

1996

Manuel Guevara v. Morris Air, Inc., Tur Mexico, John Does 1-10 : Brief of Appellant

Utah Court of Appeals

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DOCKET NO. 960832-CA

IN THE UTAH COURT OF APPEALS

MANUEL GUEVARA,

Plaintiff/Appellant,

VS.

MORRIS AIR, INC., TUR MEXICO,
and JOHN DOES 1-10, inclusive,

Defendant/Respondent.

Appeal No. 960832-CA

Priority No. 15

BRIEF OF APPELLANT

APPEAL FROM SUMMARY JUDGMENT IN FAVOR OF
DEFENDANT MORRIS AIR, INC. IN THE THIRD
JUDICIAL COURT FOR SALT LAKE COUNTY, STATE OF
UTAH, THE HONORABLE SANDRA PEULER PRESIDING

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September 17, 1997

1997

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RE: Manuel Guevara v. Morris Air, Inc., et al.
Case No. 960832CA

Dear Ms. D'Alesandro:

This letter is a citation of supplemental authority pursuant to Rule 24(i),
URAP.

I represent defendant/respondent Morris Air, Inc. Manuel Guevara,
plaintiff/appellant, appeals from summary judgment dismissing his action.

The appeal has been fully briefed and oral argument will be held on
September 22, 1997.

Manuel Guevara's reply brief on appeal argues that Morris Air did not
offer sufficient facts in the trial court to clarify the relationship among the parties
(Reply Brief of Appellant, p. 13-14).

In Jensen v. IHC Hospitals, 324 UAR 20, filed August 22, 1997, the
Utah Supreme Court observed that a party opposing a motion for summary judgment
must set forth specific facts showing that there is a genuine issue for trial. Once the
moving party has properly supported its motion, the non-moving party bears the burden

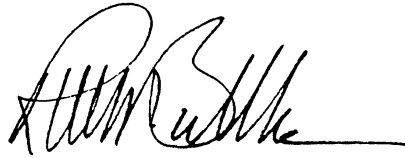
September 17, 1997

Page 2

of providing some evidence in support of the essential elements of his claim in order to successfully oppose the motion (324 UAR at 22).

Yours very truly,

STRONG & HANNI

A handwritten signature in black ink, appearing to read "R. H. Bullock", with a long horizontal flourish extending to the right.

Roger H. Bullock

RHB/db

cc: Robert J. DeBry (*via facsimile and U. S. Mail*)
Attorney for Manuel Guevara

Cite as

324 Utah Adv. Rep. 20

**IN THE SUPREME COURT
OF THE STATE OF UTAH**

Sherry JENSEN and Shayne Hipwell,
individually and on behalf of all other heirs
of Shelly Hipwell, and Ashley Michele
Hipwell and Kaycie Shaylene Hipwell
appearing by Shayne Hipwell as guardian
ad litem,

Plaintiffs, Appellants, and
Cross-Appellees,

v.

IHC HOSPITALS, Inc., dba McKay-Dee
Hospital, and Michael J. Healy, M.D.,
and Does I through X,

Defendants, Appellees, and
Cross-Appellant.

No. 950164

FILED: August 22, 1997

Third District, Salt Lake Div. I
The Honorable Glenn Iwasaki

ATTORNEYS:

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plaintiffs

James W. Gilson, Kathy A. Lavitt, Salt Lake
City, for IHC

Elliott J. Williams, Kurt M. Frankenburg,
Salt Lake City, for Dr. Healy

On Petition for Rehearing

**This opinion is subject to revision before
publication in the Pacific Reporter.**

ZIMMERMAN, Chief Justice:

This court now grants rehearing and issues this opinion without hearing oral argument. We address whether we should uphold summary judgment in favor of defendant McKay-Dee Hospital ("McKay-Dee") because plaintiffs Shayne Hipwell and Sherry Jensen's wrongful death action against McKay-Dee was barred by the medical malpractice statute of limitations. See Utah Code Ann. §78-14-4. In our prior opinion in this case, we reversed the trial court's grant of summary judgment as to all defendants and remanded on the issue of whether defendant Michael J. Healy's ("Dr. Healy") alleged fraud in collaborating with plaintiffs' original attorney was sufficient to toll the statute of limitations on their medical malpractice claims once they had retained an independent attorney. *Jensen v. IHC Hosps., Inc.*, 314 Utah Adv. Rep. 24, 29 (Apr. 4, 1997). We further held that Jensen and

malpractice wrongful death claim as a claim for fraud was not sufficient to avoid the two-year medical malpractice statute of limitations. *Id.* at 30. In its petition for rehearing, McKay-Dee now claims that summary judgment in its favor should have been upheld because (i) Dr. Healy's fraud does not toll the statute of limitations as to Jensen and Hipwell's claims against McKay-Dee; and (ii) Jensen and Hipwell's allegations of fraud on the part of McKay-Dee were properly dismissed by the trial court.

We begin with a brief review of the facts relevant to our decision on rehearing. Because we are reviewing a grant of summary judgment, we view the facts in the light most favorable to the nonmoving parties, Jensen and Hipwell. *Id.* at 25. Jensen and Hipwell allege that Dr. Healy, who had staff privileges at McKay-Dee but was not employed by McKay-Dee, committed malpractice on Shelly Hipwell (Jensen's daughter and Hipwell's wife) while she was a patient at McKay-Dee. They claim that, to cover his alleged malpractice, he and a McKay-Dee doctor fraudulently transferred Shelly to University Hospital. Jensen and Hipwell further allege that Dr. Healy then colluded with his brother, attorney Tim Healy, and attorney Roger Sharp to prevent Jensen and Hipwell from learning of the malpractice Dr. Healy had allegedly committed. Jensen and Hipwell made no allegation that McKay-Dee knew about Dr. Healy's collusion with his brother and attorney Sharp.

