

ORIGINAL

IN THE SUPREME COURT OF OHIO

Jason L. Seifert, :
 :
 :
 Appellant, : On Appeal from the Cuyahoga
 : County Court of Appeals,
 v. : Eighth Appellate District
 :
 Hartford Fire Insurance Co. : Supreme Court
 : Case No. 10-1013
 Appellee. :

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT JASON L. SEIFERT

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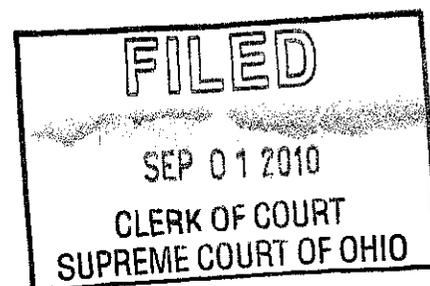
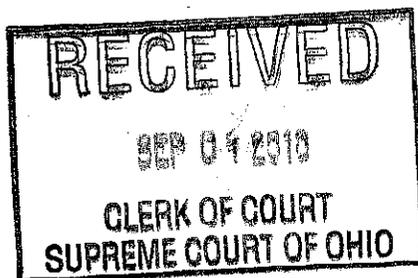


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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case presents an issue of public or great general interest concerning the safety of the citizens of Ohio and the rights of consumers: whether a rental company has a duty to properly train a consumer to operate rented equipment, or in the alternative, to disclose the inadequacy of the training, when failure to do so may cause serious injury or death to the consumer and/or others and damage to the machine.

It is a fundamental principle of Ohio Law that the State has an interest in protecting the health, safety and welfare of its citizens. It is undisputed that the state has a substantial interest in the safety of its citizens. *State v. Cooper* (Ohio Ct. App. 4th Dist. 1991), 71 Ohio App.3d 471, 476, 594 N.E.2d 713, 716 (“The state does have a substantial interest in the safety of its citizens”); *Wooster Community Hosp. v. Anderson* (Ohio Ct. App. 9th Dist. 1996), 108 Ohio App.3d 290, 294, 670 N.E.2d 563, 565 (“We begin with the proposition that the state of Ohio has a legitimate government interest in protecting the health and welfare of its citizens.”); *Tiffin v. Boor* (Ohio Ct. App. 3rd Dist. 1996), 109 Ohio App.3d 337, 342, 672 N.E.2d 200, 203; (“[t]he safety and privacy of citizens are substantial state interests.”); *Klein v. Leis* (2003), 99 Ohio St.3d 537, 545, 795 N.E.2d 633, 641 (“Public safety is a compelling state interest.”) In addition, the State has an unquestioned interest in protecting the rights of consumers, hence the proliferation of the Consumer Sales Practices Act, R.C. Chapter 1345.

The manufacturer of the Skid Steer and Rockhound attachment (hereinafter collectively referred to as the “Machine”) at issue in this case **requires** a course of study, demonstration, and instruction to be qualified to operate the Machine. An unqualified operator may cause **serious injury or death** to himself or others and damage to the machine. In the case sub judice, it is uncontested that not all of the materials required by the manufacturer were provided to

Appellant. It is also uncontested that there was no intent to, nor attempt to provide the appropriate amount of training, as the owner of the rental company specifically testified that she made a conscious business decision not to provide the appropriate training. The Court of Appeals in its decision held that Appellee did not have a duty to provide the required training and referenced as support for this proposition the fact that Appellee routinely rents the machinery to unqualified operators. A history of negligence is not a defense to negligence and one would suggest that the proposition that a business practice can establish the rule of law is anathema to our system of justice. *Marcum v. House Towing* (Ohio Ct. App. 12th Dist. Nov. 2, 1998), No. CA 98-05-109, 1998 WL 761574, unreported.

The equipment rental industry is a forty four billion dollar a year industry. Each day thousands of machines are rented, and each day people are injured on these machines. *First Research, Commercial and Industrial Rental Update*, 4/15/2010. Appellee admitted at trial that that it made a conscious business decision not to provide the requisite training even though the machinery it rents may result in serious injury or death. Given the State's strong interest in the safety of its citizenry, this Court should consider whether Appellant should have a duty to provide appropriate training, to certify that the individual has received appropriate training in the past, or at minimum disclose the inadequacy of said training, when the stakes can be so high.

