

1996

Jon Francia v. Health and Tennis Corporation of America, doing business as Bally's Holiday Spa Health club : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JON FRANCIA,

Plaintiff and Appellant,

v.

**HEALTH & TENNIS CORPORATION
OF AMERICA, doing business as
BALLY'S HOLIDAY SPA HEALTH
CLUB,**

Defendant and Appellee.

**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 960279-CA

Case No. 960279-CA

Argument Priority No. 15

REPLY BRIEF OF THE APPELLANT

Appeal from an Order Dismissing Plaintiff's Complaint in favor of
Defendant and Appellee in the Third Judicial District Court in and for Salt
Lake County, State of Utah, the Honorable J. Dennis Frederick, Judge.

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COURT OF APPEALS

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INTRODUCTION

The jurisdictional statement, issues presented for review and standards of review, statement of the case, and facts have all been previously presented. Brief of Appellant at 1-6. Appellant presents this brief in reply to new matters set forth by Appellee in its brief.

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

Any statutes, rules, and constitutional provisions relevant to the disposition of this appeal are set forth in the text of this brief.

ARGUMENT

POINT I

BALLY’S ARGUMENT THAT FRANCIA MAY NOT RAISE NEW ISSUES ON APPEAL CONFUSES THE DISTINCTION BETWEEN ARGUMENTS AND ISSUES AND MISAPPLIES THE LAW.

The ultimate issue before the trial court in this case was whether the exculpatory provision contained in the form installment contract was valid and enforceable and operated to relieve Bally’s of liability for Jon Francia’s injuries. Applying the appropriate standards of review, the ultimate issue before this court on appeal is whether the trial court’s conclusion was correct as a matter of law.

In his opening brief, Francia argued that the trial court erred when it concluded that the exculpatory clause contained in the form installment contract relieved Bally’s of the basic duty of exercising due care for the safety of itself and others, a duty the law generally imposes on everyone. Francia argued that the language of the exculpatory provision is not clear and unequivocal and is not the desire of both parties. He argued that the exculpatory provision is overly broad and even attempts to bind non-party guests to the agreement. And he argued that the effect of the exculpatory provision is against the public interest, violates public policy and thus, should be rendered invalid and unenforceable. Francia made each of these arguments in support of his position on the ultimate issue before the court that the exculpatory provision did not relieve Bally’s of liability for Francia’s injuries. Nevertheless, Bally’s asserts in its brief that these

arguments raise new issues not properly before the court.

Bally's misunderstands the distinction between arguments and issues. Relying on a footnote in Ong International (U.S.A.) v. 11th Avenue Corp., 850 P.2d 447, 455 n. 31 (Utah 1993), Bally's asserts that unless a specific *argument* is raised before the trial court, that *argument* may not be considered on appeal. Brief of Appellee at 5. Contrary to Bally's assertion in its brief, such a rule is not supported by James v. Preston, 746 P.2d 799, 801 (Utah App. 1987).

In James, the Court of Appeals considered whether plaintiff James had sufficiently raised the claim of equitable mortgage at trial to preserve the issue for appeal. James had obliquely raised the issue of an equitable mortgage in his complaint, and during the bench trial, James' attorney made two brief references to the equitable mortgage theory. Further, James made no objection to the trial court's failure to rule on the issue. In holding that the issue was not properly preserved for appeal, the court reaffirmed the well-recognized rules that matters not raised in the pleadings nor put in issue at the trial may not be raised for the first time on appeal. Id. at 801; Bundy v. Century Equip. Co. 692 P.2d 754, 758 (Utah 1984); Franklin Financial v. New Empire Dev. Co., 659 P.2d 1040, 1044 (Utah 1983). A matter is sufficiently raised if it has been submitted to the trial court and the trial court has had the opportunity to make findings of fact or law. James at 801; Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667, 672 (Utah 1992). Theories or issues which are not apparent or reasonably discernible from the pleadings, affidavits and exhibits will not be considered. James at 801; Minnehoma

Financial Co. v. Pauli, 565 P.2d 835, 838 (Wyo. 1977). Further, the rule that a legal theory may not be raised for the first time on appeal is to be stringently applied when the new theory depends on controverted factual questions whose relevance thereto was not made to appear at trial. James at 801; Bogacki v. Board of Supervisors, 489 P.2d 537, 543-44 (Cal. 1971), *cert. denied*, 405 U.S. 1030, 92 S.Ct. 1301, 31 L.Ed.2d 488 (1972).

