

1950

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

Utah Supreme Court

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Callister, Callister & Lewis; Attorneys for Respondents;

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**In the Supreme Court**  
**of the State of Utah**

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

Case No.  
7417

vs.

HEBER GLENN,  
*Defendant and Appellant.*

FILED

JAN 13, 1938

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RESPONDENT'S BRIEF

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CLERK, SUPREME COURT, UT

CALLISTER, CALLISTER & LEWIS  
*Attorneys for Respondents*

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# In the Supreme Court of the State of Utah

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*Defendant and Appellant.*

## BRIEF OF RESPONDENTS

### STATEMENT OF FACTS

The facts involved in the instant case are, for the most part, in direct dispute. Appellant's statement of facts and "summary of facts" present only his version of the transactions and are interwoven with arguments of his position. Respondents therefore feel that it would be of help to the court to make a brief recital of the facts we feel are material to a proper consideration of the case.

Respondents are co-partners doing business under the firm name and style of Kenworth Sales Company engaged in the business of selling trucks and are dis-

tributors for Kenworth Motor Trucks in this area (R. 77). Appellant, a contractor, contacted the respondents for the purpose of purchasing a large truck to use in his business and on February 13, 1946 signed a purchase order for the same (Exhibit 1). He advised respondents' representative, Mr. Golightly, that he desired a truck that would haul his "Cats" upon a flatbed and also permit the attachment of a semi trailer upon which to carry his "Shovel" (R. 94). By the term "Cats" appellant referred to Caterpillar tractors and by "Shovel" to an excavating shovel. He was advised by Golightly that it would probably be one year before delivery could be made (R. 90).

Approximately thirty days after the execution of Exhibit 1, W. J. Treadway, one of the respondent partners, called upon Appellant to discuss the truck then upon order (R. 349). Mr. Treadway advised appellant that the truck ordered was not big enough to haul "Cats" upon its back, but that one could be constructed to perform this task. Appellant advised Treadway that he not only wanted a truck big enough to haul a "Cat" but that he also wanted a truck to be so constructed that it could pull a semi trailer upon which to haul his "Shovel". Mr. Treadway then advised appellant that he would run into trouble trying to build a truck to perform these two functions but appellant advised Mr. Treadway that he could "handle it." Mr. Treadway further advised appellant that a truck so constructed would overload the front tires but appellant said that he would be able to take care of that (R. 350, 351).

Subsequently Mr. Treadway received a "face sheet" and a letter from the engineering department of Kenworth Motor Truck Corporation which he exhibited to the appellant (R. 352). This letter questioned the advisability of constructing a truck as desired by appellant because of the long wheel base and the possibility that too much load would be thrown upon the front axle of the truck (R. 353, 357). Appellant told Treadway that the engineering department wasn't buying the truck, that he was buying it and that was the way he wanted it built (R. 359).

In December, 1946, appellant was advised that his truck was ready for delivery in Seattle, whereupon on December 27, 1946 appellant issued his check to respondents in the sum of \$16,322.10 for payment in full for the truck (Exhibit 3). The truck was delivered to appellant on or about January 2, 1947.

At no time did appellant, in his discussions with Mr. Golightly and Mr. Treadway advise them that he intended to use the truck to haul road oils (R. 216, 359, 360).

During the ensuing year after the delivery of the truck respondents had occasion to make various repairs to the truck, which repairs and services are set forth in respondents' bill of particulars (R. 6). In January, 1948 respondents, at the request of appellant, shortened the wheel base of the truck, for which no charge was made to appellant. It was not until this time that appel-

lant made any complaint to respondents regarding the truck (R. 367).

Respondents commenced this action by filing their complaint wherein they sought recovery for the reasonable value of the materials and services rendered to appellant. Appellant filed his answer to the complaint and in an amended counterclaim sought to recover, among other things, the sum of \$20,000.00 for alleged loss of profits resulting from the failure of the truck to haul road oil from Woods Cross, Utah to McGill, Nevada, claiming that he was forced to hire other carriers to haul the road oil.

