

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-0276

DAVID F. FINCH AND  
SHIRLEY R. FINCH,

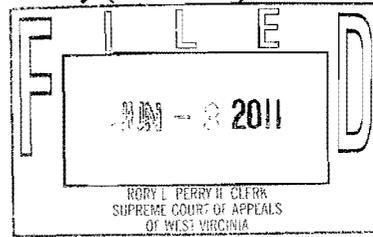
Petitioners,

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)



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BRIEF OF RESPONDENT

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CERTIFICATE OF SERVICE

I. TABLE OF AUTHORITIES

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II. ADDENDUM TO PETITIONERS' STATEMENT OF CASE

Respondent hereafter clarifies and provides additional facts for the Court's consideration:

Petitioner, Mrs. Finch, is a college graduate and has an inactive real estate agent's license. [A.R. 77, Transcript of Deposition of Shirley Finch, P. 9 Ln. 12 to P. 21].

Petitioner, Mr. Finch, is a petroleum reservoir engineer who did graduate work at Penn State. [A.R. 77, Deposition of Shirley Finch, P. 32 Ln. 14 to P. 33 Ln. 22].

On July 7, 2009, Petitioners entered into a contract to purchase a residence located at 3471 Roseland Avenue, Parkersburg, Wood County, West Virginia ("the home").

Under such purchase contract, Petitioners had the option of obtaining an inspection of the home. [A.R. 6-7].

On July 9, 2009, Petitioners entered into an "Inspection Agreement" whereby they engaged Respondent to inspect the home. The Inspection Agreement contained the following language immediately above the signature line:

**"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 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 and 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, 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 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.

[A.R. 10]

At deposition, Petitioner Mrs. Finch testified that she hired Respondent to inspect the home because she had previously hired it to inspect a different home she had considered purchasing. Petitioner Mrs. Finch hired Respondent on such previous occasion after she found it on a list of home inspectors she obtained from a real estate agent. [A.R. 77, Deposition of Shirley Finch, P. 61 Ln. 13 to Ln. 20].

Respondent inspected the home pursuant to the Inspection Agreement and issued a Confidential Inspection Report. Thereafter, Petitioners purchased the home.

No real estate agent was involved in the transaction. [A.R. 77, Deposition of Shirley Finch, P. 51, Ln. 6 to Ln. 15]. No bank financing was involved in the purchase. [A.R. 77, Deposition of Shirley Finch, P. 158 Ln. 13 to P. 158 Ln. 18].

In their Complaint, Petitioners contended that Respondent conducted a negligent inspection of the home. As a proximate result, Petitioners allegedly “purchased a home with structural defects and problems with water infiltration.” Petitioners sought compensatory damages from Respondent. [A.R. 4-5]. However, Petitioners sought punitive and compensatory damages from the Defendant home sellers for failing to disclose said defects in the home. [A.R. 3 and 4].

### III. SUMMARY OF ARGUMENT

The circuit court correctly granted summary judgment to Respondent on the basis of the Unconditional Release and Limitation of Liability conspicuously contained in Respondent's Inspection Agreement.

### IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent concurs with Petitioners that oral argument under Rev.R.A.P.18(a) appears unnecessary, unless the Court determines that oral argument is necessary and desires the same.

### V. ARGUMENT AND RESPONSE TO PETITIONER'S ASSIGNMENT OF ERROR

#### 1. STANDARD OF REVIEW

To the extent that this Court reviews the circuit court's order granting Respondent's motion for summary judgment, the standards of decision and review of motions under West Virginia Rule of Civil Procedure 56 should govern. Rule 56 provides that summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue of fact as to any material fact and that the moving party is entitled to a judgment as a matter of law." Williams v. Precision Coil, Inc., 194 W.Va. 52, 459 S.E.2d 329, 336 (1995). This Court reviews a circuit court's grant of summary judgment *de novo*. Armor v. Lantz, 207 W.Va. 672, 535 S.E.2d 737 (2000).