To preserve a substantive issue for appeal, a party must timely bring the issue to the attention of the trial court, thus providing the court an opportunity to rule on the issue's merits. LeBaron & Assoc. v. Rebel Enterprises, 823 P.2d 479, 482-83 (Utah App. 1991). Francia preserved for appeal the issue of whether the exculpatory provision was valid and enforceable by opposing Bally's motion to dismiss. The trial court had the opportunity to consider the ultimate issue -- whether the provision operated to relieve Bally's of liability for Francia's injuries. Bally's assertion that all arguments, as opposed to issues, to be considered on appeal must be made before the trial court is erroneous. Such a rule would make briefs on appeal unnecessary. In essence, Bally's argument that Francia has raised new *issues* on appeal misconstrues Francia's brief. Bally's argument that those issues may not be considered by the court misapplies the law. Francia has not raised new issues not already before the trial court. In his brief, Francia appropriately identified for the court controlling authority and expounded on arguments made before the trial court in support of his position.

POINT II

BALLY’S ARGUMENT THAT FRANCIA’S FAILURE TO FILE AFFIDAVITS IS FATAL TO HIS APPEAL IGNORES AUTHORITY AND THE PLAIN LANGUAGE OF RULE 56(e) AND MISCONSTRUES THE STANDARD OF REVIEW ON APPEAL.

Bally’s argues that the use of responsive affidavits is *mandatory* where the moving party has presented affidavits or other facts which would require the trial court to grant its motion and failure to do so is fatal to appeal. Brief of Appellee at 7. However, under the plain language of Rule 56, Utah R.Civ.P., it is not always required that the party opposing summary judgment proffer affidavits in order to avoid judgment against him. In Olwell v. Clark, 658 P.2d 585, 586 (Utah 1982), the Supreme Court stated:

Rule 56(e) states specifically that a response in opposition to a motion must be supported by affidavits or other documents *only* in order to demonstrate that there is a genuine issue of fact for trial. Where the party opposed to the motion submits no documents in opposition, the moving party may be granted summary judgment only “if appropriate,” that is, if he is entitled to judgment as a matter of law. [Citation omitted.] [Emphasis in original.]

See also, Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, 681 P.2d 1258, 1261 (Utah 1984); Town of Alta v. Ben Hame Corp., 836 P.2d 797, 805 (Utah App. 1992).

The affidavit of Sandra Harrington accompanying Bally’s memorandum in support of its motion to dismiss sufficiently set forth the facts necessary for the trial court to conclude as a matter of law whether the exculpatory provision was valid and unenforceable. The trial court was required under the appropriate standards of review to accept the factual

allegations and all reasonable inferences to be drawn from them in a light most favorable to Francia. Bally's continues to maintain that the fact that the exculpatory provision was not bargained for is unsupported in the record. Brief of Appellee at 10. However, Bally's fails to recognize that this factual conclusion is a logical, reasonable inference of the undisputed fact that Bally's requires all applicants to sign the form installment contract and membership agreement and it does not offer membership to those who do not sign such an agreement in the form presented.

The issue before this court on appeal is whether the trial court correctly applied the law when it determined that the exculpatory provision was valid and enforceable and operated to relieve Bally's of liability for Francia's injuries. This requires application of the two-part test elaborated in Appellant's brief. The first part is to determine whether the exculpatory provision contained in the form installment contract is clear and unequivocal and reflects the desire of both parties. The second part is to determine whether the provision is against the public interest and therefore violates public policy. Only by satisfying both parts of the analysis can an exculpatory provision stand. *See, Russ v. Woodside Homes, Inc.*, 905 P.2d 901 (Utah App. 1995).

POINT III

BALLY'S BRIEF MISCONSTRUES AND INCORRECTLY ADVANCES FRANCIA'S ARGUMENT.

In Point I of its brief, Bally's incorrectly states that Francia claims the form installment contract and membership agreement is void as a contract of adhesion. Brief

of Appellee at 4. Francia makes no such conclusion. A determination that the form installment contract is an adhesion contract does not by itself render it unenforceable. Resource Management Co. v. Western Ranch & Livestock Co., 706 P.2d 1028, 1048 (Utah 1985). As Francia clearly set forth in his brief, determining that a contract is an adhesion contract is not the end of the analysis. Rather, the court must determine first, whether the exculpatory provision is clearly and unequivocally expressed as the intent of both parties, and second, whether the provision is against the public interest and therefore violates public policy.

Bally's brief also incorrectly states that Francia claims exculpatory clauses are *always void* in Utah as against public policy. Brief of Appellee at 4, 10. Francia has never made such an assertion. Rather, Francia cites Union Pacific Railroad Co. v. El Paso Natural Gas Co., 408 P.2d 910 (Utah 1965) for the proposition that Utah courts do not favor contract clauses purporting to limit or negate liability for future negligent acts. Brief of Appellant at 7. Union Pacific R.R. lays out the general rule that such a provision will only be enforceable when the provision is clearly understood and expressed and reflects the intent of the parties. Id. at 913. As the Court in Union Pacific R.R. stated, "The presumption is against any such intention. . ." Id.

