

[Cite as *Templeton v. Dipaolo Truck Serv., Inc.*, 2001-Ohio-3147.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

SCOTT TEMPLETON, ET AL.)	CASE NO. 98-BA-17
)	
PLAINTIFFS-APPELLEES)	
)	
VS.)	<u>O P I N I O N</u>
)	
DIPAULO TRUCK SERVICES, INC.)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from Belmont County Court of Common Pleas, Belmont County, Ohio Case No. 93 CIV 319
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JUDGMENT:	Affirmed.
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APPEARANCES:

For Plaintiffs-Appellees:	Atty. J. Mark Costine The Costine Law Firm 136 West Main Street St. Clairsville, Ohio 43950
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For Defendant-Appellant:	Atty. John R. Estadt Hanlon, Duff, Paleudis & Estadt Co., LPA 46457 National Road West St. Clairsville, Ohio 43950
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Trial Counsel for Defendant-Appellant:	Atty. John R. Tomlan 100 West Main Street St. Clairsville, Ohio 43950
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JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: May 22, 2001

WAITE, J.

{¶1} This appeal arises from a jury verdict finding Appellant liable in bailment for the loss of its employees' work tools which were stolen from the Appellant's premises. For the following reasons, we affirm the judgment of the trial court.

{¶2} Appellant, DiPaolo Truck Service, Inc., operates a service garage which repairs and services cars and large machines. Appellant required that its employee mechanics furnish their own tools. At the employees' option, they were permitted to leave their toolboxes and equipment at the garage or to take these tools home with them as needed. Some employees chose to leave their toolboxes at the garage for the sake of convenience. However, Appellant did not require that tools be kept on their premises as long as they were available to the employees for their work.

{¶3} Appellant employed Appellees, Scott Templeton and Robert Novak, as mechanics. On September 23, 1993, Appellees filed a bailment and contract action after the theft of their tools from Appellant's garage over Labor Day weekend, 1992.

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Appellees alleged that since their tools were left at Appellant's garage, a bailment was created. Appellees also claimed that Appellant represented to them that Appellant had adequately insured the tools.

{¶4} Trial of this matter began on December 5, 1997. At the conclusion of Appellees' case in chief, the trial judge ruled that the issue as to whether a contract for Appellant to provide adequate insurance existed would not be submitted to the jury. (Tr. pp. 151-152). The jury returned a verdict in bailment for Appellee Scott Templeton in the amount of \$17,000.00 and for Appellee Robert Novak in the amount of \$10,000.00.

{¶5} On December 18, 1997, Appellant filed a motion notwithstanding the verdict and a motion for a new trial. The trial court had yet to rule on the pending motions when Appellant filed a notice of appeal on February 13, 1998. On February 26, 1998, the trial court ordered a stay of execution.

{¶6} On August 11, 2000, this Court filed a journal entry noting that the appeal appeared to be untimely as there was no record that the trial court had ruled on Appellant's post-judgment motions. Accordingly, we ordered Appellant to advise the Court of the status of the lingering motions and for the reason for delay between the jury verdict and the notice of appeal. On August 24, 2000, Appellant filed with this court a

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motion to correct the record with an attached *nunc pro tunc* judgment entry filed by the trial court which overruled Appellant's motions as of January 26, 1998. This court granted Appellant's motion to correct the record in a journal entry filed on January 18, 2001.

{¶7} Appellant raises three assignments of error, the first two stating multiple issues. Appellant's first assignment of error alleges:

{¶8} "THE DECISION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND THE LAW OF OHIO."

{¶9} Appellant's first sub-assignment here states:

{¶10} "A. THE FACTS DO NOT ESTABLISH A BAILMENT FOR MUTUAL BENEFIT."

{¶11} Appellant contends that the trial court specifically instructed the jury that the relationship between the parties was a bailment for mutual benefit. Appellant claims that this was clear error and that it is the province of the jury and not the judge to find that a mutual bailment relationship existed between the parties. Appellant argues that there is no evidence that Appellant required Appellees to leave their tools at the garage overnight. Appellant also argues that there is no evidence that Appellees delivered the tools to Appellant and that Appellant accepted them for safekeeping. Appellant concludes that in the absence of proof of delivery of the tools, Appellant was not obligated to return them to Appellees.

