. The difference here is that the inspection agreement seeks to prevent any and all liability, including tort claims.

waiver by which an entity (principal or agent) seeks to contractually exculpate itself from liability arising out of negligence is invalid.); *Spath v. Dillon Enterprises, Inc.*, 97 F. Supp. 2d 1215, 1218 (D. Mont. 1999).

Conversely, liquidated damages provisions negotiate efficiency into contractual relations. In an enforceable liquidated damages provision, parties of equal bargaining power may agree in advance on a specific damage amount to be paid upon breach. Richard A. Lord, *Williston on Contracts*, § 65:1 (4th ed. 2002). This amount is intended to predetermine expectancy damages, which are untethered to negligence concepts. *Arrowhead Sch. Dist. No. 75, Park Cnty. v. Klyap*, 2003 MT 294, ¶ 21, 318 Mont. 103, 111, 79 P.3d 250, 256. The parties agree that, in lieu of requiring a post-breach inquiry into damages caused by a breach (which need not be negligent), the breaching party simply pays the nonbreaching party the stipulated amount. *Id.* Further, in this way, liquidated damages clauses allow parties to estimate damages that are impractical or difficult to prove, as courts cannot enforce expectancy damages without sufficient proof. *Id.*

Fair administration of the law requires fair discernment between these two very different species and recognition of wolves in sheep's clothing. For example, an alleged liquidated damages provision which caps liability for negligence at a de minimis payment affords the same legally proscribed benefit of the bargain as an exculpatory provision. Simply put, calling an exculpatory provision (which caps

liability for negligence at a de minimis amount) a liquidated damages provision does not make it so. As Abraham Lincoln quipped:

If you call a tail a leg, how many legs has a dog? Five? No, calling a tail a leg don't make it a leg.

See Washington v. Kass Mgt. Services, No. 10 C 4409, 2011 WL 1465581, at *3 n.5 (N.D. Ill. Apr. 18, 2011).

A number of courts have held that a provision limiting liability to the cost of the allegedly negligent inspection for damages caused by an inspector's negligence is really an exculpatory clause. For example, the New Jersey Superior Court examined a home inspection contract very similar to the contract at bar. *Lucier v. Williams*, 841 A.2d 907, 911–12 (App. Div. 2004). The *Lucier* court explained that the proper focus is 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.” *Lucier*, 841 A.2d at 911–12.

The *Lucier* court observed that “to be enforceable, the amount of the cap on a party's liability must be sufficient to provide a realistic incentive to act diligently.” *Id.* The *Lucier* court determined the contract was not enforceable, and was a contract of adhesion:

This is a classic contract of adhesion. There were no negotiations leading up to its preparation. The contract was presented to Lucier on a standardized pre-printed form, prepared by CAL, on a take-it-or-

leave-it basis, without any opportunity for him to negotiate or modify any of its terms.

The bargaining position between the parties was grossly disparate. Vasys has been in the home inspection business for twenty years. He has inspected thousands of homes. He has an engineering degree. He has served as an expert witness in construction matters. He holds various designations in the building and construction field. He advertises his company and holds it and himself out as possessing expertise in the home inspection field. Lucier and Haley, on the other hand, are unknowledgeable and unsophisticated in matters of home construction. They are consumers. They placed their trust in this expert. They had every reason to expect he would act with diligence and competence in inspecting the home they desired to purchase and discover and report major defects. The disparity in the positions of these parties is clear and substantial.

The foisting of a contract of this type in this setting on an inexperienced consumer clearly demonstrates a lack of fair dealing by the professional. The cost of homes in New Jersey is substantial. It has often been said that the purchase of a home is usually the largest investment a person will make in life. The purchase of a home is, for most people, a very infrequent occurrence, and a very major undertaking. People may buy a home once in a lifetime, or not very often. Home inspectors, on the other hand, conduct a volume operation. As a businessperson who possesses knowledge about and experience in the industry, Vasys is aware of the cost of repairing major defects. In fact, that is a major selling point of his service to residential buyers.

Lucier, 841 A2.d at 912 (internal citations omitted).

More importantly, however, the *Lucier* court also properly characterized the contract clause as exculpatory, rather than as a liquidated damages provision. The court stated:

It 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. **This excessively restricted damage allowance, which**

caps the inspector’s exposure at \$192.50, effectively immunizes him from the consequences of his own negligence. Although the cap is one-half of the fee paid for this job, we nonetheless deem it “so minimal compared with the expected compensation, that the concern for the consequences of a breach is drastically minimized.” This is so because the home inspector’s exposure is nominal with respect to this job and, more significantly, when viewed in the realistic context of the home inspector’s high volume operation. In these circumstances, the limitation clause is tantamount to an exculpation clause, and warrants application of the same policy considerations.