The opportunities for this Court to see this particular issue are likely to be few and far between, but the implications of this practice are far reaching. In a situation where someone is physically injured, the parties are likely to settle long before this Court would have the opportunity to see the case, given the uncertainty around this issue. One might consider how a case involving damage to the machine, as in this case, might play out in a typical consumer setting. The consumer when confronted with the \$10,000 bill has two choices: submit; or retain

an attorney and attempt to fight the claim. Given the size of the claim, the cost associated with hiring an attorney, and the uncertainty of the result, especially given the Court of Appeals' recent pronouncement, any reasonable cost benefit analysis would indicate that submission is the best option. It is highly unlikely that the consumer would have the wherewithal to pursue his or her defense through two appeals. If the consumer does submit to settlement, then he or she may still not have the money to pay the claim, subjecting him or her to a possible collection action and the attendant detrimental impact on his or her credit, garnishment, and possible bankruptcy. The simple act of renting a piece of machinery can result in an abusive situation and significant financial hardship as a result of the lack of clarity surrounding this issue.

The fact is that at the time of contract only the rental company understands what the appropriate amount of training is. The rental company possesses the required study materials, and it is the only party that can provide the required demonstration and supervised observation. The rental company makes a conscious business decision not to provide this training, because it apparently does not fit into its business model, despite the fact that the manufacturer of the Machine specifically states that failure to properly train may result in serious injury or death to the operator and others and damage to the Machine. This case is before the Court simply because the Appellant had some capacity to represent himself, not necessarily always competently so. Appellant requests this Court take this opportunity to decide whether the rental company has a duty to properly train, certify that the individual has been properly trained in the past, or at a minimum disclose the inadequacy of said training and risks associated with inadequate training. Stated another way, should a for profit business that makes a business decision that exposes the public and its own equipment to risk, be required to assume that risk? We would ask that this Court follow the lead of other States, which have determined that one

who supplies personal property for another's use may be subject to liability in negligence for injuries resulting from the use when the supplier knows, or reasonably should know, that the property will be used in a manner involving unreasonable risk of physical harm, due to the user's inexperience...*Clark v. Rental Equipment Co.* (1974) 300 Minn 420, 220 NW2d 507.

This case is analogous to the car rental industry. To rent a car, the individual must possess a valid driver's license (appropriate training), be at least twenty four years of age (approximately eight years of experience); and be insured against damage to the machine and others. One could imagine the liability the rental car company would be exposed to if it failed to meet these requirements. The Court of Appeals has seemingly carved out an exception for the equipment rental industry, whose equipment is arguably more dangerous. Appellant respectfully requests this Court grant jurisdiction and review the erroneous and dangerous decision of the Court of Appeals.

STATEMENT OF FACTS AND CASE

This case arises as a result of Appellant's ("Seifert's") rental of equipment from Taylor. In June 2007, Seifert contacted Taylor with respect to renting a Skid Steer. On June 30, 2007, Bob Funk, a representative of Taylor, delivered the Machine, along with a pre-printed rental agreement, to Seifert's home. Upon Mr. Funk's arrival, Seifert indicated that he had never used this type of equipment and requested instructions. Mr. Funk provided approximately five minutes of instruction on how to operate the Machine: encompassing how to turn the Machine on and off, which was by key, and how to use the joysticks to operate the Machine and the attachment (a rockhound/landscape rake) used to prepare the ground for seeding. In addition, Mr. Funk provided a verbal instruction not to operate the Machine at its maximum height with a full bucket.

Approximately an hour later, Seifert checked the Machine for any additional reading materials regarding its operation, which he did not find, and then moved the Machine to a flat surface in the back of his property to begin attempting to operate it. Seifert's property had previously been staked to identify the location of gas, electric, water, and sprinkler system lines. When not using the landscape rake, i.e., on turns or as he would approach a neighboring property, it was necessary to pull the bucket up to a certain height, approximately chest high, to maintain visibility of the gas, electric, water, and sprinkler lines. Approximately a half hour into Seifert's operation of the Machine, he ran the landscape rake to the line between his and a neighboring property and stopped on a flat surface. He pulled the quarter full bucket to a level which would allow him to maintain visibility of the service lines. Upon locating all of the service lines, Seifert engaged the Machine to move forward and the Machine lurched forward and began to tip forward. The Machine did tip completely forward with its front tires facing the ground and its rear tires in the air, coming to rest between Seifert's property and a neighboring property.

