

1949

# W. J. Treadway, Veda Gene Treadway, and J. E. Treadway dba Kenneth Sales Company v. Heber Glenn : Brief of Appellant

Utah Supreme Court

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E. L. Schoenhals; Attorney for Appellant

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# In the Supreme Court of the State of Utah

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W. J. TREADWAY, VEDA GENE  
TREADWAY, and J. E. TREADWAY,  
co-partners doing business  
under the firm name and style  
of KENNETH SALES COMPANY,  
*Plaintiffs and Respondents,*

vs.

HEBER GLENN,  
*Defendant and Appellant.*

Case  
No. 7417

APPELLANT'S BRIEF

**FILED**

17 1949

CLERK, SUPREME COURT, UTAH

E. L. SCHOENHALS,  
*Attorney for Appellant.*

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## ASSIGNMENTS OF ERROR

1. Error in Court refusing defendant the right of cross-examination.

2. Error in Court's refusal to permit evidence of warranty.

3. Error in Court taking position that response to leading questions would be ignored whether objected to or not.

4. Error in Court's failure to impose duty on vendor to furnish equipment that would sustain its own weight and refusal to impose liability for damages directly and naturally resulting therefrom in the ordinary course of events.

5. Error under the facts submitted to impose duty on vendor to furnish equipment capable of moving items of weight represented by vendee to be moved.

6. Error in Court's refusal to apply the law charging vendor with damages sustained directly and naturally and within the contemplation of the parties.

7. Error of the Court in finding that the defendant vendee was warned of probable failure of performance because of long wheel base since same is contrary to the evidence.

8. Error of the defendant in finding vendee had requested the truck delivered since such finding is contrary to the evidence.

9. Finding that vendee could have corrected the defective equipment is contrary to the evidence and such finding cannot sustain the judgment being contrary to the law.

10. Error in the Court finding that vendee knew what the difficulty was or could have known by the exercise of reasonable diligence and error in concluding as a matter of law that such a finding would sustain the judgment as entered.

## STATEMENT OF FACTS

Defendant and counter-claimant was a contractor engaged in road building for about 25 years, R 87. Plaintiff operated an automotive truck sales agency in Salt Lake City, Utah, R 77. Defendant entered into negotiations for the purchase of a truck, in response to an advertisement, with an agent of the plaintiff, R 88, 89. The truck was to be used in road building work and defendant specified the particular type of a truck, referred to in the transcript as one like the "Strong" truck, or "Strong & Grant" truck. This truck was understood by the parties to be capable of hauling a 25 ton Cat., R 92, 93, 94, 95, 96, 97, 178, 250, 288, 289, 290, 293. The plaintiffs had sold the particular "Strong" truck in question, and the defendant had seen the same and ordered one exactly like the "Strong" truck, see Exhibit 1 for contract of sale, and R 136, 289, 370. Thereafter plaintiff approached defendant and indicated that the truck plaintiff had sold defendant might not be entirely satisfactory, and that defendant should have a different type truck costing several thousand dollars more and recommended and urged defendant to buy a truck of the size and dimensions suggested by plaintiff, R 98, 99, 370, 374, 560. Plaintiff went out to the place where defendant kept all of his equipment to measure some other equipment and saw the equipment, including the tanks and shovels and Cats., and recognized that this equipment was to be used and hauled, and at the time of examination it was within the contemplation of the parties that the truck ordered would satisfactorily handle the equipment on the premises, R 100, 101, 103, 521, 522. Defendant acquiesced and permitted plaintiff to place the order for the newly suggested truck costing \$16,522.00 and cancelled the order

for the truck originally ordered under Exhibit 1, upon the recommendations of the plaintiff that he do so, R 99, 100, 101, 103, Exhibit 1.

Trucks were very hard to secure and purchase and it was almost impossible to buy one without waiting a year or more for delivery of same, R 111, 532. Defendant received delivery of the truck and each time he attempted to use the same the front tires would blow out and they would get so warm that they would catch on fire and burn because of the excess weight on the front end, R 121, 122, 125, 126. Front tires blew out when the truck was empty, R 125. The front tires would blow out because of the truck being improperly designed and the weight all shifted onto the front, R 123. Because of the long wheel base the drive shafts were so long that they would whip and tear out, R 116, 118, 120, 193, and the defendant did replace them and sued for the recovery for replacing these drive shafts on the improperly designed truck, R 6. The defendant did not know what was wrong with the truck, or what caused tires to blow out, R 113, 545. Both plaintiff and defendant weighed the front end of the truck at the suggestion of a tire dealer who refused to sell new tires to be used on the truck, which weighing was done prior to the time that defendant sustained damage caused by the plaintiff, R 128, 129, 130. The tire dealer told plaintiff and defendant the front end was overloaded when empty and gave this as the reason why he would not sell new tires for the truck. The plaintiff was not skilled in truck designing and the plaintiff purported to be skilled and represented himself as an authority on the matter, and the tire dealer indicated that the tires would blow out if the truck were operated empty since the front was overloaded when driven empty, R 128, 129, 130.

