

2010

Jennifer Broderick, et. al. v. Apartment Management, et. al. : Brief of Appellant

Utah Supreme Court

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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

BRIEF OF APPELLANT

APPEAL FROM A DECISION OF THE SECOND JUDICIAL DISTRICT COURT

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STATUTES AND CONSTITUTIONAL PROVISIONS

Utah Code Annotated § 78-3-102(3)(j) (West 2008)

STATEMENT OF JURISDICTION

This is an appeal from an order of the Second Judicial District Court in a civil case wherein the court granted a motion for summary judgment. This Court has jurisdiction pursuant to Utah Code Annotated § 78-3-102(3)(j) (West 2008).

STANDARD OF REVIEW

“Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.”¹ “A district court’s decision to grant summary judgment is reviewed for correctness, with no deference afforded to the district court.”² The facts and all reasonable inferences drawn therefrom are viewed “in the light most favorable to the nonmoving party.”³

Issues Presented for Review

Issue #1: Whether, as a matter of law, landlords may immunize themselves against liability for harm caused by their own negligence through an ‘exculpatory’ clause in a residential lease⁴? This issue was preserved below. (R. 706).

Controlling Statutes, Rules and Constitutional Provisions

None.

¹ *Pearce v. Utah Athletic Found.*, 2008 UT 13, ¶ 11, 179 P.3d 760, 764–65.

² *Id.*

³ *Id.*

⁴ The only issue on appeal is the validity of the ‘exculpatory’ clause from a public interest or public policy perspective. Accordingly, Appellants will be collectively referred to as Canyon Cove.

Statement of the Case

Canyon Cove Apartments first caught fire on December 4, 1981. (R. at 496).

Canyon Cove again caught fire on April 18, 1994. (Id.). The fire in this case is now the third such occurrence resulting in significant property and personal damages, including the death of one resident. (R. 1-6 and 19-22). Appellants, referred to collectively as Broderick, brought this action alleging , *inter alia*, negligence because Canyon Cove knew of the fire history yet failed to adequately maintain the smoke detectors/fire alarms, failed to maintain fire extinguishers, failed to keep doors shut and automated 'fire doors' maintained which would have prevented or slowed the spread of the fire, and allowed an abandoned couch to remain in a stairwell. (R. 1-6). The couch ultimately provided the fuel source for the fire.

Fact discovery during the case supported the allegations. Following the fire, an inspection revealed multiple fire detectors that were either missing or not working. (R. 278). Inspection also established that Canyon Cove Apartments had nonfunctioning fire doors and nonworking smoke detectors. (R. 287). Many of the smoke detectors emitted a light "beep" indicating that the batteries were dead or dying. (R. 917). During the course of the fire in this case, one tenant opened the door to her apartment and the hallway was so filled with smoke that she could not see. (R. 914). However, the tenant heard no fire alarms going off. (R. 914). Another tenant also testified that she could not hear fire alarms even as the fire was spreading. (R. 918).

The couch, the fuel source for the fire, had been abandoned and left in a stairwell for up to two weeks. (R. 496, 917). Several of the tenants complained about the couch being in the stairwell. (R. 917). If the couch had not been left in the stairwell, there would not have been this fire. (R. 272). The fire spread easily due to Canyon Cove's lack of due care in this case. In part, the fire spread due to the proximity of the couch to the stairwell. (R. 277). Additionally, some of the magnetic doors meant to close automatically in the case of a fire were not working. (R. 277). Simply keeping the stairwell doors closed would have helped prevent the fire from spreading up the stairs (like a chimney) and into the attic where a lack of fire stops further allowed the fire to spread throughout the entire building in a very short time. (R. 496). By leaving the doors open, oxygen was able to further fuel the fire and contribute to the spread. (R. 272).

