

1988

Hanover Limited, Western Maintenance and Management, Inc., and Brooke Grant v. Cessna Aircraft Company, Cessna Finance Corporation, Teledyne Industries Inc., AAR Northwest Inc., and Trans West Aircraft Sales Inc. : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

H. Wayne Wadsworth, R. L. Knuth; attorneys for respondent.

Paul N. Cotro-Manes; attorney for appellant.

Recommended Citation

Brief of Appellant, *Hanover Limited v. Cessna Aircraft*, No. 880042.00 (Utah Supreme Court, 1988).
https://digitalcommons.law.byu.edu/byu_sc1/1916

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
KFU
50
.A10
DOCKET NO. 880042-CA

IN THE SUPREME COURT

STATE OF UTAH

HANOVER LIMITED, a partnership;)
WESTERN MAINTENANCE AND)
MANAGEMENT, INC., a Utah corpora-)
tion; and BROOKE GRANT, an)
individual,)
Plaintiffs,)
vs.)
CESSNA AIRCRAFT COMPANY, a)
Kansas corporation; CESSNA)
FINANCE CORPORATION, a Kansas)
corporation; TELEDYNE INDUSTRIES,)
INC., a California corporation;)
AAR NORTHWEST, INC., a Delaware)
corporation; and TRANS WEST)
AIRCRAFT SALES, INC., a Utah)
corporation,)
Defendants.)

TRANS-WEST AIRCRAFT SALES, INC.,)

Cross Claim Defendant)
and Appellant,)

vs.)

CESSNA AIRCRAFT COMPANY, a)
Kansas corporation,)

Cross Claim Defendant)
and Respondent.)

88-0042-CA

No. 860051

#14

BRIEF OF APPELLANT

Appeal from the Third Judicial District Court
of Salt Lake County, Honorable David B. Dee, Judge

PAUL N. COTRO-MANES
Suite 280, 311 South State Street
Salt Lake City, Utah 84111-2377
Attorney for Appellant

H. Wayne Wadsworth
R. L. Knuth
310 South Main, 12th Floor
Salt Lake City, Utah 84101
Attorneys for Respondent

FILED

MAY 16 1986

Clerk, Supreme Court, Utah

PAUL N. COTRO-MANES
Attorney at Law
SUITE 280, PIONEER STATE BANK BUILDING
311 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84111-2377
(801) 531-1300

RECEIVED
MAY 25 1988

May 25, 1988

COURT OF APPEALS

Mr. Timothy M. Shea
Clerk of the Court
Utah Court of Appeals
400 Midtown Plaza
230 South 500 East
Salt Lake City, Utah 84102

On Calendar
Wed May 25 9:0
Panel:
Greenwood-Chair
Billings - Writing
Dawson

Re: Hanover Limited, et. al. v. Cessna Aircraft Co.
Court of Appeals No. 880042-CA

Dear Mr. Shea:

Pursuant to Rule 24 (J), Rules of the Utah Court of Appeals, I am handing you herewith the original and five copies of this letter which sets forth additional citations of authority that has come to the attention of the Appellant, Trans-West Aircraft Sales, Inc., after the filing of its brief. The Court of Appeals has not rendered its decision.

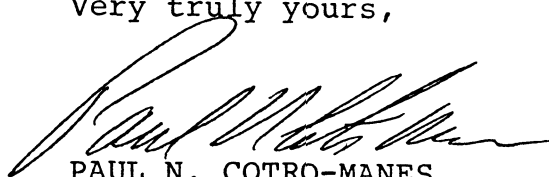
These citations relates to page 32, Point Seven of its brief and to page 8-9, Point 1 B of the Respondent's brief.

These citations are Piedmont Equipment Co., Inc v. Eberhard Mfg, 665 P.2d 256 (Nevada 1983) and the cases cited therein on on pages 258 through 260; and, INA Ins. Co v. Valley Forge Ins. Co., 722 P.2d 975 (Ariz. App. 1986) and the cases cited therein at pages 980 and 981.

These additional citations are given to illustrate to the Court that there is a split of authority on the issue of whether or not the allegations of the complaint are controlling as to the issue of indemnification.

Copy of this letter has been mailed this date to Appellant's counsel with a hand delivered copy to him at the time of hearing of this matter on oral argument, this date.

Very truly yours,



PAUL N. COTRO-MANES

PNC:pc

cc: H. Wayne Wadsworth, Esq.
R. L. Knuth, Esq.

IN THE SUPREME COURT

STATE OF UTAH

HANOVER LIMITED, a partnership;)	
WESTERN MAINTENANCE AND		
MANAGEMENT, INC., a Utah corpora-)	
tion; and BROOKE GRANT, an		
individual,)	
Plaintiffs,		
vs.)	
CESSNA AIRCRAFT COMPANY, a		
Kansas corporation; CESSNA)	
FINANCE CORPORATION, a Kansas		
corporation; TELEDYNE INDUSTRIES,)	
INC., a California corporation;		
AAR NORTHWEST, INC., a Delaware)	
corporation; and TRANS WEST		
AIRCRAFT SALES, INC., a Utah)	
corporation,		
Defendants.)	
<hr/>		
TRANS-WEST AIRCRAFT SALES, INC.,)	
Cross Claim Defendant)	
and Appellant,)	
vs.)	No. 860051
CESSNA AIRCRAFT COMPANY, a)	
Kansas corporation,)	
Cross Claim Defendant)	
and Respondent.)	