POINT IV

BALLY’S ARGUMENT THAT THIS COURT ON APPEAL MAY NOT CONSIDER TUNKL v. REGENTS OF UNIVERSITY OF CALIFORNIA MISAPPLIES THE STANDARD OF REVIEW.

It is well established that Utah appellate courts review grants of summary judgment for correctness. Transamerica Cash Reserve, Inc. v. Dixie Power & Water, Inc., 789 P.2d 24, 25 (Utah 1990); Oquirrh Assoc. v. First Natl. Leasing Co., 888 P.2d 659, 662 (Utah App. 1994). Trial courts shall grant summary judgment only when the moving party has shown that “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), Utah R.Civ.P. Because a challenge to summary judgment presents only conclusions of law for review, the appellate court reviews a trial court’s conclusions for correctness without according them any deference. Higgins v. Salt Lake County, 855 P.2d 231, 235 (Utah 1993).

Bally’s argues that this court on appeal may not consider Tunkl v. Regents of University of California, 60 Cal.2d 92, 383 P.2d 441, 32 Cal.Rptr. 33 (1963). Brief of Appellee at 13-15. Tunkl sets forth six factors or characteristics of the public interest that help determine whether an exculpatory provision violates public policy. As Francia illustrated in his brief, numerous courts in other jurisdictions have adopted Tunkl and applied its factors to determine whether exculpatory agreements violate public policy. Brief of Appellant at 10-12. Bally’s argument fails to understand that the standard of review requires this court on appeal to determine whether the trial court’s decision was

correct as a matter of law. This necessarily requires a review of all authority available, including Tunkl and the other numerous cases identified in Francia's brief adopting in whole Tunkl's rationale. Rather than confront Francia's argument on its merits, Bally's attempts to confuse this court with a discussion about public servants. Brief of Appellee at 13. Francia has never claimed that Bally's is a public servant. Rather, the Tunkl analysis turns on whether an exculpatory provision affects the public interest. In this case, as Francia illustrated in his brief, the exculpatory provision in the form installment contract exhibits all six of the characteristics delineated in Tunkl. Consequently, because the exculpatory clause affects the public interest, this court should conclude that the clause is invalid and unenforceable as against public policy. Brief of Appellant at 12-16. Such a determination requires this court to reverse the trial court's decision granting Bally's motion to dismiss.

CONCLUSION

The issue before the trial court in this case was whether the exculpatory provision was valid and enforceable and operated to relieve Bally's of liability for Francia's injuries. In support of his position, Francia made several arguments that the exculpatory provision did not absolve Bally's of liability. On appeal, applying the appropriate standards of review, the issue remains whether the trial court correctly determined that the exculpatory provision absolves Bally's of liability as a matter of law.

To decide the issue, Francia urges this court to apply the two-part test elaborated

in his brief. The first part is to determine whether the exculpatory provision is clear and unequivocal and reflects the desire of both parties. The second part is to determine whether the provision is against the public interest and therefore violates public policy. Only by satisfying both parts of the analysis can an exculpatory provision stand.

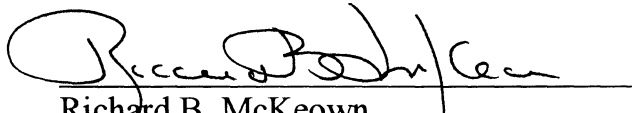
Rather than brief and argue the case on its merits, Bally's brief on appeal confuses the distinction between arguments and issues, ignores authority and the plain language of Rule 56(e), misconstrues and incorrectly advances Francia's argument, and misapplies the standard of review.

Francia respectfully urges this court to wade through Bally's brief, consider the distinct facts of this case, and conclude that the trial court erred when it granted Bally's motion to dismiss. The exculpatory provision in Bally's form installment contract does not clearly and unequivocally express the desire of both parties. The provision affects the public interest, violates public policy, and thus is invalid and unenforceable.

Dated this 21 day of May, 1996.

Respectfully submitted,

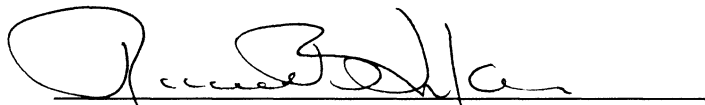
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and forgoing REPLY BRIEF OF THE APPELLANT was either hand delivered or mailed by United States Mail, postage prepaid, this 21 day of May, 1996, to the following:

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