2. THE CIRCUIT COURT CORRECTLY RENDERED SUMMARY JUDGMENT TO RESPONDENT ON THE BASIS OF ITS UNCONDITIONAL ANTICIPATORY RELEASE, WHICH WAS VALID AND NOT AGAINST PUBLIC INTEREST

This Honorable Court upholds anticipatory releases when they are clear and unequivocal like the UNCONDITIONAL RELEASE AND LIMITATION OF LIABILITY in the parties' Inspection Agreement:

Generally, in the absence of an applicable safety statute, a plaintiff who expressly and, under the circumstances, clearly agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct may not recover for such harm ... When such express agreement is freely and fairly 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.

Murphy v. North American River Runners, 186 W.Va. 310 at 314 (W.Va. 1991).

In this case, the UNCONDITIONAL RELEASE AND LIMITATION OF LIABILITY was conspicuously identified and absolutely unambiguous. It held Respondent harmless from "the cost of repairing and replacing any unreported defect or deficiency and for any consequential damage" [A.R. 10]. By their Complaint, Petitioners sought compensatory damages from Respondent arising from their purchase of a home with structural defects and water infiltration problems. [A.R. 4]. Accordingly, Petitioners clearly released Respondent from liability for the damages sought in their Complaint.

To evade the ramifications of their anticipatory release of Respondent, Petitioners rely entirely on this Court's decision in Kyriazis v. University of West Virginia, 192 W.Va. 60, 450 S.E.2d 649 (W.Va., 1994)(adopting the factors set forth in Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92, 98-101, 383 P.2d 441 (1963).

However, there is no basis in Kyriazis for this Court to find that Respondent performs a “public service” and, therefore, cannot enter into a clear and unambiguous contract containing an anticipatory release.

As this Court knows, it delineated the issue in Kyriazis as “not whether recreational activity sponsored or offered by a commercial enterprise constitutes public service; the issue is whether a recreational activity sponsored by a state university constitutes public service...the Tunkl criteria focus on the status of the entity providing the service. When considering whether an enterprise qualifies as a public service, we must examine the nature of the enterprise itself.” Kyriazis at W.Va. 66. (emphasis added). Thus, this Court clarified that the nature of the entity, rather than the nature of the service it provides, is the basis for determining whether or not an entity provides a public service.

The Court determined that West Virginia University provides a public service because “when a state university provides recreational activities to its students, it fulfills its educational mission, and performs a public service. As an enterprise charged with a duty of public service here, the University owes a duty of due care to its students when it encourages them to participate in any sport.” Kyriazis at W.Va. 66.

This Court has never held that a private enterprise, such as Respondent, provides a public service. In Murphy, supra, this Court indicated its agreement that a private white water rafting company does not offer a public service because it does not offer an “essential service”. Murphy at fn. 6. See also Kyriazis at W.Va. 65.

In Morse v. Bullseye Marketing, Inc., No. 30891-6-II (WA 10/5/2004) (WA, 2004), the Washington court also noted that that Tunkl, supra, is applicable to “essential”

public services.<sup>1</sup> It characterized “essential” public services as those provided by hospitals, housing, public utilities and public education, but not residential home inspectors. Accordingly, it found that home inspectors do not perform a public service and upheld a home inspector’s anticipatory release. Morse, 30891-6-II at P. 4. The Washington Court stated:

A common thread runs through those cases in which exculpatory agreements have been found to be void as against public policy. That common thread is they are all essential public services—hospitals, see Wagenblast, 110 Wn.2d at 854 n.23 (citing Tunkl, 383 P.2d at 447); housing, McCutcheon v. United Homes Corp., 79 Wn.2d 443, 486 P.2d 1093 (1971); Thomas v. Hous. Auth., 71 Wn.2d 69, 426 P.2d 836 (1967); public utilities, Reeder v. W. Gas & Power Co., 42 Wn.2d 542, 256 P.2d 825 (1953); and public education, Wagenblast, 110 Wn.2d 845. In the housing cases, McCutcheon held that a lease provision exculpating a landlord from liability for injury caused by his negligence to anyone entering the premises or building he leased was void as against public policy. Thomas held that a provision in a lease with the public housing authority was not effective to release liability for injuries suffered by a tenants' child because of the negligent maintenance of a hot water heater.