In our prior opinion, we held that Jensen and Hipwell's allegations of fraud against Dr. Healy were sufficient to toll the statute of limitations on their claims as long as they retained attorney Sharp. *Id.* at 28. However, we remanded to the trial court on the issue of whether Dr. Healy's alleged fraud was sufficient to toll the statute of limitations after Jensen and Hipwell retained independent counsel but before that counsel had actual knowledge of the facts constituting Dr. Healy's alleged fraud. *Id.* at 28-29. The issues we now address are (i) whether Dr. Healy's alleged fraud can also act to toll the statute of limitations as to McKay-Dee; and (ii) whether Jensen and Hipwell's allegations of fraud on the part of McKay-Dee are sufficient to toll the statute of limitations as to McKay-Dee. These issues were not discussed in our initial opinion.

As to the first issue, whether Dr. Healy's fraudulent collusion with Jensen and Hipwell's original attorney can toll the statute of limitations as to McKay-Dee, the general rule is that fraud committed by a third party in concealing a cause of action against another defendant will not toll the statute of limitations as to that defendant. *See* 51 Am. Jur. 2d *Limitation of Actions* §150 (1970). Where, however, there is an agency or privity relationship between the third party committing the fraud and the defendant, our cases indicate that liability for the agent's negligent or

the purposes of the principal. *See Hodges v. Gibson Prods. Co.*, 811 P.2d 151, 156 (Utah 1991); *Birkner v. Salt Lake County*, 771 P.2d 1053, 1057 (Utah 1989).¹ On the record before us, we cannot determine whether Dr. Healy's fraud in colluding with attorney Sharp and attorney Healy should be imputed to McKay-Dee absent two factual findings: (i) that Dr. Healy was McKay-Dee's agent; and (ii) that Dr. Healy acted in whole or in part to further the aims of McKay-Dee. The complaint makes no allegations regarding these issues. We remand to the trial court for further proceedings.

If the trial court finds that Dr. Healy was McKay-Dee's agent and that he acted at least in part to further McKay-Dee's aims, it should impute liability for Dr. Healy's fraud to McKay-Dee and toll the statute of limitations as to McKay-Dee to the same extent it is tolled as to Dr. Healy.² If, on the other hand, the trial court finds either that Dr. Healy was not McKay-Dee's agent or that Dr. Healy acted "entirely on personal motives unrelated to [McKay-Dee's] interests," *Hodges*, 811 P.2d at 157, then Dr. Healy's fraud does not toll the statute of limitations as to McKay-Dee and Jensen and Hipwell's claims against McKay-Dee are barred.

Moving to the second issue raised on rehearing, Jensen and Hipwell argue that the statute of limitations as to McKay-Dee should be tolled because of fraud allegedly committed by McKay-Dee, through one of its doctors, in participating in an allegedly fraudulent transfer of Shelly Hipwell from McKay-Dee to University Hospital. Jensen and Hipwell did not originally argue that McKay-Dee had committed fraud that would toll the statute of limitations. Their complaint did, however, include a count of constructive fraud against McKay-Dee. The trial court held first that the medical malpractice statute of limitations, section 78-14-4 of the Code, barred Jensen and Hipwell's claim of constructive fraud against McKay-Dee. In the alternative, the trial court ruled that the claim was "unsupported by the facts" and that there was "insufficient evidence to submit this matter to a jury as the fact finder." In our original opinion, we upheld the trial court's finding that Jensen and Hipwell's claim for constructive fraud amounted to nothing more than a claim for medical malpractice, which would be barred by the medical malpractice statute of limitations. *Jensen*, 314 Utah Adv. Rep. at 30. We did not address, however, the contention that Jensen and Hipwell's allegations of constructive fraud on the part of McKay-Dee would be sufficient to toll the statute of limitations on Jensen and Hipwell's medical malpractice claims against McKay-Dee. We find that the trial court properly granted summary judgment to McKay-Dee, ruling that Jensen and Hipwell's constructive fraud claim was insufficiently supported by the evidence and therefore could

careful analysis of the relative burdens of proof and production involved in making and opposing a motion for summary judgment. As noted above, when reviewing a motion for summary judgment, we view all facts in the light most favorable to the nonmoving party. *Id.* at 25. On a motion for summary judgment, the moving party bears the burden of proof for its motion, namely, the burden of proving that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. However, in opposing a motion for summary judgment, the plaintiff still has the ultimate burden of proving all the elements of his or her cause of action. *Thayne v. Beneficial Utah, Inc.*, 874 P.2d 120, 124 (Utah 1994). Further, once challenged, the party who opposes such a motion must come forward with sufficient proof to support his or her claim, particularly when that party has had an opportunity to conduct discovery. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The party opposing a properly supported motion for summary judgment “may not rest upon the mere allegations or denials of his [or her] pleading, but his [or her] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” Utah R. Civ. P. 56(e) (emphasis added). Put another way, once the moving party has brought forth evidence either tending to prove a lack of genuine issue of material fact or challenging the existence of one of the elements of the cause of action, the nonmoving party then bears the burden of “provid[ing] some evidence, by affidavit or otherwise, in support of the essential elements of his [or her] claim.” *Thayne*, 874 P.2d at 124.

