

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

ORIGINAL

American Municipal Power, Inc.,

Plaintiff,

v.

Bechtel Power Corporation,

Defendant.

FILED
OCT 24 2014
CLERK OF COURT
SUPREME COURT OF OHIO

14-1847

Case No. 2:11-cv-131

Judge Michael H. Watson

OPINION AND ORDER

American Municipal Power, Inc. ("AMP" or "Plaintiff") sues Bechtel Power Corporation ("Bechtel" or "Defendant") for breach of contract.¹ The Court granted Defendant summary judgment in part, finding the contract's limitation of liability clause enforceable. Plaintiff now seeks certification of a question of Ohio law to the Ohio Supreme Court, or in the alternative, seeks certification of the Court's summary judgment order for interlocutory appeal to the United States Court of Appeals for the Sixth Circuit. ECF No. 108. For the following reasons, the Court **GRANTS** Plaintiff's motion to certify a question of law to the Ohio Supreme Court and reserves ruling on Plaintiff's alternative motion.

The Court previously dismissed AMP's claims for negligent misrepresentation and breach of fiduciary duty. Opinion and Order 16, ECF No. 63.

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I. BACKGROUND

The Court extensively set forth the underlying facts of this case in its previous Opinion and Order, ECF No. 106, and will restate only the relevant facts here.

In January 2009, AMP entered into an engineering, procurement, and construction contract ("EPC Contract") with Bechtel regarding the development of a coal-fired supercritical power plant. As part of the initial phase of the EPC Contract, Bechtel would develop, in accordance with professional standards, a target price estimate for the project. As part of the development process, the EPC Contract required Bechtel to timely identify potential developments that might impact the cost and/or schedule of the project's current estimate for AMP's evaluation. The identification of cost and scheduling impacts is called "trending," and the provision in the EPC Contract outlining the requirement is referred to as the "trend provision." AMP alleges Bechtel breached the EPC Contract by failing to comply with the trending requirements as outlined in the trend provision.

Bechtel moved to limit AMP's potential recovery to \$500,000 pursuant to the EPC Contract's limitation of liability clause and to dismiss the breach of contract claim to the extent it sought damages exceeding that amount. ECF No. 9. AMP countered that the limitation of liability clause was unenforceable because Bechtel acted willfully, wantonly, recklessly, or with gross negligence. ECF No. 19. The distinction between those legal terms has become an important issue in this case.

The Court held that Ohio law precludes enforcement of a limitation of liability clause upon a showing of willful or wanton conduct and that the facts alleged in AMP's Complaint support a plausible inference that Bechtel was wanton in its failure to comply with the trending provision. Opinion and Order 8-9, ECF No. 63. The Court thus declined to limit AMP's potential damages at that time. *Id.* at 12.

Thereafter, Bechtel moved for summary judgment on the issue of limitation of liability. ECF No. 86. AMP again argued that the limitation of liability clause was unenforceable, this time arguing that *Anderson, Administrator v. City of Massillon*, 134 Ohio St. 3d 380 (2011), which was decided after the Court issued its Opinion and Order on Bechtel's motion to dismiss, established that limitation of liability clauses may be rendered unenforceable by willful, wanton, or *reckless* conduct. ECF No. 93. AMP submitted that Bechtel acted wantonly or at least recklessly, thereby precluding enforcement of the EPC Contract's limitation of liability clause.

The Court disagreed and awarded Bechtel summary judgment on the issue of limitation of liability, finding that *Anderson* did not change the Court's prior finding that Ohio law does not recognize recklessness as a standard that will render a limitation of liability clause unenforceable and that there was no genuine dispute of fact as to whether Bechtel was willful or wanton in its alleged breach. Opinion and Order, ECF No. 106.

Bechtel also moved for summary judgment on the merits of AMP's breach of contract claim, arguing that AMP could not prove damages. The Court denied Bechtel's motion on this ground, thereby necessitating a trial wherein AMP's potential damages could not exceed \$500,000.

AMP's instant motion centers on the Court's finding that, under Ohio law, recklessness does not bar enforcement of a contractual limitation of liability clause. AMP does not seek reconsideration of this issue. Rather, it seeks to certify the issue to the Ohio Supreme Court, or in the alternative, seeks certification of the Court's summary judgment order to the United States Court of Appeals for the Sixth Circuit for interlocutory appeal.

