IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-0276

DAVID F. FINCH AND
SHIRLEY R. FINCH,

Petitioners,

v.

INSPECTECH, LLC, a West Virginia limited liability company,

Respondent.

Appeal from a final order of the Circuit Court of Wood County (09-C-561)

2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

PETITIONERS' BRIEF

Counsel for Petitioners,
David F. Finch and Shirley R. Finch

George J. Cosenza (WV Bar #833)
Counsel of Record
Cosenza Law Office
P.O. Box 4 - 515 Market Street
Parkersburg, WV 26102
(304) 485-0990
(304) 485-1090 facsimile
e-mail address: cosenza@wvdsl.net

TABLE OF CONTENTS

ASSIGNMENTS OF ERROR 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

STATEMENT REGARDING ORAL ARGUMENT AND DECISION 3

ARGUMENT 3

CONCLUSION 7

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Aetna Casualty & Surety Co. v. Federal Insurance Co.,
148 W.Va. 160, 133 S.E.2d 770 (1963) 3

Kyrazis v. University of West Virginia,
192 W.Va. 60, 450 S.E.2d 649 (1994) 4, 5

Murphy v. North American River Runners,
186 W.Va. 310, 412 S.E.2d 504 (1991) 3, 4

Thacker v. Tyree,
171 W.Va. 110, 297 S.E.2d 885 (1982) 7

Tunkl v. Regents of University of California,
60 Cal.2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963)(en banc) 4

Restatement (Second) of Torts 4

Restatement (Second) of Contracts 4

Revised Rules of Appellate Procedure, Rule 18 3

Revised Rules of Appellate Procedure, Rule 19 3

ASSIGNMENT OF ERROR

THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA ERRED IN GRANTING THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

STATEMENT OF THE CASE

The Petitioners, David F. Finch and Shirley H. Finch, purchased a home in Wood County, West Virginia from Brian Richardson, M.D. and Angela Richardson pursuant to a Residential Real Estate Contract. [A.R. 6-9]. Prior to purchasing the home, Mrs. Finch engaged the services of the Respondent, Inspectech, LLC, a West Virginia limited liability company ("Inspectech") to conduct an inspection of the home located on the property to determine if there were any defects that should be considered by the Finches prior to purchasing the home. [A.R. 10].

The agreement contained the following language:

> **UNCONDITIONAL RELEASE AND LIMITATION OF LIABILITY**
>
> It is understood and agreed that the COMPANY is not an insurer and that the inspection and report are not intended or to be construed as a guarantee or warranty of the adequacy, performance or condition of any structure, item or system at the property address. The CLIENT hereby releases and exempts the COMPANY and its agents and employees of and from all liability and responsibility for the cost of repairing or replacing any unreported defect or deficiency and for any consequential damage, property damage or personal injury of any nature. In the event the COMPANY and/or its agents or employees are found liable due to breach of contract, breach of warranty, negligence, negligent misrepresentation, negligent hiring or any other theory of liability, then the liability of the COMPANY and its agents and employees shall be limited to a sum equal to the amount of the fee paid by the CLIENT for the inspection and report. In the unlikely event that the CLIENT has a dispute with the COMPANY, the CLIENT hereby agrees that the dispute shall be settled by arbitration through the Better Business Bureau of West Virginia,

> Acceptance and understanding of this agreement are hereby acknowledged through the acceptance of this report.

Inspectech conducted the inspection of the home and issued a report. [A.R. 11-15]. The Finches relied on Inspectech's report and purchased the home from the Richardsons. [A.R. 77, 71-85].

Within one (1) week of the purchase, the Finches began experiencing significant water infiltration into their home and other issues relating to the structural integrity of their home, which had not been disclosed and were concealed. [A.R. 77, 113-133]. As a result of the issues the Finches experienced with the home, they instituted a lawsuit against the Richardsons and Inspectech. [A.R. 1-4]. They have incurred in excess of $35,000.00 in repairs to a home that cost $160,000.00 to purchase.

After discovery was conducted by the parties to the litigation, Inspectech filed a motion for summary judgment on the basis that the above-cited language contained in Inspectech's contract with the Finches absolved it from any liability to the Finches for its negligence in inspecting the home.

The Wood County Circuit Court granted Inspectech's motion giving rise to this appeal.

SUMMARY OF ARGUMENT

The Petitioners maintain that the Court erred in applying the West Virginia law applicable to anticipatory releases.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument under Rev. R.A.P. 18(a) is not necessary unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

ARGUMENT

THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA ERRED IN GRANTING THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

A motion for summary judgment should be granted only when it is clear that there is a genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law. Syl. Pt. 3, Aetna Casualty & Surety Co. v. Federal Insurance Co., 148 W.Va. 160, 133 S.E.2d 770 (1963).

First, it is important to note that there are no reported cases in West Virginia that address the fact situation presented to the Court herein.

The threshold case in West Virginia dealing with the issue of anticipatory release is Murphy v. North American River Runners, 186 W.Va. 310, 412 S.E.2d 504 (1991). In that case, the plaintiff had executed an anticipatory release prior to going on a white water raft trip. During the trip, she was injured and brought suit against the rafting company. The company denied liability citing the release executed by the plaintiff and was granted summary judgment. This Court reversed the decision.

