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ON CERTIORARI TO THE COLORADO COURT OF APPEALS Court of Appeals Case No. 07CA00482	
Petitioner: Savannah Boles v. Respondent: Sun Ergoline, Inc., a Delaware corporation	Δ COURT USE ONLY Δ Case Number: 08 SC 970
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OPENING BRIEF

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I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the public policy of Colorado allows enforcement of an exculpatory agreement purporting to release a manufacturer from liability for possible future injuries caused by the manufacturer's defective products.

II. STATEMENT OF THE CASE

This is an appeal from a summary judgment entered by the trial court in favor of the respondent, Sun Ergoline. The action arises out of injuries which the petitioner, Savannah Boles, suffered on March 12, 2004 at an Executive Tans franchise outlet located in Aurora, Colorado. On that morning, Ms. Boles entered the Executive Tans outlet for a tanning session. After checking in, Ms. Boles was given the use of a Sun Radius 252 upright tanning booth. The tanning booth was manufactured by Sun Ergoline. The tanning booth was a cylindrical walk-in booth with ultraviolet tanning lamps installed around the sides of the booth.[1] A large commercial –grade exhaust fan was installed in the ceiling of the booth, approximately six and one-half feet above the booth floor. The exhaust fan was protected by a fan guard, consisting of a concentric circular wire grill. Near the periphery of the fan guard, the wires making up the grill were spaced sufficiently

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[1] For the following, please see Affidavit of John Smith, P.E., attached as Exhibit 2 to Plaintiff's Response to Defendants' Motion for Summary Judgment (R. at p. Vol. 2, pp. 381-382).

far apart so that a person's fingers could easily past through the grill, and contact the fan blades.

After checking in, Ms. Boles was shown to a tanning room where the Sun Radius 252 tanning booth was located. Ms. Boles put on safety goggles provided by Executive Tans, stepped into the tanning booth, and reached above her for handles which she expected to be located the top of the booth. As she did so, the fingers of her right hand passed between the wires of the fan guard and contacted the moving blades of the overhead exhaust fan, resulting in the partial amputation of the ring and middle fingers of her right hand.

At the time she checked in for her tanning session, Ms. Boles signed a document entitled "Executive Tans Tanning Release Form." A copy of the tanning release form appears in the record as Exhibit B to Sun Ergoline's Motion for Summary Judgment, filed in the trial court on December 5, 2006 (R. at Vol. 2, pp. 336-337). The tanning release form is a two-page form release, which was apparently prepared by Executive Tans Inc, the tanning salon franchisor, for use by Executive Tans franchise owners. The release form lists the inherent risks of indoor UV tanning, such as eye injury, sunburn and skin damage, and lists precautions to be taken by the customer while tanning, together with contra-indications for indoor tanning. Several of the numbered paragraphs contained on

the first page of the release contain exculpatory language, releasing and holding Executive Tans and its franchisee harmless for any injuries suffered by the customer by the use of the Executive Tan's premises and services. The second page of the release form contains the following language:

> I have read the instructions for proper use of the tanning facilities and do so at my own risk, and hereby release the owners, operators, franchisor or manufacturers, from any damage or harm that I might incur due to the use of the facilities.

Ms. Boles' action was filed in the trial court on March 9, 2005 (see Complaint and Jury Demand, R. at Vol. I, pp. 3-6). Ms. Boles filed a Second Amended Complaint on June 9, 2009 (R. at Vol. I, pp. 31-35). The Second Amended Complaint also asserted claims against Sun Ergoline based on theories of strict products liability and negligence. The Second Amended Complaint asserted a claim against Elite RBC Executive Bronzing, Inc., the Executive Tans franchise holder, under the Colorado Land Owner Liability Act, CRS 6 §13-21-115.

Elite RBC filed a motion for summary judgment as to the claims asserted against it in the Second Amended Complaint. (R at Vol. 1, pp. 82-106) Elite RBC's summary judgment motion was based on an argument that the tanning release form which Ms. Boles signed at the time of her March 12, 2004 tanning session insulated Elite RBC, as the franchise owner, from liability. The trial court agreed, and entered summary judgment in favor of Elite RBC Executive Bronzing,

Inc., by Order dated March 6, 2006 (R. at Vol. 1, pp. 139-140). The propriety of the trial court's entry of summary judgment as to the claims asserted against Elite RBC Executive Bronzing, Inc. is not at issue in this proceeding.

