

1996

Jon Francia v. Health & Tennis Corporation of America : Brief of Appellee

Utah Court of Appeals

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DOCKET NO. 960279-LA COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

JON FRANCIA, :
 :
 : **BRIEF OF APPELLEE**
 Plaintiff/Appellant, :
 :
 vs. : Case No.
 :
 HEALTH & TENNIS CORPORATION OF : (Oral Argument Requested)
 AMERICA, DBA BALLY'S HOLIDAY SPA:
 HEALTH CLUB, :
 :
 Defendant/Appellee. :

APPEAL FROM ORDER GRANTING MOTION TO DISMISS
THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
Honorable J. Dennis Frederick

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JURISDICTIONAL STATEMENT

Bally's concurs with Francia's assessment that this Court has jurisdiction pursuant to Utah Code Ann. §78-2-2(3)(j) 1953, as amended.

ISSUES PRESENTED FOR REVIEW

The issues presented for review in this brief are:

1. May Francia raise issues before this Court he failed to raise before the trial court?
2. Is Francia's failure to respond to a Rule 56, Utah Rules of Civil Procedure, Motion as required by Rule 56(e) fatal to his opposition of the motion and to his appeal?
3. Are the exculpatory provisions of the agreement sufficiently specific to be enforced?
4. Is the agreement void as against public policy?

STANDARDS OF REVIEW

Because Motions to Dismiss and Motions for Summary Judgment are appropriately granted only as a matter of law, appellate courts accord no deference to the trial court's determinations and review the issues under a correctness standard. *K & T, Inc. v. Koroulis*, 888 P.2d 623, 627 (Utah 1994).

Because Francia suggested to the trial court its interpretation of the contract should turn on what he intended, this Court should review aspects of this appeal pertaining to interpretation of the contract under the clearly-erroneous

standard. *Trail Mt. Coal Co. v. Utah Div. Of State Lands & Forestry*, 884 P.2d 1265 (Utah App. 1994).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

The law relevant to the disposition of this appeal is set forth within the text of the brief.

STATEMENT OF THE CASE

This is an appeal from an order granting Bally's Motion to Dismiss.

Francia filed suit claiming he was injured when employees of Bally's failed to properly assist him as he participated in a weight lifting contest at Bally's spa. Record at 1. Bally's moved to dismiss Francia's Complaint under Rule 12(b)(6), Utah Rules of Civil Procedure, and attached the Affidavit of an employee of Bally's with a copy of Francia's Membership Application. Record at 23.

Francia filed his memorandum in opposition but no affidavit or other supporting documents were filed with Francia's memorandum. The trial court granted the Motion to Dismiss on the grounds that the actions, or inaction, of which Francia complained were specifically waived and released by the Membership Agreement. Record at 70.

SUMMARY OF ARGUMENTS

Francia raises the law stated in *Tunkl v. Regents of Univ. of Calif.*, 60 Cal.2d 92, 383 P.2d 441, 32 Cal.Rptr. 33 (1963) for

the first time on appeal. He also specifically argues the Membership Agreement is a contract of adhesion for the first time on appeal. Where these issues were not raised before the trial court, they may not be raised on appeal.

Bally's motion was supported by an affidavit. Francia responded to the motion without any supporting affidavit or other documentation. Rule 56(e), Utah Rules of Civil Procedure, requires such supplementation. Francia's failure to meet the requirements of Rule 56(e) was fatal to his response before the trial court and fatal to his appeal.

Utah law allows exculpatory contracts if they are appropriately drawn to specify the covered behavior. By the Membership Agreement, Francia waived his right to sue for "our negligent instruction or supervision" which negligence for the factual basis for his claims as pled in his Complaint.

Even if this court were to adopt the analysis of *Tunkl v. Regents of Univ. of Calif.*, supra, Bally's health spa is not a public servant.