BRIEF OF APPELLANT

Appeal from the Third Judicial District Court
of Salt Lake County, Honorable David B. Dee, Judge

PAUL N. COTRO-MANES
Suite 280, 311 South State Street
Salt Lake City, Utah 84111-2377
Attorney for Appellant

H. Wayne Wadsworth
R. L. Knuth
310 South Main, 12th Floor
Salt Lake City, Utah 84101
Attorneys for Respondent

TABLE OF CONTENTS

	Page
STATEMENT OF ISSUES PRESENTED ON APPEAL	1
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	9
ARGUMENT	10
POINT ONE. DEFENDANT, TRANS-WEST, IS ENTITLED TO INDEMNIFICATION FROM THE DEFENDANT, CESSNA AIRCRAFT	10
POINT TWO. WRITTEN TENDER IS NOT REQUIRED TO ACTIVATE THE DUTY OF INDEMNIFICATION	12
POINT THREE. THE RIGHT TO INDEMNIFICATION MAY BE PREDICATED UPON AN IMPLIED CONTRACT THEORY	15
POINT FOUR. TRANS-WEST'S RIGHT TO INDEMNIFICATION EXISTS REGARDLESS OF THE THEORY USED	17
POINT FIVE. TRANS-WEST IS ENTITLED TO THE AWARD OF ATTORNEY'S FEES AS A PART OF ITS DAMAGES	18
POINT SIX. THE LAW OF INDEMNIFICATION DOES NOT REQUIRE THAT THE CLAIMS OF THE PARTIES BE FULLY ADJUDICATED BEFORE THE PASSIVE DEFENDANT MAY MAINTAIN HIS ACTION FOR INDEMNIFICATION	30
POINT SEVEN. CESSNA KNEW THAT UPON READING THE COMPLAINT THAT TRANS-WEST WAS A PASSIVE SELLER AND THAT IT KNEW OR SHOULD HAVE KNOWN THAT IT HAD THE DUTY TO DEFEND THE ACTION	31
POINT EIGHT. THE UNCONTROVERTED FACTS OF THIS CASE ESTABLISH THAT TRANS-WEST WAS A PASSIVE PARTY	32
POINT NINE. THE TRIAL COURT ERRED IN NOT ALLOWING A TRIAL ON THE ISSUE OF THE DEFECTIVE AIRCRAFT	34
CONCLUSION	36

TABLE OF CONTENTS (CONT'D)

	Page
INDEX OF ADDENDA	38
Judgment of Dismissal of Cross-claim	39-41
Rule 13(f), Utah Rules of Civil Procedure	42
Rule 14(a), Utah Rules of Civil Procedure	42
Pages 85-87, Deposition, Brook Grant, Original not filed	43-46

TABLE OF AUTHORITIES

Rule 13(f), Utah Rules of Civil Procedure	30
Rule 14(a), Utah Rules of Civil Procedure	30

CASES CITED

Alterman Foods, Inc., v. G.C.C. Beverages, Inc., 310 S.E.2d 755 (Ga., 1983)	26
Champion Mobile Homes v. Rasmussen, 553 S.W.2d 237 (Tex. Civ. App., 1977)	20, 21
Chittam v. Abell, 485 S.W.3d 231, 237 (Ky., 1972)	19
Cowen & Co. v. Atlas Stock Transfer Co., 695 P.2d 109 (Utah, 1984)	35
D. G. Shelter Products v. Moduline Industries, 684 P.2d 839 (Alaska, 1984)	12, 13, 24
Davidson v. Parker, 622 P.2d 1113, 1118 (Ore. App., 1981)	11
Farber v. State, 682 P.2d 630 (Idaho, 1984)	22
Gadd v. Olsen, 685 P.2d 1041 (Utah, 1984)	36

TABLE OF AUTHORITIES (CONT'D)

	Page
General Electric Co. v. Cuban American Nickel Co., 396 F.2d 89 (5th Cir., 1968)	15
Hales v. Green Colonial, Inc., 402 F. Supp 738 (Mo., 1975)	13, 26
Hartwig Farms v. Pacific Gamble Robinson, 625 P.2d 171 (Wash., 1981)	12
Heritage v. Pioneer Brokerage & Sales, 604 P.2d 1059 (Alaska, 1983)	12
Herman v. General Irrigation Co., 247 N.W.2d 472 (N.D., 1976)	27
Hill v. Joseph T. Ryerson & Son, Inc., 268 S.E.2d 296 (W. Va.)	14, 18
Hobelman Motors, Inc., v. Allred, 685 P.2d 544 (Utah, 1984)	35
Holmstead v. Abbott G. M. Diesel, Inc., 493 P.2d 625 (Utah, 1972)	11, 17
Illinois Central Railroad v. Blaha, 89 N.W.2d 197, 201-02 (Wis., 1958)	14
Insurance Company of North America v. Hawkins, 246 N.W.2d 878 (Neb., 1976)	14
Insurance Co. of North America v. King, 340 So.2d 1175 (Fla. App., 1976)	20, 25, 32
Jennings v. United States, 374 F.2d 983 (4th Cir., 1967)	14
Massingale v. Northwest Cortez, Inc., 620 P.2d 1009 (Wash. App., 1980)	11
McBride v. Jones, 615 P.2d 431 (Utah, 1980)	36
McStain Corp. v. Elfine Plumbing & Heating, Inc., 558 P.2d 558 (Colo. App., 1976)	14

TABLE OF AUTHORITIES (CONT'D)

	Page
Miller v. New York Oil Co., 243 P. 118 (Wyo., 1926)	13, 24
Morningstar v. Black & Decker Manufacturing Co., 253 S.E.2d 666 (W. Va., 1979)	16
Occidental Fire & Cas. Co. v. Stevenson, 370 S.2d 1211, 1214 (Fla., 1979)	19
Oceanic Steam Navigation Co. v. Compania Transatlantica Espanola, 38 N.W. 360 (N.Y., 1895)	14
Pan American Petroleum v. Maddox Well Service, 586 P.2d 1120 (Wyo., 1979)	13
Paradis v. A. L. Nichols, 12 N.E.2d 863 (Mass., 1938)	16
Parfait v. Jahncke Service, Inc., 484 F.2d 296 (5th Cir., 1973)	15
Pender v. Skillcraft Industries, Inc., 358 So.2d 45 (Fla. App., 1978)	25, 26
Sanone v. J. C. Penney Company, 404 P.2d 248 (Utah, 1965)	11, 31
Southern Arizona York Refrigeration v. Bush Mfg. Co., 331 F.2d 1 (9th Cir., 1964)	22
St. Paul Fire and Marine Ins. Co. v. Crosetti Bros., Inc., 475 P.2d 69 (Ore., 1970)	22
Stanley Title Company v. Continental Bank and Trust Company, 26 U.2d 121, 485 P.2d 1400 (1971)	30
United States Fire Ins. Co. v. Chrysler Motors Corp., 505 P.2d 1137 (Ore., 1973)	23
Vallegos v. C. E. Glass Company, 583 F.2d 507 (10th Cir., 1978)	24
Wagner v. Beech Aircraft Corp., 680 P.2d 425 (Wash. App., 1984)	23