After the trial court's entry of summary judgment in favor of Elite RBC Executive Bronzing, Inc., Ms. Boles amended her Complaint to add EBM-Papst Mulfingen GMBH & Co., KG and EMB-Papst, Inc., the manufacturers of the fan and fan guard assembly installed by Sun Ergoline in the Sun Radius 252 tanning booth, as defendants. See Third Amended Complaint and Jury Demand, filed March 10, 2006 (R. at Vol. 1, pp. 147-154). The Third Amended Complaint asserted a single claim for relief against Sun Ergoline, based upon a theory of strict products liability. See Third Amended Complaint, supra, at pp. 2-3, paragraphs 7-11.

Sun Ergoline filed its motion for summary judgment on December 4, 2006, in which Sun Ergoline sought summary judgment as to Ms. Boles' claim against it. In its summary judgment motion, Sun Ergoline contended that the inclusion of the phrase "or manufacturers" in the above-quoted language on the second page of the tanning release form operated to release Sun Ergoline, as the manufacturer of the tanning booth, from legal responsibility for Ms. Boles' injuries. The EBM-Papst defendants each filed joinders in Sun Ergoline's summary judgment motion.

The trial court issued its Order granting Sun Ergoline's motion for summary judgment on January 13, 2007 (see Order, R. at Vol. 2, pp. 396-97). In its Order, the trial court found in relevant part that the tanning release form, as it applied to the Sun Ergoline and the EBM-Papst defendants, satisfied the prerequisites for validity and enforceability of an exculpatory agreement.

Ms. Boles and the EBM-Papst defendants reached a settlement of the plaintiff's claims against said defendants prior to issuance of the trial court's order granting summary judgment. On February 9, 2007, after the summary judgment order had been issued, the plaintiff filed an Unopposed Motion to Amend Judgment, seeking to amend the summary judgment order to provide that the summary judgment was entered only in favor of defendant Sun Ergoline, in light of the EMB-Papst defendants' settlement (R. at Vol. 2, pp. 398-401). The trial court granted this motion, and amended the summary judgment to provide that it was entered against Sun Egroline only. See Order re: Unopposed Motion to Amend Judgment, issued February 13, 2007 (R. at Vol. 2, p. 402).

Ms. Boles appealed the trial court's summary judgment order as to Sun Ergoline to the Colorado Court of Appeals, as *Savannah Boles v. Sun Ergoline, Inc.*, Case No. 07 CA 00482. On appeal, Ms. Boles argued in relevant part that the tanning release agreement, as it applied to her claim against Sun Ergoline, related

not to tanning services, but rather to Sun Ergoline's liability for the manufacture and distribution of a defective product. Ms. Boles argued on appeal that an exculpatory agreement purporting to prospectively release a manufacturer from liability for injury resulting from a defective product directly impacts the public interest, and contravenes the public policy of the state of Colorado, as established by Colorado's adoption of the doctrine of strict product liability. In rejecting this argument, the Court of Appeals found that there exists nothing in Colorado law which precludes a release from insulating a manufacturer from liability for injuries caused by a defective product. See Slip Opinion at pp. 7-8.

This Court has accepted certiorari to consider the question of whether the public policy of Colorado allows the enforcement of an exculpatory agreement which purports to prospectively release a manufacturer from liability for possible future injuries caused by the manufacturer's defective products.

III. SUMMARY OF ARGUMENT

The release which Ms. Boles executed prior to her tanning session, by its terms, constitutes an agreement by Ms. Boles to prospectively release Executive Tans and its franchisee, together with "manufacturers," from liability for any damage or harm which Ms. Boles might suffer during the course of her use of the Executive Tans facility. As the release applies to Sun Ergoline, it purports to

prospectively release Sun Ergoline from liability, under any theory, for possible injury resulting from the use of its tanning booth. The trial court and the Court of Appeals found that the release was effective to shield Sun Ergoline from liability on Ms. Boles' claim against it, which was premised on strict products liability. The issue raised in this proceeding is whether an exculpatory agreement purporting to prospectively release a manufacturer from liability under strict products liability doctrine for injuries caused by the manufacturer's defective product is enforceable, in light of the public policy considerations underlying the doctrine.

