

ORIGINAL

IN THE SUPREME COURT OF OHIO

10-1013

Jason L. Seifert,	:	
	:	
Appellant,	:	On Appeal from the Cuyahoga
	:	County Court of Appeals,
v.	:	Eighth Appellate District
	:	
Hartford Fire Insurance Co.	:	Court of Appeals
	:	Case No. 09-093291
Appellee.	:	

MOTION FOR IMMEDIATE STAY OF COURT OF APPEALS JUDGMENT

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 JUN 10 2010
 CLERK OF COURT
 SUPREME COURT OF OHIO

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COUNSEL FOR APPELLEE, HARTFORD FIRE INSURANCE CO.

MOTION FOR IMMEDIATE STAY OF COURT OF APPEALS JUDGMENT

Appellant Jason L. Seifert hereby respectfully requests that this Court stay the Judgment of Eighth District Court of Appeals in the above captioned matter during the pendency of this Appeal. Appellant previously deposited the amount of the claimed damages with the Parma Municipal Court and requests that said funds remain on deposit with the Parma Municipal Court during the pendency of this Appeal.

Respectfully submitted,

Jason L. Seifert, Pro Se

A handwritten signature in black ink, appearing to read 'Jason L. Seifert', is written over a horizontal line.

Jason L. Seifert

APPELLANT

Certificate of Service

I certify that a copy of this motion was sent by ordinary U.S. mail to counsel for appellee, Herbert L. Nussle, 55 Public Square #800, Cleveland Ohio 44113 on June 8, 2010.

A handwritten signature in black ink, appearing to read 'Jason L. Seifert', is written over a horizontal line.

Jason L. Seifert

APPELLANT

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93291

HARTFORD FIRE INSURANCE CO.

PLAINTIFF-APPELLEE

vs.

JASON L. SEIFERT

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Parma Municipal Court
Case No. 08CVE03159

BEFORE: Gallagher, A.J., Dyke, J., and Boyle, J.

RELEASED: May 27, 2010

JOURNALIZED:

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ANNOUNCEMENT OF DECISION
PER APP.R. 22(B) AND 26(A)
RECEIVED

MAY 27 2010

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

SEAN C. GALLAGHER, A.J.:

Appellant Jason Seifert brings this appeal of the judgment against him by the Parma Municipal Court. For the reasons herein, we affirm.

On June 30, 2008, appellees Hartford Fire Insurance Company (“Hartford”) and W.E.D. Corp., dba Taylor Rental (“Taylor Rental”), filed a complaint against Seifert for negligence, breach of bailment, and breach of contract. On March 30, 2009, a bench trial commenced. The court entered judgment in favor of Hartford and Taylor Rental.

On June 30, 2007, Seifert entered into a contract with Taylor Rental for the use of a skid steer with a rockhound/landscape attachment (“attachment”).¹ On that date, Bob Funk, a Taylor Rental employee, brought the skid steer to Seifert’s house in Broadview Heights, Ohio, and personally demonstrated for Seifert how it operated. Funk testified he showed Seifert how to turn the machine on and off, how to use the joysticks to control the machine and its attachment, and instructed Seifert not to raise the attachment to its maximum height when it was fully loaded. Seifert declined Funk’s offer to operate the machine himself while Funk was present. Funk testified he believed the safety manuals were in the skid steer when he delivered it to Seifert, and that Seifert

¹ A skid steer with rockhound/landscape attachment is used to prepare the ground for seeding.

never asked to see them. He also stated he gave Seifert his cell phone number in the event Seifert had questions over the weekend and outside of store hours.

Henry Hunter, the mechanic for Taylor Rental, testified that the notes he made in his equipment log reflect that at the time the skid steer was delivered to Seifert, it was fully operational, had sufficient oil, and had a safety manual in the glove box of the cab.

Funk presented Seifert with a preprinted contract ("Contract") with the rental terms included. On the face of the Contract, in a box located at the upper righthand corner of the page, was the following language:

"The back of this contract contains important terms and conditions, including Taylor's disclaimer from all liability for injury or damage and details of renter's obligations for rental and other charges and responsibilities to care for and return the item(s) rented. *They are part of this contract-Read Them. I have read and understand the terms & conditions listed on the face and reverse hereof, specifically Item 3.*" (Emphasis in original.)

Seifert initialed this portion of the Contract directly below the box.

On the reverse side of the Contract were the Terms and Conditions of Rental. Item 3, as noted on the front of the Contract, was similarly outlined in a box. Item 3, captioned "RESPONSIBILITY FOR USE AND DISCLAIMER OF WARRANTIES," reads in full:

"You are responsible for the use of the rented item(s). You assume all risk inherent in the operation and use of the

item(s) and agree to assume the entire responsibility for the defense of, and to pay, indemnify and hold Dealer harmless from, and hereby release Dealer from, any and all claims for damage to property or bodily injury (including death) resulting from the use, operation or possession of the item(s), whether or not it be claimed or found that such damage or injury resulted in whole or in part from Dealer's negligence, from the defective condition of the item(s), or from any cause. YOU AGREE THAT NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE HAVE BEEN MADE IN CONNECTION WITH THE EQUIPMENT RENTED."