Seifert turned off the key, which did not shut down the Machine. He crawled out from under the Machine. Two contractors, Theodore and Charles Russell, who were building a deck on Seifert's property, his brother-in-law Stephen Merritt, and an unidentified landscape worker, who was working on a neighboring property, rushed to assist him in finding an alternative means to shut the Machine down. The group immediately began searching for any reading materials, i.e., manuals that might have indicated an alternative means to shut the Machine down. When none were found, Seifert ran to his house and called Mr. Funk to inquire as to whether there were any alternative means to shut the Machine down. The Machine was finally shut down by pulling back on the throttle.

The next day, needing to move the Machine off of the neighboring property where it had come to rest, Seifert started the Machine and moved it to his property and shut it down. Seifert realized that oil had drained out during the time it was tipped, and he needed to check the oil. He again, with the assistance of Theodore Russell, who had returned to work on the deck, began searching for reading materials, i.e., a manual, as to how to check the oil and add oil if necessary. Unable to find any, Seifert again called Mr. Funk to see if he could provide this information. Seifert left his property to purchase oil for the Machine. While he was away, representatives of Taylor arrived at his property and removed the battery from the Machine.

The next day, while Seifert was at work, representatives of Taylor removed the Machine from Seifert's property. Seifert paid the full rental price (\$381.00) for the weekend the Machine was on his property.

Taylor filed a complaint against Seifert in the instant action alleging breach of contract, negligence and breach of bailment duties on July 1, 2008, in the Parma Municipal Court. The Trial of this matter began on March 30, 2009, and concluded on March 31, 2009. The Trial Court, in a one sentence opinion, with no findings of fact or conclusions of law, entered final judgment in favor of Taylor Rental on April 14, 2009.

Seifert appealed to the Eighth District Court of Appeals on the basis that the strict liability/disclaimer of liability provisions of Taylor's contract were unconscionable and thus precluded a finding in favor of Taylor on its contract claim; and that Taylor's failure to properly train Seifert to operate the Machine was both the direct and proximate cause of the accident at issue and thus precluded a finding in favor of Taylor on its negligence and bailment claims. The Court of Appeals agreed that the disclaimer of liability/strict liability provisions of Taylor's contract were unconscionable, however, it affirmed the judgment of the trial court, holding that

Taylor, despite the risks to Seifert's safety and the Machine, did not have a duty to train Seifert, and that given the presumption created by the general verdict handed down by the trial court it was obligated to find negligence notwithstanding how tenuous the facts supporting that claim may be. (Court of Appeals Decision, p. 10-11).

Given the State's strong interest in protecting the safety of its citizens and the rights of consumers, the Court erred in failing to find that Taylor did not have a duty to properly train Seifert, assess his qualifications to operate the Machine, or at a minimum disclose the risks of unqualified operation. Taylor breached this duty and this breach was the direct and proximate cause of the accident and damages at issue. Seifert did not breach any duties owed to Taylor and at all times acted as a prudent person.

In support of its position, Appellant presents the following argument.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: The conduct of Taylor, not Seifert was both the direct and proximate cause of the accident and the resulting damage to the Machine.

Seifert was sued in Parma Municipal Court under three theories of liability: negligence, bailment, and contract. The trial court ruled in favor of Taylor in a one sentence opinion that failed to identify a theory of liability. Seifert appealed on the basis that the disclaimer of liability/strict liability provisions of Taylor's contract were unconscionable and thus Taylor could not prevail on the contract theory; he was not negligent and in fact Taylor was negligent in failing to provide the appropriate training, and thus Taylor could not prevail on its bailment and negligence theories, as non-negligence or the negligence of the other party would be a defense to both the negligence claim and a bailment claim sounding in either contract or tort. *Pschesang v. Butler* (Ohio App. 12 Dist. Jan. 19, 1999), CA98-05-033, 1999 WL 17696 (citing *Season's Coal*

Co., Inc. v. Cleveland (1984), 10 Ohio St. 3d 77, 80; *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279).