By the adopting the doctrine of strict products liability and incorporating it in Colorado law, Colorado has adopted a fundamental public policy of protecting consumers from defective products, and shifting the burden of injures caused by defective products from the consumer suffering such injury to the product manufacturer. Permitting manufacturers to prospectively avoid responsibility for such injury by the use of releases or other exculpatory agreements would frustrate this policy, and would undermine the public interest sought to be furthered by this policy. Permitting the enforcement of exculpatory agreements to shield manufacturers from liability under the strict product liability doctrine should properly be precluded on public policy grounds.

IV. STANDARD OF REVIEW

The question of the validity and enforceability of an exculpatory agreement constitutes an issue of law, and accordingly is subject to de novo review. *B & B Livery, Inc. v. Riehl*, 960 P.2d 134, 136 (Colo. 1998). In addition, this proceeding involves review of the entry of a summary judgment by the trial court. The appellate courts' review of an order granting or denying a motion for summary judgment is de novo. *Cooper v. Aspen Skiing Co.*, 48 P.3d 1229, 1232 (Colo. 2002), citing *Pierson v. Black Canyon Aggregates*, 480 P.3d 1215 (Colo. 2002).

V. ARGUMENT

1. The public policy considerations underlying the doctrine of strict products liability should preclude the enforcement of exculpatory agreements releasing manufacturers from liability for injuries caused by defective products.

Beginning with *Jones v. Dressel*, 623 P.2d 370 (Colo. 1981), this Court has on several occasions addressed the question of whether an exculpatory agreement may be enforced to bar a claim of negligence. See *Chadwick v. Colt Ross Outfitters*, 100 P.3d 465 (Colo. 2004); *B & B Livery, Inc. v. Riehl*, supra, 960 P.2d 134 (Colo. 1998); *Heil Valley Ranch, Inc. v. Simkin*, 784 P.2d 781 (Colo. 1990). The Court has determined that such agreements, prospectively releasing a party

from the consequences of its own negligence, are enforceable under certain circumstances. The Court has recognized that the question of the validity of an exculpatory agreement implicates competing considerations of freedom of contract and responsibility for damages caused by one's negligent acts. *B & B Livery, Inc. v. Riehl*, supra, 960 P.2d at 136, citing *Heil Valley Ranch, Inc. v. Simkin*, 784 P.2d 781, 784 (Colo. 1990). The Court has held that, in order to fairly balance these considerations, the determination of the enforceability of a particular agreement requires a consideration of the public policy implications of the subject matter involved (whether it concerns a duty to the public and whether the type of service performed affects the public interest), and the language and circumstances of the specific contract. In *Jones v. Dressel*, supra, the Court held that, in applying these considerations, the Court is to consider four factors: (1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties to exonerate the releasee from its negligence is expressed in clear and unambiguous language. *Jones v. Dressel*, supra, 623 P.2d at 376. The Court has since reaffirmed and applied the four-part *Jones* test. See *Heil Valley Ranch, Inc. v. Simkin*, supra, 784 P.2d at 784; *B & B Livery, Inc. v. Riehl*, supra, 960 P.2d at 136.

In applying the public policy factors enunciated in the *Jones* decision and its progeny with respect to exculpatory agreements releasing claims of negligence, the courts have focused on the service or activity in the context of which the exculpatory agreement was executed. Using this approach, this Court has formulated a general rule that enforcement of an exculpatory agreements is barred as affecting the public interest where the agreement involves a service of great importance or practical necessity. This Court and the Court of Appeals have generally held that necessary services, such as housing, implicate public policy considerations precluding the enforcement of exculpatory agreement releasing prospective negligence claims, while services involving leisure or recreational activities do not. See e.g., *Stanley v. Creighton* Co., 911 P.2d 705 (Colo. App. 1996) (invalidating an exculpatory clause contained in a residential lease, on public policy grounds); *Jones v. Dressel*, supra (exculpatory agreement executed in connection with recreational skydiving does not implicate a public interest); *Chadwick v. Colt Ross Outfitters, Inc.,* supra; *B & B Livery, Inc., v. Reihl*, supra (recreational equestrian activities do not implicate a public interest).