In addition to the terms set forth above, the following paragraphs were part of the Contract. Item 4, captioned "RESPONSIBILITY FOR EQUIPMENT," reads in part:

"From the time the item(s) is rented out until it is returned, you are responsible for it. If the item is lost, stolen or damaged under any circumstances while rented, regardless of fault, you shall be responsible for all charges, including labor costs to replace or repair the item(s). * * *"

Item 5, captioned "ITEM(S) FAILURE," reads in part:

"You agree immediately to discontinue the attempt to use the rented item(s) should it at any time become unsafe or in a state of disrepair, and will immediately (one hour or less) notify Dealer of the facts. * * *"

Seifert signed the Contract as written, and both Seifert and Funk testified Funk was at Seifert's house for approximately 15 minutes.

Seifert testified that after Funk left, he looked in the machine for a copy

of the operating and/or safety manual to further familiarize himself with the skid steer's operation. He testified he could not locate any manual at all. Seifert then drove the machine to a flat surface in his backyard where he began operating the skid steer with the attachment. Within a half hour of starting to use the machine, Seifert raised the partially filled bucket to approximately eye level, and the machine began to tip forward.

Seifert testified the skid steer tipped on its face, and he was forced to crawl out from under the machine. Although he turned the ignition key to the "off" position, the machine continued to run. He then called Funk and asked Funk if there were an alternate way, besides using the key, to turn off the machine. Funk indicated he did not know of another way, and the call ended. Seifert did not tell Funk the machine had tipped over.

Several men working at Seifert's house that afternoon attempted to turn off the machine, as well as to locate an operating manual. Eventually one of the men pulled back on the skid steer's throttle, and the machine engine stopped. Seifert noticed that oil had leaked from the machine, so he called Funk a second time and asked what kind of oil the machine took. Seifert again did not tell Funk the machine had tipped over, and Funk only indicated the machine should not need oil. Seifert was still not able to locate any applicable manual in the skid steer.

Funk testified that on July 1, he sent Taylor Rental representatives to Seifert's house, and they removed the battery from the skid steer. Seifert acknowledged that he was not home when the Taylor Rental representatives came to his house on July 1, nor on July 2, when Taylor Rental representatives removed the skid steer from his property.

Taylor Rental delivered the skid steer to Ohio CAT for repair; Ohio CAT billed Taylor Rental \$9,328.13 to replace the engine. There was testimony that the engine was damaged beyond repair because it operated without oil for some period of time. There was also testimony from an expert for Taylor Rental that when the machine tipped, oil ran through the machine that prevented it from turning off with the key, but when the oil burned off, the lack of lubrication damaged the engine.

In response to Taylor Rental's case-in-chief, Seifert attempted to show that Taylor Rental's failure to properly train him on the use of the skid steer constituted negligence on its part, thereby negating any liability on his part. He also argued that Taylor Rental fraudulently concealed a material fact, i.e., that only "qualified operators," as defined in the skid steer's operating manual, were permitted to operate the skid steer, and that by allowing a person not trained as a "qualified operator" such as himself to drive the machine, Taylor Rental was negligent.

Although Taylor Rental asserted three causes of action, the basis of its claims against Seifert is that while Seifert had possession of the rented skid steer, his actions caused irreparable damage to its engine, and the engine had to be fully replaced. Therefore, Taylor Rental argues Seifert is liable for the total amount of damages.

In its journal entry, the court stated: "Upon considering all of the evidence, and arguments presented the court finds as follows: Judgment is hereby granted in favor of plaintiff Hartford Fire Insurance Company and W.E.D. dba Taylor Rental against Jason L. Seifert in the amount of \$9328.13 and costs."

Seifert filed this timely appeal and raises three assignments of error for our review. As each assigned error relates directly to whether the court erred by not striking Taylor Rental's liability disclaimer, we address them together.

"I. The Parma Municipal Court erred by failing to find that the Agreement provisions relating to the disclaimer of liability/strict liability are unconscionable due to the parties' unequal bargaining positions, and/or are void because Taylor fraudulently concealed material facts prior to entering into the transaction, and accordingly, Taylor cannot hold Seifert strictly liable nor disclaim its own willful/negligent conduct under a contract theory for the damage caused to the machine."

“II. The Parma Municipal Court erred by failing to invalidate the disclaimer of liability/strict liability provisions of Taylor’s agreement as provided in assignment of error one, which, in turn, prevented a finding that Taylor’s own negligence was the direct and proximate cause of both the accident and the resulting damage to the machine and thus a defense to a negligence claim.”

“III. The Parma Municipal Court erred by failing to invalidate the disclaimer of liability/strict liability provisions to Taylor’s agreement as provided in assignment of error one, which, in turn, prevented a finding that Taylor’s own negligence was a direct and proximate cause of both the accident and the resulting damage to the machine and thus a defense to a bailment claim sounding in contract or tort.”