The Court agreed with Seifert that the disclaimer of liability/strict liability provisions of Taylor's contract were unconscionable and thus invalid, however, given the Trial Court's general verdict and the rebuttable presumption it creates, it appears that the Court of Appeals felt compelled to stretch to find a tenuous connection between the facts and Taylor's negligence claim in an effort to support the verdict.

Judgments supported by some competent, credible evidence going to all of the essential elements of the case will not be reversed by the reviewing court as being against the manifest weight of the evidence. However, the facts cited by the Court of Appeals simply do not support a negligence claim, and Seifert was not negligent. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, syllabus. More importantly, the Court of Appeals specifically held that Taylor did not have a duty to properly train Seifert, certify that he had received the proper training in the past; or to disclose the inadequacy of this training and the potential risks. The Court held that Taylor did not have this duty even though the manufacturer of the Machine specifically states that an unqualified or untrained operator may cause serious injury or death to himself or others and/or damage to the Machine. Taylor should have this duty. Business expediency is not an excuse to put the public at risk, and, given this Court and the State's strong interest in protecting the public's safety and the rights of the consumer, this duty should be imposed. If this Court agrees that Taylor does have this duty, then that duty was clearly breached. Even if this Court were to agree with the Court of Appeals analysis of Seifert's negligence or lack thereof, Taylor's breach is clearly the primary cause of this accident.

Taylor's Conduct

The manufacturer of the Machines at issue requires a course of study, demonstration and supervised operation to become a "qualified" operator of the Machines. The course of study includes a review of the delivery report, operations and maintenance manual, safety manual and operator's and maintenance manual for any attachments that are being utilized. The demonstration and supervised operation component requires demonstration and instruction from an Ohio Cat dealer and supervised operation using all controls under all work conditions. The manufacturer also provides that operating these Machines while not qualified may cause serious injury or death to the operator or others. Mr. Russell testified that, as a journeyman carpenter, he was required to take an eight hour course prior to operating similar Machines and Ms. Davis, the owner of Taylor, testified to the rigorous instruction required for her employees prior to operating the Machines.

While there is some dispute as to whether one of the required manuals was delivered, Mr. Funk admitted in his testimony that not all of the required study materials were provided, nor was the course of demonstration and supervised operation provided. Taylor breached its duty to properly train Seifert prior to leasing the equipment.

Mr. Hunter, Taylor's mechanic, and Mr. Funk admitted that the manual for the landscape rake was not provided to Defendant. Included within this manual is a warning related to the enhanced tipping risk, which is caused by the weight of the landscape rake. In addition, the manual provides instruction as to how one might stop the Machine from tipping when confronted with that situation. Taylor breached its duty train Seifert and to warn him of this enhanced risk and to provide him with information as to how to mitigate this risk.

Mr. Funk testified that there are counterweights available to avoid the type of accident that occurred. Mr. Russell testified that his employer's Machines are equipped with an automatic "kill" mechanism. Taylor did not equip these machines with either of these options and thus breached its duty to mitigate the risk of the accident in this case.

Seifert testified that Mr. Funk negligently provided verbal instruction that significantly enhanced the risk. Seifert testified that Mr. Funk told him one thing he did not want to do is to operate with a full bucket at the Machine's maximum height, the corollary being that so long as he did not do that he would be fine.

In addition to the specific instances of negligence both contested and uncontested, throughout the trial there was evidence of Taylor's poor internal controls, which demonstrated a pattern of negligence. Evidence was presented that Taylor manipulated its vehicle repair logs against its own stated policy. In addition, evidence was presented that Taylor failed to document what was or was not delivered to Seifert. Taylor did not provide Seifert the required training putting Seifert and its own equipment at risk, and, based on the testimony of its representatives, it did not have any intent to do so. This failure was both the direct and proximate cause of the accident and resulting damage. Perhaps more egregiously, it manipulated its own poor recordkeeping for purposes of this case.