Plaintiff had a contract for hauling 63 carloads of oil for road building near McGill, Nevada, which oil was to be hauled in the late summer of 1947, and plaintiff was fully informed of the oil hauling contract, R 103, 139, 140. It cost the defendant to haul this oil by rail \$25,834.00, see Exhibit 4 and R 140. Defendant could have hauled the same by using this truck, had the truck been properly designed, as it was later changed and redesigned, for a total cost to the defendant of \$5,000.00, which would include depreciation, costs of operation and all costs for the hauling of the entire 63 carloads of oil, R 168, 145, 146, 147, 338. The oil was hauled subsequent to June of 1947, and the defendant was thereby damaged in the sum of \$20,000.00, being the difference between what it cost the plaintiff to haul the oil by rail, Exhibit 4, and what the oil could have been hauled for, had the truck been so built as to permit the hauling of the same, or had it been altered, as it was later altered in design, to permit satisfactory operation. The truck purchased from the plaintiff was required to remain idle from the time it was purchased until it was redesigned. After the oil had been hauled by rail and after many contacts requesting that the truck be redesigned vendor plaintiff received a newly designed truck which was of the same general construction except that it was engineered and designed and properly balanced. Plaintiff vendor told defendant that this was a newly designed truck properly balanced and that he could bring his truck in now and that they could redesign the truck using the newly designed truck on the floor as a sample, R 392, 393, 514, 515, 519. This remodeling and redesigning of the truck consisted of the cutting off of 5 feet of the frame and changing four drive shafts, R 173, 177, 387, 388. The redesigning and rebalancing of the chassis using the



other truck as a model was done without cost to the defendant vendee and took 40 days, R 133, 363, 394. After the redesigning the truck operated satisfactorily and hauled a carload of oil on each trip and all other equipment that had been represented to be hauled, R 132, 143, 173. The same month that the truck was redesigned at no cost to the defendant vendee a new set of tires was supplied to replace the old ones, R 6. Plaintiff sued to recover for the tires that were so supplied to the truck and for the repairs to the drive shafts that went out while the truck was practically new and was awarded judgment therefore in the sum of \$1,579.00, R 6, 60.

Defendant claimed that the tires and drive shafts were merely making good the guarantee on the truck, R 116, 119, 120, 300, and that defendant had been damaged and counter-claimed for \$20,000.00 claiming that it was within the contemplation of the parties that the truck would be used for road building and that the fact that the truck would not permit the hauling of oil or the hauling of any weight resulted in \$25,000.00 being expended to haul the oil when the same could have been hauled for \$5,000.00, had the truck been properly designed, R 29, 33, or had the same been redesigned prior to June or July in the year the oil was hauled.

The Court refused to permit the claims of the defendant with respect to tires or parts as coming within the guarantee and also denied defendant's right to recover any damages for selling a truck improperly designed, or for furnishing a truck that would not move any weight without blowing out its tires.

Defendant vendee could not change the design without taking a chance of violating a notice that drilling of any holes in the frame destroyed the warranty, R 516. De-

fendant vendee had demanded alterations to be made to permit satisfactory operations fifty times, R 542, and had done so in May prior to any damage sustained and sued for R 133, and had refused to pay for the drive shaft installations, claiming and requesting modifications prior to any damage sustained, R 116, 119. Plaintiff vendee admitted certain guarantee, R 300 ,and that the company never did advise against building the truck under specifications requested by vendor or plaintiff, R 385.

# In the Supreme Court of the State of Utah

W. J. TREADWAY, VEDA GENE  
TREADWAY, and J. E. TREADWAY,  
co-partners doing business  
under the firm name and style  
of KENNETH SALES COMPANY,  
*Plaintiffs and Respondents,*

vs.

