2007 WL 2665931 (Wash.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Washington.
King County

Eric POST, Plaintiff,
v.
RYDER TRUCK RENTAL, INC., a Florida corporation, Defendant.

No. 05-2-24699-5 SEA.
February 20, 2007.

Defendants Motion for Summary Judgment

McGaughey Bridges Dunlap, PLLC, Shellie McGaughey, WSBA #16809, Barbara L. Bollero, WSBA #28906, Attorneys for Defendant, Ryder Truck Rental, Inc.

The Honorable Judge Douglas McBroom.

Date and Time: March 30, 2007 @ 10:00 am

Nature of Motion: Defendant's Motion for Summary Judgment

With Oral Argument

I. *Relief Requested*

Defendant Ryder Truck Rental, Inc. ("Ryder") requests the court enter Summary Judgment dismissing this matter with prejudice because the liability limitation and warranty exclusion provisions in plaintiff's truck Rental Agreement with Ryder are a complete bar to all his claims, and Post can not prove proximate cause. This motion is brought pursuant to CR 56(c) and KCLR 56(c) on the grounds that there are no triable material factual issues and as a matter of law defendant is entitled to summary judgment.

II. *Statement of Facts*

In the summer of 2002, plaintiff Eric Post was an independent contract mover for Atlas Van Lines.[1] During the course of his 20 plus year career in the moving business Post rented "shuttles," smaller trucks used to transport goods, as a "very common" part of his business.[2] He rented shuttles over 200 times collectively from U-Haul, Penske, Budget, and Ryder prior to the subject incident, including 25 to 30 times from Ryder.[3]

The moving companies that contracted Post's services arranged for the shuttles before Post's arrival at the truck rental businesses.[4] Post never paid attention to the contracts he signed to rent shuttles from any rental agency.[5] He never read any part of a shuttle contract[6] He never intends to read any such contract[7]

On July 30, 2002, Post rented a truck from Ryder Truck Rental, Inc. for a Seattle job transporting goods to his moving van.[8] He inspected the vehicle before renting it.[9] Post signed a Rental Agreement with Ryder for the truck and initiated it in five places.[10] He did not read the Rental Agreement, nor any of the paragraphs that he initialed.[11] Nevertheless, he felt he could have read it if he had chosen to do so.[12]

The first paragraph Post initialed specifically references personal accidents. It reads in its entirety, one-eighth inch above his initials, as follows:

PERSONAL ACCIDENT AND CARGO PROTECTION Customer declines Personal Accident and

> Cargo Protection. (Read Para. 8) /s/[13]

By initialing this statement, Post indicated he had read and accepted the terms of Paragraph 8. It states:

PERSONAL ACCIDENT AND CARGO RESPONSIBILITY:

> Customer agrees that Ryder will have absolutely no liability whatsoever and agrees to release, indemnify, and hold Ryder harmless for any and all ... claims, damages, or losses arising from injuries of any nature whatsoever, or death of Customer, Customers agents, employees, guests, family, members of Customer's family, or other occupants of the Vehicle EVEN WHEN SUCH DEATH OR INJURY WAS DUE TO RYDER'S FAULT OR NEGLIGENCE, and Customer assumes all such risk and liability.[14]

Post initialed two other identical paragraphs of the Rental Agreement, the text of both which appear one-eighth inch above his initials. Both state identically as follows:

> I have read, understand and hereby agree to the terms and conditions on both sides of this Agreement .... /s/[15]

The first numbered paragraph on the reverse side of the Rental Agreement reads:

> 1. VEHICLE CONDITION: Customer acknowledges that it has inspected the Vehicle and ... Customer acknowledges and agrees that the Vehicle is in good and usable condition with no apparent defects, and fit for Customer's rental purpose. RYDER MAKES NO EXPRESS OR IMPLIED WARRANTY OR GUARANTY AS TO ANY MATTER WHATSOEVER, INCLUDING, WITHOUT LIMITATION, THE CONDITION OF THE VEHICLE, OR THE VEHICLE'S MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE. RYDER SHALL NOT BE LIABLE TO CUSTOMER OR ANY THIRD PARTY FOR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES FOR ANY REASON WHATSOEVER.[16]