ARGUMENT

I

FRANCIA MAY NOT RAISE NEW ISSUES ON APPEAL

Plaintiff/Appellant's (Francia) Memorandum in Opposition to Defendant/Appellee's (Bally's) Motion to Dismiss filed with the trial court consisted of six pages of argument of substantive

law. Record at 29. The points he raised were 1) the exculpatory clause was void as against public policy, and 2) alternative theories of liability avoided dismissal of his claims. He has not raised the alternative theories point in this appeal.

Francia's public policy argument constituted three and one-half pages of his memorandum in the trial court. Record at 31-34. He cited *Union Pacific Railroad Co. v. El Paso Natural Gas Co.*, 408 P.2d 910 (Utah 1965), which is discussed hereafter, for the general proposition exculpatory clauses were always void in Utah as against public policy. He then cited other cases from other jurisdictions for the propositions that; 1) inconspicuous exculpatory language was not effective, and 2) general exculpatory language was not effective. No where within Francia's memorandum was there mention of the contract being one of adhesion.

In point one of his brief before this Court, Francia argues his Membership Agreement with Bally's is void as a contract of adhesion. This point is supported by citations to 16 different cases, none of which were cited to the trial court. While Francia alleges unequal bargaining power once in his memorandum before the trial court, no where in that memorandum does he argue the Membership Agreement is a contract of adhesion. Superior bargaining power is only one element of an adhesion contract.

Wagner v. Farmers Ins. Exch., 786 P.2d 763, 766 n.2 (Utah App. 1990).

An argument will be deemed to have been raised before the trial court if the trial court had an opportunity to enter findings of fact and/or conclusions of law. *James v. Preston*, 746 P.2d 799, 801 (Utah App. 1987). There must be a "factual showing or . . . submission of legal authority" before the argument will be deemed to have been raised at the trial court level, *id.* Further, the trial court must address an argument before it may be considered on appeal. *Ong International (U.S.A.) Inc. v. 11th Ave. Corp.*, 850 P.2d 447, 455 n.31 (Utah 1993).

Even when this Court liberally construes Francia's memorandum before the trial court, it cannot reach the conclusion that he argued, before that court, that the Membership Agreement was a contract of adhesion or that the six elements of *Tunkl v. Regents of Univ. of Calif.*, 60 Cal.2d 92, 383 P.2d 441, 32 Cal.Rptr. 33 (1963) applied. Because these issues are raised for the first time on appeal, they may not be considered by this Court.

II

FRANCIA FAILED TO RAISE ISSUES OF FACT BEFORE THE TRIAL COURT

Rule 12(b)(6), Utah Rules of Civil Procedure, allows a party to move to dismiss a claim for "failure to state a claim upon which relief can be granted." Rule 12(b) provides:

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Bally's moved to dismiss Francia's Complaint under Rule 12(b)(6) and attached the Affidavit of Sandra Harrington, an employee of Bally's. Record at 23. Harrington's Affidavit reported on its face that she was competent to testify to the matters stated in the Affidavit, and that the document attached to the Affidavit, Francia's Membership Application with Bally's, was a true and correct copy of that document, and that Harrington was a custodian of the membership record. Under Rule 12(b), the affidavit altered the nature of the motion to one which is treated as a Motion for Summary Judgment.

In response, Francia filed his Memorandum with five (5) numbered paragraphs identified as "Statement of Facts". Record at 29. These statements did not cite any supporting affidavit, deposition, answers to interrogatories or admissions which would

make them "facts." No affidavit was filed with Francia's reply memorandum. There was no verification which would allow the Memorandum to substitute for an affidavit. The Memorandum itself was not signed by Francia.

Rule 56 provides:

When a Motion for Summary Judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits, or as otherwise provided in this Rule, must set forth specific facts showing there is a genuine issue for Trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. Rule 56(e), Utah Rules of Civil Procedure; see also *Watkiss and Campbell v. Foa and Son*, 808 P.2d 1061 Utah (1991).

Accordingly, the only "facts" which the trial court could consider in addressing the motion were those contained in Sandra Harrington's affidavit and the agreement attached to it.