TABLE OF AUTHORITIES (CONT'D)

	Page
Ward v. City National Bank & Trust Co., 379 S.W.2d 614 (Mo., 1964)	13
Whittle v. Timesavers, Inc., 572 F. Supp 584 (Va., 1983)	16, 26
<u>OTHER AUTHORITY</u>	
41 American Jurisprudence 2d 717, Indemnity, Section 25	11
42 Corpus Juris Secundum, Indemnity, Section 32a(2) (1944)	14
Section 76, Restatement of the Law of Restitution . . .	23
Section 80, Restatement of the Law of Restitution . . .	19
Section 90, Restatement of the Law of Restitution . . .	22
Section 93, Restatement of the Law of Restitution . . .	20, 21, 22
Section 96, Restatement of the Law of Restitution . . .	17
Section 914(2), Restatement of the Law of Torts 2d	23

IN THE SUPREME COURT

STATE OF UTAH

HANOVER LIMITED, a partnership;)
WESTERN MAINTENANCE AND)
MANAGEMENT, INC., a Utah corpora-)
tion; and BROOKE GRANT, an)
individual,)

Plaintiffs,

vs.)

CESSNA AIRCRAFT COMPANY, a)
Kansas corporation; CESSNA)
FINANCE CORPORATION, a Kansas)
corporation; TELEDYNE INDUSTRIES,)
INC., a California corporation;)
AAR NORTHWEST, INC., a Delaware)
corporation; and TRANS WEST)
AIRCRAFT SALES, INC., a Utah)
corporation,)

Defendants.)

TRANS-WEST AIRCRAFT SALES, INC.,)

Cross Claim Defendant)
and Appellant,)

vs.)

NO. 860051

CESSNA AIRCRAFT COMPANY, a)
Kansas corporation,)

Cross Claim Defendant)
and Respondent.)

BRIEF OF APPELLANT

STATEMENT OF ISSUES PRESENTED ON APPEAL

Is a retailer entitled to be indemnified for damages suffered by it when it is named in a product liability action, which damages include its attorney's fees and costs, from the manufacturer of the claimed defective product.

Did the Trial Court err in not trying the issue of whether or not the aircraft was defective, and whether or not Trans-West was a passive tortfeasor as opposed to an active tortfeasor.

STATEMENT OF FACTS

This is an action based on a cross claim of the Defendant-Appellant, Trans-West Aircraft Sales, Inc., (Trans-West) a Utah corporation, against the Defendant-Respondent, Cessna Aircraft Company, (Cessna) a Kansas corporation, seeking indemnification for damages suffered by Trans-West in defending itself in the product liability action brought by the plaintiffs claiming that an aircraft designed and manufactured by Cessna was defective.

The complaint and all cross claims were compromised and settled, except for the cross claim of Trans-West Aircraft Sales against Cessna Aircraft Company and Cessna Finance Company.

From cross motions for summary judgment, Trans-West appeals from summary judgment in favor of Cessna of no cause of action and from the order denying its motion for summary judgment in its favor and from the order striking the trial of the matter as to whether or not the aircraft was in fact defective and Trans-West was not an active tortfeasor.

The following facts are uncontroverted:

1. Defendant, cross-claimant, appellant, Trans-West Aircraft Sales, Inc., (Trans-West) is a Utah corporation with its principal place of business at the Salt Lake City International Airport. (Complaint, R-03, Para. 6; Answer of Trans-West, R-118; Affidavit, Battocchio, R-272)

2. Defendant, cross-defendant, respondent, Cessna Aircraft Company, (Cessna) is a Kansas-based aircraft manufacturer engaged in the designing, manufacturing, equipping and marketing of light aircraft which it markets through what the plaintiffs denominate as the Cessna System. (Cessna's Answers to Interrogatories, R-914, No. 15; Complaint, R-02, Para. 2, R-03, Para. 7; and Answer of Trans-West, R-118)

3. Cessna markets its aircraft through a system of franchised aircraft retail dealers who acquire their aircraft from Cessna franchised zone distributors, or wholly owned zone distributors. (R-94)

4. Trans-West, at the time of the sale of the 1979 Cessna Aircraft P-210, the subject matter of the product liability suit, was a franchised Cessna Aircraft retail dealer. (Complaint, R-04, Para. 13; Answer of Trans-West, R-118, R-908)

5. Trans-West, in selling Cessna aircraft to the public, purchased all Cessna airplanes from the regional franchised zone distributor, the defendant, AAR Northwest

Inc. (AAR), not a party to this appeal, who in turn purchased the aircraft from Cessna directly. (Affidavit, Jeno Battochio, October 15, 1982. (R-273,274; R-04, Para. 17)

6. The aircraft in question was acquired by AAR from Cessna in March 1979, which used it as a demonstrator. The plane is described as a pressurized single engine, high wing, six passenger aircraft, Cessna, Model P-210. This aircraft was sold by AAR to Trans-West, who in turn acted as a conduit for the sale of the aircraft to the plaintiffs, Hanover Limited (Hanover), and Western Maintenance and Management Inc., a Utah corporation. This sale from AAR to Trans-West to Hanover was a back-to-back transaction, which was consummated all on one day, April 18, 1979. (Complaint, R-04, Para. 14, 17; Reply of Cessna to Cross-claim, R-1233; Affidavit, Battochio, R-274)

7. The aircraft was not modified, changed, repaired, or otherwise worked on by the defendant, Trans-West, from the time of its sale by AAR to Trans-West and its sale and delivery on the same day by Trans-West to the plaintiffs. (Depo, Battochio, July 12, 1985, p. 7, R-1417, et. seq.)