After entering the Rental Agreement on July 30, 2002, Post took possession of the Ryder truck and parked it facing downhill on a steep incline at his customer's residence.[17] Post is a very experienced commercial driver.[18] He learned the proper procedure for hillside parking in driving school, including four methods to prevent a vehicle from rolling.[19] He always uses all four methods whenever necessary. He utilized only three of those methods when he parked the Ryder truck. Post felt it advisable to use the fourth method, wheel chocks, on the Ryder shuttle when he parked it.[20] Although Post owns his own chocks and always carries them, he did not use chocks on the Ryder shuttle.[21] He criticized Ryder for not warning him about proper hillside parking methods and not supplying chocks with the shuttle.[22] Nevertheless, in Posts experience of renting over 200 shuttles from at least four different rental agencies, none had ever come with chocks.[23]

After parking the Ryder truck, Post and a helper started loading it. Post alleges about two hours later, while he and his helper loaded furniture into the parked truck, its brakes failed to hold it in place, gave way and it careened down the street.[24] Post claims he sustained personal injuries and other damages as a result.[25]

Post filed his Complaint against Ryder stating three causes of action for
1. Negligence and Breach of Duty of Care;

2. Failure to Warn; and

3. Breach of Contract.

All causes of action are premised on the allegations that Ryder provided an unsafe vehicle, without chocks, did not warn Post about parking on inclines, and the vehicle had latent defects.,

Ryder previously filed a summary judgment motion on the same general grounds as the present motion, but withdrew it after receiving Post's reply brief and declaration. Ryder has now conducted Post's deposition and brings the present motion because its contractual warranty disclaimer and liability limitation are valid, enforceable, and bar any liability of Ryder, and Post can not prove proximate cause; accordingly, Ryder must be awarded summary judgment against Post

III. *Statement of Issues*

1. Do the Rental Agreement's liability limitation provisions bar Posts claims against Ryder?

2: Do the Rental Agreements warranty disclaimer provisions bar Posts claims against Ryder?

3. Is Post unable to prove Ryder proximately caused his injuries?

4. Is Ryder entitled to attorneys' fees under RCW 4.84.330 and the Rental Agreement provisions?

IV. *Evidence Relied Upon*

This motion is supported by the pleadings and papers on file; the Declaration of Barbara L. Bollero in Support of Defendant's Motion for Summary Judgment, and the exhibits attached thereto.

V. *Authority and Argument*

A. *Standard for Summary Judgment*

The purpose of summary judgment is to avoid a useless trial *Balise v. Underwood,* 62 Wn.2d 195, 199, 381 P.2d 966 (1963). Summary judgment is proper when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. CR 56(c). All facts and reasonable inferences are viewed in a light most favorable to the nonmoving party. *Overton v. Consol. Ins. Co.,* 145 Wn.2d 417, 429, 38 P.3d 322 (2002). Resolution of disputed factual issues can be sustained when reasonable minds could reach but one conclusion from the evidence accompanying a summary judgment motion. *Sundquist Homes, Inc. v. Snohomish County Pub. Util. Dist. No. 1,* 140 Wn.2d 403, 406-07, 997 P.2d 915 (2000).

The moving party bears the initial burden of showing the absence of an issue of material fact. *LaPlante v. State,* 85 Wash. 2d 154, 158, 531 P.2d 299 (1975). A moving defendant can challenge the ability of the plaintiff to establish the existence of an essential element on which plaintiff bears the burden of proof at trial. The defendant then need only inform the court that this is the basis of its motion and identify the portions of the record that demonstrate the absence of a genuine issue for trial. *Young v. Key Pharmaceuticals. Inc.,* 1 12 Wash. 2d 216, 225, 770 P.2d 182 (1989), *citing Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Once the defendant meets this initial showing, the inquiry shifts to the plaintiff. if, at this point, plaintiff "fails to make a showing sufficient to establish the existence of is an element essential to that party's case, and on which that party will bear the burden of proof at trial", then the trial court should grant the motion. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct 2548 (1986). "In such a situation, there can be 'no genuine issue as to any material fact' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." 477 U.S. at 322-23.