HEBER GLENN,  
*Defendant and Appellant.*

No. 7417  
Case

## SUMMARY OF FACTS

Defendant and Counter-claimant was a contractor engaged in road building for more than 17 years. The plaintiff operated an automotive truck sales agency in Salt Lake City, Utah. Defendant entered into negotiations for the purchase of a truck in response to an advertisement with an agent of plaintiff. The truck was to be used in road building work and defendant specified the particular type of a truck referred to in the transcript as one like "the Strong Truck," or "Strong & Grant Truck." This truck was known by all parties to be capable of hauling a 25 ton Cat. The plaintiff had sold the particular "Strong" truck in question and the defendant had seen the same and ordered one exactly like the "Strong" truck, Exhibit 1. Thereafter, the plaintiff approached defendant and indicated that plaintiff's

agent had sold defendant a truck that might not be entirely satisfactory and that he should have a different type truck costing several thousand dollars more, and recommended and urged him to buy a truck of size and dimensions suggested by the plaintiff. The plaintiff went out to the place of business of the defendant to measure the equipment and saw the tanks that were to be put on the truck and the Cats. and shovels and equipment that was to be used at the time of making the suggestion, and it was within the contemplation of the plaintiff and defendant that the truck was to be used for the hauling of oil in the tanks and for the use by defendant in his road building work, and that the truck would at least haul 25 tons. Defendant acquiesced and permitted plaintiff to place the order for the newly suggested truck costing \$16,522.00 and cancelled the order for the truck ordered under Exhibit 1 upon the recommendations of the plaintiff that he do so. Trucks were very hard to secure and purchase and it was almost impossible to buy one without waiting for a year or more to secure delivery of the same.

Defendant received delivery of the truck and each time he attempted to use the same the front tires would blow out whether the truck was empty or loaded and the drive shafts were so long they would whip and break down and broke down on two occasions, requiring installations and repairs. The plaintiff installed the new drive shafts and discussed with the defendant the difficulties in connection with the blowing of tires when riding empty prior to the time of the damages sustained by the defendant for which defendant counter-claimed for damages. The defendant did not know what was wrong with the truck or what caused the tires to blow out. Both plaintiff and defendant weighed the front end of the truck at the suggestion of a

tire dealer who refused to sell new tires for the truck prior to the time that any damages were sustained by defendant and determined that there was too much weight on the front end of the truck. The tire dealer told plaintiff and defendant the front was overloaded when empty and gave this as the reason why he would not sell new tires for the truck. The defendant was not skilled in truck designing, and the plaintiff purported to be skilled and represented himself as an authority on the matter.

The plaintiff had a contract for hauling 63 carloads of oil for road building near McGill, Nevada, which oil was to be hauled in the summer of 1947. It cost the defendant to haul the same by railroad \$25,834.00, Exhibit 4. Defendant could have hauled the same by his truck, had the truck been properly designed, as it was later changed and as redesigned for a cost of \$5,000.00, which would include depreciation and all costs of operation of the truck for hauling the entire 63 carloads of oil. The oil was to be hauled subsequent to June, 1947, and defendant was thereby damaged in the sum of \$20,000.00, being the difference what it cost to haul and what the oil could have been hauled for, had the truck been so built as to permit the hauling of the same. The truck purchased from the plaintiff was required to remain idle all this time because it could not be operated without blowing out the front tires. After the oil had all been hauled by rail plaintiff vendor had another truck delivered to his place of business which was the same truck in almost each respect as that delivered to defendant except that it was properly designed, weight balanced and had a shorter wheel base. This newly designed truck was delivered to plaintiff's place of business about one year after defendant had received the truck involved in this litigation. After having made many demands the plain-

tiff took the defendant's truck into his place of business and used the other newly designed truck as a design and model to redesign and shorten the wheel base of the truck that had been sold to the defendant. This remodeling and redesigning of the truck consisted of the cutting off of five feet of the frame ,the moving of the rear wheel assembly forward and the changing of the four interconnecting drive shafts. This redesigning and the rebalancing of the chassis was done without cost to the defendant and thereafter the truck operated satisfactorily and hauled a carload of oil on each trip. The same month the truck was redesigned at no cost a new set of tires was supplied to replace the old ones. The plaintiff sued to recover for the tires that were so supplied to the truck and for the repairs to the drive shafts that went out while the truck was practically new and was awarded judgment therefore in the sum of \$1,579.00.

Defendant claimed that the tires and the drive shafts were merely making good the guarantee on the truck, and that the defendant had been damaged and counter-claimed for \$20,000.00, claiming that it was within the contemplation of the parties that the truck was to be used for road building and that the fact that the truck would not permit the hauling of the oil, or hauling of anything even its own weight, resulted in \$25,000.00 being expended to haul the oil when the same could have been hauled for \$5,000.00, had the truck operated properly or had the same been redesigned prior to June or July. The lower Court refused to permit the claims of the defendant with respect to the furnishing of the tires or the parts as coming within the guarantee and also denied defendant's right to recover any damages for the improper designing of the truck, or furnishing a truck that would not even move its own weight.