8. Trans-West denied having made any representations as to the merchantable quality of the aircraft to the plaintiffs or any statement whatsoever about P-210 aircraft, except those representations contained in Cessna prepared advertising materials. This was admitted by the plaintiff, Brooke

Grant, who was the principal executive officer of Hanover, who in his deposition stated that Trans-West made no other representations about the aircraft other than what the Cessna sales brochures stated. (R-1304; Depo, Grant, pp. 86, 87, Addendum) This admission was in direct controvention to the allegations of the complaint. Further, Cessna admitted that Trans-West made no express warranties other than those contained within Cessna's advertising materials. (R-1303)

9. The plaintiff, Brooke Grant, testified with respect to the representations of Trans-West's president, Mr. Battochio, prior to the sale of the aircraft:

"Q. Over and above the information contained in that brochure or those brochures, did he tell you anything additional that was in those brochures about the performance of the aircraft?

"A. I don't think so. You mean did he make any recommendations outside of what Cessna was representing? I don't remember. I don't remember that he did."
(Depo, Grant, p. 86, Addendum)

10. Trans-West did not maintain at any time germane to the sale of this aircraft:

- (a) an aircraft repair facility,
- (b) an aircraft maintenance facility,
- (c) an aircraft manufacturing facility,
- (d) a test facility of any kind;

and Cessna knew this to be a fact prior to the commencement of plaintiffs' action and at all times during the prosecution

of the same. (Depo, Battocchio, July 12, 1985, p. 10, R-1417, et. seq.)

11. Trans-West only maintained and operated a retail sales agency for the sale of aircraft and in particular, new and used Cessna aircraft, and Cessna knew this prior to the commencement of plaintiffs' action and at all times during the prosecution of the same. (Depo, Battocchio, p. 10, R-1417, et. seq.)

12. Trans-West did not formulate, write, print, produce, or otherwise generate sales manuals, advertisements, news releases and pilot's operating data, but utilized the material advertising Cessna aircraft supplied it by Cessna and Cessna Finance Company, not a party to this appeal, and Cessna knew this prior to the commencement of plaintiffs' action and at all times during the prosecution of the same. (Cessna Finance Answers to Interrogatories dated October 6, 1983, Nos. 6, 7, R-714; R-912-914)

13. Trans-West did not design, manufacture, assemble, inspect or test Cessna Aircraft and in particular, the P-210, or any component thereof, and Cessna knew this prior to the commencement of plaintiffs' action and at all times during the prosecution of the same. (R-916-917)

14. Trans-West had no duty to nor did it publish, discriminate, distribute or mail to its customers airworthiness

directives or emergency airworthiness directives, and Cessna knew this prior to the commencement of plaintiffs' action and at all times during the prosecution of the same. (R-927)

15. Trans-West made no express warranties of the P-210 aircraft but did give the plaintiffs a copy of the standard Cessna printed warranty. (Depo, Battochio, p. 22, R-1417, et. seq.; Depo, Grant, p. 86, Addendum)

16. The plaintiffs or the other defendants failed to prove that Trans-West did anything more than merely act as the selling conduit of the aircraft in question or sold the aircraft in a negligent manner.

17. AAR Northwest, Inc., was the point of contact and communication between Cessna and appointed retail dealerships, including Trans-West, as the zone distributor, at the time of the purchase of the P-210 by the plaintiffs, and any communication involving Cessna by Trans-West was made directly with AAR and not with Cessna. However, when the action was filed, Cessna had substituted a company owned zone distributor for AAR. (Affidavit, Jeno Battochio, October 15, 1982, R-273)

18. Immediately following the service of summons and complaint in this matter, Trans-West's president, Jeno Battochio, called the Cessna zone manager, Bob Conover, then manager of the wholly owned Cessna Zone distributorship at Troutdale, Oregon, and advised him that Trans-West was being sued over the P-210 and asked him if Cessna would defend

Trans-West on the suit. (Depo, Battocchio, p. 13, R-1417, et. seq.)

19. Cessna through the zone manager declined to assume the defense of Trans-West and at no time thereafter did Cessna undertake the defense of this action for Trans-West. (Depo, Battocchio, p. 14, R-1417, et. seq.)

20. Cessna's zone manager was not aware of any of the allegations of the complaint when he declined to defend Trans-West on this suit. (Depo, Battocchio, pp. 14, 20, R-1417, et. seq.)

21. After months of protracted pre-trial discovery, the plaintiffs and the defendant Cessna entered into settlement negotiations, but at no time did Trans-West either participate or join in the negotiations. The matter was ultimately settled. However, under the settlement agreement, Trans-West did not pay any part of the agreed settlement figure and refused to dismiss its cross-claims against Cessna and Cessna Finance Company for indemnification of its costs and expenses incurred in defending the action, which included its attorney's fees. (Stipulation of Dismissal, R-1246-1248)

22. Trans-West, in addition to court costs, deposition costs and pre-trial discovery expenses, in the amount of \$118.00, incurred attorney's fees in the sum of \$6,910.00 or a total of \$7,028.00. (R-1359, 1362-1365)

23. Trans-West asserts that its costs, expenses and attorney's fees are damages which it incurred and is now looking for indemnification from Cessna for those expenses and costs.

24. The matter was set down for trial on the issue of whether or not the subject aircraft was in fact defective and whether or not the financing of the aircraft by Cessna Finance was tortious as asserted by the plaintiff, and whether Trans-West did in fact act in such a way that would be construed to be an active participant in the negligence complained of by the plaintiff. (R-1324) This trial date was stricken upon the granting of the summary judgment in favor of Cessna and Cessna Finance, thereby precluding Trans-West from adjudicating the issue of liability of either Trans-West or Cessna under plaintiff's complaint.