## ARGUMENT

The evidence presented at the trial of the instant case by appellant and respondents was in direct conflict as to all material issues. This being the situation we feel that the only major question confronting this court upon appeal is whether or not there was introduced at the trial sufficient evidence to substantiate the findings of the lower court.

It is fundamental, and a well settled rule in the State of Utah, that the trial court may determine the facts and judge the credibility of witnesses and that the findings of the trial court, if supported by any substantial evidence, will not be disturbed upon appeal; furthermore, this court has held that in such a case, it cannot weigh and pass on conflicting evidence, or pass

on the credibility of witnesses. *In Re Dong Ling Hing's Estate*, 78 Utah 324, 2 Pac. 2d 902, 904.

*Decorso v. Booth, et al.*, 97 Utah 163, 91 Pac. 2d 449;

*Jensen v. Logan City*, 96 Utah 522, 88 Pac. 2d 459.

With the foregoing rule of law in mind the respondents will first endeavor to set forth the evidence which substantiates the trial court's pertinent findings and then discuss some of appellant's assignments of error.

#### POINT I.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT FINDINGS OF FACT NUMBERS 2 AND 3 TO THE EFFECT THAT RESPONDENTS SOLD GOODS, WARES AND MERCHANDISE TO APPELLANT FOR THE REASONABLE VALUE OF \$1,579.08 AND THAT APPELLANT FAILED AND REFUSED TO PAY SAID SUM OR ANY PART THEREOF.

Appellant in his brief has not assigned as error the trial court's findings, Numbers 2 and 3 and has not discussed the issues therein in his brief. These findings are supported by the testimony of W. J. Treadway, one of the respondents, in his testimony (R. 77-79).

#### POINT II.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT FINDING OF FACT NUMBER 5 TO THE EFFECT THAT, APPELLANT, REGARDLESS OF RESPONDENTS' WARNING, SPECIFIED THE TYPE OF TRUCK THAT HE DESIRED, CLAIMING THAT THE SAME WOULD BE SATISFACTORY FOR HIS PURPOSES.



Appellant, at the trial, introduced testimony to the effect that the truck delivered to him by respondents was improperly designed and would not perform the functions for which it was intended. He maintained that the wheel base of the truck was too long and that as a consequence thereof too much weight was thrown upon the front tires.

In contradiction to this contention respondent, W. J. Treadway, testified that approximately one month after Mr. Glenn had signed Exhibit Number 1 on February 13, 1946 he paid a visit to Glenn for the purpose of advising him that the truck so ordered on Exhibit Number 1 would not be big enough to satisfy Glenn's needs. During this conversation appellant advised Treadway of the type of truck he desired and he was warned by Treadway that such a truck would cause appellant trouble unless the load was properly balanced upon the truck. Regardless of this appellant advised Treadway that he wanted the truck in accordance with his specifications.

The respondent, W. J. Treadway, testified as follows (R. 350) :

Q. (By Mr. E. R. Callister) Just tell us what transpired when you went to Mr. Glenn's house?

A. I told Mr. Glenn that order he gave Mr. Golightly, to haul his equipment, if he was going to haul these cats and bulldozers on the back of the truck it wasn't big enough.

And he said, "Well, that is what I want. I want a truck big enough to haul a cat and bulldozer on the back of the truck."

I said, "Well, we can build you a truck that will haul that, but we will have to change the specifications from the order you gave Mr. Golightly."

And I asked him what loading space he wanted back of the cab, and he said he wanted twenty feet.

I said, "Well, we can build that truck that way."

And he said, "Now, I want to pull a low bed back of it, also."

And I said, "Now, Mr. Glenn, you are going to run into trouble trying to build a truck to hold a cat and bulldozer on the back of the truck, and still build a low bed to pull a semi trailer."

"In order to balance that truck with your cat on its back, your frame is going to project over the back axle until you can't hook the semi on it."

He said, "I can take care of that. I can balance that cat back there to where I can handle it."