Lucier, 841 A.2d at 913 (internal citations omitted).²

Notably, Montana statutes similarly recognize the importance of the role of home inspectors and require them to carry insurance far in excess of the cost of the inspection. Home inspectors must register with the State of Montana, obtain many hours of comprehensive and approved instruction and carry a minimum of \$100,000 in errors and omissions coverage. *See* Mont. Code Ann § 39-9-212. By so regulating this industry and requiring that inspectors carry significant insurance, there is recognition that a negligent inspection can cause significant harm to a consumer

² In the unpublished *Mullins v. N. Kentucky Inspections, Inc.*, the Kentucky Supreme Court also keenly observed that an identical fee refund provision is not a liquidated damages clause. Rather, the proper characterization of the contract is an exculpatory clause:

We preface our discussion with the proper characterization of the contract clause. The \$200 potential recovery is nothing more than a refund of the fee charged and is *de minimus* when compared to the damage Mullins incurred as a result of NKI's negligence. Because the clause effectively immunizes NKI from its own negligence, the limitation clause is tantamount to an exculpation clause and its enforceability is based on the same public policy considerations applicable to exculpation clauses.

No. 2009-CA-000067-MR, 2010 WL 3447630, at *1 (Ky. Ct. App. Sept. 3, 2010).

investing in the most significant asset of their life. Exculpating an inspector from the true cost of a negligent inspection defies the reasonable expectations of Montana consumers and their Legislature.

The West Virginia Supreme Court relied on a similar statute to invalidate a provision limiting a home inspector's liability. *Finch v. Inspectech, Ltd. Liab. Co.*, 727 S.E.2d 823, 836 (W. Va. 2012). Like here, the inspector in *Finch* had the homeowners sign an agreement limiting the inspector's liability to the inspection fee. The Court found the provision invalid. Like Montana, it noted that West Virginia statute requires that inspectors carry minimum liability insurance. This statute made the homeowners part of a protected class "intended to be protected from home inspectors' unscrupulous conduct." *Id.* Because the provision allowed the homeowners to recover "substantially less" than what the Legislature intended for homeowner protection, it was contrary to the statute and public policy.

Other courts have similarly found that similar provisions in home inspection contracts are really exculpatory clauses. For example, in *Mattegat v. Klopfenstein*, the court ruled that a clause in a prepurchase home inspection contract which limited exposure for a negligent inspection "to a maximum of the inspection fee paid unless an inspection warranty was purchased by the Client," was unenforceable as a disclaimer of liability. 717 A.2d 276, 280 (Conn., 1998).

In *Rubin v. AMC Home Inspection & Warranty Service*, the court held that a clause in a home inspection contract, limiting the inspection company's liability to its fee (\$175), was an unenforceable exculpatory clause as the company sought to relieve itself from liability for its negligence. 418 A.2d 306 (Law Div. 1980).

In *Estey v. MacKenzie Engineering Inc.*, a prospective home buyer hired an engineer to perform a "limited visual review" of a house. 927 P.2d 86 (Oregon, 1996). The inspection contract contained a provision which provided: "The liability of [the engineer] and the liability of its employees are limited to the Contract Sum" of \$200. *Id.* at 87.

The engineer reported the house was in good structural condition, but the new owner subsequently sued the engineer for negligence seeking \$340,000 in repair damages. *Id.* The *Estey* court ruled that the liability limitation provision was an exculpatory clause which failed to clearly and unequivocally express an intent to immunize the engineer from negligence liability and was unenforceable. *Id.* The *Estey* court found the limitation of liability clause was exculpatory because, as in this case, it sought to limit the engineer's liability to a nominal sum. *Id.* Moreover, enforcement of the clause would deprive the client of the purpose of the contract, which was to shield against financial calamity. *Id.*

The Vermont Supreme Court similarly found such clauses to be exculpatory, not a liquidated damages clause. *Glassford v. BrickKicker*, 35 A.3d 1044, 1051, ¶ 22

(Vt. 2011). Contrary to the contract’s claim that determining damages would be difficult, the *Glassford* Court found that “the customer’s damages in a case such as this represents a routine application of tort damages rules to the particular facts of the case.” It further observed that reimbursing the fee “is not a reasonable estimate of the customer’s likely damages, and thus cannot be intended to compensate the nonbreaching party.” It concluded that “the liquidated damages language in this contract appears to be created to cover up the true purpose of the liability limitation.”

Id.

Glassford was also unequivocal about the dangers in permitting such clauses in home inspection contracts. As it observed, home inspections play a critical role because they give “a consumer a rational basis upon which to decline to enter into a contract to buy, to provide lawful grounds to be relieved from a contractual commitment to buy, or to offer a sound basis upon which to negotiate a lower price.”