In this case, Jensen and Hipwell failed to provide any such evidence to support their claim of constructive fraud. Constructive fraud requires two elements: (i) a confidential relationship between the parties; and (ii) a failure to disclose material facts. *See Blodgett v. Martsch*, 590 P.2d 298, 301-02 (Utah 1978); 37 Am. Jur. 2d *Fraud and Deceit* §§4, 15 (1968). Jensen and Hipwell’s complaint alleges both (i) that McKay-Dee’s employee, Dr. Baughman, had a confidential relationship with Shelly and her family as one of her treating physicians, and (ii) that Dr. Baughman failed to disclose that he had committed medical malpractice in treating Shelly. McKay-Dee’s motion for summary judgment did not challenge Jensen and Hipwell’s assertion that Dr. Baughman had a confidential relationship with Shelly and her family. McKay-Dee’s motion, however, did dispute Jensen and Hipwell’s allegation that Dr. Baughman failed to disclose his alleged malpractice. McKay-Dee produced the deposition of Dr. Baughman, wherein he states, “I have no question at all that [Shelly] received care that’s exemplary, that could be used as an example of the management of a good

Shelly’s care. McKay-Dee properly challenged Jensen and Hipwell’s allegation that Dr. Baughman had failed to discharge his duty to disclose material facts to them, namely, the fact that he had committed malpractice, by producing Dr. Baughman’s deposition in which he states that he did not believe and does not believe that he committed malpractice.

Jensen and Hipwell, however, as the nonmoving parties, utterly failed to meet their burden of coming forward with evidence to contradict Dr. Baughman’s deposition testimony. In their opposition to McKay-Dee’s motion for summary judgment, Jensen and Hipwell simply reiterate the allegations of their complaint and provide no support for their claim that Dr. Baughman failed to tell them that Shelly had been “left to bleed internally for several hours before accurately diagnosing her illness.” Dr. Baughman’s deposition testimony specifically and directly challenges Jensen and Hipwell’s assertion, and they failed to provide any evidence to support their claim. Thus, the trial court correctly ruled that there was insufficient evidence to submit the matter to a jury. Because Jensen and Hipwell’s claim of constructive fraud against McKay-Dee was insufficiently supported by the evidence, such a claim cannot be used to toll the statute of limitations on their medical malpractice claims against McKay-Dee.

We remand to the trial court for further proceedings consistent with this opinion.

Justice Howe, Justice Russon, Judge Eves, and Judge Halliday concur in Chief Justice Zimmerman’s opinion.

Having disqualified themselves, Associate Chief Justice Stewart and Justice Durham do not participate herein; District Judge J. Philip Eves and District Judge Bruce K. Halliday sat.

1. The cases cited also include two other factors to consider in determining whether an agent’s conduct will be imputed to the principal in the employment context: (i) whether the employee’s conduct is of the general kind the employee is expected to perform; and (ii) whether the employee’s conduct occurred within the hours of the employee’s work and ordinary spatial boundaries. *Hodges*, 811 P.2d at 156; *Birkner*, 771 P.2d at 1056-57. As Dr. Healy was not McKay-Dee’s employee, these criteria would not seem to apply to the question of whether Dr. Healy’s acts fall within the scope of any agency relationship he may have had with McKay-Dee.

2. We note, however, that this issue will be moot if the fact finder determines, pursuant to our prior opinion, that Jensen and Hipwell’s complaint was not timely filed because Dr. Healy’s fraud did not toll the statute of limitations long enough. *See Jensen*, 314 Utah Adv. Rep. at 29.

MANUEL GUEVARA,)	
)	
Plaintiff/Appellant,)	
)	
vs.)	
)	
MORRIS AIR, INC., TUR MEXICO,)	
and JOHN DOES 1-10, inclusive,)	Appeal No. 960832-CA
)	
Defendant/Respondent.)	
)	

APPEAL FROM SUMMARY JUDGMENT IN FAVOR OF
DEFENDANT MORRIS AIR, INC. IN THE THIRD
JUDICIAL COURT FOR SALT LAKE COUNTY, STATE OF
UTAH, THE HONORABLE SANDRA PEULER PRESIDING

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I.

PARTIES TO THIS PROCEEDING

The parties to this proceeding are identified in the caption. The appellant, Manuel Guevara, was the plaintiff below; the respondent, Morris Air, Inc., was a defendant below. Tur Mexico, was named as a defendant, but has not been served and is not a party to this appeal.

II.

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IV.

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction of this appeal pursuant to Utah Code Ann. §§78-2-2(3)(k), 78-2a-3(2)(j). The order granting summary judgment was entered on July 10, 1996 (R.123-24). Appellant's timely notice of appeal was filed on August 9, 1996 (R.125-27). The Utah Supreme Court transferred this case to the Utah Court of Appeals on or about December 27, 1996.

V.

ISSUES PRESENTED FOR REVIEW AND THE STANDARD OF REVIEW

This appeal is from a grant of summary judgment in favor of defendant. All issues presented are reviewed as questions of law for correctness, with no deference to the trial court's conclusions. See Schurtz v. BMW of North America, 814 P.2d 1108, 1111-12 (Utah 1991). The issues presented for review are:

1. Whether the court below erred in granting summary judgment to defendant on the ground that, as a travel agent, it was immune from liability for the negligence of a services provider, when the determination of that status required resolving a factual dispute and where the law does not recognize such immunity? (preserved for review at R.60-62).

2. Whether, the court below erred in granting summary judgment to defendant on the ground that, under its contract with

plaintiff, it was not liable for the negligence of a third party where:

- a. the contract in question was internally contradictory and, thus, ambiguous as a matter of law;
- b. admissible extrinsic evidence created a factual dispute as to the intent of the parties and whether apparent or ostensible authority existed and/or,
- c. the court simply applied one part of one provision, without regard to the basic law of contract interpretation, including the need to resolve threshold issues such as completeness, integration and ambiguity? (preserved at R.55-62, 77-108).