## ARGUMENT

### POINT ONE

#### *ERROR IN REFUSING DEFENDANT RIGHT OF CROSS-EXAMINATION.*

The plaintiff was suing for the items listed in the Bill of Particulars, R 6. These items included a set of tires, involving over One Thousand Dollars, and the replacing of two sets of drive shafts. The defendant should have been entitled to cross-examine the plaintiff on the issue of whether the tires were second grade war tires or whether they were merely replacing tires blown out by improper designing of the truck and whether they were factory replacements without cost to plaintiff, whether or not the drive shafts as replaced were replaced within the period that the plaintiff had guaranteed the truck. What the guarantee consisted of. Whether it was for a year or ten thousand miles of operation that the guarantee extended. Whether or not the extreme length of the truck, together with the extra long interconnecting drive shafts caused a whipping motion, tearing the same out and whether this should have been replaced by the plaintiff under factory guarantee, or under a guarantee from the plaintiff as the dealer. Whether the factory paid for the tires or parts.

Note that at R 82, when the Court sustained an objection and defendant's attorney attempts to explain the reason for the request to continue, the Court sharply interrupts the attorney for the defendant, refuses to permit him to even give his reasons, or continue cross-examination with the sharp response, "The Court has ruled, Mr. Schoenhals. You may proceed." Note also that the Court in its ruling did not extend to counsel the usual courtesy of permitting him to complete his reason for cross-examination, the re-

porter indicating by dashes that the Court was talking at the same time that the attorney for the defendant was talking. Counsel for defendant has never heretofore experienced or even heard of a case where the defendant was so curtly denied the right of cross-examination without being even permitted to give to the Court the reasons therefore and being stopped in the middle of a sentence of explanation and notified that the Court had ruled.

70 C. J. p. 611

“§779 A party has a right to cross-examine witnesses who have testified for the adverse party and this right is absolute and not a mere privilege 33 and, unless subject to cross-examination, a witness cannot testify, 34 and it is not within the discretion of the Court to say whether or not the right will be accorded 35 \* \* ”

There are many cases cited, among them a Utah case, as well as an A. L. R. citation.

70 C. J .p. 615

“§ 782 The right to cross-examine witnesses \* \* being absolute, 76 it should not be abridged 77 \* \* ”

Note also that again another Utah case is cited.

58 Am. Jur. p. 340

“§ In a judicial investigation the right of cross-examination is absolute and not a mere privilege of the one against whom a witness may be called 19.”

Note here a Utah case is cited.



58 Am. Jur. p. 340

“§ 612 It is generally held that he is entitled to have the direct testimony stricken from the record.”

Here we see again that the Court goes so far as to hold that the evidence given by the plaintiff must be disregarded unless cross-examination is granted. These cases go further than saying it is an abuse of discretion and hold that it is mandatory to permit cross-examination. The manufacturer might have supplied the parts and tires without cost to plaintiff and instructed him to supply same to defendant without cost. Yet plaintiff forces defendant to pay for same since defendant is not permitted to cross-examine.

#### **POINT TWO**

#### ***ERROR IN REFUSAL TO PERMIT EVIDENCE OF WARRANTY.***

At R 88-89, after having been denied the right of cross-examination, the defendant, in attempting to introduce into the evidence an advertisement in which the vendor holds himself out as a designer of trucks and building trucks to handle any situation, the defendant is again precluded from introducing into the evidence or even examining on the question. That such evidence was material and properly admissible.

See:

55 C. J. p. 683, § 686

#### **POINT THREE**

#### ***ERROR IN COURT TAKING POSITION THAT RESPONSE TO LEADING QUESTIONS WOULD BE IGNORED WHETHER OBJECTED TO OR NOT.***

At R 104 the Court announced, “I disregard answers

to leading questions whether they are objected to or not.” For the Court to make such a pronouncement places the attorney representing a client in a position where he is unable to tell which evidence the Court is going to ignore and which evidence the Court is going to receive. It likewise places the attorney for the client in a position where the said client feels that the Court is favoring one side over the other. The Court may be in error in holding a certain question to be leading. If the Court is in error and just ignores the response, the attorney is unable to ask a new question satisfactory to the Court to make sure certain evidence will be received. It places the attorney in a position where the attorney is fearful of proceeding and is unnerved, realizing that the Court might ignore any of the evidence introduced. If an objection is made and sustained, the attorney is then placed in a position of asking a question, or at least correcting what the Court concludes to be a leading question whether the Court is right or wrong so that counsel is certain the Court will consider the evidence. He can then properly try the case and have evidence before the Court which the Court has acknowledged as being received, rather than being ignored, without any notice to counsel that it has been ignored. The other side might welcome a few leading question to speed up the trial. Here the Court will not permit this.

#### POINT FOUR

*VENDOR REQUIRED TO FURNISH EQUIPMENT  
THAT WILL AT LEAST SUSTAIN ITS OWN WEIGHT  
OR BE RESPONSIBLE FOR DAMAGES DIRECTLY  
AND NATURALLY RESULTING IN THE ORDINARY  
COURSE OF EVENTS.*

"81-5-7 (6) The measure of damages for breach of warranty is the loss directly and naturally resulting in the ordinary course of events from the breach of warranty."—U. C. A. 1943.