Rule 56 is augmented by Rule 4-501, Utah Code of Judicial Administration. Rule 4-501(1)(a) provides:

All motions, except uncontested or ex parte matters, shall be accompanied by a Memorandum of Points and Authorities, appropriate affidavits, and copies of or citations by page number to relevant portions of depositions, exhibits or other documents relied upon in support of the motion.

Despite the requirements of both Rule 56 and Rule 4-501, Francia's Memorandum was not accompanied by affidavits, depositions, answers to interrogatories, etc. The use of responsive affidavits is mandatory where the moving party has presented affidavits or other facts which would require the

granting of its motion. *Thayne v. Beneficial Utah, Inc.*, 874 P.2d 120 (Utah 1994).

Thereafter, the court issued a Minute Entry granting Bally's Motion to Dismiss, Record at 68, and entered an order elucidating the reasons therefor pursuant to Rule 52, Utah Rules of Civil Procedure. Record at 70.

Utah case law supports the interpretation of Rules 12 and 56, cited above, requiring the dismissal of Francia's appeal. In *State Bank of Southern Utah v. Troy Hygro Systems*, 894 P.2d 1270, 1277 (Utah App. 1995), the court addressed similar issues:

Despite asserting each of these defenses in its answer, Hygro has not presented any evidence to support them. 'In resisting a Motion for Summary Judgment, bare contentions, unsupported by any specifications of fact in support thereof, raise no material questions of fact.' *First Sec. Fin. vs. Okland Ltd.*, 750 P.2d 195, 197 (Utah App. 1988) (quoting *Brigham Trucking Implement Co. v. Fridle*, 746 P.2d 1171, 1173 (Utah 1987) (per curium)). As a party opposing the Bank's properly supported Motion for Summary Judgment, Hygro 'had an affirmative duty to respond with affidavits or other materials allowed by Rule 56(e) [of the Utah Rules of Civil Procedure].' *Thayne v. Beneficial Utah, Inc.*, 847 P.2d 120, 124 (Utah 1994). Hygro simply did not meet its burden by presenting some evidence, by affidavit or otherwise, raising a credible issue of material fact with respect to any of these defenses.

Because Ballys filed a Rule 12(b)(6) motion supported by affidavits, that motion should have been treated and was treated as a Rule 56 Motion for Summary Judgment by the trial court. As a Rule 56 Motion for Summary Judgment, Francia was obligated to provide affidavits or other supporting material appropriately

delineated in Rule 56 to support his position with regards to the motion. Having failed to do so, the trial court was entitled to and correctly did grant summary judgment. Francia's failure to file affidavits was fatal to his action below and is fatal to appeal. This defect alone requires that the appeal be dismissed.

III

THE EXCULPATORY CLAUSE IS NOT VOID

In opposing Bally's Motion, Francia asserted the exculpatory clause was "in much smaller print" and was not bargained for by Francia. Record at 30. Even the most cursory review of the contract shows that in actual fact, provisions of Paragraph Ten were in exactly the same size type face as the majority of the language on the front page of the agreement and that the last two sentences in Paragraph Ten were printed in bold type face and provide, "You acknowledge that you have carefully read this waiver and release and fully understand that it is a release of liability. You are waiving any right to bring a legal action to assert a claim for our negligence." Not only was the release language of Paragraph Ten not smaller than the rest of the agreement, it was virtually the only information, not required by Federal or State law, which was printed in bold. Additionally, no affidavit was filed to show the terms were "not bargained for".

Francia's suggestion in his "Statement of Facts" that the waiver and release provision was not bargained for was not supported by anything he filed to support his position when responding to the motion.