II. ANALYSIS

AMP first requests that the Court certify to the Ohio Supreme Court the question of whether reckless conduct as defined in *Anderson v. Massillon*, 134 Ohio St. 3d 380 (2012) can render a contractual limitation of liability clause unenforceable.

Rule 9.01(A) of the Practice Rules of the Supreme Court of Ohio allows a federal court to certify questions of Ohio law to the Supreme Court if the analysis may be determinative of the proceeding and there is no controlling precedent in the decisions of the Supreme Court of Ohio. S. Ct. Prac. R. 9.01.

AMP maintains that the question of whether reckless conduct renders a contractual limitation of liability clause unenforceable is one for which there is no controlling precedent and that may be determinative of this proceeding.

Bechtel opposes certification on two grounds: (1) AMP's request is procedurally improper, and (2) AMP has not satisfied the Rule 9.01(A) standard.

A. Whether AMP's Request for Certification is Procedurally Improper

The parties dispute whether AMP's request for certification is barred by its failure to seek certification of its proposed question prior to the Court's resolution of the issue on consideration of Defendant's motion to dismiss and/or motion for summary judgment. Bechtel submits that AMP was required to seek certification *before* the Court decided the issue and cannot now seek certification after an unfavorable ruling. AMP maintains that no such requirement exists.

As support for its position, Bechtel cites *City of Columbus v. Hotels.com, L.P.*, 693 F.3d 642 (6th Cir. 2012), wherein the Sixth Circuit stated the following:

"The decision whether or not to utilize a certification procedure lies within the sound discretion of the district court." *Pennington v. State Farm Mut. Auto. Ins. Co.*, 553 F.3d 447, 449–50 (6th Cir. 2009) (internal quotation marks omitted). . . . In an unpublished opinion, we have stated that **certification is disfavored where a plaintiff files in federal court and then, after an unfavorable judgment, "seek [s] refuge" in a state forum.** *Local 219 Plumbing & Pipefitting Indus. Pension Fund v. Buck Consultants, LLC*, 311 Fed.Appx. 827, 831 (6th Cir. 2009). **"The appropriate time to seek certification of a state-law issue is before a District Court resolves the issue, not after receiving an unfavorable ruling."** *Id.* at 832.

The view that state-law issue certification should be sought before, not after, a district court resolves the issue, is shared by many of our sister circuits. See, e.g., *Thompson v. Paul*, 547 F.3d 1055, 1065 (9th Cir. 2008) ("There is a presumption against certifying a question to a state supreme court after a federal district court has issued a decision."); *Enfield v. A.B. Chance Co.*, 228 F.3d 1245, 1255 (10th Cir. 2000) (denying certification where party did not seek certification until adverse decision and stating "[t]hat fact alone persuades us

that certification is inappropriate"); *Perkins v. Clark Equip. Co., Melrose Div.*, 823 F.2d 207, 209–210 (8th Cir. 1987) (discouraging requests for certification made by a party after summary judgment has been decided against that party because "[o]therwise, the initial federal court decision will be nothing but a gamble with certification sought only after an adverse decision").

The localities in this case waited to request certification until after the district court had already made numerous decisions in this case. The district court did not abuse its discretion in declining to certify this issue to the Ohio Supreme Court.

Hotels.com, 693 F.3d at 654 (emphasis added).

Bechtel also cites *Geronimo v. Caterpillar, Inc.*, 440 F. App'x 442, 449 (6th Cir. 2011), which includes much of the same language cited to in *Hotels.com*, and correctly notes that cases cited by AMP involve certification before a district court's resolution of the issue.

While *Hotels.com* and *Geronimo* state that certification of a question after the district court resolves the issue is *disfavored*, and courts have denied requests for certification made after receiving an unfavorable ruling, it is clear that the decision to certify a question is within the district court's sound discretion. See, e.g., *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974); *Hotels.com*, 693 F.3d at 654 (citation omitted). While the Sixth Circuit has not explicitly stated that the decision of *when* to certify a question is within the district court's discretion, the Court has found no authority for the proposition that if the district court chooses to certify a question, it *must* do so before it resolves the issue. Absent such authority, the Court interprets the above cases to favor and encourage certification before the district court's resolution of the issue but to ultimately

place the decision of whether to certify within the district court's discretion even when certification is sought after an adverse decision.