VI.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS

This appeal include no determinative constitutional provision, statute, ordinance, rule or regulation.

VII.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, Disposition in the Court Below.

Plaintiff Manuel Guevara appeals from the trial court's grant of summary judgment dismissing his negligence and breach of contract claims against defendant Morris Air, Inc. His claims

relate to personal injuries sustained in Puerto Vallarta, Mexico, during a vacation which he purchased as a package from Morris Air (R.66-69, 74). Mr. Guevara was injured while disembarking from a bus, during a tour which was part of the package (R.71-76). The direct operator of the bus was Tur Mexico (R.48), which Mr. Guevara alleges was the agent and representative of Morris Air (R.1-6). After both sides conducted discovery, Morris Air moved for summary judgment on the ground that it could not be held liable for the negligence of Tur Mexico (R.45-54).¹

Specifically, Morris Air asserted two grounds for summary judgment. First, Morris Air maintained that it was merely a "travel agent" and that, as such, it could not be liable for the "independent negligence of parties performing travel services" (R.49-52). Second, Morris Air asserted that the charter ticket (or passenger agreement) specifies that "other travel suppliers [such as Tur Mexico] are not agents or employees of Morris Air, but are independent contractors . . ." and, that it disclaims liability as to Morris Air for any act or omission of such suppliers (R.52-53). Morris Air's motion was supported by an excerpt from ¶ 13 of the charter ticket which contains the supposed disclaimer (R.48), and

¹Whether or not Tur Mexico was, in fact, negligent is not at issue on appeal. The grounds presented for summary judgment relate solely to whether or not Morris Air would be liable, if Tur Mexico had acted negligently.

by its assertion that it could not "locate" any written agreement between itself and Tur Mexico (R.49).

In opposing summary judgment, Mr. Guevara provided a copy of the entire charter ticket including the full text of ¶ 13 (R.100-8). Notwithstanding the portion selectively offered by Morris Air, that paragraph also specifically provides, that:

FOR PUBLIC CHARTER TRIPS ONLY, MORRIS AIR SERVICE, INC., acts as principal and is responsible for making arrangements with airlines, hotels, ground transportation companies, and other travel suppliers to provide the services and accommodations included in the trip.

(R.108) (emphasis added).

Mr. Guevara also produced additional written materials, which had been provided to him by Morris Air in connection with his tour package (R.77-86). These materials evidence a close association between Morris Air and Tur Mexico, including a specific statement that Morris Air's "Representative in Puerto Vallarta" was "Tur Mexico" (R.79). Mr. Guevara submitted an affidavit stating that Morris Air employees held Tur Mexico out as its agent, and that he relied upon those representations in purchasing the package (R.59-60).

Morris Air filed a Reply Memorandum (R.115-21), wherein it maintained that Mr. Guevara's understanding of these representations was "not relevant" (R.116). It did not deny that the representations were made. Notwithstanding its assertion that

Mr. Guevara's understanding of ¶ 13 was a mere conclusion, Morris Air also offered its own interpretation of that disputed provision (R. 116-17). Unlike Mr. Guevara's interpretation, this was presented as mere argument, unsupported by affidavit or evidence. Indeed, the only "evidence" presented by Morris Air, extrinsic to the charter ticket, consists of its unsupported characterization that it was merely a "travel agent," and the fact that it could find no written agreement between itself and Tur Mexico.²

By Order dated July 10, 1996, the court below granted Morris Air's Motion and entered summary judgment in its favor (R. 123-24). That Order is a bare holding, which contains no findings or conclusion as to the basis for the court's decision. The Order does not state whether the court relied upon Morris Air's status as a "travel agent" or upon its interpretation of the charter ticket. The Order does not specify whether or not the court found that ticket to be a complete, integrated and unambiguous agreement. It does not indicate what, if any, of the evidence offered by Mr. Guevara the court actually considered.

B. Statement of the Facts Relevant to the Issues Presented for Review.

Mr. Guevara purchased a vacation package from Morris Air, which included a charter flight to Puerto Vallarta, hotel

²Morris Air's motion for summary judgment cites to its own self-serving interrogatory answers as support for the proposition that it "acted as a travel agent" (R.48). That is not a historical fact, but an ultimate factual conclusion.

accommodations and other services, including ground transportation and bus tours (R.66-69). Morris Air was the direct provider of the charter flight. Mr. Guevara's itinerary lists "Velas Vallarta" as his hotel and "Tur Mexico" as the provider of "other services" (R.81). This was a tour package, assembled and sold by Morris Air (R.66-69). It was not a tour, which was operated by others and merely brokered by Morris Air.

The information brochure provided by Morris Air expressly holds Tur Mexico out as its "Representative in Puerto Vallarta" (R.79) ("[w]e are being represented by Tur Mexico"). Mr. Guevara was advised by that document to contact Tur Mexico if he need assistance (R.79). Thus, although part of Tur Mexico's duties were to provide ground transportation, it was not simply a bus service. It provided a wide array of tour services on behalf of Morris Air (R.81, 84). Other materials provided in connection with the package, refer jointly to Morris Air and Tur Mexico. Buyers are cautioned that "Morris Air Service & Tur Mexico have no connection" with certain time share promotions (R.83). There is a document on Tur Mexico letterhead providing information from Morris Air (R.85). Mr. Guevara testified that Morris Air employees made oral statements, that Tur Mexico was Morris Air's representative in Mexico (R.111).