The HomeTeam [home inspector] does not provide an essential public service, such as banks, common carriers, or utility companies provide. An inspection is not necessary in order for a real estate transaction to close. Real estate is routinely bought and sold on an ‘as is’ basis. See Atherton Condo. Apartment-Owners Ass'n Bd. of Dir. v. Blume Dev. Co., 115 Wn.2d 506, 535, 799 P.2d 250 (1990). This service does not rise to a matter of practical necessity.

Morse, 30891-6-II at P. 3.(emphasis added).

Petitioners fail to allege why a residential home inspector provides an essential service or one that is a matter of practical necessity. In this case, the subject home inspection was not essential for Petitioners’ purchase of the home. No real estate agent or bank required it. [A.R. 77, Deposition of Shirley Finch, P. 51, Ln. 6 to Ln. 15][A.R. 77,

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<sup>1</sup> Washington had previously adopted the Tunkl factors with respect to anticipatory releases in Wagenblast v. Odessa Sch. Dist. 105-157-166J, 110 Wn.2d 845, 848, 758

Deposition of Shirley Finch, P. 158 Ln. 13 to P. 158 Ln. 18]. Petitioners' real estate purchase contract was not contingent on the subject home inspection; rather, the inspection was entirely at the option of Petitioners. [A.R. 6-7].

In Baker v. Roy H. Haas Associates, Inc., 629 A.2d 1317, 97 Md.App. 371 (Md. App., 1992), a Maryland court also applied the Tunkl factors, found that home inspection services do not constitute a public service and enforced the limitation of liability clause in the home inspection report<sup>2</sup>:

Our review of the record in the instant case leads us to conclude that the limitation of liability clause at issue was valid and enforceable in limiting Haas's liability to the contract fee, for the same reasons supporting our holding in *Winterstein*...the home inspection services performed by Haas do not fall under the realm of a public duty or concern the public interest.

Consequently, we hold that the limitation of liability clause in the home inspection report, limiting Haas's liability to the cost of the contractual fee, is valid and enforceable.

Baker at 97 Md.App. 380.(emphasis added).

In that home inspectors do not provide a public service (which this Court has agreed means an “essential service”), the circuit court correctly granted summary judgment to Respondent on the basis of its UNCONDITIONAL RELEASE AND LIMITATION OF LIABILITY.

3. THERE WAS NO ABSENCE OF BARGAINING POWER IN THIS CASE

In Murphy v. North American River Runners, 186 W.Va. 310 (W.Va. 1991), this Court stated that an anticipatory release will be upheld when an “express agreement is

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P.2d 968 (1988).

<sup>2</sup> Maryland had previously adopted the Tunkl factors with respect to anticipatory releases in Winterstein v. Wilcom, 16 Md.App. 130, 135-36 (1972).

freely and fairly made, between parties who are in an equal bargaining position” Id. at 314.

Kyriazis, supra, and Tunkl, supra, both involved facts evincing an obvious, inherent disparity in bargaining power. Kyriazis emphasized the disparity of bargaining power between a public university and its students. Id. at W.Va. 655. Tunkl concerned an anticipatory release executed by patients in favor of a hospital. The California court therein noted the obvious bargaining power a hospital possesses because “the would-be patient is in no position to reject the proffered agreement, to bargain with the hospital, or in lieu of agreement to find another hospital. The admission room of a hospital contains no bargaining table where, as in a private business transaction, the parties can debate the terms of their contract.” Tunkl at 383 P.2d 447.

Both of the cases directly on-point cited above, Morse v. Bullseye Marketing, Inc., No. 30891-6-II (WA 10/5/2004) and Baker v. Roy H. Haas Associates, Inc., 629 A.2d 1317, 97 Md.App. 371 (Md. App., 1992) found that, because the consumer has a choice of many home inspectors, there is no absence of bargaining power between parties to a contract for home inspection services.