Id. Allowing liability limitations downplays the essential role a home inspection plays in what is most people’s most significant transaction in their lives, and would create adverse incentives for home inspectors. Indeed, if “home inspectors can exempt themselves from liability for their negligence, they could walk through the house in five minutes, fabricate a report, and escape liability, without any consideration of the consequences of their conduct on the homebuyer’s decision involving hundreds of thousands of dollars.” *Id.*

The Court should note that the clause at issue here is not isolated to this defendant. Instead, this is an industry-wide practice. For example, InterNACHI is one of the biggest home inspection associations in America, and its form contract includes a clause limiting the inspector's liability to the inspection fee.³ In effect, this Court upholding the provision would effectively provide immunity to the entire industry despite the Legislature requiring minimum liability insurance requirements specifically intended to protect prospective homebuyers.

Montana Trial Lawyers Association (“MTLA”) urges this Court to not begin down the slippery slope of granting the prohibited benefit of exculpatory provisions to negligent actors that reimburse the cost of the negligent service. Should we proceed down this dangerous path, negligence of all sorts could be immunized independent of legislative action on the subject.

B. Enforceable Liquidated Damages Provisions Reasonably Attempt to Estimate Anticipated Losses Caused by a Breach. If They Do Not, the Provision Is Likely a Penalty or Exculpatory Provisions Rather Than a True Liquidated Damages Provision.

If the Court concludes that the clause is an exculpatory clause, not a liquidated damages clause, then the analysis ends there. Exculpatory clauses are not enforceable in Montana.

³ Accessible at: <https://www.nachi.org/documents2012/InterNACHI-Home-Inspection-Agreement-revd-February-2019.pdf>

But if the Court treats the provision as a liquidated damages clause, then more analysis (and factual record development) is necessary. In *Arrowhead Sch. Dist. No. 75, Park Cnty. v. Klyap*, this Court set forth the test to determine whether a liquidated damages provision is unconscionable, and therefore unenforceable. 2003 MT 294, ¶ 48, 318 Mont. 103, 121, 79 P.3d 250, 263. It held that the “proper way” to analyze liquidated damages clauses is from the perspective of whether or not the clause is unconscionable as indicated by the nature of the bargaining process between the parties. Unconscionability involves a two-prong determination: 1) whether the clause fits the doctrine of contract of adhesion such that the weaker bargaining party had no meaningful choice regarding acceptance of the provisions; and, 2) whether the contractual terms are unreasonably favorable to the drafter, usually the party with superior bargaining power. Whether or not the clause is unreasonably favorable to the drafter in turn involves an inquiry into whether the clause is within the reasonable expectations of the weaker party or is unduly oppressive to the weaker party.

Arrowhead did not, however, provide guidance regarding how to identify penalties or exculpatory provisions amongst purported liquidated damages provision. MTLA suggests that the Court proffer guidance to the lower courts on this issue consistent with the law set forth herein.

Liquidated damages provisions, by definition, codify a reasonable estimation of the anticipated or actual loss caused by the breach taking into consideration

inherent difficulties of proof of loss post-breach. Restatement (Second) of Contracts § 356(1) (1981).

However, liquidated damages provisions that fail to reasonably estimate damages for a breach are not liquidated damages provisions at all. See Unif. Commercial Code § 2-718(1): (“Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach.”).

A term which fixes an unreasonably large “liquidated damages” amount is not a liquidated damages provision. Rather, it is deemed a penalty. Liquidation or Limitation of Damages, Deposits, Unif. Commercial Code § 2-718 (Purpose 1).

Similarly, an unreasonably small “liquidated damages” provision may be stricken as unconscionable. *Id.* As the Official Comments to the Uniform Commercial Code state:

Under subsection (1) liquidated damage clauses are allowed where the amount involved is reasonable in the light of the circumstances of the case. The subsection sets forth explicitly the elements to be considered in determining the reasonableness of a liquidated damage clause. A term fixing unreasonably large liquidated damages is expressly made void as a penalty. An unreasonably small amount would be subject to similar criticism and might be stricken under the section on unconscionable contracts or clauses.

§ 2-718. Liquidation or Limitation of Damages, Deposits., Unif. Commercial Code (Purpose 1).