SUMMARY OF ARGUMENT

1. A retail seller is entitled to indemnification from a manufacturer in a product liability action.

2. A retail seller does not have to make a written tender of defense to the manufacturer to activate the duty of indemnification.

3. A retail seller may predicate the right to indemnification on the theory of implied contract between the retail seller and the manufacturer.

4. In the case before the Court the right of indemnification exists regardless of the legal theory used.

5. Legal fees and costs are a part of the damages that the retail seller is entitled to against the manufacturer in obtaining indemnification.

6. A claim of indemnification may be asserted by cross claim or third party complaint.

7. Under the facts of this case the manufacturer knew that the retail seller was a passive party and, therefore, entitled to indemnification and defense.

8. A retail seller who does nothing more than sell a product without alteration, repair or other involvement or negligence is a passive party.

9. The Court erred in not allowing a trial on the issue that the aircraft in question was defective.

ARGUMENT

POINT ONE

DEFENDANT, TRANS-WEST, IS ENTITLED TO
INDEMNIFICATION FROM THE DEFENDANT,
CESSNA AIRCRAFT.

The general law with respect to sales and in particular implied warranties of merchantable quality or fitness for intended purposes holds that the ultimate seller of the product has the right of indemnification back over against the distributors, wholesalers, and manufacturers, from whom he obtained the product for sale to the ultimate

consumer, 41 Am Jur 2d 717, Indemnity § 25. This includes the award of attorney's fees as part of the damages comprising the indemnification award, Massingale v. Northwest Cortez, Inc., 620 P.2d 1009 (Wash. App., 1980), so long as the ultimate seller stands in the position of being either passive or merely a conduit in the sale of the product to the ultimate consumer where that seller has not modified, altered, changed, or otherwise dealt with the product in a negligent manner.

The Oregon Appellate Court in Davidson v. Parker, 622 P.2d 1113, 1118 (Ore. App., 1981) observed:

"Where a retailer delivers goods to a buyer without creating a defect in the product, it is only secondarily liable for that defect and is entitled to indemnity from the manufacturer."

Utah recognizes this law. Sanone v. J. C. Penney Company, 404 P.2d 248 (Utah, 1965). In this case, a department store's right to maintain its third-party complaint against an escalator manufacturer where a child was injured on the escalator was affirmed by the Supreme Court.

Every person must act or use that which he controls so as not to injure another. If his actions do injure another, then a third person who is called upon, under some theory of law, to respond to those damages may look to that person who is primarily liable for the recovery of any damages awarded against that third person. Holmstead v.

Abbott G. M. Diesel, Inc., 493 P.2d 625 (Utah, 1965). See also Hartwig Farms v. Pacific Gamble Robinson, 625 P.2d 171 (Wash., 1981).

In products liability cases, the manufacturer has an implied duty to defend the retailer, and the manufacturer is liable to the retailer for attorney's fees if it fails to defend. Heritage v. Pioneer Brokerage & Sales, 604 P.2d 1059 (Alaska, 1983).

In D. G. Shelter Products v. Moduline Industries, 684 P.2d 839 (Alaska, 1984), the court in footnote 8 observed:

"The 'general rule' was stated in Heritage v. Pioneer Brokerage & Sales, Inc., 604 P.2d 1059, 1067 (Alaska 1979), quoting Addy v. Bolton, 257 S.C. 28, 183 S.E.2d 708, 710 (1971):

"[I]n actions of indemnity, brought where the duty to indemnify is either implied by law or arises under contract, and no personal fault of the indemnitee has joined in causing the injury, reasonable attorney's fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses. (Emphasis added)"

Clearly, Trans-West had the right to maintain its cross-claim for indemnification against Cessna.

POINT TWO

WRITTEN TENDER IS NOT REQUIRED TO
ACTIVATE THE DUTY OF INDEMNIFICATION.

Cessna asserted that a written tender of defense must have been given to it by Trans-West before Cessna had any duty to defend or answer in indemnification.

It is a fact which is not in dispute that such a written tender was not made by Trans-West.

It is a fact, however, that Cessna was a party defendant with Trans-West in this action and, therefore, had actual notice of the pendency of the action.

It is a further fact that Trans-West gave oral notice of the pendency of the action to Cessna's zone manager immediately after the commencement of the action and requested that Cessna defend Trans-West, which request was summarily denied.

Case law points out that a tender is not a prerequisite to fix liability under indemnification. Miller v. New York Oil Co., 243 P. 118 (Wyo, 1926). This doctrine was reaffirmed in Pan American Petroleum v. Maddox Well Service, 586 P.2d 1120 (Wyo, 1979).

The Alaska Supreme Court in D. G. Shelter Products v. Moduline Industries, 684 P.2d 839 (Alaska, 1984), after pointing out that proper notice of the litigation should be given so that the indemnitor could prepare a defense, then said:

"A tender of defense by the indemnitee, however, is not required since it can be inferred upon timely notice of the pending action. Bedal v. Hallack & Howard Lumber Co., 226 F.2d 526, 535-36 (9th Cir, 1955)."

The same holding was affirmed in Hales v. Green Colonial, Inc., 402 F. Supp 738 (Mo., 1975); Ward v. City

National Bank & Trust Co., 379 S.W.2d 614 (Mo., 1964), and the numerous cases cited therein.

Many cases have gone even further in holding that notice, as opposed to tender, is not even required unless the indemnitee seeks to bind the indemnitor to the original judgment or determination of liability. McStain Corp. v. Elfine Plumbing & Heating Inc., 558 P.2d 588 (Colo. App., 1976); Insurance Company of North America v. Hawkins, 246 N.W.2d 878 (Neb., 1976); Oceanic Steam Navigation Co. v. Compania Transatlantica Espanola, 38 N.W. 360 (N.Y., 1895); Hill v. Joseph T. Ryerson & Son Inc., 268 S.E.2d 296 (W. Va.).

