

1996

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

Utah Court of Appeals

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IN THE

COURT OF APPEALS

Plaintiff

MORRIS
and DO

OF A

STATE

AND

ROBERT J.
ROBERT J.

Salt
Telephone
Attorney

IN THE UTAH COURT OF APPEALS

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| MANUEL GUEVARA, |) | |
| |) | |
| Plaintiff/Appellant, |) | |
| |) | |
| v. |) | |
| |) | Case No. 960832CA |
| MORRIS AIR, INC., TUR MEXICO, |) | |
| and DOES 1-10, inclusive, |) | Priority No. 15 |
| |) | |
| Defendants/Appellees |) | |

BRIEF OF APPELLEE MORRIS AIR, INC.

APPEAL FROM A FINAL JUDGMENT OF THE THIRD
JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,
STATE OF UTAH, THE HONORABLE SANDRA PEULER, PRESIDING

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PARTIES

The caption of this case in the Utah Court of Appeals shows the names of all parties to the proceeding in the court below. Tur Mexico was named as a defendant, but has not been served and is not a party to this appeal.

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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 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.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Summary judgment is proper only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c). Because the court only resolves legal issues on appeal from a summary judgment, the court does not defer to the trial court's conclusions of law, but it reviews them for correctness. Averett v. Grange, 909 P.2d 246 (Utah 1995). The following issues are presented for review:

ISSUE I. Whether the trial court was correct in finding that the undisputed facts showed no agency relationship existed between Morris Air and Tur Mexico; therefore Morris Air cannot be held liable for any negligence of Tur Mexico or its bus driver.

ISSUE II. Whether the trial court was correct in

finding the contract between Morris Air and Manuel Guevara clearly and unambiguously states that Morris Air is not liable for any negligence of ground transportation companies and others.

DETERMINATIVE STATUTES

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

STATEMENT OF THE CASE

Nature of the Case and Course of Proceedings

Plaintiff and appellant Manuel Guevara purchased a Tur Mexico excursion bus tour of Puerto Vallarta, as well as charter transport and hotel lodging through Morris Air Corporation (R.66-68). While on the bus tour, Mr. Guevara was injured while walking in front of the bus (R.71-76). The operator of the bus was Tur Mexico (R.48).

Mr. Guevara filed this action against Morris Air, Inc. and Tur Mexico, alleging that Tur Mexico was the agent of Morris Air, and that Morris Air is liable for Tur Mexico's negligence (R.1-6). Although Tur Mexico was a named defendant in this suit, no steps whatsoever have been taken to prosecute the action against it.

Disposition in Court Below

After both sides conducted discovery over a period of one year and four months, 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). The motion was briefed by the parties, and oral arguments were heard by Hon. Sandra Peuler on July 1, 1996. On that date the judge granted summary judgment in favor of the defendant. The Court explicitly stated the reasons for its decision as follows:

First of all, with regard to the contract itself, that was the ticket, and I think that the terms of that are very clear. And that ticket, that contract, contains an express disclaimer by Morris as to the negligence of ground transportation companies and others. So I think the contract terms, first of all, negate any actual or express authority. . . . And in terms of the brochures, I believe that the brochures, the language in the brochures simply does not raise any indication of a principal/agent relationship in the terms that plaintiff seeks to have the Court find. I think the contract, going back to that, clearly says what the relationship is and the brochures do not raise any inference that are contrary to that.

(R.141-42). A full copy of Judge Peuler's ruling is attached as "Addendum A." Judge Peuler's Order granting summary judgment was entered on July 10, 1996. Plaintiff appeals from this judgment.

Relief Sought on Appeal

Morris Air, Inc. respectfully requests this Court to affirm summary judgment in its favor.

STATEMENT OF FACTS

1. Plaintiff-Appellant Manuel Guevara purchased a Tur

Mexico excursion bus tour of Puerto Vallarta, as well as charter air transport and lodging through Morris Air Corporation (R.66-68).