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{¶12} Appellant states as its second sub-assignment:

{¶13} "B. EVEN IF THERE WAS A BAILMENT FOR MUTUAL BENEFIT, DiPAOLO EXERCISED ORDINARY CARE UNDER THE CIRCUMSTANCES, AND THEREFORE, IS LEGALLY EXCUSED FROM RETURNING THE TOOLS TO THE PLAINTIFFS."

{¶14} Appellant contends that even if a prima facie case of bailment was established, the precautions taken by Appellant to prevent the theft at the garage excused their failure to deliver Appellees' tools. Appellant asserts that it was under a duty to exercise ordinary care in order to keep Appellees' tools safe and that it was legally excused for the theft of the tools since they were lost without fault or lack of due care on the part of Appellant.

{¶15} Appellant insists that the common law duty of care owed by a bailee is codified in R.C. §§1307.09(A) and .27(A), and states that the bailee must only exercise ordinary care in protecting and keeping safe the bailed goods and in redelivering the subject of the bailment. These statutes cited by Appellant actually refer to the duties and obligations of warehousemen as defined in R.C. §1407.01, "* * * a person engaged in the business of storing of goods for hire." Nonetheless, Appellant argues that the record supports that it instituted enhanced security measures, including double-locked garage doors and windows secured with bars, which far surpasses the duty it may owe to Appellees.

{¶16} For its third sub-assignment, Appellant states:

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{¶17} "C. EVEN IF THERE WAS A BAILMENT FOR MUTUAL BENEFIT, DiPAOLO MET ITS BURDEN OF GOING FORWARD WITH THE EVIDENCE TO ADEQUATELY EXPLAIN ITS FAILURE TO REDELIVER THE TOOLS TO PLAINTIFFS."

{¶18} Appellant states that once a prima facie case of bailment was established, the burden of going forward shifts to the bailee to explain the failure to redeliver the goods. According to Appellant, once the bailee has explained his failure to redeliver the goods, the burden of proof is upon the bailor to prove the bailee was guilty of negligence or want of due care. Appellant contends that ample evidence was presented establishing reasonable care in securing the garage premises. This, Appellant claims, was actually admitted by Appellee Templeton who testified that there was nothing Appellant could have done differently in securing the garage. (Tr. p. 133).

{¶19} In addressing Appellant's arguments under this first assignment of error, we note that in addition to raising a manifest weight of the evidence argument, Appellant alleges that the trial court improperly instructed the jury that a bailment for mutual benefit existed. As Appellant raises this same allegation in its second assignment of error, we will address the matter when reaching its second assignment.

{¶20} With respect to the claim that the judgment was against the manifest weight of the evidence, Appellant's argument lacks merit based on the record and the relevant law.

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It is well settled that when there exists competent, credible evidence which goes to all of the material elements of the case, a court of appeals must not reverse a judgment as being against the manifest weight of the evidence. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. If the evidence is susceptible to more than one interpretation, we must give it the interpretation which is consistent with the trial court's judgment. *Motors Corp. v. City of Pepper Pike* (1995), 73 Ohio St.3d 581, 584. While an appellate court is bound to reverse a judgment that is against the manifest weight of the evidence where the case arises, an appellate court must indulge every reasonable presumption in favor of the lower court's judgment and resolution of the facts. *Seasons Coal Co., Inc. v. Cleveland*, 79-80. "The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the [trier of fact] is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co., Inc. v. Cleveland*, 80.

{¶21} As to the issues raised in Appellant's many sub-assignments, it is clear that:

{¶22} "Bailment exists where one person delivers personal property to another to be held for a specific purpose with a contract, express or implied, that the property shall be returned or accounted for when this special purpose is accomplished or retained until the bailor reclaims the property. The duty of the bailee

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is to hold the property in accordance with the terms of the bailment."

{¶23} *Tomas v. Nationwide Mut. Ins. Co.* (1992), 79 Ohio App.3d 624, 628. A bailment may be for the benefit of only the bailor, only the bailee or for the mutual benefit of both. *Id.*, 629. The failure of a bailee to return the bailed property undamaged creates an action either in contract or in tort. *David v. Lose* (1966), 7 Ohio St.2d 97, 98-99. To establish a prima facie breach of bailment duty, the bailor must prove that he had a contract for bailment, he delivered the bailed property and the bailee failed to return the property undamaged. *Id.*, 99.

{¶24} "In an action by a bailor against a bailee based upon a breach of the contract of bailment, where the bailor proves delivery of the bailed property and the failure of the bailee to redeliver upon legal demand therefor, a prima facie case of want of due care is thereby established and the burden of going forward with the evidence shifts to the bailee to explain his failure to redeliver."