B. *Ryder's Liability Limitation is Prima Facie Conscionable and Bars Post's Recovery.*

A chattel lease, although not a contract for sale of goods, is governed by Article 2 of the UCC (RCW 62A.2-101, *et seq.). Baker v. City of Seattle,* 79 Wash. 2d 198, 201 (1971). Section 62A.2-719 specifically provides for contractual modification or limitations of UCC remedies. Subsection 3 provides, in part, that "Limitation of other consequential damages is valid unless it is established that the limitation is unconscionable." The official comments to that subsection make clear that *exclusion* of *all* remedies is valid, so long as not unconscionable.

Exclusionary clauses in purely commercial transactions are *prima facie* conscionable under the UCC. *Schroeder v. Fageol*

Motors, Inc., 86 Wash. 2d 256, 63 (1975); *M.A. Morentson Co., Inc. v. Timberline Software Corp.,* 140 Wash. 2d 568, 586-87 (2000). Further, the burden of establishing unconscionability is on the party attacking the contract clause. *Schroeder. supr; American Nursery Products. Inc. v. Indian Wells Orchards,* 115 Wash. 2d 217, 222 (1990). The Washington Supreme Court has noted that it is questionable whether clauses excluding consequential damages in a commercial contract can ever be substantively unconscionable. *M.A. Morentson Co., supra,* at 586. The factors which determine unconscionability are:
1. Whether each party had a reasonable opportunity to understand the terms of the contract;

2. Whether the important terms were hidden in a maze of fine print;

3. The prior course of dealing between the parties; and

4. The usage of trade.

Id.; United Van Lines v. Hertz Penske Truck Leasing. Inc., 710 F. Supp. 283, 288 (1989). No one factor is determinative and the court must look to the totality of the circumstances. *Cox v. Lewiston Grain Growers. Inc.,* 86 Wash App. 357, 368-69 (1997).

Where a remedy limitation clause is standard in the industry and useful in making the product affordable it is not substantively unconscionable. *M.A. Morentson Co., supra,* at 586-87. Regardless of the surrounding circumstances, if there is a prior course of dealing between the parties or reasonable usage of trade as to the exclusionary clause, it is conscionable. *American Nursery Products, supra,* at 223; *M.A. Morentson Co., supra,* at 588.

Here, every element of the transaction proves the conscionability of the Rental Agreement. There can be no doubt that Post and Ryder were engaged in a purely commercial transaction. Post was conducting his business as an independent contract agent of a national moving company. He was not renting the truck for his personal use. In fact, the moving company arranged for the Ryder shuttle and paid the rental cost.[26] Accordingly, the contract is *prima facie* conscionable, and it is Post's burden to prove it is not.

Similarly, Post and Ryder had a regular prior course of dealing in which he always signed whatever contract terms were offered to him. That these terms were standard in the industry is established by Post's testimony regarding his 200 shuttle rentals from at least four different entities, all conducted in the same fashion, and especially his 30 prior Ryder rentals. Further, usage of the trade is established by *United Van Lines v. Hertz Penske Truck Leasing, Inc.,* 710 F. Supp. 283, 288 (1989). There, the court recognized that liability exclusions in a truck rental lease are "customary and usual" and "are an economic necessity for truck rental businesses because they have no control over the property conveyed in their vehicle, the way the vehicles are loaded or the way the vehicles are driven." *Id.* at 287. Ryder has conclusively established both the parties' prior course of dealing and usage of the truck rental trade; thus, under *American Nursery Products, supra,* the contract is conscionable regardless of surrounding circumstances.