Accordingly, the Court declines to deny AMP's request solely on the ground that it was required to seek certification earlier.²

B. Whether AMP has satisfied the standard of Rule 9.01(A)

Bechtel next argues that AMP has failed to satisfy the standard for certification. District courts may certify questions to the Ohio Supreme Court if: (1) the analysis of the issue may be determinative of the proceeding, and (2) there is no controlling precedent in the decisions of the Ohio Supreme Court. S. Ct. Prac. R. 9.01. Bechtel argues AMP has failed to satisfy both requirements.

1. Whether the issue may be determinative of the proceeding

Bechtel argues AMP has failed to establish that the issue of whether recklessness precludes enforcement of a limitation of liability clause is determinative of the proceeding. Citing to *Guardian Ins. & Annuity Co. v. White*, No. 1:13-cv-360, 2014 WL 1685919, at *3 (S.D. Ohio April 29, 2014), Bechtel first asserts that in determining whether an issue is "determinative" of a proceeding for purposes of certification to the Ohio Supreme Court, courts apply the "controlling question of law" standard used in determining whether to certify an order for interlocutory appeal. That standard requires a question of law to

² This conclusion should not, however, be understood to condone the practice of seeking certification after the district court's resolution of the question to be certified. AMP should have sought certification in its response to Bechtel's motion for summary judgment as an alternative to the arguments it presented therein.

either terminate or materially affect the outcome of the litigation. Bechtel then argues that the issue of recklessness and limitation of liability does not present a "controlling question of law" for interlocutory appeal purposes and thus is not "determinative" of the proceeding under Rule 9.01(A).

The Court does not read *Guardian* to hold that the controlling question of law standard for interlocutory appeals applies to the determination of whether to certify a question to the Ohio Supreme Court, nor has it found any other case so holding. In the context of certification to the Ohio Supreme Court, this Court has stated that "a question which may be determinative of a proceeding is one which would form the basis of the Court's disposition of one or more of a plaintiff's causes of action." *Prof'l's Direct Ins. Co. v. Wiles, Boyle, Burkholder & Bringardner Co., LPA*, No. 2:06-cv-240, 2008 WL 3925634, at *2 (S.D. Ohio Aug. 25, 2008) (citing *Super Sulky, Inc. v. U.S. Trotting Ass'n*, 174 F.3d 733, 744 (6th Cir. 1999)).

Here, the Court recognizes that whether reckless conduct bars enforcement of the EPC Contract's limitation of liability clause relates only to the amount of potential damages available for AMP's breach of contract claim and is not dispositive of the underlying merits of that claim. Nevertheless, the Court finds that the issue is determinative of the central dispute in this proceeding. Indeed, the only remaining claim in this case is for breach of contract, and the primary issue in this case thus far has been the enforcement of the EPC Contract's limitation of liability clause. In fact, Bechtel's motion to dismiss did not

seek to dismiss AMP's breach of contract claim on the merits but rather sought enforcement of the limitation of liability clause. Similarly, Bechtel moved for summary judgment not on the issue of whether it breached the EPC Contract but on the issue of whether its liability was limited. Notably, resolution of the issue implicates the difference between \$97 million and \$500,000 in potential damages. Thus, while the issue at hand will not terminate the proceeding, reasonable jurists could conclude that given the unique circumstances of this case, the question of whether reckless conduct bars enforcement of a limitation of liability clause is tantamount to determinative of this particular proceeding.

2. Whether there exists controlling Ohio Supreme Court precedent

The parties next dispute whether there exists controlling Ohio Supreme Court precedent on the issue of whether a reckless standard of conduct renders a limitation of liability clause unenforceable.