In addition to reading the provisions of Paragraph Ten as suggest by Bally's, the trial court, in making its ruling, noted additional language calling Francia's attention to the fact that he was waiving certain rights under the contract. Immediately above Francia's signature on the front page of the agreement was the following language. Record at 68. **"WAIVER AND RELEASE:** This contract contains a **WAIVER AND RELEASE** in Paragraph 10 to which you will be bound." [emphasis in the original]

Francia cited *Union Pacific Railroad Co. v. El Paso Natural Gas Co.*, 408 P.2d 910 (Utah 1965) for the proposition that exculpatory clauses are void as against public policy. That was not the holding of *El Paso Natural Gas*. *El Paso Natural Gas* is in fact the case which governed the disposition of Bally's motion, but required the dismissal of Francia's case. In *El Paso Natural Gas*, this Court upheld the denial of the Defendant's Motion for Summary Judgment based on exculpatory language which would have required El Paso Natural Gas to indemnify Union Pacific and hold it harmless:

. . . from and against **any and all liability**, loss, damage, claims . . . **of whatsoever nature** . . . growing out of injury or harm to, or death of persons

whomsoever, or loss or destruction of, or damage to property whatsoever, including the pipe line, when such injury, harm, death, loss, destruction or damage, howsoever caused, grows out of, or arises from, the bursting of or leaks in the pipeline, or **in any other way whatsoever is due to or arises because of the existence of the pipeline** where the construction, operation, maintenance, repair, renewal, reconstruction, or use of the pipeline or any part thereof, or the contents therein or therefrom." *Id.* at 912 [emphasis in the original.]

In discussing exculpatory clauses in *El Paso Natural Gas*, this Court did not hold such clauses are void but only "the law does not look with favor upon one exacting a covenant to relieve himself of the basic duty which law imposes. . .", *Id.* at 913. While the law does not favor exculpatory clauses, there are situations where they will be upheld.

This court described some of those situations.

The majority rule appears to be that in most situations, where such is the desire of the parties, and it is clearly understood and expressed, such a covenant will be upheld. That the presumption is against such an intention, and it is not achieved by inference or implication from general language such as was employed here. It will be regarded as a binding contractual obligation only when that intention is clearly and unequivocally expressed.

If it had been the intent of the parties that the Defendant should indemnify the Plaintiff even against the latter's negligent acts, it would have been easy enough to use that very language and to thus make that intent clear and unmistakable which was not done here. *Id.* at 914.

While that was not done in *El Paso Natural Gas*, it was done by Bally's. Paragraph Ten includes the following language:

This waiver and release of liability includes, without limitation, injuries which may occur as a result of (a) your use of any exercise equipment or facilities which may malfunction or break, (b) our improper maintenance of any exercise equipment or facilities, (c) our negligent instruction or supervision, and (d) you slipping and falling while in the Health Club or on the premises.

Additionally, Francia's attention was specifically drawn to the waiver and release language of Paragraph Ten by the bold type immediately above his signature line on the first page of the agreement.

The only factual allegations of Francia's Complaint addressing any departure from a duty Bally's allegedly owed Francia were that Bally's failed to properly train and/or supervise the spotters who assisted in the weight lifting contest. The language of Paragraph Ten specifically addresses and then waives and releases liability pertaining to negligent training or supervision. To paraphrase *El Paso Natural Gas*, "it was easy enough to use that very language and to thus make that intent clear. . ." *Id.* at 914.

In *El Paso Natural Gas*, this Court noted the Defendant had to stretch the language of the release to reach the conclusion that the injuries for which indemnification was sought were covered by the agreement. The court felt that "the fair import of the entire provision . . . is that the damage is guaranteed against some causal connection with the construction, existence,

maintenance, or operation of the pipeline other than an incident which happened merely coincidental with existence." *Id.* at 914. In the current matter, the claims being waived and released by Paragraph Ten were exactly the variety of claims Francia sought to assert.

The clear reading of *El Paso Natural Gas* is that while exculpatory agreements may not be favored, they will be upheld if appropriately drawn. An appropriately drawn exculpatory agreement, which relieves a party of liability for its own negligence, must specify the negligent action or inactions for which the party will not be liable. The waiver and release language of the Membership Agreement specified Bally's would not be liable for failure to train or supervise. This language is sufficiently narrow to be enforced. The agreement is not void because it is too broad or too vague and is enforceable to exclude the claims Francia asserted in before the trial court.