And I told him we could build that frame to where it would be detachable, and to where we could bolt the back sections together; that when we hauled his cat he would use that frame on it, and when he put his low bed on he would have to unbolt that section, in order for his gooseneck of his semi-trailer to hook onto his truck. He didn't want that. He wanted it built with the wheels put on the extreme rear end of the truck, and a twenty foot loading space on the back of the cab.

So, I questioned him quite a bit about the overloading of the front tires that way.

And he said no, that was all right, he could take care of it. When he pulled that low bed with his shovel on it, he wanted that space for the boom of his shovel to go up back of the cab on the truck, and have a space there for it.”

Mr. Treadway further testified (R. 358) that the long wheel base was necessary in order to conform to the expressed desires of the appellant and that the truck, as delivered, could have met the needs and desires of appellant provided the latter properly balanced the load (R. 361, 362, 402, 403).

The foregoing testimony of respondent, W. J. Treadway is supported by appellant’s own testimony (R. 99, 100) to the effect that he told Treadway he wanted a truck to haul freight, put a flatrack on, put a fifth wheel on, and haul a fifty-ton shovel. In other words, appellant, in ordering the truck, gave Treadway the specifications of the type of truck he desired.

The testimony set forth above is more than ample to substantiate the trial court’s findings of fact Number 5 and it was within the province of the Trial Judge to believe Treadway as against conflicting testimony given by the appellant.

The Trial Court, believing the evidence of respondents to the effect that appellant designated the type of truck he desired and insisted upon it being built in the manner specified regardless of respondents’ warning, was justified in rendering judgment against appellant

upon his counterclaim. This evidence negated any express warranty or responsibility upon respondents.

### POINT III.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT FINDING OF FACT NUMBER 6 TO THE EFFECT THAT APPELLANT WAS FAMILIAR WITH HEAVY TRUCKS AND THAT HE WAS AWARE OF THE FACT THAT RESPONDENTS WERE MERE SALES AGENTS FOR THE MANUFACTURER OF THE TRUCK.

It is a well settled principle of law that where an agent acts on behalf of a disclosed principal his acts and contracts are considered as the acts and contracts of the principal, and, in the absence of an agreement otherwise, involves no personal liability on the part of the agent to a third person. This rule applies to express or implied warranties.

2 Am. Juris., p. 248;

2 C. J., p. 812.

The appellant, Glenn, had been a contractor for approximately 25 years (R. 87) and had used equipment similar to the truck involved for approximately 8 to 12 years (R. 222). The original purchase order (Exhibit Number 1), which appellant signed on February 13, 1946, is clearly designated as a contract of purchase between appellant and Kenworth Motor Truck Corporation. Mr. Golightly signed on behalf of respondents who were clearly designated in Exhibit 1 as a sales agent. Exhibit 1, in and of itself, clearly establishes the fact that respondents were the mere agents of the truck

manufacturer and thus not personally liable for any breach of implied or express warranty.

In addition to Exhibit 1, the agency relationship is further established by the testimony of appellant (R. 107) to the effect that he knew the truck was being manufactured in Seattle and also by Exhibit 6 which is a letter directed to Kenworth Motor Truck Corporation, Seattle, Washington, by appellant's attorney.

The foregoing clearly supports the trial court's finding of fact Number 6, which finding negatives any liability upon the part of the respondents for the damages claimed by appellant.

#### POINT IV.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT FINDING OF FACT NUMBER 7 TO THE EFFECT THAT RESPONDENTS' ADVISED APPELLANT THAT THE TRUCK MANUFACTURER WOULD NOT GUARANTEE PERFORMANCE OF THE TRUCK AS ORDERED BY APPELLANT AND THAT APPELLANT, REGARDLESS OF THIS FACT, DESIRED THE TRUCK.

Upon examination Mr. Treadway testified that subsequent to his conversation with appellant in March, 1946, he received a letter from the engineering department of Kenworth Motor Truck Corporation questioning the wheel base of the truck which appellant had ordered (R. 352). This letter was exhibited to Mr. Glenn.

The respondent, W. J. Treadway, testified as follows (R. 357) :

A. They told me that—this letter said the wheel base of the truck was long. “If he is going to load his cat and bulldozer on the back end of the truck, and he will balance it back there, why, he will be all right with it.”