In *Richard A. Berjian, D.O., Inc. v. Ohio Bell Tele. Co.*, the Ohio Supreme Court held that willful or wanton conduct can render a limitation of liability clause "ineffective." 54 Ohio St. 2d 147, 158 (1978). Bechtel maintains that this decision constitutes controlling Supreme Court precedent on the issue at hand. The Court disagrees. In holding that willful or wanton conduct precludes enforcement of a limitation of liability clause, *Berjian* did not exclude recklessness as a standard that would bar enforcement of a limitation of liability clause. In fact, there is no indication that the court even considered the effect of recklessness at all. Therefore, while *Berjian* constitutes controlling precedent as

to whether willful or wanton conduct precludes enforcement of a limitation of liability clause, it is silent as to whether recklessness does so as well.

Additionally, the parties have not cited, and the Court has not found, an Ohio Supreme Court decision discussing recklessness as a bar to enforcing a limitation of liability clause or an Ohio appellate or trial court decision precluding enforcement of a contractual limitation of liability clause due to reckless conduct.

Despite the lack of Ohio law on the issue, five district courts have indicated that reckless conduct renders a limitation of liability clause unenforceable. See *Nahra v. Honeywell, Inc.*, 892 F. Supp. 962, 970 (N.D. Ohio 1995) (citing *Berjian* for the proposition that a limitation of liability clauses will be upheld absent a willful or reckless breach); *Solid Gold Jewelers v. ADT Sec. Sys., Inc.*, 600 F. Supp. 2d 956, 959 n.2 (N.D. Ohio 2007) (citing *Nahra* for the proposition that limitations on liability are upheld absent a willful or reckless breach); *Superior Integrated Solutions, Inc. v. Reynolds and Reynolds Co.*, No. 3:09-cv-314, 2009 WL 4135711, at *3 (S.D. Ohio Nov. 23, 2009) (citing *Solid Gold* and stating that a reckless breach is considered willful misconduct that would invalidate a limitation of liability clause); *Transcon. Ins. Co. v. Simplexgrinnell LP*, No. 3:05CV7012, 2006 WL 2035571, at *5 (N.D. Ohio July 18, 2006) (citing *Nahra* for the proposition that limitation of liability clauses will be upheld absent a willful or reckless breach); *Purizer Corp. v. Battelle Mem'l. Inst.*, No. 01 C 6360, 2002 WL 22014, at *5 (N.D. Ill. Jan. 7, 2002) (same).

These district court decisions, while of some assistance, are not controlling. First, the decisions are not binding on this Court. Second, the decisions merely assert in a conclusory manner that recklessness bars enforcement of a limitation of liability clause, citing to either *Berjian* or each other. Absent any discussion of the issue, this assertion is merely dicta.³ Third, although the district court decisions apply Ohio law, they are not themselves Ohio law and thus do not serve as an example of Ohio authority on the issue.⁴ Fourth, after these cases were decided, the Ohio Supreme Court clarified that willful, wanton, and reckless are not interchangeable standards of conduct and noted that Ohio appellate courts have incorrectly conflated them. *Anderson v. Massillon*, 134 Ohio St. 3d 380, 387–88 (2012). Therefore, to the extent these

³ Moreover, the Court respectfully disagrees with the district courts' reliance on *Berjian* in stating that reckless conduct will invalidate a limitation of liability clause, as it does not read *Berjian* to have reached the issue, let alone stand for that proposition.

⁴ AMP appears to argue that *Anderson* also casts doubt on Ohio decisions equating recklessness with wanton conduct in discussing limitations of liability. In so doing, it references the Court's Opinion and Order addressing Bechtel's motion to dismiss, in which the Court noted that "[s]ome Ohio cases discuss gross negligence and recklessness as a bar to the limitation of liability. See, e.g., *Thompson v. McNeill*, 53 Ohio St. 3d 102, 104 (1990); *Harsh v. Lorain Cnty. Speedway*, 111 Ohio App. 3d 113, 118 (Ohio Ct. App. 8th Dist. 1996)." Opinion and Order 7, ECF No. 63.