A focal point of the dispute is ¶ 13 of the charter ticket/customer agreement (R.108). That provision first states,

that Morris Air "acts as principal" and is responsible for arranging certain services. It then states, that Morris Air "acts only as agent" of the suppliers of such services. Next, it denies that such suppliers are agents or representatives of Morris Air, and states that they are "independent contractors." Finally, customers are cautioned, that they are "solely" responsible for "[a]ny deviation from the advertised trip." The full text of that paragraph is as follows:

RESPONSIBILITY: FOR PUBLIC CHARTER TRIPS ONLY, MORRIS AIR SERVICE, INC., acts as principal and is responsible for making arrangements with airlines, hotels, ground transportation companies, and other travel suppliers to provide the services and accommodations included in the trip; provided that where MORRIS AIR SERVICE is the airline, it is responsible for providing directly to passengers the subject air transportation. In all other cases, MORRIS AIR SERVICE acts only as agent of the respective airline(s) and other suppliers, and, as such, shall not be responsible for the provision or operation of such flights or other services and accommodations. In each case, transportation provided by the airline is subject to all of the terms and conditions of the respective carrier's applicable tariff and/or contract of carriage; refer to the air transportation ticket for conditions of contract and notice of incorporated terms, and inquire of the airline for additional details. Also, other airlines, hotels, ground transportation companies, and other travel suppliers are not agents or employees of MORRIS AIR SERVICE, but are independent contractors over whom MORRIS AIR SERVICE has no control. Accordingly, you hereby agree that, except as otherwise provided herein, MORRIS AIR SERVICE is not responsible or liable for any loss, injury, expense, damage to property, or personal

sickness, injury or death which results directly or indirectly from (a) any act or failure to act (including, but not limited to, delays), whether negligent or otherwise, of any other airline, hotel, ground transportation company, or other travel supplier, or (b) any other cause or act of whatsoever nature, beyond MORRIS AIR SERVICE'S direct and immediate control. Except as otherwise specified herein, in the event of non-operation of any Public Charter flight due to reasons beyond our control, our sole liability shall be to refund to you that portion of the price allocable to the services not provided. Any deviation from the advertised trip which you initiate is solely your responsibility. Other matters concerning your responsibilities and ours are as follows:

(R.108) (emphasis added).

Mr. Guevara was injured, during the course of a tour which was part of the "advertised trip" (R.71-76). When he was disembarking from a bus, directly operated by Tur Mexico, he was instructed by the driver to walk between two parked buses (R.72-73). One of the buses moved forward, pinning Mr. Guevara between them and crushing his pelvis (R.74-76).

VIII.

SUMMARY OF ARGUMENT

The court below committed reversible error by resolving factual disputes on a motion for summary judgment. Winegar v. Froerer Corp., 813 P.2d 104, 107 (Utah 1991). It either made a determination as to the nature of defendant's relationship with Tur Mexico or, proceeded to interpret an incomplete and ambiguous contract. Even if the parties generally agree as to historical

facts, there exists a legitimate dispute as to the ultimate fact, which precludes summary judgment. Sandberg v. Klein, 575 P.2d 1291, 1292 (Utah 1978).

(A)

It Was Not Disputed That Morris Air Was A Mere Travel Agent

Whether or not there was an agency relationship--a central issue here--is fact intensive and not generally an appropriate subject for summary judgment. Vina v. Jefferson Insurance Co. of N.Y., 761 P.2d 581, 585 (Utah App. 1988); Zions First National Bank v. Clark Clinic Corp., 762 P.2d 1090, 1095-96 (Utah 1988). Here, plaintiff presented evidence of written and oral representations by defendant, supporting the existence of such an agency relationship. It was, thus, error to grant summary judgment. Zions Bank, 762 P.2d at 1095-96.

(B)

The Contract Is Not Unambiguous Nor Does The Extrinsic Evidence Undisputedly Establish That Morris Air Is Not Liable

The court below also erred to the extent that its grant of summary judgment rests upon interpreting the parties agreement, and holding defendant immune from liability under ¶ 13 of the charter ticket.

(1)

Paragraph 13 is internally contradictory and, therefore, ambiguous as a matter of law. Sparrow v. Tayco Construction Co.,

846 P.2d 1323, 1327 (Utah App. 1993). It specifically refers to Morris Air as the "principal." The court could not resolve that ambiguity on summary judgment. Id.

(2)

Because the charter ticket is ambiguous, extrinsic evidence is admissible and must be considered in resolving the ambiguity. Sparrow, 846 P.2d at 1327. The extrinsic evidence offered by Mr. Guevara gives rise to a factual dispute, precluding summary judgment. Winegar, 813 P.2d at 107. The court below erred, either by ignoring that evidence or by resolving the fact dispute.

(3)

The court below erred by granting summary judgment, on the basis of one part of one provision in an incomplete and ambiguous contract. It did so in favor of the party drafting the contract. In so doing, the court ignored and failed to follow standard cannons of contract interpretation. Cox v. Cox, 877 P.2d 1262, 1268-69 (Utah App. 1994); Colonial Leasing Co. v. Larsen Bros. Const., 731 P.2d 483 (Utah 1986); Sparrow, 846 P.2d 1323.

IX.

ARGUMENT

This appeal turns upon whether or not the facts of record undisputedly establish that, as a matter of law, Morris Air has no liability for the acts and omissions of Tur Mexico. See Winegar v. Froerer Corp., 813 P.2d 104, 107 (Utah 1991) (summary judgment is

proper only where the material facts are undisputed and the movant is entitled to judgment as a matter of law). They do not, and that judgment must be reversed.