In the Murphy opinion, this Court recognized that a plaintiff who expressly and, under the circumstances, clearly agrees to accept a risk of harm arising from the defendant's negligence or reckless conduct may not recover for such harm, unless the agreement is invalid and contrary to public policy. Continuing to cite Restatement (Second) of Torts, this Court stated that when such an express agreement is freely or fully made, between parties who are in an equal bargaining position, and there is no public interest with which the agreement interferes, it generally will be upheld. A clause in an agreement excepting a party from tort liability is, however, unenforceable on the grounds of public policy if, for example, (1) the clause exempts a party charged with a duty of public service from tort liability to a party to whom that duty is owed, or (2) the injured party is similarly a member of a class which is protected against a class to which the party inflicting the harm belongs. Restatement (Second) of Contracts, §195(2)(b)-(c) (1979); Murphy, supra. at 316.

These specific rules of anticipatory release construction are related to the general rule that a release ordinarily covers only such matters as may fairly be said to have been within the anticipation of the parties at the time of its execution. Murphy, supra. at 317.

The foregoing principles have been reiterated in other cases, most notably Kyrazis v. University of West Virginia, 192 W.Va. 60, 450 S.E.2d 649 (1994).

In Kyriazis, supra., this Court considered the case of Tunkl v. Regents of University of California, 60 Cal.2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963) (en banc), a leading case on the issue of anticipatory releases, to consider the criteria to determine whether an

anticipator release violates public policy under the public service "exception". Characteristics of a "public service" as adopted by the West Virginia Supreme Court in Kyriazis are that:

(1) it concerns a business of a type generally thought suitable for public regulation;

(2) the party seeking exculpation is engaged in performing a service of great importance to the public and which is often a matter of practical necessity for some members of the public;

(3) such party holds itself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards;

(4) because of the essential nature of the service, and the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks such service;

(5) in exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees to obtain protection against negligence;

(6) the person or property of members of the public seeking such services must be placed under the control of the furnisher of the services, subject to the risk of

carelessness on the part of such furnisher or its servants.

In applying the above-cited principle to the case before the Court, the following is clear:

(1) The agreement was prepared by Inspectech and must be strictly construed against its interests;

(2) There is no proof or finding in the record as to what was in the contemplations of the parties at the time the agreement containing the anticipatory release was executed;

(3) Gary Flanagan, who did the inspection for Inspectech, held himself out as being certified by the State of West Virginia [A.R.11, 15]. In addition, Mr. Flanagan held himself out as being certified by West Virginia and Ohio in home inspection, radon testing and environmental health. [A.R. 15]. This falls within the definition of public service as set forth in the above-cited criteria;

(4) Because of his declared expertise, Mr. Flanagan (Inspectech) was in a superior bargaining position to Mrs. Finch. He knew she was going to rely on information provided to her to purchase the home. Although an intelligent woman, she did not have the expertise needed to perform the inspection for the defects that were eventually found;

(5) This agreement is certainly a violation of public policy. To uphold this anticipatory release would mean that every professional or person with

expertise can hold themselves out to the public as an expert, put release language in their contract, take money for their services and then not have to perform. In addition, because of this Court's decision regarding disclosure of latent defects [See, Thacker v. Tyree, 171 W.Va. 110, 297 S.E.2d 885 (1982)], the type of services offered by Inspectech are crucial to consumers who are interested in purchasing a home.

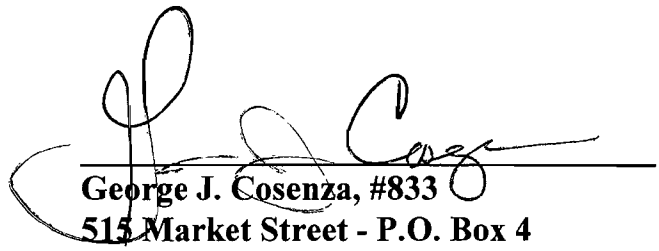
(6) The language in the release is not clear. The release doesn't excuse Inspectech from its negligence in the course of the inspection and a client's reliance on same, but "of and from all liability and responsibility for the cost of repairing or replacing any unreported defect or deficiency and for any consequential damage, property damage or personal injury of any nature."

(7) The agreement makes no provision whereby Mrs. Finch could have paid additional fees to obtain protection against negligence.

CONCLUSION

Based on the foregoing, the Petitioners respectfully requests that the Court reverse granting of summary judgment to the Respondent.

Dated this 10 day of May, 2011.



George J. Cosenza, #833
515 Market Street - P.O. Box 4
Parkersburg, WV 26101
(304) 485-0990
E-mail: cosenza@wvdsl.net
Counsel of Record for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 10 day of May, 2011, true and accurate copies of the foregoing **PETITIONER'S BRIEF** were deposited in the U.S. Mail contained in a postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

William Crichton, Esquire
Crichton and Crichton
325 Ninth Street
Parkersburg, WV 26101

George J. Cosenza, #833
515 Market Street - P.O. Box 4
Parkersburg, WV 26101
(304) 485-0990
e-mail: cosenza@wvdsl.net
Counsel of Record for Petitioners