Ms. Boles' claim against Sun Ergoline does not constitute a claim of negligence, but rather is based on strict products liability. While this Court has comprehensively addressed the enforceability of exculpatory agreements with

respect to negligence claims, the Court has yet to directly address the enforceability of such agreements to bar claims brought on the basis of strict products liability.

Strict products liability is distinct from negligence. Products liability under §402A does not rest upon negligence principles, but rather is premised on the concept of enterprise liability for casting a defective product into the stream of commerce. *Jackson v. Harsco Corp.*, 673 P.2d 363, 365 (Colo. 1983). The doctrine of strict products liability provides that a manufacturer who sells a product in a defective condition which is unreasonably dangerous to the user or consumer is subject to liability for physical harm caused to the ultimate user or consumer, where the seller is engaged in the business of manufacture or sale of the product, and the product is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. See e.g., *Camacho v. Honda Motor Co. Ltd.*, 740 P.2d 1240, 1244 (Colo. 1987), citing Restatement (Second) of Torts §402A. The focus under strict products liability is upon the nature of the product, rather than on the conduct of the manufacturer. See *Smith v. Home Light and Power Co.*, 784 P.2d 1051, 1054 (Colo. 1987). A manufacturer's conduct is not germane in a strict products liability action, and liability may be imposed in the absence of any negligence or other culpable conduct on the part of the

manufacturer. *Forma Scientific, Inc. v. BioSera, Inc.*, 960 P.2d 108, 115 (Colo. 1998). Strict products liability attaches regardless of whether there exists any contractual or other relationship between the manufacturer and the injured consumer. See e.g., *Camacho v. Honda Motor Co., Ltd.*, supra, 741 P.2d at 1244, quoting Restatement (Second) of Torts §402A.

Colorado's adoption and recognition of the strict products liability doctrine reflects fundamental public policy considerations. Holding a manufacturer strictly responsible for injury caused by its defective and unreasonably dangerous products is based on the principle that a consumer is justified in expecting that a product placed in the stream of commerce is reasonably safe for intended use. See *Camacho v. Honda Motor Co., Ltd.*, supra, 741 P.2d at 1245, and cases and authorities cited therein. The principles of strict product liability exist in part to motivate manufacturers to use their information concerning product hazards to avoid dangers likely to affect consumers in using their products, to control the massive problem of product accidents. *Palmer v. A.H. Robins & Co.*, 684 P.2d 187, 217 (Colo. 1984). This Court has adopted the rationale for strict products liability set forth in §402A, comment c, which states as follows:

> [T]he justification for strict liability has been said to be that the seller, by marketing his products for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured or harmed; that the public has

> the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such of products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford this are those who market the products.

Camacho v. Honda Motor Co., Ltd., supra, 741 P.2d at 1246, quoting Restatement (Second) of Torts §402A, comment c.

In adopting and recognizing the doctrine of strict products liability as a basis for manufacturers' liability, Colorado has adopted a fundamental public policy of protecting consumers from defective and unreasonably dangerous products, and shifting the burden of injuries caused by such products from the consumer suffering such injury to the product manufacturer. The public policy considerations underlying strict products liability are sufficient to invalidate any exculpatory agreement purporting to prospectively release a manufacturer from such liability. The Court has recognized that where the public policy considerations impacted by an exculpatory agreement are sufficiently strong, these considerations alone are sufficient to invalidate the exculpatory agreement, and that there are situations where public policy reasons for preserving an obligation outweigh the countervailing regard for freedom of contract. *Cooper v. Aspen*

Skiing Co., supra, 48 P.3d at 1232-35. Permitting the enforcement of exculpatory agreements purporting to prospectively release manufacturers from liability for injury to consumers caused by defective products would have the potential to substantially impact a long-standing fundamental public policy of this state, and should properly be precluded on public policy grounds.