It is anticipated Post will claim the terms were lost in "a maze of fine print and, because Ryder "hid" its liability exclusion from him, the terms are unconscionable. This argument is a red herring. First, whether the important terms are hidden is just one of four factors to consider *in* determining unconscionability, *if* the contract is *not* commercial. As discussed above, the subject contract is between commercial parties; in any event, all other factors are in Ryder's favor.

More importantly, whether the terms were hidden or not is simply irrelevant in these circumstances. Post acknowledged he had not read the subject Rental Agreement, he never read such agreements in the past, he had no intention to do so in the future and always just signed whatever he was given.[27] Accordingly the type style, font, size, placement and visibility of the terms had no bearing on his determination to execute the contract or not.

Even should the court consider Post's "fine print" argument, the facts do not support it. A disclaimer clause in the middle of a long paragraph, in exactly the same font and size as the rest of the paragraph, approximately two inches above the renter's signature, is too inconspicuous and not conscionable. *Baker, supra,* 199-200. A liability limitation contained on the reverse side of a rental agreement, including 16 numbered paragraphs, each with a title printed in all capital letters on a separate line, with a reference immediately above the signature line to terms on the reverse side, and a statement that "Customer represents that he/she has read and agrees to same:... See reverse side" *is* conscionable as a matter of law. *United Van Lines. supra,* at 285 and 287-88.

Here, Ryder's Rental Agreement is virtually identical to that held conscionable ' in *United Van Lines. supra,* and nothing like

the unconscionable one in *Baker, supra.* Post initialed in not only one, but two, places acknowledging, "1 have read, understand and hereby agree to the terms and condition on both sides of this Agreement ...." His initials were within one-eighth inch, and even overlapped, *both* references to the reverse side of the agreement Further, precisely as in *United Van Lines, supra,* the reverse side has 15 numbered paragraphs, each with a separate title in all capital letters. Moreover, there are a limited number of paragraph sections printed in all capital letters. The liability exclusion is the first such section and is easily visible in the third paragraph of the agreement.

In view of the foregoing, the court must find as a matter of law that Ryder's liability exclusion is conscionable and bars Posts claims in this case.

C. *Ryder's Warranty Exclusion Bars Post's Recovery.*

Washington's UCC provides an implied warranty of merchantability and fitness for a particular purpose unless excluded. RCW 62A.2-314 and 315. Section 62A.2-316 establishes the manner in which warranties may be excluded, including that they must be:
1. in writing;

2. conspicuous; and

3. mention merchantability.

However, implied warranties may also be excluded by course of dealing or usage of trade. RCW 62A.2-316(3)(c). There is no requirement that a warranty exclusion be explicitly negotiated, *Puget Sound Financial. L.L.C. v. Unisearch Inc.,* 146 Wash. 2d 428, 440-41 (2002), nor even discussed, *Frickel v, Sunnyside Enterprises,* 106 Wash. 2d 714, 721 (1986).

Even if a product defect could not be discovered by a reasonable inspection, a warranty waiver is operative. *United Van Lines supra,* at 287. This is especially true where the warranty exclusion is unqualified, and there is a prior course of dealing between the parties. *Id.* A disclaimer which reads as follows is valid to disclaim warranties for a latent defect in a rental truck:

> LESSOR MAKES NO WARRANTIES, EXPRESS, IMPLIED OR STATUTORY INCLUDING, BUT NOT LIMITED TO-THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. CUSTOMER REPRESENTS THAT HE/SHE HAS FULLY INSPECTED THE VEHICLE DESCRIBED HEREIN AND THAT SAME IS IN GOOD CONDITION AND REPAIR.

Id. at 284 (emphasis in original).