In 42 CJS Indemnity § 32a(2) (1944), it is stated:

"The omission to give notice to the indemnitor, however, does not affect the right of action against him, but simply changes the burden of proof and imposes on the indemnitee the necessity of again litigating and establishing all of the actionable facts."

Cited with approval in Illinois Central Railroad v. Blaha, 89 N.W.2d 197, 201-02 (Wis., 1958). The same rationale was applied in Jennings v. United States, 374 F.2d 983 (4th Cir., 1967), wherein the court observed:

"The concept that notice plus an opportunity to defend render binding on an indemnitor the judgment in a case in which he did not participate springs from notions of res judicata."

In the case now before the Court, Cessna not only had notice, but was a party defendant and in effect controlled the conduct of the case and then settled the action without the participation of Trans-West in the settlement negotiations.

It is respectfully submitted that the law is clear that no tender of defense is required to maintain an action of indemnification, nor for that matter is notice, but as in the instant case actual notice was given both by the institution of the action against Cessna, Trans-West and others and the notice and demand for defense made by Trans-West of Cessna, it had ample opportunity to participate in the defense.

The argument that Trans-West cannot maintain its action for indemnification is without merit.

POINT THREE

THE RIGHT TO INDEMNIFICATION MAY BE
PREDICATED UPON AN IMPLIED CONTRACT
THEORY.

The question has been raised many times in the field of indemnification as to whether the right of action is founded on contract or tort. General Electric Co. v. Cuban American Nickel Co., 396 F.2d 89 (5th Cir., 1968). The two types of indemnity rest on separate and distinct theoretical bases and require proof and evaluation of different elements. Parfait v. Jahncke Service, Inc., 484 F.2d 296 (5th Cir., 1973).

In the case now before the Court, Cessna, as a manufacturer, designed, built and manufactured an aircraft and sold the same to its distributor who in turn sold it to Trans-West, the ultimate seller. Thus, the aircraft was sold to Trans-West with the same implied warranty of merchant-

ability as that which ran with this sale to the ultimate purchaser and user.

The implied warranty of merchantability creates an implied contract in law. Whittle v. Timesavers, Inc., 572 F. Supp 584 (Va., 1983); Paradis v. A.L. Nichols, 12 N.E.2d 863 (Mass., 1938). And this implied contract in law creates an implied indemnity.

In the case of Morningstar v. Black & Decker Manufacturing Co., 253 S.E.2d 666 (W. Va., 1979), the West Virginia court acknowledged the right of implied indemnity and stated:

"Most Courts recognize that a seller who does not contribute to the defect may have an implied indemnity remedy against the manufacturer, when the seller is sued by the user."

Thus, the Court may predicate the right of indemnification upon an implied contract between Cessna as the manufacturer of a product, and Trans-West as the intermediate purchaser who bought the product with the same warranties as were ultimately provided the end buyer-user (the plaintiffs in this suit). The right of indemnification, however, does not hinge on this theory only, but can and in many jurisdictions does predicate itself on negligence or express contract theories.

It would seem that this is a situation of first impression before the courts of Utah.

POINT FOUR

TRANS-WEST'S RIGHT TO INDEMNIFICATION
EXISTS REGARDLESS OF THE THEORY USED.

As pointed out in the various cases cited herein, the right of indemnification exists whether one wishes to espouse the theory of active-passive negligence as between a manufacturer and a seller who sells without modification or change, or an express contract or an implied contract arising from the express and/or implied warranties of fitness and merchantability.

Based upon either of these theories, the law of Utah not being clear as to which one applies, Trans-West is still entitled to indemnification, which doctrine Utah does recognize.

In Holmstead v. Abbott G. M. Diesel, Inc., 493 P.2d 625 (Utah, 1972), the Utah court recognized and cited with approval § 96 of the Restatement of the Law of Restitution, which states:

"A person who, without personal fault, has become subject to tort liability for the unauthorized and wrongful conduct of another, is entitled to indemnity from the other for expenditures properly made in the discharge of such liability."

The Supreme Court went on to state that:

"Subrogation is said to be a creation of equity for the purpose of effecting an adjustment between parties so as to secure ultimately the payment or discharge of a debt by a person who in good conscience ought to pay for it."

Applying this philosophy of having the party who in good conscience pay for the wrongdoing in the instant case, it is clear that it is Cessna, the party who was the active participant in the manufacture of a bad product, who should be called upon to pay the costs and expenses incurred by Trans-West in defending itself from the wrongs of Cessna, as it stands as a mere conduit in the stream of commerce, a passive participant who had the misfortune to be named as a party defendant along with an active negligent party or a party who actively breached its duties of warranty.

POINT FIVE

TRANS-WEST IS ENTITLED TO THE AWARD
OF ATTORNEY'S FEES AS A PART OF ITS
DAMAGES.

Trans-West asserts that as it is entitled to indemnification, whether it be by implied contract, express contract, or under a tort negligence theory and that the right of such indemnification is affirmed as the general law throughout the United States. Hill v. Joseph T. Ryerson & Son, 268 S.E.2d 296 (W. Va.), and the extensive cases cited therein.

As a part of the damages incurred by Trans-West, it asserts that it is entitled to the reimbursement of the attorney's fees and costs that it paid out in defense of this action.

Cessna, on the other hand, points out that there is no basis for the award of attorney's fees as under Utah

law, there is no written contract nor statute authorizing the award of attorney's fees in this type of case.

Cessna misses the point asserted by Trans-West, that is, that attorney's fees are a part of the damages awardable under an indemnification theory, and not a separate award of fees distinct from damages.

The cases throughout the United States have almost uniformly allowed attorneys fees as a part of the indemnification to which a seller is entitled from a manufacturer where the manufacturer has been the active participant in the creation of a defective product and the seller is a passive participant in the transaction, who has not added by alteration, repair or otherwise to the failure of the product sold.