They said, “If he attempts to load weight right back of the cab, the truck, with a long wheel base, it would throw all the weight on your front axle.”

And Mr. Glenn told me he could balance his equipment back there, and he wanted it built that way, because he wanted to pull his semi-trailer with it.

Q. Because he wanted to pull his semi-trailer with it?

A. He wanted to pull a semi-trailer with his shovel and other equipment on it, at times.

Appellant refused to heed the warning contained in the letter. In this connection Mr. Treadway testified as follows (R. 358, 359):

Q. What, if anything, did Mr. Glenn say during this conversation in which you were discussing the letter from the Engineering Department?

A. He said the Engineering Department wasn't buying the truck; he was buying it, and that was the way he wanted it built.

The trial court saw fit to believe the foregoing testimony of Mr. Treadway which is sufficient evidence to support Finding of Fact Number 7, which finding negatives any responsibility by respondents for breach of any implied or express warranty.

## POINT V.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT FINDING OF FACT NUMBER 9 TO THE EFFECT THAT IT WAS NOT WITHIN THE CONTEMPLATION OF THE PARTIES THAT THE TRUCK WAS TO BE USED TO HAUL ROAD OIL.

This particular finding deserves particular attention inasmuch as appellant, in his brief, has directed all of his argument to the second cause of action as set forth in his amended counterclaim (R. 32). In this second cause of action the appellant sought damages for loss of profits allegedly sustained upon a road construction job in the State of Nevada. He alleged that by reason of the defective truck he was unable to haul road oil upon the same which necessitated the hiring of other carriers which resulted in a loss of profits to himself in the amount of \$20,000.00.

It is well settled that in order to recover as damages for breach of warranty loss of profits to the buyer, such profits must have been within the contemplation of the parties at the time the warranty was made. 46 *Am. Juris.*, Paragraph 745. In the instant case the warranty, if one was made, was made either by Mr. Golightly on February 13, 1946 or by Mr. Treadway one month later. Appellant testified that on both occasions he advised the parties that he intended to use the truck to haul road oil for the Nevada Road Construction Job. It is important to point out that the appellant testified (R. 10) that he had the contract with the State of Nevada

to build the road at the time of his discussion with Mr. Treadway in March, 1946. This was a false statement, for as shown in Exhibit "A" the bid upon the job was not accepted until at least June 4, 1946.

In contradiction to appellant's testimony Mr. Golightly (R. 216) and Mr. Treadway (R. 359, 360) both testified that at no time during the entire negotiations with appellant did he advise them that he intended to use the truck for the purpose of hauling road oil. The court was entitled to believe the testimony of Mr. Golightly and Mr. Treadway as against that of the appellant.

However in addition to the testimony of Mr. Golightly and Mr. Treadway other facts and circumstances are found in the record which discredit appellant's testimony regarding the road oil haul and which indicate that appellant's second cause of action, as contained in his amended counterclaim, was but an afterthought and certainly not within his reasonable contemplation at the time the truck was ordered. These facts and circumstances are related as follows in their chronological sequence:

(a) On February 13, 1946 appellant signed the original purchase order (Exhibit 1) for a truck at which time, according to Mr. Golightly, no mention was made of using the truck to haul road oil.

(b) In March, 1946 appellant conversed with Mr. Treadway regarding changes in the specifications of



the truck and, according to Mr. Treadway, no mention was made of using the truck to haul oil.

(c) On Page 1 of Exhibit A which is a copy of the contract between Sumsion and Glenn for the Nevada State Road Job, it is set forth that bids would be received until 2:15 P.M. of June 4, 1946. *Obviously, appellant did not know whether or not he had the job at the time of his conversation with Golightly and Treadway and therefore, it could not have been within the contemplation of the parties that appellant might suffer loss of profits from the operation of an unestablished business.*

(d) The truck was not delivered to appellant until January 2, 1947 and he did not commence the hauling of oil by other carriers to the Nevada Road Job until June, 1947 (Exhibit 4).