On appeal from a grant of summary judgment, the reviewing court views the facts and inferences in the light most favorable to the losing party. Id. "[I]t takes one sworn statement under oath to dispute the arguments of the other side . . . and create an issue of fact" precluding summary judgment. Holbrook Co. v. Adams, 542 P.2d 191, 193 (Utah 1975). Moreover, even if the parties generally agree as to the underlying historical facts, any legitimate dispute as to the "understanding, intention or consequences of those facts" still precludes summary judgment. Sandberg v. Klein, 575 P.2d 1291, 1292 (Utah 1978). Here, the evidence submitted by Mr. Guevara creates a dispute as to the ultimate fact issues of Morris Air's relationship with Tur Mexico and the meaning of its agreement with Mr. Guevara. Summary judgment therefore, is precluded.

The Order granting summary judgment contains no statement of the court's reasoning, which renders it subject to question. See Schurtz v. BMW of North America, Inc., 814 P.2d 1108, 115 (Utah 1991). Regardless of the basis of its decision, the trial court erred in arriving at the conclusion that Morris Air was immune, as a matter of law, from liability for the acts and omissions of Tur Mexico. To the extent that the court found that Morris Air was merely a "travel agent," immune from liability, it resolved a

legitimate factual dispute as to Morris Air's status. It also erred, as a matter of law, in holding that such a status confers absolute immunity. To the extent that the court relied upon ¶ 13 of the charter ticket, it erred either by holding that provision to be unambiguous or by resolving the factual dispute raised by the extrinsic evidence. Indeed, it is apparent that the trial court ignored basic rules of contract interpretation, in blindly giving effect to one part of one provision, without considering the whole contract and whether or not it was, not only unambiguous, but complete and integrated.

(A)

**THE COURT BELOW COULD NOT RESOLVE THE FACT
ISSUE OF AGENCY ON SUMMARY JUDGMENT**

Under Utah law, the relationship between Morris Air and Tur Mexico--be it principal and agent, joint ventures or partners--depends upon the facts and circumstances as a whole. See Vina v. Jefferson Insurance Co. of N.Y., 761 P.2d 581, 585 (Utah App. 1988) ("agency relationship is determined from all the facts and circumstances"); Score v. Wilson, 611 P.2d 367, 369 (Utah 1980) ("joint venture must depend upon the facts of each case"); Accord, Strand v. Cranney, 607 P.2d 295, 296 (Utah 1980) (joint venture is question of fact). A formal written contract of agency or association is not required to establish such a relationship. See Score, 611 P.2d at 369. Moreover, the existence and terms of written agreements, although relevant, are not conclusive. See

Score, 611 P.2d at 369 ("agreement is less important than the acts and conduct of the parties"). Indeed, even if there is a written contract, "parol evidence is admissible" to prove agency. Garland v. Fleischmann, 831 P.2d 107, 110 (Utah 1992). See also Horrocks v. Westfalia Systemat, 892 P.2d 14 (Utah App. 1995) (equipment seller was responsible for its agent's absconding with merchandise, notwithstanding buyer's execution of written acknowledgement of receipt before actual delivery). The law does not permit one to hold another out as its agent or partner, then later deny that relationship to the detriment of innocent third parties. See Forsyth v. Pendleton, 617 P.2d 358, 360 (Utah 1980); Garland, 831 P.2d at 110; Hoth v. White, 799 P.2d 213, 218-19 (Utah App. 1990).

Mr. Guevara offered documentary and testimonial evidence showing that Morris Air held Tur Mexico out as its agent or associate. The trial court was obliged to consider that evidence, regardless of the existence and content of any written agreements. See Garland, 831 P.2d at 110. Even if those facts themselves were not disputed by Morris Air, the issue of whether or not they give rise to an agency relationship is one of fact for the jury. See Zions First National Bank v. Clark Clinic Corp., 762 P.2d 1090, 1095-96 (Utah 1988) (summary judgment not proper as fact intensive issue of agency). Morris Air certainly could not obtain judgment

in its favor by simply asserting that it was only a travel agent, and by failing to produce a written contract with Tur Mexico.³

Moreover, even if the court could accept Morris Air's self-serving and unsupported assertion that it was only a travel agent, that status does not confer some sort of absolute legal immunity. Morris Air did cite several cases below, in which travel agents were held not liable for the acts or omissions of others providing services as part of a tour. Mr. Guevara cited to other cases, in which a party claiming to be a travel agent was held actually or potentially liable for another's acts. See Casey v. Sanbourn, Inc. of Texas, 478 S.W.2d 234 (Tex. App. 1972) (travel agent vicariously liable for driver's negligence); Hudson v. Continental Bus System, Inc., 317 S.W.2d 584 (Tex. App. 1958) (jury question as to relationship between travel agent and connecting carrier); Rookard v. Mexicocoach, 680 F.2d 1257 (9th Cir. 1982) (summary judgment inappropriate as to travel agent's liability for bus accident); Jacobsen v. Princess Hotels International, inc., 475 N.Y.S.2d 846 (1984) (travel agent could be liable for hotel's negligence).

The common denominator among both parties' cases is that they are fact intensive. Indeed, some of these cases specifically hold that summary judgment is improper in "travel agent cases" on the very ground, that the inquiry is too dependent upon overall

³If anything, Morris Air's failure to deny Mr. Guevara's evidence would support judgment in his favor.

circumstances. See Hudson, 317 S.W.2d at 589; Jacobsen, 475 N.Y.S.2d at 848-49. These cases look to the facts to ascertain whether or not the travel agent's involvement exceeded merely making reservations. See Jacobsen, 475 N.Y.S. 2d 15 848-49. Where the so-called "travel agent" is actually the seller of a vacation package, which it provides, it may be liable. Id. Here, Mr. Guevara's evidence, at a minimum, raises an issue as to the fact that Morris Air sold a package.