The legislature has spoken and has fixed the measure of damages in cases of this kind:

ANDRUS v. HORNSBY

Tex. Civ. App. 238 S. W. 314

"Loss of profits due to the fact that a *truck and trailer* represented to have a certain capacity had a much less capacity was allowed. \* \* the buyer took the seller to the section of the country where he proposed to operate the truck, and explained to him the necessity of a truck of a given capacity in order to receive the compensation which he expected. The court said that *evidence of loss of profit was established* with reasonable certainty."

MAWHINNEY v. PORTEOUS

17 Manitoba L. R. 184

"\* \* \* the buyer is entitled as part of his damage to compensation for *loss of profits* from *delays* during the time necessarily elapsing *before* the *machine* could be *put in the condition it was warranted* to be in."

MAYFIELD v. GEORGE O. RICHARDSON  
MACHINERY CO.

231 S. W. 288, 208 Mo. App. 206

"Where a *tractor proved worthless*, the purchaser was entitled to recover the *loss of rental value* of one *season's use* of the land he was to plow, the machine having been sold for plowing purposes and warranted to pull a certain number of plows \* \* "

## EXCELLO HOSIERY MILLS v. HIRSCH

177 Atl. 96, N. J.

"I am fully satisfied from the testimony adduced on behalf of complainant that it had the orders which were to be filled by use of the attachments, and that the defendant company was apprised and knew of these orders and undertook to deliver attachments which it warranted fit and suitable for that purpose. *The defendant company is therefore liable for the special damages consisting of the loss of the profits shown to have been sustained.* \* \* "

## SURYAN v. LAKE WASHINGTON SHIPYARDS

300 Pac. 941, Wash.

" \* \* The defendant next contends that the trial court erred in the allowance of damages on items 1 to 3, inclusive. These three items of damage resulted by reason of the defendant's *breach of the implied warranty*. We have frequently laid down the rule that all damages are recoverable that can be said to have been *reasonably within the contemplation of the parties* at the time the contract was entered into as a probable result in case of a breach. \* \* "

"The defendant knew that the boat which it constructed for the plaintiff was intended for use as a fishing boat in Alaskan waters during the herring season of 1928; knew that the *fishing* season for herring in those waters was limited; and must have contemplated that, *if the boat proved unseaworthy* through its *faulty construction*, it might *become necessary*, when stress of weather arose, to jettison the cargo and seek aid in order to save the lives of the crew and bring the helpless boat into port. So far as concerns the allowance for loss of profits during the time the boat was laid up for

necessary repairs, as awarded by the trial court on item 1, it is sufficient to say that this court is committed to the doctrine that, in such a case as this, prospective profits may be the basis of recovery if they can be estimated with reasonable certainty. \* \* ”

“ \* \* From this evidence the trial court found that the plaintiff had *lost in catch* on those *two days 800 barrels*, and we *are not disposed to disturb this finding*.”

AMERICAN OIL PUMP & TANK CO. v. FOUST  
274 Pac. 323, Ore.

“ \* \* The *defendant* was entitled to *equipment which would operate*, and to *its daily use in his business*. A *return to him of the payments he had made upon the purchase price would not compensate him for his full damages*, because he had purchased the equipment for use in a business which was bringing him a profit. Both parties apparently assumed that such a pump should render service for more than five months’ time. When it ceased to operate, in the latter part of December, the defendant was unable to supply his customers with gasoline. While there is no evidence upon the subject, we assume that similar pumps could be purchased from other manufacturers, and could be installed before any great period of time had passed. The court’s instructions authorized the jury to allow the defendant compensation for such “a reasonable time within which he could have removed this pump and replaced it with a workable and usable one. \* \* \* ”

“But it is to be observed That, *in our case, there was substantial evidence to the effect that the plaintiff knew that the defendant expected to use this*

*device in the operation of a business for profit. In such instances, where the loss of profits in the event of a breach, was within the contemplation of the parties, a recovery limited to the rental value of the device may not compensate fairly for the loss sustained during the period while an efficient machine is being substituted for the defective one; the lost profits are sometimes recoverable.* Feeney & B. Co. v. Stone, 89 Or. 360, 171 P. 569, 174 P. 152. See the comprehensive note accompanying California Press Mfg. Co. v. Stafford Pack. Co., 192 Cal. 479 \* \* ”