(e) On November 20, 1947 appellant's attorney wrote a letter to Kenworth Motor Truck Corporation (Exhibit 6) wherein complaint was made of the truck but no mention made of any loss of profits from the road oil haul.

(f) On or about January 5th respondents shortened the wheel base of appellant's truck (Exhibit C) at which time no mention was made of any loss of profits from the road oil haul.

(g) On August 11, 1948 appellant filed his answer and counterclaim to respondents' complaint wherein nothing is contained relating to any loss of profits from the road oil haul.

(h) On December 11, 1948 appellant's deposition was taken (Exhibit G) wherein he was asked at Page 8 of that deposition, what he had told Mr. Treadway he wanted the truck to do. Appellant answered that he wanted the truck to haul a cat upon its back and pull a semi-trailer behind it for the purpose of moving a fifty-five ton shovel. At no place in the deposition, although given the opportunity so to do, did appellant make the statement that he wanted the truck for the purpose of hauling road oil (R. 538).

(i) On January 18, 1948 the trial court held a pre-trial hearing and entered its pre-trial order on the same date. At this time no mention was made nor any issue raised regarding loss of profits from the hauling of road oil (R. 27).

(j) On January 24, 1949, the first day of the trial, the appellant filed his amended counterclaim in which he sought damages for the loss of profits from the road oil haul. *This was the first time that any mention or indication was made by the appellant that he had suffered any such loss.*

Certainly it is apparent from the foregoing that appellant's claim for damages as contained in his second cause of action was but an after-thought and was never within his contemplation nor within the contemplation of the respondents during any part of their negotiations.

Mr. Glenn's testimony was to the effect that he intended to use the truck to haul road oil from Woods

Cross, Utah over the highways of the State of Utah to the road construction job near McGill, Nevada. He stated that he planned to put a 5000 gallon tank upon the truck and another 5000 gallon tank upon his trailer, thus enabling him to haul 10,000 gallons of road oil at one time (R. 186). He further testified (R. 187) that the total weight of his truck, together with the two 5000 gallon tanks, filled with road oil, and excluding the weight of the trailer, would amount to at least 106,000 pounds. He admitted that this would be in excess of the weight permitted by the laws of the State of Utah (R. 187).

Mr. R. A. Gould, an experienced tank truck operator, testified (R. 305) that the maximum amount of gasoline which could be hauled by truck and trailer was 7000 gallons and that road oil weighed more than did gasoline. He also stated (R. 318) that it would be impossible to build or design a truck and trailer that would carry 10,000 gallons of road oil and operate upon the highways of the State of Utah.

Thus, it is seen that not only was the issue of loss of profits from the road oil haul an after-thought but that appellant's alleged plan for hauling the oil was impossible to carry out.

It should be noted that appellant's loss of profits, if any, from the failure to haul the road oil in the truck was extremely speculative and uncertain of ascertainment. This is particularly true with respect to the rela-

tionship between the appellant and Mr. Jim Sumsion. Appellant testified (R. 150) that he and Mr. Sumsion bid jointly on the job at McGill, Nevada. The bills of lading contained in Exhibit 4 designated "Sumsion and Glenn" as the consignees of the road oil used upon the Nevada job. Mr. William Weir, through whom the road oil was purchased, testified (R. 452) that his dealings regarding the purchase of road oils was with Mr. J. W. Sumsion. Exhibits D and E (R. 460) which were telegrams directed to Wasatch Oil Refining relating to shipment of road oil were sent by Mr. J. W. Sumsion. No written document was introduced to show what was the distribution of profit and losses, if any, between Sumsion and Glenn. It is contended that respondents' objection to the introduction of Exhibit 4 (R. 155) should have been sustained by the Trial Court for the reason that the parties who purchased the oil and who shipped it were Sumsion and Glenn, operating as a joint venture, and foreign to the instant action. Appellant is not the proper party to maintain a suit for any loss of profits resulting from the Nevada road job which was bid upon jointly by himself and Mr. Sumsion.