Broderick asserted a cause of action against Canyon Cove for their negligence. (R. 001-006). Broderick claimed that Canyon Cove negligently: "knowing about the prior fire failed to take any measures to reduce or eliminate that hazard; failed to have an intact and working fire alarm system; and, failed to keep the stairwells free of burnable materials." (R. 003). Canyon Cove sought summary judgment against Broderick's negligence cause of action. (R. 475). The district court denied the motion for summary judgment on the negligence claim. (R. 624).

However, aware of the previous fire (R. 83, ¶ 9, and R. 478-479), Canyon Cove had required tenants to sign a lease which included a "Limited Liability" clause. (R. 645-648). This exculpatory provision provided:

Owner will not be liable for any damages or losses to person or property caused by any Resident or any other person including, but not limited to, any ... crimes. Owner shall not be liable for personal injury or for damage to or loss of Resident's personal property (furniture, jewelry, clothing, etc.) or Resident from fire ... or negligent behavior of Owner or its agents unless such injury or damage is caused by **gross negligence** of Owner or its agents.

(R. 839)(emphasis in original). Canyon Cove then sought summary judgment under this 'exculpatory clause.' (R. 642). Canyon Cove argued that Broderick "signed a release that was clear and unequivocal, waiving any claims of negligence against defendant." (R. 643). Canyon Cove also argued that, because the fire was intentionally started on the abandoned couch, the 'crimes or fire' portion of the clause also prohibited Broderick's claims in their entirety. (R. 832). Broderick countered that exculpatory provisions contained within a residential lease violate public policy. (R. 706). The district court agreed with Canyon Cove, granting the motion for summary judgment. (R. 1052-1054).⁵

Summary of the Argument

An 'exculpatory clause' shields a party from liability for harm caused by their own negligent conduct. As a result, exculpatory clauses directly undermine the incentive to act with reasonable care for the health, welfare and safety of others. Tenants, often those with the least financial power, must accept a unilaterally incorporated exculpatory clause thereby shielding the landlord against any claim. Housing, properly considered,

⁵ Although Canyon Cove argued dismissal on the basis of crime, fire, or negligence, the Court order reflects only dismissal for damage "caused by acts of (1) crime; or (2) fire;" (R. 1053, ¶ 2). It appears that the 'negligence' was inadvertently dropped as the sentence in ¶ 2 is not punctuated correctly. For purposes of appeal, Appellant agrees that this is simply a scrivener's error and that all three provided the basis for trial court's decision.

represents a fundamental need for everyone. Landlords control the common areas as well as much within the individual leasehold itself with only a right of occupancy falling to the tenant. Eliminating the liability of a landlord based on exculpatory language ultimately increases risk exposure for those with the least power to protect themselves from harm through no wrongdoing of their own, while protecting the individual who brings that harm about.

ARGUMENT

I. IMMUNIZING THE LANDOWNER AGAINST THEIR OWN NEGLIGENCE ELIMINATES A LANDLORD'S INCENTIVE TO ACT WITH REASONABLE CARE.

A. Landlords Must Use Due Care to Keep the Premises Reasonably Safe.

Utah courts recognize that “landlords have an affirmative, common law duty to exercise reasonable care in all circumstances.”⁶ A “landlord is bound by the usual standard of exercising ordinary prudence and care to see that premises he leases are reasonably safe and suitable for intended uses.”⁷ Accordingly, landlords must answer “for injuries caused by any defects or dangerous conditions which he created, or of which he was aware, and which he should reasonably foresee would expose others to an unreasonable risk of harm.”⁸ Here, the district court denied Canyon Cove’s motion for

⁶ *Schreiter v. Wasatch Manor, Inc.*, 871 P.2d 570 (Utah App. 1994).

⁷ *Stephenson v. Warner*, 581 P.2d 567, 568 (Utah 1978).

⁸ *Id.*

summary judgment, finding that the “undisputed facts presented to the Court are inadequate to conclude that [] Canyon Cove was not negligent.” (R. 624).