“Such being the circumstance the court was of necessity driven to the adoption of another measure of compensation for the period of substitution of equipment. It instructed the jury that, in determining the value of the use of the pump, “you would be entitled to consider what his (defendant’s) *average earnings had been over the five or six months preceding the 27th day of December, 1925, when it appears from the evidence that the pump became unusable, merely for whatever it may be worth to you in determining what was the reasonable value of the use of the pump to the defendant.*”

\* \* We do not believe that this instruction was erroneous; \* \* ”

### LOBDELL v. PARKER

3 La. 328

“It was held that for breach of warranty on the sale of machinery for a sugar mill, due to defects which rendered it unfit for the purpose intended, might include the *loss of profits on the sugar and molasses which the buyer failed to make*; the court, however, said that these must not be valued at the price at which they could have been sold in market,

for the expense of grinding, manufacturing, carrying to market, etc., must be taken into consideration."

JORGENSEN v. GESSELL PRESSED BRICK CO.

45 Utah 31, 141 P. 460

"The measure of damages for breach of warranty is the *loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty*. This is the ordinary rule as to general damages. But there may be a recovery in a proper case *for special as well as general damages, and such damages as may fairly be supposed to have been within the contemplation of the parties as a probable result of the breach are included*."

OLIVER FARM EQUIPMENT SALES CO.  
v. RICH

42 P. 2d 604, Kan.

" \* \* The Court held that where a manufacturer sells a machine on a written order, describing it, *an express warranty of quality will not exclude an implied warranty that the machine will do the things necessarily implied by the description*. There is nothing in the express warranty which destroys the obligation of the seller to deliver the engine described in the order. *It is a matter of common knowledge that an engine that will neither develop nor sustain power is of no value*."

"Another objection was in allowing the defendant to testify that the tractor was worthless to him, and which was not stricken out on the motion of plaintiff. That was an issue in the case as made by the pleadings, and the tests were made showing that it was of no value to the plaintiff who purchased it

for work which it failed to perform. It may not be the best evidence of the fault in the tractor, but it is clear that it was not material error."

STUDEBAKER BROS. CO. v. ANDERSON

50 U. 319, 167 Pac. 663

" \* \* The defendants (the buyers) according to the undisputed testimony, applied to the plaintiff for an automobile to use for a special purpose—'something to carry people to and from the New Grand Hotel and depot.' The plaintiff's salesman met the defendants' application by representing it had just such a car, 'We have exactly what you want \* \* \* ' We think from the foregoing statements made concerning the particular car in question *something more was to be implied, as matter of law, than that the plaintiff could sell the defendants a junk pile for an automobile, and then escape liability therefor by saying such statements were only 'seller's talk' \* \* "*

No question but what plaintiff sold defendant a junk pile.

ROYAL PAPER BOX CO. v. MUNRO &  
CHURCH CO.

188 N. E. 223, 284 Mass. 446

27 — 4th D. — 1103

"Mass. 1934. *Damages* for breach of *implied warranty* that cardboard was fit for candy boxes were *not merely difference* between *value of cardboard* as it was and value as it should have been, but *included damages resulting from reasonable attempt to use cardboard prior to date when buyer acquired knowledge of its condition.* G. L., Ter. Ed., c. 106, § 17(1)."



## GARY COAST AGENCY v. LAWREY

101 Or. 629, 201 Pac. 214

"When the buyer of an *automotive truck* informed the *seller*, a dealer, of the purpose for which the truck was to be used, and the latter represented that it was fit for that purpose, there was an implied *warranty of fitness*. [Gary Coast Agency v. Lawrey (1921)] 101 Or. 629, 201 Pac. 214; Long v. Five-Hundred Co. (1923) 123 Wash. 347, 212 Pac. 559."

46 AM. JUR. 829

"§ 705. \* \* Where there is a contract to sell an article, such as a machine, for use by the buyer in the performance of a collateral contract the terms and conditions of which are known to the seller, and the contract to sell is broken by a wrongful failure or refusal to deliver or by a late delivery, which breach results in a loss of profits to the buyer in the performance of the collateral contract, such loss of profits has been regarded in some cases as being within the contemplation of the parties, and the seller has been held liable therefor<sup>6</sup> \* \* "

RUDOLPH WURLITZER CO. v.  
KAUFMAN STRAUS CO.

116 S. W. 2nd 305

" \* \* The statute, section 2651b-69, further gives to a purchaser the right to recover any loss directly and naturally resulting in the ordinary course of events from the breach of a warranty. The evidence tended to prove that the plaintiff had lost certain business by reason of the improper refrigeration of its fur storage plant, and we think this was properly submitted."

Note in the above case that with respect to the identical statute that the Court would require judgment for counter-claimant in the case at Bar.