There is an annotation in 32 ALR 120 et seq which contains a rather exhaustive discussion relating to loss of profits as an element of damages. As pointed out in this annotation, such damages must have been within the contemplation of the parties at the time they entered into the contract, the damages must be certain and un-speculaive and they must be the direct result of the

breach. At Page 153 of this annotation the following statement is made:

“Probable profits from the operation of an unestablished business are too uncertain and conjectural for the loss thereof to form the basis for the assessment of damage for the breach of contract for the sale of a machine or machinery for the buyers use.”

It was held in *Schaefer v. Fiedler (Ind.)* 63 N.E. 2d 310, that loss of profits because of inability to carry out a contract with another is not generally recoverable upon a breach of warranty, since such damage is not the usual, natural and probable consequence of the breach, and if recoverable at all, such damages must be recovered as special damages on the theory that it was within the actual contemplation of the parties and included in the agreement.

Thus it is seen that there was more than ample evidence upon which the Trial Court could base its Finding of Fact Number 9 to the effect that appellant did not advise respondents that he intended to use the said truck for the purpose of transporting road oil and that it was not within the contemplation of the parties that the truck was to be used for such a purpose. In view of this appellant is precluded from recovering any damages based upon any loss of profits incurred by reason of his failure to haul road oil with the truck.

## POINT VI.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT FINDING OF FACT NUMBER 10 TO THE EFFECT THAT APPELLANT DID NOT HAVE OR ATTEMPT TO HAVE THE WHEEL BASE OF THE TRUCK SHORTENED AND THUS FAILED TO EXERCISE THE CARE AND DILIGENCE OF AN ORDINARY, REASONABLE PERSON IN MINIMIZING OR FORECLOSING DAMAGES WHICH HE MIGHT SUFFER.

The appellant was aware of the fact that the truck had a long wheel base which would tend to throw too much weight upon the front tires. He was aware of this following his first conversation with Mr. Treadway in March, 1946 in which the latter warned appellant of this probable difficulty (R. 350-351). He was further advised that the long wheel base would throw all the weight upon the front axle when Mr. Treadway exhibited to him the letter received from the Engineering Department of Kenworth Motor Truck Corporation (R. 357).

Mr. Treadway testified (R. 400) that there were numerous concerns in Salt Lake City and surrounding area that could perform the job of shortening the wheel base upon the truck. This testimony was substantiated by that of Mr. Harold Slack, shop superintendent for Fruehauf Trailer Company, that his concern in Salt Lake City was capable of shortening the wheel base of a truck similar to Mr. Glenn's (R. 584).

Respondents, at the request of Mr. Glenn, shortened the wheel base in January, 1948 and Mr. Glenn testified that the same performed satisfactorily thereafter. In

view of the fact that Mr. Glenn was aware of the cause of his difficulty, if any, he could have remedied the situation by having the wheel base shortened at any one of a number of automotive concerns at a comparatively low cost. The cost of shortening the wheel base was established as being in the amount of \$277.09 (Exhibit C). It was incumbent upon appellant to take the steps which an ordinary, reasonable and prudent man would do under the circumstances and have the wheel base shortened, at a cost not to exceed \$300.00 and thus avoid a \$25,000.00 alleged loss in profits.

In 81 ALR, 282, the general rule relating to damages is stated as follows:

“The cardinal principle of the law of damages is that the injured party shall have compensation for the injuries sustained. But the liability of the delinquent is limited to such consequences as are the direct and immediate consequences of his act, and not remote, speculative and contingent consequences. And, on the same principle, where by the use of reasonable measures the plaintiff could have prevented or reduced the loss, his recovery will be limited to that consideration.”

“The rule applies where the buyer of a machine, or machinery, for his own use, seeks to recover for loss of profit as a consequential loss growing out of the breach of the contract by the seller. If all the other elements permitting the recovery of such damages are present, the buyer cannot recover for such loss if he might reasonably have avoided it.”