The duty of landlords to exercise reasonable care stands on a simple principle: because the landlord is the one in control, the landlord must act to see that safety prevails over danger. “The landlord is [] under a [] duty of reasonable care to make conditions reasonably safe to maintain those parts of the structure which remain in his control but are needed for the safety or protection of the leased premises.”⁹ Despite this policy based common law duty, the trial court immunized Canyon Cove under the terms of the exculpatory provision.

B. Exculpatory Clauses Immunizing A Landlord’s Obligation to Exercise Reasonable Care Undermines the Safety and Welfare of the Public.

Where exculpatory provisions prohibit liability for negligence, this Court invalidates the provision should it infringe on public policy. *Hawkins v. Peart* invalidated a ‘pre-injury’ exculpatory provision. The provision at issue in *Hawkins*, similar to the provision here, attempted to immunize the Defendant against claims based on the Defendant’s own negligence. Specifically, the provision required a mother to ‘indemnify’ the Defendant for “any claims, demands, and actions or causes of action on account of death or injury ... without regard to the negligence ... of [Defendant.]”¹⁰ The release for recreational horse back riding contained this combined exculpatory and indemnity provision. *Hawkins* recognized that “most courts allow release of liability for

⁹ *Williams v. Melby*, 699 P.2d 723, 727 (Utah 1985)(citation omitted).

¹⁰ *Hawkins ex rel. Hawkins v. Peart*, 2001 UT 94, ¶ 1, 37 P.3d 1062, 1063.

prospective negligence, **except where there is a strong public interest in the services provided.**”¹¹ Ultimately, the court held “that public policy renders void the indemnity agreement between Navajo Trails and Hawkins's mother.”¹²

When determining whether public policy or public service voids an exculpatory clause, *Hawkins* and several other Utah decisions cited with approval *Tunkl v. Regents of Univ. of Cal.*¹³ *Tunkl* surveyed the case law at the time and arrived at a “rough outline” of the factors which typically cause invalidation of exculpatory clauses.¹⁴ In *Berry v. Greater Park City Co.*, Utah courts adopted the *Tunkl* ‘factors’ as the means for evaluating exculpatory clauses. Although Utah courts previously considered warranty of habitability issues in the residential lease context, it does not appear that any decision directly addresses the ability of a landlord to insulate themselves against liability for their own negligence.

The only Utah case touching on similar issues in the landlord context, *P.H. Inv. v. Oliver*, addressed the specific question as to whether there may be an implied waiver of the warranty of habitability. Importantly, the issue in *Oliver* required deciding whether “the tenant waived any [warranty of habitability] defense or cause of action by agreeing

¹¹ *Id.* at ¶ 9 (emphasis added).

¹² *Id.* at ¶ 18.

¹³ See, *Hawkins* at ¶ 9. See, also, *Pearce v. Utah Athletic Found.*, 2008 UT 13, ¶ 17, 179 P.3d 760; and, *Berry v. Greater Park City Co.*, 2007 UT 87, ¶ 15, 171 P.3d 442.

¹⁴ *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441, 445 (Cal. 1963).

to rent the premises in their deteriorated condition.”¹⁵ By contrast, this case involves the landlord’s wholesale insulation from liability for their own negligence through boilerplate language in a nonnegotiable residential lease agreement. The warranty of habitability, either by statute or at common law, certainly supports public policy considerations which weigh against enforcement of exculpatory provisions in residential leases. However, much broader public interests also caution against shielding landlords.

Public policy or public interest concerns generally operate to void residential lease provisions prohibiting claims for negligence against the landlord. Even before the *Tunkl* decision, courts recognized that “the comparative bargaining positions of landlords and tenants in housing accommodations ... are so unequal that tenants are in no position to bargain; and an exculpatory clause which purports to immunize the landlord from all liability would be contrary to public policy.”¹⁶ Following *Tunkl*, courts employed that analysis to arrive at the same conclusion: exculpatory provisions in a residential lease violate public policy.