Seifert's Conduct

In this case, there was simply no evidence that Seifert was negligent, which was necessary to support Taylor's negligence and bailment claims. Again, the manufacturer of the Machine at issue specifically provides that an unqualified operator may cause serious injury or death to himself and others and/or damage to the Machine. Seifert specifically told Taylor's representative Mr. Funk that he had never operated this type of Machine, and Mr. Funk knew

that he did not provide the requisite training. Therefore, the accident that occurred was an expected result as the operator was unqualified, and thus a *res ipsa loquitur* argument cannot prevail.

The only competent, credible evidence related to Seifert's actions leading up to the accident comes from Seifert and Mr. Russell, as they were the only witnesses on the property at the time. They testified that to begin operation, Seifert moved the Machine to the furthest point away from the house and any bystanders and the flattest point on in his yard; that at the time of the accident, Seifert was operating the Machine on a flat surface, at a normal rate of speed, with an approximately quarter full bucket, and was attempting to balance keeping the bucket low and the need to maintain visibility of the various service lines. Seifert's pre-accident actions were those of an ordinarily prudent person under the circumstances.

Seifert's post accident actions in an attempt to mitigate any potential damage were those of an ordinarily prudent person as well. Seifert and Russell testified that, when the Machine tipped, they immediately turned off the key. When that did not work, they began to search for an alternative method to shut down the Machine, which included looking for the manual and contacting Mr. Funk for suggestions, which he was not able to provide. Once the Machine was finally shut down, they testified that the next step was to both check and add oil to the Machine if necessary, realizing that a certain amount of oil had leaked out while the Machine was tipped. Seifert again contacted Mr. Funk in an effort to do so. While these efforts were for not, as Taylor's expert, Mr. Marzette, testified that the damage would have occurred in the first sixty seconds of tipping, they do illustrate the efforts of an ordinarily prudent person under the circumstances. Seifert acted at all times as a prudent un-qualified operator of the Machine,

which is all he claimed to be. Seifert did not breach any duty owed, and therefore cannot be held liable on Taylor's negligence and bailment claims.

The Court of Appeals agreed with Seifert on the contract issues. However, given the presumption created by the general verdict, it appeared to consider itself obligated to find some contortion of the facts of this case to support Taylor's bailment and negligence claims, which both required a showing of negligence. The only problem is that none of the facts the Court referred to, nor any of the facts for that matter, support a finding of negligence, which requires a showing of duty, breach, causation and damages.

The Court of Appeals referenced the fact that Seifert read the contract, which has no bearing on whether he operated the machine negligently, unless the court is suggesting that simply the act of renting the Machine constitutes negligence. The court stated that he chose not to practice operating the Machine in Funk's presence. While this fact was contested at trial, even if accurate, it has no impact on whether Seifert was negligent. What is uncontested is that, at the time of contract, only Funk knew and/or could have known what it takes to become a qualified operator of the Machine; that there was no intent on the part of Funk or Taylor Rental to provide the training necessary to make Seifert qualified; that Taylor did not provide all of the written materials necessary to make Seifert qualified; that Taylor did not disclose the risks associated with unqualified operation; and that even if Seifert had an opportunity operate the machine, he would have still been unqualified based on the Manufacturer's specifications. To put it in negligence parlance, Taylor Rental knew or should have known the duties that each party should have met to insure the safe operation of the Machine. Taylor made a conscious decision not to fulfill these duties and robbed Seifert of his ability to assess the risk and take any steps that were available to mitigate that risk. It would seem both illogical and unjust if Taylor's breach can be

used to then create a duty and breach for Seifert where Seifert is ultimately liable, while Taylor remains whole.

The Court then referred to the fact that the Machine tipped over; and that the Machine would not turn off when Seifert turned the key as he was instructed to do, and that the Machine was damaged because it continued to run after it was tipped. The correct word for this is unfortunate not negligent. Unfortunate that Taylor did not have this Machine equipped with counterweights which would have prevented it from tipping; unfortunate that the Machine tipped; unfortunate that the Machine did not shut off in the manner that Seifert was instructed; unfortunate that Taylor Rental did not equip the Machine with an automatic kill, which would have prevented the damage to the Machine, and unfortunate that the Machine was damaged. This is a *res ipsa loquitur* argument by the court. As stated above, the manufacturer specifically warns there could be an accident if the Machine is operated by an unqualified individual. Mr. Russell and Mr. Marzette both testified that these Machines tip often. This was an expected result, therefore one cannot argue negligence based on these facts.