To the effect that the buyer has a duty to minimize damages, see the following:

- Vol. 3, Williston Sales, Revised Edition, Pages 378, 380;
- Restatement of Contracts, Paragraph 336 (d) ;
- Vol. 1, Uniform Laws Annotated, Sales, Page 423;
- Haberkorn vs. Lawrence (Ill.) 68 N. E. 2d 621;
- Bailey vs. Roebuck (Okl.) 275 P. 329;
- O. C. Barber Mining Company vs. Brown Hoisting Machine Company, 258 Fed. 1;
- People's State Bank vs. Randby (Minn) 197 N. W. 265.

The evidence introduced was sufficient to support the Trial Court's Finding that appellant failed to exercise the care and diligence which an ordinary and prudent person should do in minimizing the damages, if any.

## POINT VII.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT FINDING OF FACT NUMBER 13 TO THE EFFECT THAT RESPONDENTS AT NO TIME MADE OR GAVE ANY SPECIAL WARRANTY CONCERNING THE TRUCK.

Throughout the preceding portion of this argument respondents have endeavored to point out the evidence and testimony which negated any special warranty concerning the truck which appellant purchased. In addition to such evidence and testimony we have appellant's Exhibit 1, which by its express terms limits the liability of Kenworth Motor Truck Corporation respect-



ing warranties. On the reverse side of Exhibit 1 there is contained the following provision:

“THIS IS TO CERTIFY THAT WE WARRANT each new commercial motor vehicle manufactured by us to be free from defects in material and workmanship under normal use and service, our obligation under this warranty being limited to making good at our factory any part or parts thereof which shall be returned to us with transportation charges prepaid, and which our examination shall disclose to our satisfaction to have been thus defective provided that such part or parts shall be so returned to us not later than ninety (90) days after delivery of such vehicle to the original purchaser, and that at the time of such return, the said vehicle shall not have been operated in excess of five thousand (5,000) miles. This warranty is expressly in lieu of all other warranties expressed or implied and of all other obligations or liabilities on our part, and we neither assume nor authorize any other person to assume for us any other liability in connection with the sale of our vehicles.”

Certainly the provisions of Exhibit 1, together with other testimony and evidence, supports the Trial Court's finding that respondents at no time made or gave any special warranty concerning appellant's truck.

#### POINT VIII.

APPELLANT'S ASSIGNMENTS OF ERROR DO NOT CONSTITUTE GROUNDS OR REASONS FOR REVERSAL OF TRIAL COURT'S JUDGMENT.

In his brief Appellant has set forth ten Assignments of Error upon which he asked this court to reverse

the decision of the Trial Court. Respondents do not feel that any of the Assignments contain grounds for reversal and that the Trial Court's judgment should be sustained. We will briefly endeavor to discuss and answer some of appellant's Assignments of Error.

1. *The Trial Court did not refuse appellant the right of cross-examination.* At page 5 of his brief appellant contends that the Trial Court committed error in refusing him the right of cross-examination. He refers to R. 82 to substantiate his position. A reading of this portion of transcript reveals that appellant was not refused the right of cross examination but was merely precluded from asking questions which the Trial Court properly considered to be improper upon cross examination. Appellant was allowed to cross examine the witness, Treadway, upon all matters testified to upon direct examination and appellant was later allowed to examine the witness fully and completely upon all issues.

2. *The Trial Court did not commit error in refusing to permit evidence of warranty.* Appellant, in his second Assignment of Error, which is argued on page 7 of his brief, contends that the Trial Court wrongfully refused him the right to introduce evidence relating to an advertisement. He refers this court to R. 88-89 of the record. It need only be noted that the appellant did not offer into evidence the actual advertisement but merely tried to prove the same by hearsay. This the court properly refused.

3. *The Trial Court did not commit prejudicial error in stating that he would ignore leading questions.* It is difficult for respondents to follow appellant's argument concerning his third Assignment of Error which is contained on pages 7 and 8 of his brief. Suffice it to say that leading questions are improper and subject to objection and the court may properly disregard answers to such questions.