In the present case, the warranty disclaimer is virtually identical to that held to bar plaintiff's recovery in *United Van Lines, supra.* It reads as follows:

> 1. VEHICLE CONDITION: Customer acknowledges that it has inspected the Vehicle and ... Customer acknowledges and agrees that the Vehicle is in good and usable condition with no apparent defects, and fit for Customer's rental purpose. RYDER MAKES NO EXPRESS OR IMPLIED WARRANTY OR GUARANTY AS TO ANY MATTER WHATSOEVER, INCLUDING, WITHOUT LIMITATION, THE CONDITION OF THE VEHICLE, OR THE VEHICLE'S MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE. RYDER SHALL NOT BE LIABLE TO CUSTOMER OR ANY THIRD PARTY FOR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES FOR ANY REASON WHATSOEVER.[28]

This term satisfies all the prerequisites of RCW 62A.2-316,by being written, conspicuous (as discussed above) and mentioning merchantability and fitness for a particular purpose. The only distinction from the warranty disclaimer found valid in the *United Van Lines* case is that this one appears on the reverse side of the contract However, as discussed previously, this distinction is irrelevant since Post readily admits he did not read the contract and had no intention to do so. Further, the *United Van Lines* court explicitly found incorporation of terms on the reverse side of the contract, when coupled

with a reference to those terms in the immediate vicinity of the renter's signature, binding on an unknowing signer as a matter of law. *Id.* at 288.

Ryder's Rental Agreement effectively excludes all warranties pursuant to RCW A.2-316 such that Post's claims against it, including for latent defects, are barred.

D. ***Ryder Did Not Proximately Cause Posts Injuries.***

Generally, a breach of contract does not give rise to a tort action. *American Nursery Products, Inc. v. Indian Wells Orchards,* 115 Wash. 2d 217, 230 (1990). Negligent performance of a contract may create a tort claim if a duty exists independently of the contract performance. *Id.* Further, although negligence and strict liability claims are now subsumed under the Washington Products Liability Act ("WPLA"), RCW chapter 7.22, *et seq.,* claims involving goods are covered by the UCC. *Hofstee v. Dow,* 109 Wash. App. 537, 542-43 (2001). Breach of warranty claims are either WPLA tort actions or UCC contract actions. *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc.,* 119 Wash. 2d 34, 343 (1992). Regardless, a party may contract to limit liability for damages resulting from its own negligence. *Id.; Wagenblast v. Odessa Sch. Dist. 105-157-166J.* 110 Wash 2. 845, 848 (1988).

Here, Ryder believes all of Post's claims against it are governed by the parties' written contract accordingly, the liability limitation and warranty disclaimer addressed is above bar all claims. In the event the court disagrees, however, then Post's remaining claims are governed by the WPLA, and Ryder is still entitled to judgment as a matter of law.

Under the WPLA, a product manufacturer is liable if a claimant is harmed by a product that is not reasonably safe because adequate warnings were not provided. RCW 7.72.030(1); *Hiner v. Bridgestone/Firestone. Inc.,* 91 Wash. App. 722, 731

> or demand to Customer, ... immediately terminate this Agreement without prejudice to any of Ryder's rights or other remedies available under this Agreement or any law. Ryder will be entitled to recover from Customer all reasonable costs, expenses, and attorneys fees incurred by Ryder to ... enforce the terms of this Agreement.

Ryder has incurred attorneys' fees in defense of this action. Paragraph 10 of the Rental Agreement entitles it to recover those fees from Post when it prevails on summary judgment The court should award Ryder its fees in this matter pursuant to a cost bill to be filed forthwith.

VI. *Conclusion*

In consideration of the foregoing defendant, Ryder Truck Rental, Inc., respectfully requests summary judgment be entered in its favor against plaintiff, Eric Post, and this action dismissed with prejudice and with costs and attorneys' fees awarded to Ryder Truck Rental, Inc., pursuant to a cost bill to be filed forthwith. A proposed form of order is attached.

Dated this 15th day of February, 2006.

MCGAUGHEY BRIDGES DUNLAP, PLLC

<<signature>>

SHELLIE MCGAUGHEY, WSBA #16809

BARBARA L. BOLLERO, WSBA #28906

Attorneys for Defendant, Ryder Truck Rental, Inc.