See also:

RUSSELL v. CORNING MFG. CO., 49 Appl. Div. 610, 63 NYS 640; COHN v. BESSEMER GAS ENGINE CO., 44 Cal. A. 85, 186 P. 200; SINKER v. KIDDER, 24 N. E. 341; MAYFIELD v. GEORGE O. RICHARDSON MACH. CO., 208 Mo. A 206, 231 SW 288; WOOD v. CARLETON, 3 Silv. Sup. 509, 6 NYS 865; DENIVELLE CO. v. LEONARD KEIL, 140 NYS 150; DWYER v. REDMOND 100 Conn. 393; HACKETT v. LEWIS, 173 Pac. 111; FARMERS BANK OF TRENTON v. RAY & SON, 167 S. W. 2d 963; BRYSON v. McCONE, 121 Cal. 153, 53 Pac. 637; FINDLEY vs. BREEDLOVE, 4 Mart. N. W. (La) 105; ST. MARYS MACH. CO. v. COOK, 187 Ky. 112, 218 S. W. 733; MONACI v. TURNER et al, 98 Pac. 2d 755; LORRAINE MFG. CO. v. ALLEN MFG. CO. 234 Pac. 1055; ELCO SHOE MFG. CO. v. THATCHER, 203 N. W 669, IOWA MFG CO. v. BALDWIN, 82 S. W. 2d 994; BARRETT CO. v. PANTHER RUBBER MFG. CO., 24 F. 2d 329; AMERICAN OIL PUMP & TANK CO. v. FOUST, 274 P. 322, 128 Or. 263, LIQUID CARBONIC CO. v. COCLIN, 164 S. E. 895, 166 S. C. 400; JONES v. HOLLAND FURNACE CO., 206 N. W. 56, 188 Wis. 394; MURRAY CO. v. PUTMAN, 61 Tex. Civ. App. 517, 130 S. W. 631; CHISHOLM & M. MFG. CO. v. UNITED STATES CANOPY CO., 111 Tenn. 202, 77 S. W. 1062; AULTMAN & T. MACHINERY CO .v. CAPPLEMAN, 36 Tex. Civ. App. 523, 81 S. W. 1243; JANNEY MFG. CO. v. BANTA, 26 Ky. L. Rep. 1089, 83 S. W. 130.

There can be no question but what the damages here

sustained were within the contemplation of the parties. The evidence is conclusive that the truck would not carry its own weight without blowing out tires, much less any portion of the road building equipment. After the truck had been altered the defendant and counter-claimant was then able to use it for every purpose for which it had been intended in the first instance. Under the evidence submitted and under the law the Court should have rendered judgment for the counter-claimant for Twenty Thousand Dollars and was under obligation to do so. Exhibit 4 is conclusive evidence of the cost of \$25,834.00 to defendant. Appellee should be embarrassed to claim this as speculative damages.

#### POINT FIVE

#### *VENDOR RESPONSIBLE TO FURNISH EQUIPMENT CAPABLE OF MOVING ITEMS REPRESENTED BY VENDEE TO BE MOVED.*

The plaintiff knew that the defendant counter-claimant was in the road constructing business. On Exhibit 1 the plaintiff represented this equipment was capable of moving 25 tons, and when supplying a truck which costs thousands of dollars more than the truck described in Exhibit 1, represented that it would haul at least 25 ton or better. The evidence shows it would not even move its own weight when empty without blowing the front tires, much less 25 tons. That the front tires got so hot they smoked, R 125. From the authorities cited under Point Four, it is obvious that it was the duty of the Court to render judgment against plaintiff for Twenty Thousand Dollars on the Counter-Claim.

**POINT SIX*****VENDOR CHARGEABLE WITH DAMAGES SUSTAINED DIRECTLY AND NATURALLY RESULTING AND IN CONTEMPLATION OF THE PARTIES.***

The evidence is conclusive that the counter-claimant was in no position to secure trucks elsewhere, R 39. The counter-claimant showed by unrefuted evidence that he sustained a Twenty Thousand Dollar loss by being unable to secure any trucks elsewhere and the witness of the plaintiff himself testified that the cost of the operation of the truck was the same as that claimed by the counter-claimant, R 388, or \$5,000.00 for the 63 carloads. This means that had the Court followed the unrefuted evidence and that introduced by the plaintiff's own witnesses that the finding of \$20,000.00 for counter-claimant was mandatory.

**POINT SEVEN*****FINDING THAT DEFENDANT VENDEE WAS WARNED OF PROBABLE FAILURE OF PERFORMANCE BECAUSE OF LONG WHEEL BASE CONTRARY TO EVIDENCE.***

The evidence of the vendor is no stronger than it is left at its weakest point on cross-examination, R ~~200~~ 362.

Q. Didn't the engineer tell you it wouldn't work?

A: No, they didn't tell me it wouldn't work.

Q: Did you think it would work?