In *Henrioulle v. Marin Ventures, Inc.*, the landlord sought to escape liability for injury or damage “no matter how caused.”¹⁷ The court then used the six criteria set forth in *Tunkl* to find the exculpatory clause contrary to public policy.¹⁸ Specifically, the court observed that (1) residential leases are increasingly the subject of governmental

¹⁵ *P.H. Inv. v. Oliver*, 818 P.2d 1018, 1019 (Utah 1991).

¹⁶ *Kuzmiak v. Brookchester, Inc.*, 111 A.2d 425, 432 (N.J. Super. Ct. App. Div. 1955).

¹⁷ *Henrioulle v. Marin Ventures, Inc.*, 573 P.2d 465, 467 (Cal. 1978).

¹⁸ *Id.* at 468.

regulation; (2-3) a lessor of residential property provides shelter, a basic necessity of life and this offer is generally made to all members of the public; (4) the parties to a residential lease have unequal bargaining strength; (5-6) a residential lease does not make any provision whereby the tenant can pay the lessor additional fees for protection against the lessors negligence.¹⁹ Finally, gathering case authority at the time, the court observed that in holding “exculpatory clauses in residential leases violates public policy, this Court joins an increasing number of jurisdictions.”²⁰

In *Crawford v. Buckner*, the court found that an exculpatory clause in a residential lease “deprives the tenant of the right to recover damages for harm caused by the landlord's negligence by releasing the landlord from liability for future acts of negligence.”²¹ The *Crawford* court applied *Tunkl*'s six factors to the exculpatory clause in a residential lease and reached the same conclusion that such clauses are void as a matter of public policy. The court concluded that “by definition a residential lease places the person and the property of the tenant under the control of the landlord, subject to the risk of carelessness by the landlord and his agents.”²²

Importantly, the court rejected any attempts by the defendant landlord to characterize the matter as a “purely private affair”²³ and invalidated the contract on public

¹⁹ *Id.* at 468-469.

²⁰ *Id.* at 469-470. (citations omitted).

²¹ *Crawford v. Buckner*, 839 S.W.2d 754, 755–56 (Tenn. 1992).

²² *Id.* at 758.

²³ *Id.*

policy grounds. *Crawford* recognized residential rental property involved the rights of potentially thousands of tenants. The court also premised its conclusion on the fact that a residential landlord is “engaged in performing the service of great importance to the public.”²⁴

Utah courts have also expressed similar concerns regarding the lack of control by tenants and unequal bargaining power, factors which lead to invalidation of exculpatory clauses in the residential lease. *Williams v. Melby*, noted that tenants today have “little interest in the land 30 or 40 feet below, or even in the bare right to possession within the four walls of his apartment.”²⁵ Similarly, in *Oliver*, the court held “[b]ecause of a lack of bargaining power, low-income tenants often have no meaningful choice but to accept and continue to live in substandard housing.”²⁶

Hawkins cautioned that enforcing an exculpatory clause “may remove an important incentive to act with reasonable care.”²⁷ Exculpatory clauses imposed in a unilateral manner offer no genuine bargaining and the party seeking to use such a clause “simply evades the necessity of liability coverage,” shifting the risk of harm solely to another party. Placing this Court's prior concerns next to the *Tunkl* factors, it becomes readily apparent that a landlord may not insulate themselves from harm done as a result of their own negligence. Residential lease exculpatory clauses immunizing the landlord

²⁴ *Id.*

²⁵ *Williams v. Melby*, 699 P.2d 723, 727 (Utah 1985)(citation omitted).

²⁶ *P.H. Inv. v. Oliver*, 818 P.2d 1018, 1022 (Utah 1991).

²⁷ *Hawkins*, 2001 UT 94, ¶ 12.

from liability for their own negligent acts violates public policy and must be stricken down.