The payment of attorney's fees is recognized as a part of indemnification under § 80, Restatement of the Law of Restitution, and the cases cited thereunder. Kentucky recognized this principle in 1972 in Chittom v. Abell, 485 S.W.3d 231, 237 (Ky., 1972) (reversed on other grounds) in holding that where there was a failure to discharge a duty to provide a defense on a claim for damages, the indemnitee would be entitled to the award of attorney's fees paid for a defense of the action.

This same theory was adopted by Florida in 1979 in Occidental Fire & Cas. Co. v. Stevenson, 370 S.2d 1211,

1214, (Fla., 1979) (reversed on other grounds) wherein the court noted that a principal is subject to a duty to exonerate an agent for the expense of defending actions brought by third parties which are unfounded but not brought in bad faith. In an earlier case, Insurance Co. of North America v. King, 340 So.2d 1175 (Fla. App., 1976), the court observed:

" . . . Generally an indemnitee is entitled to recover, as part of his damages, reasonable attorneys fees, and reasonable and proper legal costs and expenses, which he is compelled to pay as the result of suits by or against him in reference to the matter against which he is indemnified."

This case goes on to point out that the allegations of wrongdoing in the plaintiffs' complaint are not sufficient to allow the wrongdoing party to escape liability by setting up the defense of the allegations of the complaint as Cessna attempts to do in this case. The court stated:

"A plaintiff should not be able to arbitrarily deprive a defendant of his right to indemnification from a third party by alleging that he was actively negligent when in fact that defendant is found not to have been actively negligent."

In a case on all fours factually with the present case, the Texas Appellate Court in Champion Mobile Homes v. Rasmussen, 553 S.W.2d 237 (Tex. Civ. App., 1977), in relying on § 93 of the Restatement of the Law of Restitution, observed that the Restatement provides that where a person (such as the manufacturer) has supplied to another (such as the retailer) a chattel which, because of the supplier's negligence

or other fault, is dangerously defective for the use for which it is supplied, and both the supplier and the second party have become liable in tort to a third person injured by such use, the supplier (manufacturer) is under a duty to indemnify the second party (retailer) for expenditures made in discharge of the third person's claim.

Section 93 of the Restatement of the Law of Restitution states:

"(1) Where a person has supplied to another a chattel which because of the supplier's negligence or other fault is dangerously defective for the use for which it is supplied and both have become liable in tort to a third person injured by such use, the supplier is under a duty to indemnify the other for expenditures properly made in discharge of the claim of the third person, if the other used or disposed of the chattel in reliance upon the supplier's care and if, as between the two, such reliance was justified."

The significant words to be noted in the Champion case and § 93 of the Restatement is "expenditures properly made" (emphasis mine).

Is it not true, attorney's fees fall within the definition of an expenditure?

Is it not the intent of indemnification to shift over to the defaulting or wrongdoing party the cost and expense incurred by the innocent party?

How can this equitable principle be carried out if the costs and expenses (which include attorney's fees) are not paid?

It is to be noted that the word expenditures is used in both Sections 90 and 93 of the Restatement of the Law of Restitution.

Thus, in St. Paul Fire and Marine Ins. Co. v. Crosetti Bros., Inc., 475 P.2d 69 (Ore., 1970), the Oregon Supreme Court ruled:

"The rule in most jurisdictions, regardless of whether indemnity is based upon an implied or an express agreement, is that when a claim is made against an indemnitee for which he is entitled to indemnification, the indemnitor is liable for any reasonable expenses incurred by the indemnitee in defending against such claim, regardless of whether the indemnitee is ultimately held not liable. Paliaga v. Luckenback Steamship Co., 301 F.2d 403, 408 (2d Cir. 1962); Miller and Company of Birmingham v. Louisville & N. R. Co., 328 F.2d 73, 78 (5th Cir., 1964); Southern Arizona York Refrigeration Co. v. Bush Mfg. Co., 331 F.2d 1, 60 (9th Cir., 1964); O'Connell v. Jackson, 273 Minn. 91, 140 N.W.2d 65, 69 (1966); Commercial Standard Ins. Co. v. Cleveland, 86 Ariz. 288, 345 P.2d 210, 216 (1959); Restatement, Restitution § 80, Comment b., 356. We so hold. Statements in New Amsterdam Cas. Co. v. Terrall, 165 Or. 390, 107 P.2d 843 (1940), and National Surety Co. v. Johnson, 115 Or. 624, 239 P. 538 (1925) are not to be construed to the contrary."

Idaho adopted the rationale and authority of the Oregon Court in Farber v. State, 682 P.2d 630 (Idaho, 1984).

Indemnification has been recognized in common law and in the case of Southern Arizona York Refrigeration v. Bush Mfg. Co., 331 F.2d 1 (9th Cir., 1964), the federal court held that only that if the indemnitee establishes its right to indemnity is it entitled to recover its costs including attorney's fees incurred in defending the action.

The Restatement of Torts 2d § 914(2) states:

"(2) One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action."

For further discussion and cases holding the award of attorneys fees is proper, see United States Fire Ins. Co. v. Chrysler Motors Corp., 505 P.2d 1137 (Oregon, 1973). This case summarizes common law indemnity as summarized by Restatement of the Law of Restitution § 76.

The Washington Court of Appeals aptly summarized the law in Wagner v. Beech Aircraft Corp., 680 P.2d 425 (Wash. App., 1984), and stated:

"In Aldrich & Hedman, Inc., v. Blakely, 31 Wash. App. 16, 639 P.2d 235 (1982), the Court of Appeals reviewed the law in this state with respect to the right of a litigant to recover attorney's fees and other defense costs. The Court summarized the law as follows:

"Attorney's fees are generally not recoverable in the absence of contract, statute, or a recognized ground of equity. Where the natural and proximate consequence of the acts or omissions of a party to an agreement or an event have exposed one to litigation with a third person, equity may allow attorney's fees as an element of consequential damages. Three elements are necessary to create this equitable right to recover attorney's fees: (1) a wrongful act or omission by A towards B; (2) such act or omission exposes or involves B in litigation with C; and (3) C was not connected with the original wrongful act or omission of A towards B."