A: Yes, it did work.

Q: You think you could load 50,000 pounds on it without blowing the front tires out?

A: Yes.

Q: Do you think you could have done that the way it was built?

A: Yes.

R 218 386

Q: They didn't say the truck would be overloaded on the front wheels?

A: No.

Q: Just running it empty, they didn't say that?

A: No.

Please note that the change of mind with respect to the vendor plaintiff came only after on cross-examination, counsel requested the Court to order him to bring into Court the engineer's reports on the construction of the truck. Having realized that he must now tell the truth on this matter, he represents to the Court that the truck was engineered properly to haul 54,000 pounds. How can the Court under such evidence make a finding that vendee was warned of failure of performance when even during the trial the vendor still contends that it was satisfactory when the evidence was conclusive that the truck would blow out its front tires when riding empty? And the front end was over weight because of improper design in balance when empty. R 3

#### POINT EIGHT

#### *FINDING THAT VENDEE REQUESTED THE TRUCK DELIVERED CONTRARY TO THE EVIDENCE.*

The vendor himself at R 278 admitted that the truck ordered under Exhibit 1, in his opinion, would not have been satisfactory, and that he urged the purchase of the truck ultimately delivered. The plaintiff went to the ven-

dee's home, and suggested a truck different from that in Exhibit 1. There is not any evidence of any kind that the vendor wanted any truck other than the one described in Exhibit 1 and that he took the truck ultimately delivered only because of suggestions and representations of the vendor plaintiff.

### POINT NINE

#### *VENDEE OBLIGATED TO CORRECT DEFECTIVE EQUIPMENT IS ERROR.*

Defendant vendee was unfamiliar with large trucks and their design. Vendee did not recognize what was necessary to accomplish the balancing of the truck in the designing of same. It was not until a newly designed truck was sent down properly designed with weight balances that the vendor himself knew what was necessary to do in order to accomplish the balancing of the equipment to permit it to operate without blowing out the front tires.

#### LOUISVILLE N. A. v. SUMNER

106 Ind. 55, 5 N. E. 404

81 A. L. R. 282 at 284

*"The rule does not relate to the performance of the primary obligations of contracts. So, where one whose duty it is to do work necessary to fulfill a contract has equal knowledge of the consequences of noncompliance and opportunity to fulfill the obligation, he alone may be depended on to perform the duty, and it will not avail him to say the injured party might have performed the duty for him, and thus lessened the damages. Louisville, N. A. & C. R. Co. v. Sumner 1886, 106, Ind. 55, 55 Am. Rep. 719, 5 N. E. 404."*

The Court erred in entering finding paragraph 10, R 57. There is absolutely no evidence that defendant knew how to redesign the truck or that he could have found any one else other than plaintiff who could redesign it. Moreover, plaintiff could not redesign same until he had a model to work with. Such a finding cannot sustain the conclusion of law and the judgment. It was in error under the law as submitted in the above captioned case, as well as the facts.

#### POINT TEN

*FINDING THAT VENDEE KNEW WHAT THE DIFFICULTY WAS, OR COULD HAVE KNOWN BY EXERCISE OF REASONABLE DILIGENCE CONTRARY TO EVIDENCE.*

R 128 indicates that the vendee in attempting to purchase new tires was refused new tires and didn't know the reason therefore. R 128 indicates that the dealer thought that the weight was balanced and designed so as to throw all of the weight on the front. R 129 indicates that the vendor plaintiff and vendee defendant both went to the city scales to have the truck weighed and discovered that the design and balance was such that the truck was overloaded when empty on the front wheels each tire should carry only 5900 pounds and were required to carry 12,000 pounds with the truck empty. The fact that a model was used for redesigning of the truck to rebalance the weight indicates that the vendor designer himself didn't know how to accomplish the shifting of weights by design. The vendee had a fourth-grade education and cannot be expected to comprehend truck designing problems that the vendor himself didn't recognize. Moreover, under the

theory of the lower Court, the vendee would be required to tamper with the vehicle and place himself in a position where the vendor could then refuse to act, contending that the tampering with the design itself had relieved vendor of responsibility and had so modified the construction as to make it now impossible to properly correct the original defective design.

Vendor could have contended also that it was the tampering of the vendee that had caused the unbalanced condition. The lower Court forces vendee to tamper nevertheless or be precluded from damage.

Under the Cases Cited and the treatment afforded Appellant, the Court should grant a new trial, however since the damages suffered are so definite, and convincing and conclusive and since the law is certain and no cases to the contrary the cause should be remanded with instructions to enter judgment for defendant counter-claimant as proven for \$20,000.00 and a new trial ordered only on items sued for in plaintiff's complaint.

Respectfully submitted,

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*Attorney for Appellant.*