IV

TUNKL DOES NOT APPLY TO THE MEMBERSHIP AGREEMENT

Francia argues this Court should apply the law of *Tunkl v. Regents of Univ. of Cal.*, 60 Cal.2d 92, 383 P.2d 441, 32 Cal.Rptr. 33 (1963), in this matter. The *Tunkl* analysis was created by the California Supreme Court to determine whether a contract with a given entity is subject to stricter public policy scrutiny because the entity is a public servant.

The *Tunkl* criteria, paraphrased from Francia's brief, are; 1) does the agreement concern an endeavor of a type generally thought suitable for public regulation, 2) is the party seeking exculpation performing a service of great importance to the public, 3) is the party seeking exculpation willing to perform its service of any member of the public who seeks it, 4) is there a decisive economic advantage because of the essential nature of the service, 5) is there no provision in the contract for purchasing protection from negligence, and 6) the person seeking the services must be placed under the control of the furnisher of services.

Tunkl was cited by the Utah Court of Appeals in *Russ v. Woodside Homes, Inc.*, 905 P.2d 901 (Utah App. 1996). In *Russ*, the entity seeking to be exculpated was a home builder. There the Court of Appeals said:

In our view, it is clear that Woodside is not a public servant. Traditionally, public servants are state agencies, utilities, innkeepers, common carriers, and public warehousemen. See *Tunkl v. Regents of Univ. of Cal.*, 60 Cal. 2d 92, 383 P.2d 441, 445 n.12, 32 Cal. Rptr. 33 (Cal. 1963). Public servants are those who are duty bound to contract with all comers. While Woodside does contract with some home buyers, it has no obligation to contract with every home buyer. Public servants are persons and entities that provide essential and indispensable services such as hospital care and police protection. See *id.* at 447 (discussing essential nature of hospital services); *Schrier v. Beltway Alarm Co.*, 73 Md. App. 281, 533 A.2d 1316, 1323 (Md. Ct. Spec. App. 1987) (contrasting alarm company's services with essential nature of police services). Woodside's service of building houses for private

parties cannot be described as an essential public service. Consequently, Woodside is not a public servant.

A

NO FACTS SUPPORT TUNKL

A *Tunkl* analysis would require the trial court to consider facts and make findings of fact and reach conclusions of law. To perform this analysis, the court would need to hear testimony or, in the case of a motion for summary judgment, have submitted to it affidavits, depositions, answers to interrogatories. Since no such support was provided, no issue of fact allows the court to make a *Tunkl* analysis.

Even if the court were to decide a *Tunkl* analysis could be made as a matter of law, Bally's submits this Court could take judicial notice of the fact that Bally's services would not meet any element of the six conjunctive *Tunkl* criteria.

B

TUNKL WAS NOT RAISED BELOW

Finally, this Court may not consider whether the Bally's Membership Agreement meets the elements of the *Tunkl* analysis. The *Tunkl* issue not raised before the trial court and may not be considered for the first time on appeal for the reasons stated above.


CONCLUSION

Bally's Motion to Dismiss was treated as a Rule 56 Motion for Summary Judgment. Francia allowed the trial court to rely on the language on the face of the Membership Agreement when he failed to submit affidavits. The trial court reviewed the agreement and correctly ruled it specifically and narrowly described the types of negligence for which Bally's would not be held liable. The Motion to Dismiss was appropriately granted.

Francia now asks this Court to examine the agreement under a completely different analysis than that he presented to the trial court. Since these issues are raised for the first time on appeal, the court may not consider them.

This court should dismiss Francia's appeal and grant Bally's its costs.

DATED this 18th day of April, 1996.



Robert H. Wilde
Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing **Brief of Appellee** were mailed to the following via first class mail, postage prepaid thereon, this 18th day of April, 1996:

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