Finally, Canyon Cove may attempt to argue that, regarding factor number six of the *Tunkl* factors, the individual tenants could have purchased their own insurance. However, both *Tunkl* and this Court recognized that not each and every one of the six criteria must be met.²⁸ Each factor standing on its own provides a basis upon which invalidation may occur. Furthermore, no facts of record demonstrate that the tenants could obtain insurance in this case. Indeed, given the history of fires it may well be that individual tenants, who lacked control over the common areas or fire suppression, would be entirely incapable of obtaining such insurance. Canyon Cove, as the party seeking summary judgment, bears the burden of demonstrating that such insurance was available.

C. ‘Crimes’ or ‘Fire’ Language Cannot Circumvent Liability for Negligence Which Brings About the Crime or Fire.

Nor does the existence of “crimes” or “fire” language in a residential lease operate to preclude a claim against a landlord for negligence. Specifically, a landlord can be held liable in ‘negligence’ for creating the conditions which make either a fire or criminal act possible or which increase the harm from a fire or criminal act. Case law, generally holds landlords held liable when they fail to exercise reasonable care with regard to a crime.

For example, in *Romero v. Twin Parks Se. Houses, Inc.* the court held “[l]andlords have a

²⁸ See, *Tunkl*, 383 P.2d at 445 (invalidity for violation of public policy “involves a transaction which exhibits some or all of the following characteristics.”); and, *Berry*, at ¶ 13 (“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.”).

common-law duty to take minimal precautions to protect tenants from foreseeable harm, including a third party's foreseeable criminal conduct.”²⁹ The “rule [requiring a landlord to exercise reasonable care] encompasses within its general ambit injuries sustained by tenants as a result of criminal acts committed by others in the common areas within the landlord's control.”³⁰

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, 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.”³¹

Canyon Cove cannot escape their own negligence and the consequences which flow from that negligence. Exculpatory clauses in residential leases which immunize a landlord work to the detriment of safety. A landlord, freed of any deterrent effect for negligent actions, might no longer take reasonable steps to provide a safe environment. Landlords control the majority of their property, with very little left that the residents can

²⁹ *Romero v. Twin Parks Se. Houses, Inc.*, 895 N.Y.S.2d 387, 388 (App. Div. 2010).

³⁰ *Scott v. Watson*, 359 A.2d 548, 552 (Md. 1976).

³¹ *Rivers v. Hagner Mgmt. Corp.*, 959 A.2d 110, 128 (Md. Ct. Spec. App. 2008).


change. Common areas themselves are wholly outside the realm of a tenant's power. Additionally, exculpatory clauses shift the burden to the weaker party in a transaction necessary to secure housing in our society. Those who cannot qualify for a mortgage are also those least likely to have the means necessary to take any steps to protect themselves.

Because the lease provision offends public policy, the summary judgment granted by the trial court should be overturned.

CONCLUSION

Exculpatory clauses operate to the detriment of all the public, not just tenants who have no choice but to accept them. First, the clause removes an important deterrent, liability, for the failure to act with reasonable care. Next, the clause shifts that burden to individual tenants who lack control over the property and who, in any event, either cannot obtain liability insurance for the property at issue or cannot afford such insurance. Finally, because there is likely no liability coverage, an exculpatory clause ultimately shifts the costs of harm from a landlord's negligence back onto the public at large who pay for any consequences due to a lack of reasonable care. Upholding exculpatory clauses in residential leases serves no useful purpose.

DATED this 14th day of September, 2010



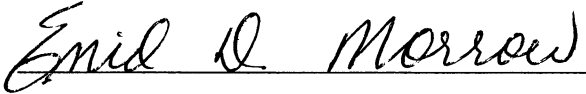
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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing **Brief of Appellant** was deposited in the US Mail, postage prepaid, on this 15th day of September 2010 to the following:

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Salt Lake City, UT 84114

Re: Canyon Cove
Case # 201000276-SC

Court Clerk:

Please accept this letter as satisfaction of the Utah R. App. P. 24(a)(11) requirement for statement that **no addendum is required**.

Sincerely,



Peter W. Summerill

cc: Gregory Sanders; Scot Boyd