So, how does a court discern a liquidated damages provision from penalties or exculpatory provisions which set an unreasonably small amount of damages? To identify appropriate and enforceable liquidated damages provisions courts generally look to whether there was any calculation of a reasonable estimate of the potential damages caused by a breach. *See La Quinta Corp. v. Heartland Props. LLC*, 603 F.3d 327, 340 (5th Cir. 2010) (holding that formula based on historical fee accruals over a term of years was “based on common business practices and the parties’ recent historical performance under the License Agreement, resulting in ascertainable losses in the event of breach”); *Country Inns & Suites By Carlson, Inc. v. Interstate Props., LLC*, No. 6:07-CV-104-ORL-28DA, 2008 WL 2782683, at *4 (M.D. Fla. July 16, 2008), *aff’d*, 329 F. App’x 220 (11th Cir. 2009); *Cusack Dev., Inc.*, 1999 WL 165702, at *8 (“The liquidated damages formula is intended to compensate Ramada for premature termination of the franchise. Past fees accrued to Ramada under the Agreement [are] a reasonable means by which to estimate future fees lost by Ramada during a period in which it has no replacement franchisee.”); *Holiday Hosp. Franchising, LLC v. Morning Star Hotel Victorville 4, LLC*, No. 1:12-CV-3809-ODE, 2014 WL 11393569, at *9 (N.D. Ga. May 2, 2014) (enforcing formula used to calculate the liquidated damages that multiplied the number of rooms in the proposed Hotel by 500 then multiplied that fee by a factor of 2.5, finding the formula was a reasonable pre-estimate of the probable loss to the

franchisor from the failure of the franchisee to open the hotel for a period of 20 months after entering into the franchise agreement).

When the liquidated damages are based on some fixed amount, rather than a formula tethered to a reasonable estimate of anticipated damages, courts are more skeptical. *See, e.g., Howard Johnson Int'l, Inc. v. HBS Family, Inc.*, 1998 WL 411334, at *7 (S.D.N.Y. July 22, 1998) (holding that provision that required minimum liquidated damages payment of \$2,000 for every room in a hotel was “not a reasonable estimate of the potential loss likely to be suffered because it does not take into account the length of time remaining on the unexpired License Agreement at the time of default” and because “there is nothing to show that the sum of \$2,000 per ... guest room ... bears any reasonable relationship to the pecuniary harm plaintiff would have likely suffered in the event of a breach”).

C. Factual Questions Must Be Determined by a Fact Finder.

To be sure, there is little doubt the provision here fails the *Arrowhead* test. As the Mississippi Supreme Court concluded, “Limiting homeowners to a recovery of the inspection fee and not allowing the recovery of reasonably foreseeable compensatory damages is clearly unconscionable.” *Pitts v. Watkins*, 905 So. 2d 553, 557 (Miss. 2005). The provision does “not provide a meaningful choice to homeowners, and is unreasonably favorable to the home inspector.” *Id.* What is more, “If the home inspector’s only consequence is to refund the fee, there is no

meaningful incentive to act diligently in the performance of home inspection contracts,” and the inspector will be immunized from the consequences of his own negligence.” *Id.*

But reaching this conclusion is more procedurally appropriate through remand, allowing the District Court an opportunity to address the various factual standards and more precise legal standards in the first instance.

MTLA suggests that this Court elucidate for the lower courts the appropriate standard of review and propose a mechanism to decide factual issues before the lower courts make conclusions of law regarding whether a provision is, in fact, a liquidated damages provision.

For example, while the enforceability of a liquidated damages provision is a question of law for a court to decide, questions regarding whether the provision is a reasonable estimate of potential damages and whether damages would be difficult to calculate require an examination of facts which should be determined by a factfinder. *See e.g., Honey Dew Assocs., Inc. v. M & K Food Corp.*, 241 F.3d 23, 28 (1st Cir. 2001) (“Determining the validity of a liquidated damages clause is usually a fact-specific exercise.”); *Caudill v. Keller Williams Realty, Inc.*, No. 13 C 4693, 2013 WL 5874761, at *4 (N.D. Ill. Oct. 31, 2013) (“Before this Court answers the legal question [defendant] posits of whether this liquidated damages provision is a penalty, factual issues must be resolved. To determine the reasonableness of

the liquidated damages provision would require this Court to make certain determinations--like the circumstances that existed when the parties executed the Settlement Agreement--that it is presently unprepared to make.”).

VII. CONCLUSION

For the reasons set forth above, the Court should hold that a clause limiting a home inspector’s liability for negligent inspection to a refund of the inspection fee is, in substance, an exculpatory provision barred by Mont. Code Ann. § 28-2-702 and Montana public policy, not a valid liquidated damages clause. Clauses that cap negligence exposure at a de minimis amount neither reflect a reasonable pre-estimate of loss nor preserve the core benefit of the bargain for consumers who rely on inspections to avoid catastrophic, undisclosed defects.

MTLA therefore respectfully urges the Court to clarify that: (1) nominal “fee-refund” caps in home inspection contracts are unenforceable exculpatory clauses; (2) purported liquidated damages provisions must be grounded in a reasonable pre-breach estimate of anticipated loss; and (3) where material factual disputes exist regarding the bargaining process, relative sophistication, expected damages, and difficulty of proof, those questions must be resolved by the fact-finder and cannot be disposed of on summary judgment.

DATED this 10th day of December 2025.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing BRIEF is proportionately spaced in 14-point roman, non-script text and contains 4847 words excluding brief's cover, table of contents, table of authorities, certificate of compliance and certificate of service.

DATED this 10th day of December 2025.

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