In this regard, the Washington court stated:

There is evidence of the availability of many other home inspectors from the yellow pages. Morse, if [Plaintiff] had read and disagreed with the limitation of liability clause, was free to seek inspection services from a variety of other sources. ... HomeTeam did not possess a decisive advantage of bargaining strength.

Morse, 30891-6-II at P. 4.

The Washington court noted that the availability of other home inspectors in “the yellow pages” gave the consumer bargaining power in the transaction. But Petitioners

had even more bargaining power in this case: not only were the yellow pages available to Petitioners, but Petitioner Mrs. Finch testified that she had actually obtained a list of home inspectors from a real estate agent and selected the Respondent there from. [A.R. 77, Deposition of Shirley Finch, P. 61 Ln. 13 to Ln. 20].

In Baker, the Maryland court found in favor of the home inspector because the consumer presented no evidence that he was unable to solicit the services of an alternative home inspection company if he was dissatisfied with the limitation of liability provision. Baker at 97 Md.App. 380.

Petitioners similarly failed to present such evidence to the circuit court. Petitioners only argued that “because of his declared expertise, Mr. Flanagan [Inspectech] was in a superior bargaining position to Mrs. Finch.” Petitioner’s Brief, P. 6.

Rather, the evidence showed that Petitioners are exceedingly well educated persons. [A.R. 77, Transcript of Deposition of Shirley Finch, P. 9 Ln. 12 to P. 21][A.R. 77, Deposition of Shirley Finch, P. 32 Ln. 14 to P. 33 Ln. 22].

Moreover, Petitioners were under no duress to use Respondent’s particular inspection services. No bank financing was involved in the purchase and, accordingly, no financial institution required Respondent’s inspection of the home. [A.R. 77, Deposition of Shirley Finch, P. 158 Ln. 13 to P. 158 Ln. 18]. Again, Mrs. Finch testified that she hired Respondent to inspect the home because she had hired it to inspect another home previously, having found Respondent’s name on the aforesaid list of home inspectors. [A.R. 77, Deposition of Shirley Finch, P. 61 Ln. 13 to Ln. 20].

Petitioners could have sought a home inspector which did not require an anticipatory release to inspect the home. There was no evidence before the circuit court that Petitioners made any attempt to find such a home inspector.

Because there was no absence of bargaining power on the part of Petitioners, with respect to the Inspection Agreement and anticipatory release, the facts underlying this case are inapposite those underlying Kyriazis and Tunkl. Accordingly, the circuit court correctly declined to apply their holdings and properly enforced Petitioners' anticipatory release of Respondent.

4. PETITIONERS' NEW ARGUMENTS SHOULD NOT BE CONSIDERED

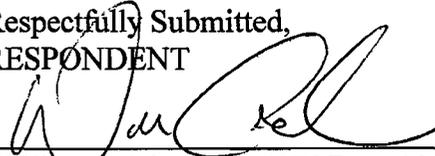
Petitioners assert in their Brief that the anticipatory release at issue "is not clear" and should be strictly constructed against Respondent. Petitioner's Brief, P. 6 and 7. However, there are new arguments. Petitioners clearly did not raise either issue in their Response to Motion for Summary Judgment below [A.R. 23, Motion for Summary Judgment]. [A.R. 45, Plaintiff's Response to Motion for Summary Judgment]. Instead, Petitioners solely argued to the circuit court that the anticipatory release was void against public policy.

"In the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken." Syl. Pt. 1, Mowery v. Hitt, 155 W.Va. 103 (1971). Accordingly, this Court should decline to consider these arguments as having been waived by Petitioners.

VI. CONCLUSION

Based on the foregoing, Respondent prays that Petitioners' Petition for Appeal be denied.

Respectfully Submitted,  
RESPONDENT

A handwritten signature in black ink, appearing to read 'W. Crichton VI', written over a horizontal line.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing  
BRIEF OF RESPONDENT, was on the 2<sup>nd</sup> day of June, 2011, served upon counsel of  
for Petitioners via the United States Postal Department, postage prepaid to:

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