The crux of Seifert’s appeal is that the trial court did not find the disclaimer of all liability void as unconscionable and, therefore, did not consider Taylor Rental’s decision to let Seifert operate the machine when he was not a “qualified operator” negligent. In essence, he argues a finding that the disclaimer is void relieves him of liability.

“Although attempts to excuse liability for negligence by contract are disfavored in the law, absent ‘unconscionability’ or vague and ambiguous language, such limiting or exculpatory provisions will be upheld.” *Motorist Mut.*

Ins. Co. v. Jones (1966), 9 Ohio Misc. 113, 223 N.E.2d 381, 383. “In order for a contractual provision to effectively disclaim liability for negligence, the parties must be in roughly equal bargaining positions or, where they are not, non-exculpatory contract options must be provided for greater consideration.”

Cannell v. Taylor Rental Ctr. (Mar. 31, 1995), Mahoning App. No. 94 C.A. 1, citing *Orlett v. Suburban Propane* (1989), 54 Ohio App.3d 127, 561 N.E.2d 1066.

Seifert relies almost exclusively on *Cannell* to argue against strict liability under the Contract. In *Cannell*, a handyman who damaged rental equipment brought a suit against Taylor Rental and argued that the exact same language used on the front of the Contract and in Item 3 was not a valid defense against a claim for negligence. The *Cannell* court found that because the parties were in an unequal bargaining position, as a matter of law, the disclaimer was not effective to disclaim any alleged negligence on the part of Taylor. As a result of its finding the disclaimer was void, the court reversed summary judgment on Cannell’s claim that Taylor Rental breached its duty to instruct with regard to the proper use and handling of the equipment. The matter was remanded to the trial court.

Likewise we find the disclaimer is void, yet this does not automatically

result in a finding in Seifert's favor.² Civ.R. 52 states: "When questions of fact are tried by the court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise before the entry of judgment * * *."³ "It is presumed that a general finding and judgment included all issues in the case not specially passed on." *Palmer v. Young* (Aug. 25, 1988), Miami App. No. 87 CA 49, citing *Kilgore v. Emmitt* (1878), 33 Ohio St. 410. Furthermore, "[t]he trial court is presumed to have ruled upon all the defenses raised * * *, and to have decided those issues adversely to the appellant." *Carnegie Distributing Co. v. Bd. of Revision of Cuyahoga Cty., Ohio, et al.* (May 28, 1981), Cuyahoga App. No. 42815.

In our case, Taylor Rental brought suit against Seifert for breach of contract, negligence, and breach of bailment arising from damage caused to the skid steer. In his answer, Seifert raised, among others, negligence as an affirmative defense.⁴ The trial court found, based on the law and the evidence

² It should be noted that *Cannell* can be distinguished from our case in several respects. In *Cannell*, the plaintiff rented the equipment and was bringing suit against the rental company for negligence. Furthermore, the court reversed summary judgment upon a finding that the disclaimer was unconscionable and that material facts existed to preclude judgment as a matter of law. The court's decision does not address whether Taylor Rental was ultimately liable for negligence on Cannell's claim.

³ It is uncontroverted that neither party requested findings of fact or conclusions of law.

⁴ Seifert argued that Taylor Rental fraudulently concealed material facts about who was qualified to operate a skid steer. Taylor Rental argued that Seifert's failure

presented, that Seifert was liable for the damage to the skid steer, without specifying under which theory. We must assume, without evidence to the contrary, that the trial court considered the applicable law and other terms of the Contract before reaching its decision.

Ohio law clearly holds that a reviewing court may not substitute its judgment for that of the trial court “simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court.” *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 81, 461 N.E.2d 1273. A trial court’s decision should be reversed if it is clearly against the manifest weight of the evidence; but, “[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.” *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578.

There was evidence presented at trial that Seifert read the Contract; that he chose not to practice operating the skid steer in Funk’s presence; that he was driving the machine when it tipped over; that he was unable to turn off the

to raise fraud as an affirmative defense waived his right to raise it at trial. See Civ.R. 8(C). Nonetheless, we presume the trial court reached its verdict after considering all arguments presented by the parties and, therefore, found there was no fraud.

machine, which led to oil draining from it, causing damage to the engine; that he did not inform Funk or Taylor Rental that the machine had tipped over.

There was also evidence at trial that a safety manual was in the skid steer while it was in Seifert's possession; that Seifert never asked Funk for the operating or safety manual; and that Taylor Rental routinely rents skid steers to individuals who are not licensed qualified operators.

Relying on the evidence, the trial court could find Taylor Rental did not act negligently when it rented Seifert the skid steer, and that Seifert's actions caused the damage to the machine's engine and that he is liable for the replacement costs. We find there was competent, credible evidence to support judgment by the trial court in favor of Taylor Rental, even if the disclaimer was invalid. Seifert's assigned errors are overruled.

Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

A handwritten signature in black ink, appearing to read 'Sean C. Gallagher', written over a horizontal line.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

ANN DYKE, J., and
MARY J. BOYLE, J., CONCUR