{¶25} *Id.*, 99-100, quoting *Agricultural Ins. Co. v. Constantine* (1944), 144 Ohio St. 275, paragraph four of the syllabus.

{¶26} "[T]he question is not whether the plaintiff has established negligence but whether the defendants have established a legal excuse for breach of the contract." *David v. Lose, supra*, 100. The exercise of due care is recognized as a legal excuse for failure to redeliver bailed property. *Id.*,

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99. With respect to the bailee's duty to redeliver, "* * * it is erroneous to say that a bailee is liable for negligence. He is liable for not delivering the subject of the bailment, but is excused if it has been lost without fault or want of care on his part." *Id.*, quoting 8 American Jurisprudence 2d, Bailments, Section 166. In establishing the want of due care on the part of the bailee, several things must be considered and weighed by the factfinder; the presumption arising from the bailee's failure to deliver, his explanation of the circumstances surrounding such failure and any evidence offered in rebuttal. *Midwestern Indem. Co. v. Winkhaus* (1987), 42 Ohio App.3d 235, 236.

{¶27} In the present matter, there was competent, credible evidence that a bailment existed. First, it is not disputed that Appellee's tools were kept at and stolen from Appellant's garage. Appellee Novak testified that he was required to provide his own tools to work for Appellant. (Tr. p. 58). Novak also testified that there was no requirement that his tools be kept at Appellant's premises. (Tr. p. 89). However, Novak testified that it was impractical to transport his tools to and from work everyday. (Tr. p. 75). Appellee Templeton also testified that he was required to provide his own tools. (Tr. p. 106). Templeton further testified that there was no express direction whether tools must be left at the premises or that they be transported on a daily basis. (Tr. p. 108).

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Templeton stated that he would take some tools home at night but that he never took his entire tool box from the garage. (Tr. pp. 108-109). Most importantly, Maria Nickerson, Appellant's manager, testified that Appellant permitted employees to leave their tools on Appellant's premises, although they were not required to do so. (Tr. pp. 159-160). From this evidence, one can infer that a bailment existed, as Appellant accepted storage of Appellees' tools for safekeeping and convenience. It can further be inferred from the theft of the tools that Appellant failed to redeliver the bailed goods.

{¶28} As noted, upon the establishment of a prima facie breach of bailment, the burden shifts to the bailee to establish a legal excuse for failure to redeliver. *David v. Lose, supra*, 100. In the matter before us, the record contains evidence that Appellant exercised some care in protecting its premises from theft. There is evidence that the office door had a deadbolt lock and a garage door had a lock placed in the roller guide track so that the door could not be lifted. (Tr. pp. 65-66). There was testimony that some windows were covered with security bars. (Tr. p. 70). However, the record reflects that the window broken on the night of the theft did not have bars. (Tr. p. 70). This window measured four feet by eight feet in size and was four feet from the ground in an unlighted area. (Tr. pp. 68-69). Further, the testimony revealed that the premises had no security system. (Tr. p. 71).

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{¶29} Although there was evidence that Appellant exercised some care, it was reasonable to conclude that Appellant failed to exercise "due care" under the circumstances. This is especially so when considering evidence that not all windows were barred and that there was no security system. As we must defer to the judgment of the finder of fact with respect to interpretation of the evidence, we must overrule Appellant's challenge that the judgment was against the manifest weight of the evidence. See *Seasons Coal Co., Inc. v. Cleveland*, *supra*, 80.

{¶30} Appellant's second assignment of error alleges:

{¶31} "AN ACCURATE AND COMPLETE JURY INSTRUCTION SHOULD HAVE BEEN GIVEN BY THE TRIAL JUDGE."

{¶32} Appellant states as its first sub-assignment under this issue that:

{¶33} "A. THE TRIAL COURT'S CHARGE TO THE JURY MISLED THE JURY AND CREATED PREJUDICIAL ERROR BECAUSE THE JURY WAS INSTRUCTED THAT THE RELATIONSHIP BETWEEN THE PARTIES WAS A BAILMENT FOR MUTUAL BENEFIT"

{¶34} Appellant contends that the trial court inappropriately removed from the jury's province the opportunity to determine the type of bailment involved. Rather than allowing the jury to determine whether the bailment was compensated, uncompensated, imposed by law, a bailment for mutual benefit or even a bailment at all, Appellant contends that the court instructed the jury that the relationship between

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the parties was a bailment for mutual benefit. In addition, Appellant contends that if the jury had determined that the bailment was gratuitous, or created by operation of law, then the standard of care would have been gross negligence as opposed to that of a reasonably prudent person, which is the standard for a bailment of mutual benefit.