2. Morris Air acted as a travel agent in selling the optional Tur Mexico bus tour to Mr. Guevara (R.49-52).

3. Morris Air instructed Mr. Guevara that he did not have to purchase the excursion bus tour from Morris Air, that he could, in fact, purchase it in Mexico, but that Morris Air could offer him a discount on the ticket price he paid for the tour (R.68).

4. Mr. Guevara chose to purchase the ticket through Morris Air (R.67).

5. Before Mr. Guevara left Salt Lake City, Morris Air sent him a "prepaid travel voucher" evidencing his purchase of the Tur Mexico bus tour. The voucher states that the name of the supplier of this "added attraction" is Tur Mexico (R.99).

6. Morris Air also sent Mr. Guevara a written itinerary which noted the name of the hotel and also listed the name and address of Tur Mexico as a provider of "other services" (R. 81-82).

7. Before Mr. Guevara left Salt Lake City, Morris Air delivered to him his charter ticket for air travel. The ticket provides at paragraph 13:

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'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.119)(emphasis added).

8. Mr. Guevara was injured on the Tur Mexico excursion bus tour, while walking in front of the bus (R.71-76). Fortunately, he has made a good recovery.

9. Mr. Guevara filed this action against Morris Air, Inc. and Tur Mexico. However no steps have been taken to further prosecute the action against Tur Mexico.

10. Morris Air moved for summary judgment on the ground that it could not be held liable for the negligence of Tur Mexico's bus driver (R.45-54).

11. There is no known written contract between Morris Air and Tur Mexico (R.49).¹

SUMMARY OF ARGUMENTS

POINT I. Summary judgment was correctly granted to Morris Air on the issue of Morris Air's liability for Tur Mexico's possible negligence. Morris Air merely acted as the travel agent with respect to the Tur Mexico bus

¹ Mr. Guevara claims in his brief that the fact that Morris Air failed to produce in discovery, or even locate, any written contract between Morris Air and Tur Mexico is not sufficient to show that Morris Air was only a travel agent in this situation. However, Morris Air faithfully conducted discovery on this issue, and if Mr. Guevara was not satisfied with the results of this discovery, he could have opposed Morris Air's motion for summary judgment on these grounds, pursuant to Rule 56(f) of the Utah Rules of Civil Procedure (Brief of Appellant, pp. 4,14).

excursion. There is no evidence in the record which contradicts this assertion. Morris Air did not represent that it was a principal and that Tur Mexico was its agent. Further, there is no evidence that Morris Air had a "right to control" Tur Mexico, an important element in principal-agent relationships. The trial court found that none of the evidence raised by plaintiff gave "any indication of a principal/agent relationship in the terms the plaintiff seeks to have the Court find" (R.142). As the travel agent, Morris Air is not liable for any negligence of the Tur Mexico bus operation.

POINT II. Summary judgment was correctly granted to Morris Air because the contract between Morris Air and Manuel Guevara clearly and expressly disclaimed Morris Air's liability for any injuries caused by ground transportation companies. When taken as a whole, paragraph 13 of the contract is unambiguous on this issue. Further, this provision unambiguously shows that Tur Mexico was an independent contractor of Morris Air, not an agent for Morris Air. The trial court correctly concluded in its ruling that no evidence in the record contradicts paragraph 13 of the contract and the record does not raise a material issue of fact (R.141-42).

ARGUMENT

POINT I.

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE DEFENDANT BECAUSE THE UNDISPUTED FACTS SHOW THAT MORRIS AIR AND TUR MEXICO DID NOT HAVE A PRINCIPAL-AGENT RELATIONSHIP.

There is no claim that the driver of the bus was employed by Morris Air, or by any entity other than Tur Mexico. Mr. Guevara does not attempt to argue that the driver was a servant of Morris Air, and there are no facts which would support such a claim. Rather, Mr. Guevara argues that the driver's possible negligence should be attributed not only to his employer Tur Mexico, but to Morris Air, an entirely different business. Mr. Guevara makes this leap of logic based solely on the fact that Morris Air and Tur Mexico did business with each other as travel agent and supplier of a bus tour, respectively. The trial court correctly found that there was no ground for vicarious liability against Morris Air and dismissed it on summary judgment.

In a principal-agent relationship, "an agent is a person authorized by another to act on his behalf and under his control." Vina v. Jefferson Insurance Co. of N.Y., 761 P.2d 581, 585 (Utah App. 1988). Such a relationship is generally created contractually, where one of the parties

confides the management of some business to be conducted in his name and by which the other assumes to do the business and to render an account of it. The right of the principal to control the conduct of the agent with respect to matters entrusted to him is the test of agency, and constitutes an essential element of the agency relation. Restatement (Second) of Agency § 14 (1958).

In determining the status of a principal-agent relationship, the Utah court has applied a "right to control" test, similar to the one used to determine the existence of an employer-employee relationship. The court outlined and applied this test in Foster v. Steed, 432 P.2d 60, 62 (Utah 1967) as follows:

In general, the determinative question has been posed as one of "control", the view being that if the defendant controls, or has the right of control, the manner in which the operations are to be carried out, the defendant is liable as a master, while, if the control extends only to the result to be achieved, the actor is regarded as an independent contractor, and the defendant is liable under neither respondeat superior nor the workmen's compensation statutes.

In Foster, the court grappled with the question of whether a principal-agent relationship existed between Texaco Oil Company and service station operators in determining whether Texaco could be liable for injuries to a third person arising out of the tortious conduct of the

service station operators. The trial court denied Texaco's motion for summary judgment "on the grounds that it cannot be said that there was no genuine issue as to any material fact or facts concerning the relationship between Texaco and the other defendants in the operation of the service station. . . ." Id. at 61. Texaco appealed and argued it was not liable because the service station operators were independent contractors, not agents of Texaco.

The Utah Supreme Court reversed and remanded for entry of summary judgment in favor of Texaco. The court applied the "right to control" test and asked "whether the oil company has retained the right to control the details of the day-to-day operation of the service station; control or influence over results alone being insufficient." In Foster the relationship between Texaco and the station operators was controlled by a lease and an agreement of sale. Under these documents both parties had mutual obligations regarding the station, but were separate legal entities, even though the station operated under the Texaco name. Plaintiff offered the following evidence to contradict Texaco's claim that the station operators were not agents and to show that Texaco "controlled" the service station:

Texaco had responsibility for making certain the building was properly maintained, and its representatives conducted inspections of the

premises. It further effected the needed repairs after the fire. Wheeler and others were encouraged to wear the Texaco uniform and to identify with its products. The only pumps in the station bore the Texaco trademark, and the sale of any other products under the Texaco trademark was forbidden. The manner and nature of delivery of products was under the control of Texaco, and it was customary for the operators to buy all items for sale from Texaco. The company had established criteria for obtaining operators for their stations, and the operators attended a school where they received instructions on marketing, operations, and safety. All documents evidencing the relationship of the parties were prepared by Texaco on standard Texaco letterhead.

Id. at 61. Plaintiff argued that this evidence should "create a jury question, and that a jury would be acting reasonably in finding Texaco liable based upon the full extent of the relationship and involvement of the company."

Id. at 61. In granting summary judgment for Texaco, the court focused on the fact that Texaco's witnesses testified that it "did not set the hours of operation, or control the hiring or firing of personnel, require reports, or prevent purchasing products from other sources." Id. at 61, 63.

The court reasoned that "[t]he areas of mutual contact demonstrate a mutual interest in the sale of Texaco products and the success of the business. None of the evidence cited by plaintiff indicates that Texaco retained control of the day-to-day operation but, rather, merely influenced the result to be achieved, revealing an independent contractor

status." Id. at 63.

The Foster decision was approved and followed recently by the Utah Supreme Court in Glover v. Boy Scouts of America, 923 P.2d 1383 (Utah 1996), affirming summary judgment in favor of Boy Scouts of America on the ground that it did not have the right to control a local Scoutmaster and therefore could not be found vicariously liable for his tortious conduct.

A. Morris Air has never represented that Tur Mexico was its agent.

In the case at issue, plaintiff argues that Morris Air is the principal of its agent, Tur Mexico, and therefore is liable for Tur Mexico's possible negligence. But Morris Air was merely a travel agent which sold the ticket for the excursion bus tour to Mr. Guevara. Morris Air informed Mr. Guevara when he called that he did not have to purchase the excursion bus tour from Morris Air, that he could wait and purchase such a tour in Mexico, but that Morris Air offered a discount ticket price on the tour (R.68). Mr. Guevara chose to purchase his ticket through Morris Air, rather than make other arrangements on his own in Mexico. Tur Mexico operates its own business running excursion bus tours in Mexico; Morris Air operates its own business as a charter air service and as a travel agent for other services in Salt

Lake City. Tur Mexico never referred to itself as a part of Morris Air. When Tur Mexico communicated to its customers in Mexico, it did so on Tur Mexico letterhead. And Mr. Guevara received his "prepaid travel voucher" from Morris Air, the excursion bus tour was listed as being conducted by Tur Mexico, not Morris Air. These facts do not support Mr. Guevara's assertion that Morris Air acted as the principal and that Tur Mexico was its agent in this situation.

Written materials state that the Morris Air Service representative in Puerto Vallarta was Tur Mexico (R.79). This does show a close association between the two, as Mr. Guevara asserts in his brief. However, this does not show that Morris Air had the right or power to control, which is the requirement for agency.

There is no showing on the record that Tur Mexico's position as a representative of Morris Air had any connection with Tur Mexico's operation of the bus tour on which Mr. Guevara was injured. Stated differently, there is no evidence that the operation of the bus tour arose out of Tur Mexico's role as a representative of Morris Air in Puerto Vallarta. On the contrary, since there is no evidence that Morris Air itself had any role in the bus tour operation, the only reasonable inference is that Tur Mexico's bus tour operation was separate and independent

from its activity as a local representative for a foreign travel agent, Morris Air.

B. Morris Air had no "right to control" Tur Mexico's operations or activities, including Tur Mexico's choice of employees and/or the maintenance of Tur Mexico's vehicles.

The right of the principal to control the conduct of the agent with respect to matters entrusted to him is the test of agency, and constitutes an essential element of the agency relation. The Foster court relied on whether Texaco had the right to control the day-to-day operations of the service station to determine the status of the relationship between the two. In this case, any factual "connection" between Morris Air and Tur Mexico is more tenuous than the relationship in the Foster case. The two are completely separate companies; there is no known written contract between them; and Morris Air merely sold a Tur Mexico excursion bus ticket at a discount price to Mr. Guevara. In light of the fact that Morris Air had no ability to control the day-to-day operations of Tur Mexico, let alone the hiring and firing of its employees and the maintenance of its vehicles, it would be unjust to hold Morris Air liable for the negligence of Tur Mexico in this situation, just as it would be unjust to hold Morris Air liable if a waiter in the hotel where Mr. Guevara stayed had spilt coffee on and

burned him. Without a right of control, it is not sound policy to hold Morris Air liable as a principal for another travel supplier's wrongs.

C. Mr. Guevara has not offered any evidence to contradict the fact that Morris acted as a travel agent in this situation or to raise an issue of factual dispute.

Mr. Guevara argues that he offered documentary and testimonial evidence showing Morris Air held Tur Mexico out as its agent (Appellant's Brief, p. 13). Mr. Guevara misunderstands the requirement for a fact issue on the question of agency. In its ruling, the trial court stated that it considered Mr. Guevara's evidence, his affidavit and the documents, but that it "does not raise issues of material fact as to that contract" and "does not raise any indication of a principal/agent relationship in the terms that plaintiff seeks to have the Court find" (R.142). The trial court properly disregarded Mr. Guevara's conclusory opinions in his affidavit about what "one party thought" about the relationship between Morris Air and Tur Mexico. "[O]nce a movant sets forth a factual basis for summary judgment, the opponent must respond with specific facts to show that there is a genuine issue for trial, and mere allegations or denials of a pleading or conclusions in an affidavit are insufficient to raise a genuine issue of

fact." Guardian State Bank v. Roy W. Humpherys, 762 P.2d 1084, 1086 (Utah 1988); Utah R. Civ. P. 56(e).

Plaintiff also argues that the "factual issue" of the relationship between Morris Air and Tur Mexico could not be resolved on summary judgment. But the Foster court, faced with a more complicated relationship to determine, had no difficulty granting summary judgment to Texaco on that issue. The Foster court reasoned as follows:

Summary judgment is not a substitute for trial but is rather a judicial search for determining whether genuine issues exist as to material facts. Rule 56, Utah Rules of Civil Procedure, dictates the granting of summary judgment where there is no genuine issue of material fact. The plaintiff in the instant case has attempted to create factual issues, but the whole purpose of summary judgment would be defeated if a case could be forced to trial by a mere assertion that an issue exists.

Foster at 63 (quoting Leininger v. Stearns-Roger Manufacturing Co., 404 P.2d 33 (Utah 1965)). The mere existence of factual issues does not preclude summary judgment so long as the **material** issues are not in dispute. Such is the case here. Further, many other cases establishing that sellers of travel services are not liable for the independent negligence of parties performing travel services, have also been decided on summary judgment.

D. Other courts faced with similar issues have found no liability of the travel agent for the negligence of independent contractors.

Cases regarding the liability of travel agents in similar situations to this one show that the travel agent is not liable for the negligence of other travel suppliers. See, Lavine v. General Mills, Inc., 519 Fed. Supp. 332 (N.D. Ga. 1981), Connolly v. Samuelson, 671 Fed. Supp. 1312 (D. Kan. 1987), Weiner v. British Overseas Airways Corp., 401 N.Y.S.2d 91 (1978), Dorkin v. American Express Co., 345 N.Y.S.2d 891, Klinghoffer v. Achille Lauro Lines, 816 Fed. Supp. 934 (S.D.N.Y. 1993), Feig v. American Airlines, Inc., 167 Fed. Supp. 843 (D.C. 1958), Pena v. Sita World Travel, Inc., 88 Cal. App.3d 642, 152 Cal. Rptr. 17 (1978). In each of those cases, the court granted summary judgment to the defendant travel agent who sold the ticket for the travel service to the plaintiff.

Mr. Guevara cites cases which appear to support his assertion that courts do not decide these issues on summary judgment. But each of the cases cited by Mr. Guevara deals with a completely different factual situation and should be distinguished.

In Casey v. Sanborn, Inc. of Texas, 478 S.W.2d 234 (Tex. App. 1972), the travel agent in Texas and the travel service, Romfel Travel Service, in Mexico had a contractual

relationship establishing that Romfel was Sanborn's agent in Mexico. The facts are closer to the Foster case in that Romfel used Sanborn's name in its business transactions; Romfel's address and phone number as Sanborn's "Mexico City branch office" were listed on the back of Sanborn's itinerary folder; Romfel's drivers told customers they worked for Sanborn; and Sanborn picked the tour cars and drivers. In short, Sanborn had a right to control several aspects of Romfel's business.

In Jacobsen v. Princess Hotels International, Inc., 475 N.Y.S.2d 846 (1984), the issue was one of piercing the corporate veil to determine if the New York courts had personal jurisdiction of the hotel at issue through the Princess Hotel's corporate office in New York. The court stated,

"[i]t appears there does exist a Princess corporate structure which may have a bearing on the issues. . . . Furthermore, there is a distinct possibility of interlocking relationships which have not been disclosed. At the least there should be an opportunity for exploration of the facts in advance of summary disposition of the issue."

Id. at 848. The court added, "[o]rdinarily, an independent travel or booking agent cannot be held responsible for the negligence of its principal, where the agent simply makes the reservation or packages the tour." Id. at 848. The Jacobsen court actually interpreted the status of the

"ordinary" relationship as one where the travel agent is the agent of its principal, the travel service provider, for whom the agent is selling the ticket. In such a case, it would be illogical to impute liability on the agent when the principal is negligent and causes injury.

Lastly, in Rookard v. Mexicoach, 680 F.2d 1257 (9th Cir. 1982), the issue not decided on summary judgment was whether Mexicoach acted as agent for the customers, and whether Mexicoach had a duty to warn them about the dangers of Mexican travel. The court stated that if Mexicoach had been acting as agent for Del Pacifico, the bus company, then it would not be liable. But the question was whether a principal-agent relationship existed between the Rookards and Mexicoach, not between Mexicoach and Del Pacifico.

Such distinctions lie in each case cited by Mr. Guevara, and none of plaintiff's cases support his assertion that summary judgment is not proper in cases dealing with travel agent liability. In fact, Mr. Guevara's cases seem to support Morris Air's assertion that a travel agent is not liable for the tortious conduct of other travel providers by merely selling the ticket.

POINT II.

**THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT
BECAUSE THE CONTRACT BETWEEN MORRIS AIR AND MANUEL
GUEVARA CLEARLY AND EXPRESSLY STATES THAT MORRIS AIR
IS NOT LIABLE FOR ANY NEGLIGENCE OF GROUND
TRANSPORTATION COMPANIES.**

The back of Mr. Guevara's airline ticket contained certain fine print which he claimed to be material to the relationship between Morris Air and Tur Mexico (R. 108). On the contrary, the ticket language supports Morris Air's position. However, it should be noted that the recital on the ticket is of limited importance. The existence of a principal-agent relationship depends much more on the acts and conduct of the parties, than on the formality of agreement, Score v. Wilson, 611 P.2d 367, 369 (Utah 1980) (dealing with the existence of a joint venture). Nevertheless, the ticket language was part of the record for summary judgment, and the trial judge reviewed it for the purpose of the summary judgment motion.

Mr. Guevara argues that the trial court did not specify the basis for its decision; however, Judge Peuler's ruling is very explicit in its reasons for granting summary judgment to Morris Air. The trial court stated:

First of all, with regard to the contract itself, that was the ticket, and I think that the terms of that are very clear. And that ticket, that contract, contains an express disclaimer by Morris as to the negligence of ground transportation

companies and others. So I think the contract terms, first of all, negate any actual or express authority. . . . And in terms of the brochures, I believe that the brochures, the language in the brochures simply does not raise any indication of a principal/agent relationship in the terms that plaintiff seeks to have the Court find. I think the contract, going back to that, clearly says what the relationship is and the brochures do not raise any inference that are contrary to that.

(R.141-42). The contract at issue is Mr. Guevara's airline ticket. Mr. Guevara relies on paragraph 13 to assert that the contract is ambiguous and that Tur Mexico was the agent for its principal, Morris Air. Paragraph 13 provides:

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'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.119) (emphasis added). Mr. Guevara argues that this paragraph is internally contradictory and ambiguous as a matter of law. This is not correct. When read as a whole, the paragraph states that Morris Air acts as principal in making arrangements with travel suppliers to provide their services and accommodations. However, such suppliers are independent contractors over whom Morris Air has no control.

A. The contract between Morris Air and Manuel Guevara is not ambiguous as a matter of law.

"A contract is ambiguous only if the words used to express the meaning and intention of the parties are insufficient in a sense that the contract may be understood to reach two or more possible meanings. . . . [h]owever, a parties' assertion of a different meaning does not in itself render a contract ambiguous." Sparrow v. Tayco Const. Co.,

846 P.2d 1323 (Utah App. 1993). Mr. Guevara asserts that because paragraph 13 uses the term "principal" in one sentence and the term "agent" in another, the contract is internally contradictory. To support his proposition, Mr. Guevara cites Sparrow, a construction contract case where the parties had used two different price figures for the same piece of equipment in two different documents. The Sparrow court held this contract ambiguous because it was unable to determine which price was correct, and the court admitted extrinsic evidence to properly construe the contract. The distinction in Sparrow is that the contract used two different prices in the sale of the same piece of equipment. In a contract for sale, this is a crucial factual issue to be determined, over which a genuine, material dispute has occurred.

Mr. Guevara also relies on Cox v. Cox, 877 P.2d 1262 (Utah App. 1994), as an example of an ambiguous contract. Cox is a divorce case, where the parties disputed the value of the house. The Cox court was left to determine whether the price figure for the value of the husband's premarital property in the Agreement could be harmonized with the terms of the Warranty Deed. The Agreement failed to state whether the figure included the value of the house. Because the Agreement omitted this material fact, the Cox court stated

that the Agreement was ambiguous and allowed extrinsic evidence to harmonize the two documents as a contemporaneous whole.

This case is different. The internal inconsistency claimed by Mr. Guevara is simply not present. To understand the context and application of the paragraph entitled "RESPONSIBILITY:," paragraph 13 must be looked at as a whole, not piecemeal. Paragraph 13 states that for public charter trips only, Morris acts as principal in its role of making arrangements with airlines, hotels and ground transportation companies. The same paragraph continues that in all other cases, Morris Air acts only as the (travel) agent and shall not be responsible for the provision or operation of the other services. Such language is not contradictory. Paragraph 13 further states that all other services, including ground transportation, "are not agents or employees of Morris Air, but are independent contractors over whom Morris Air has no control." This could not be more clear. Accordingly, Morris Air is not liable for anything that was "beyond Morris Air's direct and immediate control." As the trial court ruled, this contract is "very clear." It contains an "express disclaimer" of Morris Air's liability for others' negligence. Mr. Guevara's alternative interpretation of this language, taken out of context, does

not render the contract ambiguous as a matter of law.

Further, the trial court considered Mr. Guevara's affidavit and the brochures he received from both Morris Air and Tur Mexico before rendering its opinion. The trial court properly concluded that this evidence did not raise a material, factual dispute, did not render the clear language of the contract ambiguous, and did not contradict that Morris Air was the travel agent in this situation.

CONCLUSION

There was no principal-agent relationship between Morris Air and Tur Mexico, and the contract language clearly disclaims Morris Air's liability.


Morris Air had no right to control the operations of Tur Mexico. Tur Mexico was identified clearly to Mr. Guevara as the supplier of an added attraction, the bus tour, purchased by Mr. Guevara (R. 81, 99). Further, the contract clearly disclaimed Morris Air's liability for any tortious act that was "beyond Morris Air's direct and immediate control." It would be unfair to impute liability to the travel agent merely because it sold a ticket for a bus tour at a discount price.

The judgment of the trial court should be affirmed.

Dated this 7 day of April, 1997.

STRONG & HANNI

By

A handwritten signature in black ink, appearing to read "R. H. Bullock", written over a horizontal line.

Roger H. Bullock
Attorneys for
Defendant/Appellee

ADDENDUM A:

JUDGE PEULER'S RULING ON
SUMMARY JUDGMENT
(TRANSCRIPT, R.134-143).

COPY

IN THE THIRD JUDICIAL DISTRICT COURT, DIVISION I
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

| | | |
|---------------------------|---|--------------------------|
| MANUEL GUEVARA, |] | |
| |] | |
| Plaintiff, |] | Case No. 940906944 |
| |] | |
| vs. |] | Supreme Court No. 960342 |
| |] | |
| MORRIS AIR, INC., et al., |] | |
| |] | |
| Defendants. |] | |

RULING OF THE COURT

March 3, 1997

BEFORE THE HONORABLE SANDRA PEULER
District Court Judge

A P P E A R A N C E S:

For the Plaintiff: Albert W. Gray
DEBRY & ASSOCIATES
3575 South Market Street #206
West Valley City, Utah 84119

For the Defendants: Roger H. Bullock
STRONG & HANNI
Sixth Floor Boston Building
9 Exchange Place
Salt Lake City, Utah 84111

1 SALT LAKE CITY, UTAH; MONDAY, MARCH 3, 1997; 9:07 AM

2 -ooo0ooo-

3 [Excerpt of proceedings.]

4 THE COURT: Let me indicate, counsel, I do
5 appreciate receiving your memos and thought they were both
6 very well written, and looked up a couple of cases and
7 appreciate being able to spend the time doing that. So
8 thanks for providing them to me ahead of time.

9 The issue that's been argued in this motion for
10 summary judgment is whether Morris Air, Incorporated is a
11 principal and can be held liable for the negligence of the
12 Tour Mexico Bus Company and/or the bus driver. So I've had
13 to take a look at the principal/agency relationship.

14 Based upon what I've reviewed, my ruling is that
15 the defendant's motion for summary judgment should be
16 granted. First of all, with regard to the contract itself,
17 that was the ticket, and I think that the terms of that are
18 very clear. And that ticket, that contract, contains an
19 express disclaimer by Morris as to the negligence of ground
20 transportation companies and others. So I think the
21 contract terms, first of all, negate any actual or express
22 authority.

23 The plaintiff's affidavit as to what he
24 understood the terms to be or what he was led to believe,
25 based upon conversations with Morris employees, are

1 contrary to the clear terms of the contract. And since the
2 terms are clear, I don't believe that it's appropriate for
3 the Court to receive extrinsic evidence as to what those
4 terms "one party thought" meant. And so his affidavit does
5 not raise issues of material fact as to that contract.

6 And in terms of the brochures, I believe that the
7 brochures, the language in the brochures simply does not
8 raise any indication of a principal/agent relationship in
9 the terms that the plaintiff seeks to have the Court find.
10 I think the contract, going back to that, clearly says what
11 the relationship is and the brochures do not raise any
12 inference that are contrary to that.

13 I think that states everything that I wanted to
14 state.. Is there anything that I've left you with a
15 question about or that I've left out?

16 MR. BULLOCK: Thank you, Your Honor.

17 THE COURT: All right. Thanks for your argument,
18 counsel. I'm going to ask Mr. Bullock to prepare an order
19 consistent with the ruling.

20 MR. BULLOCK: Very well.

21 THE COURT: Thanks.

22 (Whereupon, the requested portion of transcript
23 was completed.)

24 * * *

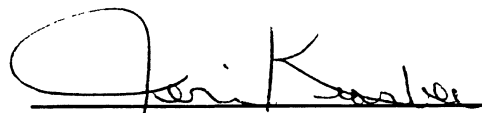
C E R T I F I C A T E

STATE OF UTAH }
 }
COUNTY OF SALT LAKE } ss.

I, JERI KEARBHEY, a Certified Court Transcriber in
and for the State of Utah, do hereby certify that the foregoing
electronically-recorded proceedings were transcribed by me from tapes
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of the State of Utah;

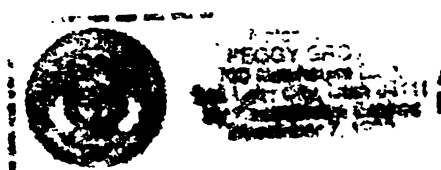
That pages 1 through 3 , both inclusive, represent
a full, true, and correct transcript of the testimony given and the
proceedings had on March 3, 1997 , and that said transcript
contains all of the evidence, all of the objections of counsel and rulings
of the Court, and all matters to which the same relate.

DATED this 12th day of March 1997.



JERI KEARBHEY, CCT

I hereby affirm that the foregoing transcript was
prepared under my supervision and direction.





Peggy Grover, CSR, RPR/Notary

MAILING CERTIFICATE

I hereby certify that two copies of the foregoing BRIEF OF APPELLEE were mailed, first class postage prepaid, this 7 day of April, 1997, to the following:

Robert J. DeBry
ROBERT J. DEBRY & ASSOCIATES
4252 South 700 East
Salt Lake City, UT 84107