The upshot of all this, is that there is no clear rule immunizing a party which claims to be a travel agent. Utah certainly recognizes no such rule--none of the cases cited by either party are from Utah. However, the cases cited by Mr. Guevara, which recognize the fact intensive nature of the issue, are more consistent with Utah law governing agency and summary judgment. See e.g., Zions Bank, 762 P.2d at 1095-96. See also Rogers v. M.O. Bitner Co., 738 P.2d 1029, 1032 (Utah 1987) (existence of joint venture "is ordinarily a question of fact"); Hoth, 799 P.2d at 218-19 (ostensible real estate agent held to be partner due to more extensive involvement).

Here, Mr. Guevara has met his burden to proffer evidence from which a reasonable fact finder could conclude, that Tur Mexico was Morris Air's agent or associate. Contrary to Morris Air's suggestions, this evidence is not mere conjecture and subjective interpretation. It consists of specific oral and written

representations by Morris Air, including that it was "represented . . . by Tur Mexico." It includes the very nature of the package, which Mr. Guevara purchased. To the extent that the court below weighed this evidence and decided the agency issue, it clearly erred and must be reversed.

(B)

**THE COURT BELOW ERRED IN CONSTRUING THE
CHARTER TICKET/AGREEMENT TO PRECLUDE MORRIS
AIR'S LIABILITY FOR THE NEGLIGENCE OF TUR
MEXICO**

Because the Order granting summary judgment does not specify the basis of that decision, it becomes necessary to consider all of the possibilities. There are three, all of which involve some reversible error. First, the court may have decided that the contract unambiguously precluded liability. Because the very provision cited by Morris Air, ¶ 13, is internally contradictory, the contract is ambiguous as a matter of law. See Sparrow v. Tayco Construction Co., 846 P.2d 1323, 1327 (Utah App. 1993). Second, the court may have either ignored the extrinsic evidence offered by Mr. Guevara or weighed that evidence in interpreting the contract. That, too, constitutes error because, once a contract is determined to be ambiguous, extrinsic evidence is admissible and summary judgment is improper if such evidence gives rise to any dispute. See Sparrow, 846 P.2d at 1327; Colonial Leasing Co. v. Larsen Brothers Construction Co., 731 P.2d 483, 487-88 (Utah 1986). Third, the court may have simply applied one part of one provision,

without considering whether the contract was complete and unambiguous, and without applying basic rules of construction. See Colonial Leasing, 731 P.2d at 488 ("[o]nly when contract terms are complete, clear and unambiguous can they be interpreted by the judge on a motion for summary judgment . . . [otherwise] the intent of the parties . . . is to be determined by the jury").

(1)

Summary Judgment Is Precluded Because The Contract Is Ambiguous As A Matter Of Law, And Morris Air Submitted No Extrinsic Evidence Supporting Its Interpretation

The focus here is upon ¶ 13, to which the parties ascribe differing interpretations. As a threshold matter, the court below was required to determine whether or not that provision was ambiguous. See Bailey-Allen Co. v. Kurzett, 876 P.2d 421, 424 (Utah App. 1994). The provision in question expressly states, that Morris Air will act as "principal" with respect to entities such as Tur Mexico. It then provides that Morris Air is not the agent of such entities, and that they are not agents of Morris Air but independent contractors.⁴ It also provides that customers are responsible for deviations from the package--suggesting otherwise

⁴The notion, that these providers were hired by Morris Air as independent contractors, is inconsistent with its claim to be a mere booking agent. Morris Air cannot simply cast that relationship into whatever different form is most immediately convenient to its own purposes.

for included items. Mr. Guevara was injured during a tour, which was part of the package.

A contract is ambiguous, as a matter of law, if it gives rise to more than one reasonable interpretation. See Sparrow, 846 P.2d at 1327. A contract which contains internal inconsistencies is almost per se ambiguous. Id. The interpretation of an ambiguous contract--resolving the ambiguity--is a question of fact, as to which summary judgment is generally inappropriate. See Records v. Briggs, 887 P.2d 864, 871 (Utah App. 1994).

The contradictory references to "principal" and "agent" within the context of ¶ 13, itself, render the contract ambiguous as a matter of law. This is particularly true where Morris Air seeks to rely upon a disclaimer of liability. See Interwest Construction v. Palmer, 923 P.2d 1350, 1357 (Utah 1996) (exculpatory clause must be clear and unequivocal). Where Morris Air has specifically referred to itself as a "principal," Mr. Guevara's assertion that it is a principal is certainly a "plausible" interpretation. See Sparrow, 846 P.2d at 1327. The fact, that Morris Air has a different (and, perhaps, plausible) interpretation, does not obviate the existence of a contrary interpretation--it just reinforces the ambiguity. Given that the only extrinsic evidence was offered by Mr. Guevara, it seems likely that the court erroneously held the provision to be unambiguous. See Winegar, 813 P.2d at 108.

Morris Air's attempt to explain the reference to "principal" cannot be utilized to support summary judgment in its favor. In the first place, this was presented as mere argument without supporting evidence or affidavit. Moreover, even if Morris Air had offered some evidence to support its explanation, such evidence would be irrelevant to whether or not there was an ambiguity. See Sparrow, 846 P.2d at 1327; Winegar, 813 P.2d at 107-8. It would be admissible only as extrinsic evidence to help resolve the ambiguity--a fact question, which the court could not decide on summary judgment. See Records, 887 P.2d at 871.

The reality is that Morris Air chose to use the term "principal." It cannot escape the consequences of that choice or eliminate that term by an after-the-fact explanation. Indeed, given the paucity of evidence offered by Morris Air and the rule, that unresolved ambiguities are construed against the drafter of the contract, the weight of the evidence supports Mr. Guevara's view. See Jones, Waldo et al. v. Dawson, 923 P.2d 1366, 1372 (Utah 1996); Edwards & Daniels v. Farmer's Properties, 865 P.2d 1382, 1386, n.5 (Utah App. 1993). It is certainly sufficient to preclude summary judgment against him, where he is entitled to the benefit of any reasonable inference.