{¶35} As raised in its first assignment of error, Appellant restates that the trial court erroneously instructed the jury that a bailment had been created and further instructed them as to the type of bailment. Because of the trial court's actions, Appellant contends that they were denied an instruction which would have excused them from the duty to return the property. Therefore, Appellant charges that the trial court misled the jury and created insurmountable prejudicial error.

{¶36} Appellant's second sub-assignment states:

{¶37} "B. THE TRIAL COURT'S FAILURE TO PROPERLY INSTRUCT THE JURY REGARDING HOW TO RETURN A VERDICT FOR THE DEFENDANT AND ON THE ISSUE OF LEGAL EXCUSE MISLED THE JURY AND RESULTED IN PREJUDICIAL ERROR."

{¶38} Appellant argues that, assuming the trial court was correct in its determination that a mutual benefit bailment existed, the trial court's jury instructions misled the jury and resulted in prejudicial error by failing to include instructions on legal excuse for failure to return the bailed property.

{¶39} Appellant's third sub-assignment states:

{¶40} "C. PREJUDICE MUST BE PRESUMED BECAUSE THE

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TRIAL COURT'S CHARGE IMPOSED A GREATER BURDEN ON the
DEFENDANT THAN THE LAW REQUIRES."

{¶41} Appellant asserts that in cases where the margin of proof is finely drawn or where Appellant has presented evidence of a nature and quality sufficient to raise a defense before the jury, a party will be presumed to have been prejudiced when the trial court places upon him or her a greater burden of proof than was required by law. Appellant states that in light of its reasonable precautions, the charge given to the jury erroneously imposed liability upon Appellant for the unauthorized and criminal acts committed after hours in the theft of the tools from the premises. Appellant claims that the trial court instructed the jury that, "if you find by a greater weight of the evidence that Defendant failed to exercise the required duty of care for the safekeeping of the property, that such failure is the approximate cause of loss to the Plaintiffs, then your verdict may be for the Plaintiff." (Appellant's Brief, p. 13). Appellant contends that the trial court's instruction represents only one half of the suggested jury instruction prescribed by O.J.I. Civil, Chapter 229, Bailments, 229.02, 5. Conclusions p. 80. According to Appellant, the trial court should have instructed the jury that it may have found in Appellant's favor if it found that the evidence was equally balanced on relevant issues or if it found that the loss was not proximately caused by Appellant.

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{¶42} Due to Appellant's oversight, we must find that this assignment of error lacks merit, as well. All of the issues argued here require our review of the jury instructions given by the trial court. However, Appellant has failed to provide this Court with a transcript of those instructions contrary to the clear duty imposed by App.R. 9(B). Moreover, Appellant has not provided any alternative to a transcript pursuant to App.R. 9(C) or App.R. 9(D). It is well settled that, "[w]hen portions of the transcript necessary for resolution of assigned errors are omitted from the record, then a reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. While Appellant apparently requested that a "complete" transcript be prepared, the transcript submitted by it to this Court is devoid of both voir dire and the jury charge. As this is clear upon the face of the transcript, Appellant knew or should have known that no jury instructions were provided to this Court. Accordingly, we must overrule Appellant's second assignment of error and its sub-assignments.

{¶43} Appellant's third assignment of error states:

{¶44} "IT IS REVERSIBLE ERROR FOR A TRIAL COURT TO ALLOW THE INTRODUCTION OF EVIDENCE OF INSURANCE, AND THEREFORE, THE JUDGMENT MUST BE REVERSED AND THE CAUSE REMANDED FOR A NEW TRIAL."

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{¶45} Appellant argues that in light of the fact that the trial court declined to submit any insurance issue to the jury, the trial court erroneously permitted the introduction of evidence that Appellant was to provide insurance coverage against the loss of its employees' tools. Appellant notes specifically that on two occasions, the trial court permitted evidence of insurance over Appellant's objections. (Tr. pp. 31-32). Appellant also specifically challenges the submission of a letter from Appellant to its insurance agent. (Tr. pp. 102-104). In addition, Appellant points to several general references to evidence of insurance coverage it claims should not have been allowed before the jury. (Tr. pp. 50, 75-77, 106, 110). Appellant contends that the trial court should have issued cautionary instructions to the jury at the time the evidence or testimony was raised. Appellant argues that the prejudicial effect of the trial court's errors is demonstrated in a number of juror affidavits which Appellant submitted with its motion for a new trial. Appellant asserts that the affidavits show that introduction of insurance evidence unduly influenced the jury. Those affidavits indicate that jurors considered, when deliberating, evidence that Appellant was allegedly inadequately insured.