4. *The Trial Court did not commit error in failing to impose a duty upon respondents to furnish equipment that would sustain its own weight and refusing to impose liability upon respondents.* Appellant's Assignment of Error Number 4 is discussed in his brief at pages 8-17. Many authorities are cited by appellant to the effect that a seller may be liable in damages for breach of warranty for losses directly and naturally resulting in the ordinary course of events. With this rule of law respondents have no quarrel. However, as has previously been pointed out in this brief, respondents made no special warranty and the loss of profits which appellant contends he sustained were not the direct and natural result, in the ordinary course of events, from the breach of any warranty. (See Points IV, V, VI, and VII of this brief.)

The rules of law set forth by appellant in this argument have no application to the instant case because of the facts and circumstances surrounding the transaction which have been set forth previously in this brief in detail.

5. *Respondents furnished appellant the type of truck which he specified.* Appellants Assignment of Error Number 5 is closely aligned with his Assignment of Error Number 4 and the argument which respondents have set forth in the preceding paragraph have equal application to this assignment.

There is testimony to the effect that appellant ordered the particular truck, despite warnings from respondents and further it was testified that the truck as delivered could haul the items, which appellant represented he wanted to haul, if the same had been properly balanced (R. 361, 362, 368).

6. *The damages claimed by appellant were not sustained directly and naturally as the result of a breach of warranty and were not within the contemplation of the parties.* Appellant, at Page 18 of his brief, contends that a judgment for him in the sum of \$20,000.00 was mandatory. He states that the unrefuted evidence shows that appellant sustained a \$20,000.00 loss. This contention has been fully covered in the preceding portions of this brief wherein evidence and testimony was set forth to the effect that the hauling of 10,000 gallons of road oil with the truck was not within the contemplation of the parties, the damages were speculative, and the appellant got just exactly what he ordered.

7. *Sufficient evidence was introduced to the effect that appellant was warned of probable failure of performance because of long wheel base.* Appellant's Assignment of Error Number 7 is to the effect that the

Trial Court's finding of Fact Number 7 is contrary to the evidence. This contention has been fully covered under Point IV of this brief. Mr. Treadway warned appellant of the long wheel base during his first conversation with the latter in March, 1946 and subsequently advised appellant that the Engineering Department of Kenworth Motor Truck Corporation had written a letter in which they questioned the advisability of the long wheel base.

The testimony set forth by appellant on Pages 18 and 19 of his brief is not inconsistent for the warnings and other testimony of Mr. Treadway. At the trial Mr. Treadway contended throughout that the truck, as delivered, could perform the tasks as outlined by appellant had the latter balanced the loads properly (R. 361, 362, 368).

8. *Finding that appellant requested the truck delivered was not contrary to the evidence.* Appellant's Assignment of Error Number 8 is to the effect that there was not sufficient evidence to sustain the Trial Court's Finding of Fact Number 5. This contention has been fully covered under Point II of this brief.

9. *Finding that appellant could have corrected any defect in the truck is not contrary to the evidence.* Appellant's Assignment of Error Number 9 takes issue with the Trial Court's Findings of Fact Numbers 9 and 10. This contention is fully answered by the argument contained in Point VI of this brief.

## CONCLUSION

We respectfully submit that appellant has failed to show any error in the trial below. There was sufficient evidence adduced at the trial to substantiate the Trial Court's findings:

(a) That appellant ordered the type of truck delivered, regardless of warnings from respondents.

(b) That respondents were mere sales agents for the manufacturer of the truck, which fact was known to appellant.

(c) That appellant insisted upon the truck as ordered, regardless of a warning from the manufacturer of the truck.

(d) That at no time did appellant advise respondents that he intended to use the truck for the purpose of transporting road oil and that the same was not within the contemplation of the parties.

(e) That appellant did not exercise the care and diligence that an ordinary, reasonable, prudent person should do in correcting any defect and thus minimizing the damages.

(f) That respondents at no time made or gave any special warranty concerning said truck.

It is respondents' contention that sufficient evidence was introduced to substantiate all of the foregoing Findings and that any one of said Findings is suffi-

cient to sustain the judgment of no cause of action as to appellant's counterclaim. The judgment of the Trial Court should be affirmed.

Respectfully submitted,

CALLISTER, CALLISTER & LEWIS

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