(2)

**The Extrinsic Evidence Offered By Mr. Guevara
Was Admissible And Sufficient To Create A
Disputed Issue Of Fact As To The Meaning Of
Paragraph 13**

Once a contract is determined to be ambiguous, extrinsic evidence is admissible to resolve the ambiguity. See Sparrow, 846 P.2d at 1327; Winegar, 813 P.2d at 107. Because the contract here is ambiguous, the court below erred, if it either refused to consider Mr. Guevara's extrinsic evidence or weighed that evidence. Id. It is the province of the trier of fact to assess the impact of such evidence upon the meaning of the agreement between Morris Air and Mr. Guevara. See Colonial Leasing, 731 P.2d at 488.

That evidence includes the statements by Morris Air employees to Mr. Guevara and the other written materials received from Morris Air in connection with the trip. This evidence weighs in favor of an agency or joint venture relationship, under which Morris Air is vicariously liable, and against the interpretation accepted by the court. Morris Air offered no extrinsic evidence, but merely criticized Mr. Guevara's evidence as conclusory. That is not sufficient. Nor does the fact, that the parties are in relative agreement as to the historical facts eliminate the genuine dispute which exists as to the ultimate issue--what the parties intended the contract to mean. See Sandberg, 575 P.2d at 1292.

In short, where, as here, the party against whom summary judgment was entered has offered extrinsic evidence in support of

his interpretation of an ambiguous contract, the dispute as to meaning is sufficient to preclude summary judgment.

(3)

**The Court Below Simply Applied One
Part Of One Provision Without
Adhering To The Standard Canons of
Contract Interpretation**

A contract must be construed as a whole, with all of its parts harmonized and accorded on meaning. Where the parties' agreement is embodied in more than one document or writing, all such documents must be considered and harmonized. See Cox v. Cox, 877 P.2d 1262, 1268-69 (Utah App. 1994). Another relevant threshold matter is whether or not the contract is complete and integrated. See Bailey-Allen Co., 876 P.2d at 424. Integration is an issue of fact, as to which "all relevant evidence is admissible." Hall v. Process Instruments and Control, 890 P.2d 1024, 1028 (Utah 1995). Thus, conflicting evidence as to integration would, itself, preclude summary judgment. Moreover, if the contract (the charter ticket) is not integrated, other written materials provided by Morris Air are not merely extrinsic evidence of intent. They are part of the contract.

The charter ticket contains no integration clause. In fact, ¶ 20 unambiguously provides that Morris Air reserves the right to amend the agreement without notice. Accordingly, under the terms of the agreement which Morris Air drafted, its written statement, that Tur Mexico was its representative in Mexico, constitutes an

amendment to the agreement. Any doubts in this regard should be resolved against the party which assumed such a broad, one-sided advantage.

It would appear, that the court below simply ignored the rules of contract construction and gave effect to one isolated provision. It did not expressly rule upon integration, ambiguity or clarity. It did not rule upon the admissibility or relevancy of any extrinsic evidence. It just decided that Morris Air could not be liable. See Interwest Constr., 923 P.2d at 1356 (exculpatory clause must be clear).

Yet, courts frequently go beyond a single provision or even an entire written contract in ascertaining the intent of the parties. In Colonial Leasing, 731 P.2d 483, the court held that the parties' agreement constituted a sale, notwithstanding that the written contract was a lease. In Sparrow, 846 P.2d 1323, the court held that a contract, which purported to relate to personal services, was actually an agreement for the sale of equipment and that the services were incidental. See also Freedman v. Northwest Airlines, 638 N.Y.S.2d 906, 907 (City Ct. 1996) (refusing to dismiss claim by passenger on basis of exculpatory clause). These cases do not support--nor does Mr. Guevara seek--some broad and indiscriminant authority to rewrite contracts. These cases demonstrate that the corollary proposition, of blind adherence to a single, questionable contract provision, is equally inappropriate. What Mr. Guevara

seeks is to have a jury resolve the patent and obvious dispute as to the meaning of his agreement with Morris Air and Morris Air's relationship with Tur Mexico.

X.

CONCLUSION

In granting summary judgment in favor of Morris Air, the court below clearly resolved disputed questions as to fact intensive issues. Mr. Guevara presented substantial evidence as to these issues. This was clear error, and the summary judgment should be reversed and the case remanded for a trial on the merits.

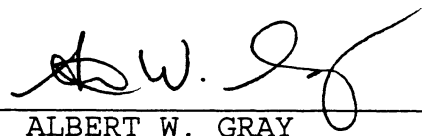
XI.

ADDENDUM

Appellant does not believe that any addendum is necessary here. The order appealed from is a bare grant of summary judgment, which contains no specific findings or conclusions. The record, as a whole, contains only about 125 pages.

Respectfully submitted this 5th day of February, 1997.

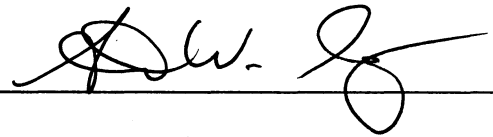
ROBERT J. DEBRY & ASSOCIATES
Attorney for Plaintiff

By: 
ALBERT W. GRAY

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing APPELLANT'S BRIEF (Guevara v. Morris Air) was mailed, postage prepaid, this 5th day of Feb, 1997 to the following:

Roger H. Bullock
STRONG & HANNI
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Salt Lake City, UT 84111



7459.BRF