{¶46} In finding that this assignment of error also lacks merit, we must first note that we are unable to review any

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apparent argument by Appellant concerning the alleged failure of the trial court to issue curative instructions when charging the jury. The record contains no proposed jury instructions and, as noted earlier, no transcript of the actual jury instructions have been provided to this court. In light of the incomplete record, a meaningful review of this matter is precluded. *Knapp v. Edwards Laboratories, supra*, 199.

{¶47} With respect to Appellant's apparent argument that the trial court erroneously permitted evidence of insurance coverage during the course of the trial, we are baffled by Appellant's assertions. As noted earlier, Appellees' complaint alleged a breach of contract wherein they alleged that Appellant was to provide insurance coverage for Appellees' tools. As such, the existence and extent of insurance coverage was in issue at trial. Also, in addressing Appellant's argument, we must state that it is well settled that error may not be predicated upon the admission of evidence unless a timely objection or motion to strike appears on the record. This objection must state the specific grounds for the objection if the grounds are not apparent from the context. Evid.R. 103(A)(1).

{¶48} Our review of the record indicates that Appellant raised an objection in only two of the instances noted in its brief before us. First, during the testimony of a former employee, Appellant objected to questioning regarding the

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witness's experience as a mechanic and whether other employers had provided insurance. (Tr. pp. 31-32). Appellant's specific objection was that the witness was not a qualified expert. (Tr. p. 31). The trial court overruled the objection and permitted the witness to answer based on his work experience. (Tr. p. 31). As noted, Appellant objected to the witness' qualification as an expert. The trial court permitted the witness to answer based on his personal experience. Appellant did not object on any other grounds, and specifically did not raise the objection that the answer may be misleading, confusing or prejudicial. Moreover, evidence of insurance was clearly relevant to the proceedings at the time of this objection, as the trial court had not yet determined that the insurance issue would not be submitted to the jury. We are mindful that the admission of evidence is within the sound discretion of the trial court. *Wyant v. Marble* (1999), 135 Ohio App.3d 559, 563. An appellate court will not disturb a trial court's admission of evidence absent an abuse of discretion which term implies that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Id.* Based on the record presented, we cannot find that the trial court abused its discretion in this instance.

{¶49} Appellant next objected to a question posed to the same former employee regarding that employee's expectations of insurance coverage provided by Appellant. (Tr. p. 50). Appellant specifically objected to the relevance of the

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question. (Tr. p. 50). The trial court immediately sustained the objection, precluding an answer from the witness. (Tr. p. 51). In Ohio, the failure to request a curative instruction at the time error can be avoided precludes any claim of error on appeal. *Whitenight v. Dominique* (1995), 102 Ohio App.3d 769, 771. Appellant did not request a curative instruction following his sustained objection to the question here. Accordingly, Appellant has waived any error in that regard, to the extent that error might exist.

{¶50} It is abundantly clear that Appellant has also waived any error regarding the remaining instances cited by Appellant where the trial court permitted certain evidence or testimony as to insurance. Appellant raised no objection in any other instance and subsequently, requested no curative instructions. Regardless, as noted earlier, the matter of a contract to provide insurance was at issue until the trial court determined that it could not be submitted to the jury, and the trial court was within its discretion to make such a determination. Moreover, the record contains no request, at any stage of the proceedings, that the trial court instruct the jury to disregard any evidence of insurance which it may already have heard. Accordingly, we find that this assignment of error lacks merit.

{¶51} As noted earlier, Appellant refers this Court to affidavits obtained from jurors in relation to Appellant's motion for judgment notwithstanding the verdict and its motion

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for a new trial wherein Appellant argued that jurors disregarded the trial court's instructions. While those affidavits indicate that some jurors may have considered the insurance evidence, Appellant has not appealed the trial court's rulings on those motions and Appellant has not provided this Court with a complete record in order to allow us to adequately review this issue even if the denial of those motions was properly appealed.

{¶52} For all the foregoing reasons, we affirm the judgment of the trial court.

Donofrio, J., concurs.

DeGenaro, J., concurs.