The Court stated that Seifert did not inform Funk or Taylor Rental that the Machine had tipped over. This was a contested fact at trial and seems highly unlikely given the uncontested fact that Seifert proactively contacted Taylor twice post accident. However, assuming that this is the accurate version of the facts, if Seifert would have informed Taylor that the Machine had tipped when he called, it would not have prevented the damage to the Machine. In other words, any failure to inform Taylor of the tipping did not cause the damage to the Machine, causation being a required element of a negligence claim. Taylor's expert, Mr. Marzette, testified that the damage was likely to occur within the first sixty seconds of the Machine tipping. Seifert's first call to Mr. Funk occurred after he climbed out from under the Machine, after he turned the key

off, after he removed the key, after he ran to the house, obtained a telephone and located Mr. Funk's number. Clearly, well more than sixty seconds had elapsed after the accident. Therefore, Seifert's call to Mr. Funk, no matter what was discussed, could not have prevented, nor did it cause the damage to the Machine.

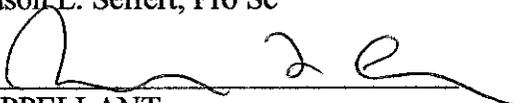
The Court referred to a heavily contested fact at trial, that being whether the manual for the skid steer itself was provided. As a standalone fact, this has no logical relation to whether or not Seifert was negligent. The Court then states that Seifert never asked Funk for the manual, which when combined with the first statement, is even less logical. This is in essence an "I win, you lose or you lose, I win" proposition. Stated another way, "we provided the manual and thus you are negligent, or we didn't provide the manual and you didn't ask for it and you are still negligent." If Taylor, in fact, provided a manual for the Skid Steer itself, it would have no bearing on whether Seifert was or was not negligent, as it is uncontested that it did not provide the demonstration and supervised operation required by the manufacturer. Even more critical, Taylor did not provide the manual for the attachment (Rockhound). This manual provided detailed information relating to the enhanced risk created by the weight of the attachment and methods to mitigate that risk. To find Seifert negligent because he may or may not have received incomplete information, while finding Taylor not negligent for failing to provide essential information required by the manufacturer, tests the bounds of logic.

CONCLUSION

This case presents an issue of public or great general interest because it involves a business practice that places the safety of Ohio consumers at great personal and financial risk. Given the state's great interest in the safety of its citizens as well as the rights of the citizens as consumers, this Court should accept jurisdiction of this case and consider whether Taylor Rental's business practice of renting heavy equipment to unqualified consumers without informing said consumers

of the potential risks should be permitted to continue. Because Taylor's failure to train and/or inform Seifert regarding the risks of a lack of training was the direct and proximate cause of the damage to the machine, should this Court accept jurisdiction and find Taylor in breach of a duty, Seifert should have no liability as well. For the foregoing reasons, Appellant Seifert respectfully requests that this Court accept jurisdiction and decide that it was Taylor Rental's negligence alone that caused the injury in this case.

Respectfully submitted,
Jason L. Seifert, Pro Se



APPELLANT

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was previously sent by ordinary U.S. mail to counsel for appellee, Herbert L. Nussle, 55 Public Square #800, Cleveland Ohio 44113..



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: JUN X 7 2010

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FILED AND JOURNALIZED
PER APP.R. 22(C)

JUN X 7 2010
GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY SMB DEP.

CA09093291

63368497



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 SMB 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).

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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

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.

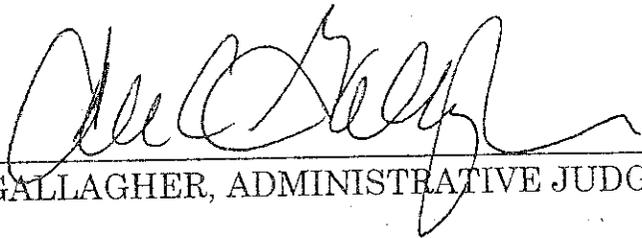
Judgment affirmed.

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.



SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

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