[PROPOSED] ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Motion for Summary Judgment filed by defendant herein, Ryder Truck Rental, Inc. ("Ryder), came on for hearing by the court on the date below. Plaintiff Eric Post appeared and was represented by counsel, Lawrence S. Glosser of Glosser Law Offices, PLLC. Defendant Ryder appeared and was represented by counsel, Barbara Bollero of McGaughey Bridges Dunlap, PLLC. In connection with hearing of the motion, the court reviewed and considered the following:

1. Defendants Motion for Summary Judgment;

2. Declaration of Barbara L. Bollero in Support of Defendant's Motion for Summary Judgment and Exhibits thereto;

3. Proposed Order Granting Defendant's Motion for Summary Judgment;

4. _____

5 _____

6. _____

7. _____ and

8. _____

After reviewing the foregoing pleadings, hearing arguments of counsel, and considering the records and files in this action, the court finds as follows:

1. The liability limitation contained in the subject Rental Agreement is valid and enforceable;

2. The warranty disclaimer contained in the subject Rental Agreement is valid and enforceable;

3. Plaintiff can not prove that but for Ryder's failure to warn him and provide him chock blocks, he would not have suffered injuries and damages; and

4. There is no issue of material fact in connection with Defendant's Motion for Summary Judgment.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. Defendants Motion for Summary Judgment is granted;

2. Summary Judgment shall be entered forthwith in favor of Defendant, Ryder Truck Rental, Inc., and against Plaintiff, Eric Post; and

3 Defendant shall be awarded its costs and attorneys' fees pursuant to a cost bill to be filed forthwith.

DONE IN OPEN COURT THIS ____ day of March, 2007.

The Honorable Douglas McBroom

Presented By:

McGAUGHEY BRIDGES DUNLAP, PLLC

By: <<signature>>

Shellie McGaughey, WSBA #16809

Barbara L. Bollero, WSBA #28906

Attorneys for Defendant

Approved as to form; Notice of Presentation waived:

GLOSSER LAW OFFICES, PLLC

By: .....

Lawrence S. Glosser, WSBA #25098

Attorney for Plaintiff

Footnotes

1 Complaint at para. 3.1; Answer at para 3.1.

2 Declaration of Barbara L. Bollero in Support of Defendant's Motion for Summary Judgment ("Bollero Declaration"), Ex. A, p. 33,II 6-12 and 11. 23-25.

3 *Id.* at Ex.A,p. 38, 1.22-p. 39, I. 20.

4 *Id.* at Ex.A,p. 35,II. 12-24.

5 *Id.* at Ex A,p. 39, L 21-p. 40, I. 4.

6 *Id.* at Ex. A, p. 42, IL 4-9.

7 *Id.* at Ex A, p. 42, IL 10-11.

8 Complaint at para 3.2; Answer at para. 3.1.

9 Bollero Declaration, Ex. A, p. 55,11.8-22.

10 *Id.* at Ex. A,p. 51,1. 19-p.52, 110 and p. 54, II. 5-9.

11 *Id.* at Ex. A, p. 57, L 12-p. 58, 1.11.

12 *Id.* at Ex. A, p. 58, IL. 4-6.

13 *Id,* Contract (emphasis in original).

14 *Id.* at p. 2, para. 8 (emphasis in original).

15 *Id.* at p. 1, second column.

16 *Id.* at p. 2, para I (emphasis in original).

17 Complaint, para 3.2 and 3.6.

18 Bollero Declaration, Ex. A, p. 17, L 17-p. 18, L 3 and p. 32, L 12-p. 33, 1.2

19 *Id.* at Ex.A,p:68,IL. 9-16.

20 *Id.* at Ex. A, p. 67, II. 16-25.

21 *Id.* at Ex. A, p. 68, II. 1-4.

[22] *Id.* at Ex A, p. 67, IL 2-15.

[23] *Id.* at Ex. A, p 68,11. 17-19.

[24] Complaint, para 3.6.

[25] *Id.* at para. 3.7.

[26] Bollero Declaration at Ex. A, p. 35, 11 12-24.

[27] *Id.* at Ex.A,p.39,1.21-p. 40, L 4.and p. 42, II. 4-11

[28] *Id.,* Contract at p. 2, para (emphasis in original).