2. **A finding that exculpatory agreements are ineffective to shield a manufacturer from liability for injuries caused by defective products would be consistent with the language of Restatement (Second) of Torts §402A, and would be consistent with decisions from other jurisdictions.**

In recognizing strict products liability as Colorado law, Colorado has adopted and incorporated Restatement (Second) of Torts §402A. See *Hiigel v. General Motors Corp*, 190 Colo. 57, 544 P.2d 983, 987 (1975); *Camacho v. Honda Motor Co., Ltd*, supra. The language of §402A firmly supports the proposition that a release or other agreement purporting to prospectively release a manufacturer from liability for injuries suffered as a result of a defective product is void as against public policy. Comment m to §402A states expressly that, given the nature of a manufacturer's liability under strict products liability, disclaimers are ineffective to negate this responsibility. Comment m reads in relevant part as follows:

> [T]he liability stated in [§402A] does not rest upon negligence. It is strict liability…the basis of liability is purely one of tort.
>
> …
>
> The consumer's cause of action does not depend upon the validity of his contract with the person from whom he acquires the product, and is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumer's hands.
>
> Restatement (Second) of Torts §402A, comment m.

The substance and rationale of comment m are fully consistent with the Court's decisions regarding the nature of strict products liability, and the public policy underpinnings of the doctrine. The Court's express adoption of comment m would be consistent with the Court's longstanding adoption and recognition of §402A, and would further the public policy considerations which underlie strict product liability doctrine.

Other jurisdictions have considered the question of whether an exculpatory agreement or disclaimer may be enforced to shield a manufacturer from liability under the strict products liability doctrine. The courts have uniformly held that, in the context of consumer transactions, such exculpatory agreements are void as against public policy. The cases have held generally that a manufacturer cannot contract away its responsibility for having placed a defective product in the stream of commerce for sale to the public. These cases note that permitting manufacturers to prospectively limit their liability for their defective products would frustrate the

rationale for the imposition of strict products liability. These cases also cite the gross disparity in bargaining power between manufacturers and consumers, and the fact that, given the nature of product defects, consumers are normally not able to make an informed evaluation of the risks which they would be agreeing to assume. See *Potomac Plaza Terraces, Inc.* v. *QSC Products, Inc.*, 868 F. Supp. 346, 355 (D.D.C.) (applying District of Columbia law), citing *Bowler v. Stewart-Warner Corp.*, 563 A.2d 344, 346 (D.C. 1989) (citing comment m); *Weiner v. Mt. Airy Lodge, Inc.*, 719 F. Supp. 342, 345-46 (M.D. Pa. 1989) (applying Pennsylvania law; citing comment m, collecting cases); *Jones v. Wilson Industries, Inc.*, 804 F.2d 1133 (10th Cir. 1986) (applying Oklahoma law); *Webster v. Empiregas, Inc. of Camdenton*, 648 S.W. 2d 198 (Mo. App. 1983), and cases cited therein; *Sipari v. Villa Olivia Country Club*, 63 Ill. App. 3d 985, 380 N.E. 2d 819, 823-24 (Ill. App. 1978), and cases cited therein.

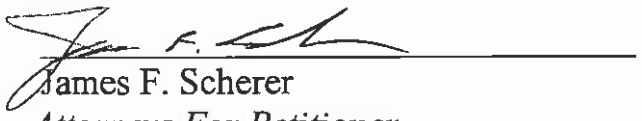
The above-cited cases were all decided in the context of the strict products liability doctrine as set forth in §402A, and involved consideration of the same public policy considerations as underlie Colorado's recognition of strict products liability doctrine. The rationale relied upon by the courts in these decisions is fully applicable to the issue presented in this proceeding.

VI. CONCLUSION

For the reasons set forth herein, the Petitioner respectfully requests that the Court reverse the Court of Appeals' affirmance of the District Court's entry of summary judgment in favor of the Respondent, and that this Court remand this proceeding to the District Court, with directions to vacate the entry of summary judgment in favor of the Respondent, and to set the matter for further proceedings as appropriate.

Respectfully submitted this 4th day of June, 2009.

MILLER & LAW, P.C.

By: 

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has served the above and foregoing: **OPENING BRIEF** upon counsel for the Respondent by U.S. Mail, postage prepaid, properly addressed as follows:

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this 4th day of June, 2009.

Denise Dyakon