Upon further review of those cases, the Court finds that its citation to *Thompson* and *Harsh* for this proposition was inaccurate. While *Thompson* and *Harsh* conflate the different standards of conduct, they do not discuss recklessness as a bar to enforcing a limitation of liability. See *Thompson v. McNeill*, 53 Ohio St. 3d 102, 104 (Ohio Ct. App. 8th Dist. 1996) (holding that under certain circumstances, reckless conduct may render an individual liable for his conduct during a golf game); *Harsh v. Lorain Cnty. Speedway*, 111 Ohio App.3d 113, 118 (Ohio Ct. App. 6th Dist. July 31, 2009) (discussing enforceability of a release of liability and equating wanton and reckless conduct in discussing gross negligence claim). Accordingly, although *Anderson* clarified the difference between the willful, wanton, and reckless standards, it had no effect on Ohio law regarding the type of conduct capable of invalidating a limitation of liability clause.

district court decisions likewise conflate recklessness and other conduct, they are no longer good law. Accordingly, these district court decisions are inapposite to the analysis of whether there exists controlling Ohio Supreme Court precedent on the issue at hand.

In sum, while there exists controlling Ohio Supreme Court precedent on whether willful and wanton conduct bars enforcement of a limitation of liability clause, there appears to be no controlling Ohio Supreme Court precedent on whether Ohio law recognizes recklessness as a standard of conduct that would bar enforcement of a contractual limitation of liability. There also does not appear to be guidance from the Ohio appellate and trial courts on the issue. In light of this lack of Ohio law, as well as the Ohio Supreme Court's recent clarification in *Anderson* of the difference between the willful, wanton, and reckless standards, the Ohio Supreme Court is in the best position to determine if recklessness as defined therein should be deemed to bar enforcement of a contractual limitation of liability clause.

"As the Supreme Court of Ohio has explained, '[c]ertification ensures that federal courts will properly apply state law.'" *Am. Booksellers Found for Free Expression v. Strickland*, 560 F.3d 443, 446 (6th Cir. 2009) (citation omitted). Moreover, "the United States Supreme Court also recognizes that 'certification of novel or unsettled questions of state law for authoritative answers by a State's highest court . . . may save time, energy, and resources and help build a

cooperative judicial federalism.” *Id.* (citation omitted). Certification in this case would accomplish both goals.

For the foregoing reasons, the Court **GRANTS** AMP’s motion to certify to the Ohio Supreme Court, ECF No. 108. Should the Ohio Supreme Court decline certification, the Court will consider AMP’s motion for interlocutory appeal at that time.

IV. CERTIFICATION REQUIREMENTS

A. The Certified Question

For the reasons set forth above, the undersigned certifies the following question of state law to the Supreme Court of Ohio pursuant to Rule 9.01 of the Rules of Practice of the Supreme Court of Ohio:

1. Does reckless conduct by the breaching party, as defined in *Anderson v. Massillon*, 134 Ohio St. 3d 380 (2012), render a contractual limitation of liability clause unenforceable?

B. The Information Required by Ohio Supreme Court Rule § 9.02(A)

Because the Court is certifying a question to the Supreme Court of Ohio, the Court provides the following information in accordance with Ohio Supreme Court Rule § 9.02(A)–(E).

1. **Name of the case:** Please refer to the caption on page 1 of this order.
2. **Statement of facts:** Please refer to Sections I and II.B.2 of this order.

Should the Ohio Supreme Court require a detailed iteration of the facts of this case, the Court respectfully refers the Supreme Court to this Court’s

opinion and order on Bechtel's motion for summary judgment, ECF No. 106.

3. Name of each of the parties:

- a. Plaintiff: American Municipal Power, Inc.
- b. Defendant: Bechtel Power Corporation

4. Names, Addresses, Telephone Numbers, and Attorney Registration

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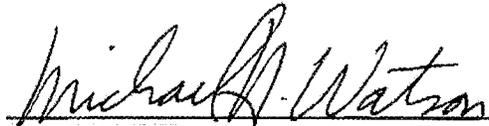
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5. Designation of Moving Party: Plaintiff

C. Instructions to the Clerk

In accordance with Rule 9.03(A) of the Rules of Practice of the Supreme Court of Ohio, the Clerk of the United States District Court for the Southern District of Ohio is hereby instructed to serve copies of this certification order upon counsel for the parties and to file this certification order under the seal of this Court with the Supreme Court of Ohio, along with appropriate proof of service.

IT IS SO ORDERED.



MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT