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Jennifer Broderick, et. al. v. Apartment Management, et. al. : Reply Brief

Utah Court of Appeals

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IN THE UTAH SUPREME COURT	
Jennifer Broderick, et. al., Appellant/Plaintiff, vs. Apartment Management, et. al, Defendant.	Utah Supreme Court Case No: 201000276-SC

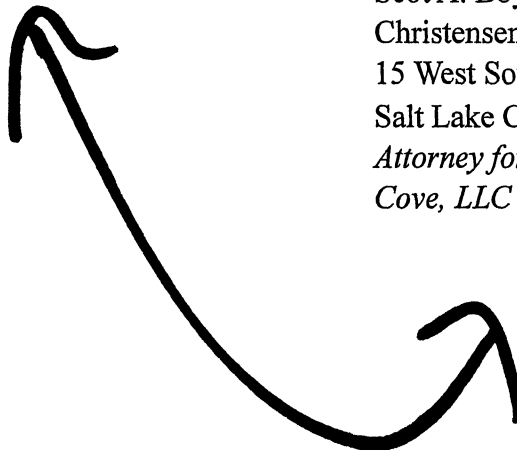
REPLY BRIEF OF APPELLANT

APPEAL FROM A DECISION OF THE SECOND JUDICIAL DISTRICT COURT,
WEBER COUNTY, STATE OF UTAH
HONORABLE ERNEST W. JONES

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ARGUMENT

Canyon Cove provides a variety of attacks on Broderick's argument that the exculpatory provision is void as against public policy. Canyon Cove maintains that clear, unambiguous, exculpatory provisions are enforceable. This is not in dispute. However, much of their brief avoids discussing or analyzing the viability of exculpatory clauses in light of public policy concerns. Rather, Canyon Cove accuses Broderick of presenting "red herrings" and attempting to play on "sympathy." If Broderick *et. al.* were truly interested in making an irrelevant emotional play for sympathy, they would have detailed the death of Ms. Byrd, a tenant and victim of Canyon Cove's negligence. (R. 3270).

Rather, Broderick focused on facts showing Canyon Cove's negligence and analyzing those facts as weighed against enforcement of an exculpatory clause in residential leases. Broderick provided the Court with legal analyses using those facts to consider the public policy ramifications of immunizing Canyon Cove through an exculpatory clause. Canyon Cove, by contrast, addresses only one point in the analytical framework used to determine whether an exculpatory provision may shield them from liability for their own negligence, namely, whether residential leases are adhesion contracts. Ultimately, Canyon Cove cites only three legal authorities in their brief and avoids any meaningful discussion of whether or not exculpatory clauses should, as a matter of public policy, be allowed to immunize landlords from liability for harm to others occasioned by the landlord's own negligence.

I. PUBLIC POLICY CONCERNS REQUIRE INVALIDATION OF CANYON COVE’S EXCULPATORY PROVISION.

Over 45 years ago this Court acknowledged the substantial trade-off between enforcing a contractual exculpatory provision and the ability of such a provision to undermine incentives to act with due care. *Union Pac. R. Co. v. El Paso Natural Gas Co.*, held that “the law does not look with favor upon one exacting a covenant to relieve himself of the basic duty which the law imposes on everyone: that of using due care for the safety of himself and others.”¹ The court stated that such exculpatory provisions “tend to encourage carelessness and would not be salutary either for the person seeking to protect himself or for those whose safety may be hazarded by his conduct.”² Yet, Canyon Cove suggests that this appeal seeks “a dramatic departure from long standing Utah law.”³ However, Broderick *et. al.* seek only to apply long standing principles to reach the same conclusion an “increasing number”⁴ of other courts reach: exculpatory provisions in residential leases are void as against public policy.

¹ *Union Pac. R. Co. v. El Paso Natural Gas Co.*, 17 Utah 2d 255, 259, 408 P.2d 910, 913-14 (1965).

² *Id.*

³ (Appellee’s Brief at 11).

⁴ *Henriouille v. Marin Ventures, Inc.*, 573 P.2d 465, 469-70 (Cal. 1978)(citations omitted); *see, also, Crawford v. Buckner*, 839 S.W.2d 754, 758-59 (Tenn. 1992)(“we conclude that the exculpatory clause in the residential lease in this case is contrary to public policy. In reaching this conclusion, we join a growing number of states.”).

A. Canyon Cove Failed to Maintain Areas and Instrumentalities
Exclusively Within Their Control.

First, Canyon Cove claims that broken fire alarms, malfunctioning fire prevention doors and a known history of fires and inadequate fire blocking, are attempts by Broderick to introduce a ‘red herring’ into the case and/or garner ‘sympathy’ from the Court. Canyon Cove claims that “Tenants attempt to sway the sympathy of this court by listing issues such as prior fires on the property, problems with fire detector and the presence of the couch.”⁵

Contrary to Canyon Cove’s assertion, these facts demonstrate negligence sufficiently to have resulted in denial of a motion for summary judgment filed by Canyon Cove. These facts are not cited in an attempt to ‘sway sympathy.’ Rather, Canyon Cove’s negligence in caring for areas under their exclusive control must be weighed alongside the practical implications of immunizing them from liability for harm due to that lack of care.

B. Canyon Cove’s Exculpatory Clauses Offends Well-Settled Public Policy
Considerations.

Broderick’s primary argument on appeal is that the exculpatory provision violates public policy considerations and must be invalidated on that basis. Canyon Cove’s only attempt to directly address the public policy analysis involves the assertion that the lease is not an adhesion contract.⁶ Whether or not the lease is an adhesion contract focuses on

⁵ Appellee’s Brief at 6.

⁶ Appellee’s Brief at 9-10.

only one of the six *Tunkl* factors to be considered in determining if the exculpatory clause should be invalidated on public policy grounds. Further, consideration of the *Tunkl* guidelines in finding a provision void as to public policy “is a flexible endeavor; the activity at issue need exhibit only a sufficient number of *Tunkl* characteristics such that one may be convinced of the activity’s affinity to the public interest.”⁷ Residential leases and the provision of shelter clearly constitute a sufficient ‘affinity to the public’ interest to garner scrutiny from a public policy perspective. Accordingly, whether or not the lease is an adhesion contract does not end the analysis.

Based on the briefing, it remains largely uncontested that five of the six *Tunkl* factors are met here as follows: (1) residential leases remain a business type subject to regulation;⁸ (2) the landlord/property owner provides a service of great public importance, i.e. a basic necessity of shelter; (3) landlords/property owners generally hold themselves out as willing to provide this service for any member of the public who seeks it and, under fair housing regulations, cannot discriminate in any event;⁹ (4) because the landlord/property owner provides the essential service of housing to those who cannot afford a bank loan or others in need of short term housing, the landlord also holds a significant advantage in bargaining strength; and, (6) the tenant and their property are

⁷ *Berry v. Greater Park City Co.*, 2007 UT 87, ¶ 16, 171 P.3d 442, 447, 590

⁸ *See*, Utah Code Ann. § 78B-6-801, Forcible Entry and Detainer (West 2010) *et. seq.*, *and*, Utah Code Ann. § 57-22-1, Utah Fit Premises Act (West 2010) *et. seq.*

⁹ *See*, 42 U.S.C.A. § 3601, *et.seq.* (West 2010).

placed under the control of the landlord, subject to the risk of landlord carelessness in failing to maintain the premises in a safe condition.

Under factor (5) of the analysis, landlords rent their properties using a standardized lease agreement, written by them to meet their needs and offered to the financially weaker party, the tenant, on a take it or leave it basis. Further, to the extent that the single factor of ‘adhesion’ bears on a public policy analysis of the exculpatory clause, most courts recognize the modern residential lease as a contract of adhesion.¹⁰ Utah authority recognizes that an adhesion contract “is defined as a contract entered into between two parties of unequal bargaining strength, expressed in the language of a standardized contract, written by the more powerful bargainer to meet its own needs, and offered to the weaker party on a ‘take it or leave it basis.’”¹¹

Canyon Cove’s own briefing supports the fact that a residential lease is a ‘take it or leave it’ proposition. “Surely, Tenants could have rented apartments at any of the other apartment complexes in the area.”¹² Canyon Cove essentially admits that they offer the lease on a take it or leave it basis while ignoring the fact that tenants would just as surely have been presented with the same or substantially similar lease agreements at other locations. Finally, reflecting the boiler plate nature of their lease, Canyon Cove

¹⁰ *Taylor v. Leedy & Co., Inc.*, 412 So. 2d 763, 766 (Ala. 1982)(“the modern standard form lease is in essence an adhesion contract.”); *Crawford v. Buckner*, 839 S.W. 2d 754, 758 (Tenn. 1992)(“a residential landlord confronts the public with a standardized adhesion contract.”)

¹¹ *Wagner v. Farmers Ins. Exch.*, 786 P.2d 763, 770 (Utah Ct. App. 1990)

¹² See, Appellee’s Brief at 10.

offers only one exemplar lease as addendum to their brief. Even if ‘adhesion’ were the only factor to be considered under a public policy analysis, that factor has been demonstrated in this case.

A complete analysis of all the *Tunkl* factors cements the proposition that, as a matter of public policy, an exculpatory clause contained in a residential lease should be found void.

C. Canyon Cove’s Negligence Provided Both the Opportunity for Arson and the Ability of the Fire to Spread Once Begun.

Finally, Canyon Cove argues that because the fire was ‘caused by’ an intentional act of arson, the exculpatory clause should not be struck down as violating public policy concerns. However, the act of arson does not eliminate liability for Canyon Cove’s own negligence and does not alter any of the factors used to evaluate the validity of the exculpatory clause. At best, this line of argument raises an issue of comparative fault, an issue that must be resolved by the finder of fact.¹³

As noted in Broderick’s opening brief, the landlord’s duty is *not* to *prevent* the crime which brings about injury or harm, but to take steps which minimize the occurrence of the crime or the damage which results. In *Rivers v. Hagner Mgmt. Corp.*, the plaintiff brought a claim for injury following a fire set by a serial arsonist. The trial court dismissed the claim. The appellate court overturned the dismissal, finding that “[a]s we see it, appellees and the circuit court misapprehended the nature of appellant’s claim,

¹³ See, Utah Code Ann. §§ 78B-5-817 through 820 (West 2010).

which was not based on a duty, if any, to prevent the arsonist from setting the fire, but rather on a duty to maintain the Property so as to minimize the danger to its occupants from fires that might occur.”¹⁴

Broderick offered several case authorities and analysis regarding the interplay between third party criminal acts, negligence of the landlord, and the ability to use an exculpatory provision to shield the landlord from liability. Canyon Cove chose not to respond to this argument or offer any authorities to the contrary.¹⁵ It remains uncontroverted that, free of the deterrent effect of liability for negligence, landlords may no longer take the necessary and reasonable steps to provide a safe environment. By eliminating or reducing the incentive to act with due care, exculpatory clauses work to the injury of tenants, their guests, firemen, police and other emergency personnel who may be required to respond to a poorly maintained and hazardous property, a property which provides fertile ground for crime to occur, or fires to spread more rapidly. Accordingly, the exculpatory clause in this case offends sound notions of public health, safety and welfare and should be invalidated.

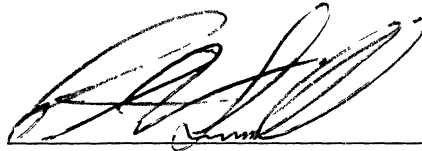
CONCLUSION

Based upon the foregoing, Broderick respectfully requests that exculpatory clauses contained within residential leases be found void as against public policy and that the dismissal based on such exculpatory provision be reversed.

¹⁴ *Rivers v. Hagner Mgmt. Corp.*, 959 A.2d 110, 128 (Md. Ct. Spec. App. 2008).

¹⁵ “Failure to provide any analysis or legal authority constitutes inadequate briefing.” *Coleman ex rel. Schefski v. Stevens*, 2000 UT 98, ¶, 17 P.3d 1122, 1124.

DATED this 27th day of October, 2010



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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing **Reply Brief of Appellant** was deposited in the US Mail, postage prepaid, on this 29 day of October 2010 to the following:

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