Wyoming adheres to the award of attorney's fees in an indemnification situation and has done so for many years. Miller v. New York Oil Co. (supra).

Alaska in D. G. Shelter Products v. Moduline Industries (supra), in approving the award of attorney's fees in the footnote to the decision, observed:

"5. The 'general rule' was stated in Heritage v. Pioneer Brokerage & Sales, Inc., 604 P.2d 1059, 1967 (Alaska 1979), quoting Addy v. Bolton, 257 S.C. 28, 183 S.E.2d 708, 710 (1971):

[I]n actions of indemnity, brought where the duty to indemnify is either implied by law or arises under contract, and no personal fault of the indemnitee has joined in causing the injury, reasonable attorney's fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses. (Emphasis added)

"We note what appears to be a technical error in our published opinion in Heritage. The italicized language in the above paragraph does not appear in Addy v. Bolton, which Heritage purports to quote. Heritage, nevertheless, accurately states the general rule."

In the case of Vallegos v. C. E. Glass Company, 583 F.2d 507 (10th Cir., 1978), the Circuit Court of Appeals observed:

"It is true that in connection with indemnity claims recovery may generally be had for attorneys' fees and expenses incurred in defense against the principal claim, but not for those incurred in establishing the right of indemnity." (Citing extensive authority)

Trans-West has not asserted a claim for any costs or attorney's fees with respect to the matters arising since the settlement of the claims of the plaintiffs.

In a case based on the passive negligence of a seller of an automobile as opposed to the active negligence of the manufacturer, Ford Motor Company, the Florida Court in Insurance Company of North America v. King, 340 So.2d 1175 (Fla. App., 1976), ruled:

"In these circumstances, we hold that Fort Lauderdale Lincoln-Mercury, Inc., as indemnitee is entitled to recover from Ford Motor Company, as part of its damages reasonable attorney's fees and reasonable and proper legal costs and expenses. . . ."

In a later case, where the indemnitee was successful in defending itself against the claims of the plaintiff and, therefore, did not have to pay any judgment, the Florida court reversed the trial court which denied the imposition of attorney's fees that the indemnitee paid out in the defense. In this case, Pender v. Skillcraft Industries, Inc., 358 So.2d 45 (Fla. App., 1978), the court point out:

"We therefore reverse the lower court's denial of the cross-claim for indemnification and hold that if a retailer would clearly have been entitled to indemnification of attorney's fees and court costs if it had lost in the main action and had a judgment rendered against it (for passive negligence, breach of implied warranty, or strict liability), then it will be equally entitled to such indemnification in the event that it should successfully defend itself in the main action."

This is precisely the position taken by Cessna, that as Trans-West was not compelled to pay anything on the settlement, that it is not entitled to any indemnification of its costs of defense. Such is not the law as pointed out in Pender.

Many of the other cases cited in this brief have authorized the award of attorney's fees to the indemnitee, such as Hales v. Green Colonial, Inc., 402 F. Supp 738 (Mo., 1975). In Whittle v. Timesavers, Inc., 572 F. Supp 584 (Va., 1983), the imposition of attorney's fees was predicated upon an implied contract and, thus, authorized under the theory of the existence of a contract.

See also Alterman Foods, Inc., v. G.C.C. Beverages, Inc., 310 S.E.2d 755 (Ga., 1983).

It is submitted that the claim of Cessna to the effect that Trans-West did not extricate itself from the lawsuit in a timely manner is totally without merit. A reading of the complaint, objectively, shows that the allegations of the plaintiffs' complaint were only indirectly aimed at Trans-West.

The basic claims were that the aircraft was not constructed properly nor were the components fit for the purposes for which they were made and sold. Trans-West, as the seller, under the generally recognized principles of products liability law, was properly in the lawsuit, but

only as a passive party. The law of indemnification in these types of suits is clear and almost without exception, that Trans-West was entitled to indemnification and that it is entitled to recoup its out-of-pocket costs and expenses and costs of defense including reasonable attorney's fees.

In the case of Herman v. General Irrigation Co., 247 N.W.2d 472 (N.D., 1976), the North Dakota court held:

"It is the general rule that a retailer or other seller suffering and paying a judgment against him by an injured person in a warranty action is entitled to indemnity from a manufacturer who sold the product to him with a similar warranty. 3 Frumer & Friedman Products Liability § 44.03[1]. And in the field of products liability, the concept underlying allowance of indemnity is that the indemnitee has been rendered liable because of a nondelegable duty arising out of common or statutory law, but the actual cause of the injury has been the act of another person. 3 Frumer & Friedman, supra, § 44.02[2]. See Burbage v. Boiler Engineering and Supply Co., 433 Pa. 319, 249 A.2d 563 (1969)."

As pointed out in other cases, whether a judgment is rendered or not, the costs of defense are recoverable under indemnification.

To hold otherwise would be to in effect say to the seller, "let the plaintiff get a judgment as we will be repaid by the manufacturer and let's not worry about a defense to what may be a case without merit."

In the case now before the Court, Trans-West did nothing wrong, other than to sell a bad aircraft which it

did not make, design, manufacture, equip or assemble, and, thus, it defended its position of no liability to the plaintiffs. Had it paid \$10,000 or \$20,000 in settlement, would Cessna now admit that it was liable to Trans-West for the settlement sums paid? The writer does not believe that the Supreme Court is that naive as to believe that Cessna would admit that it would be liable for any such payments. But is there a difference between monies expended in defending against a claim and paying that claim, when it comes to indemnification? The answer is no.

Trans-West is entitled to be made whole in this matter and that includes the payment of its costs of defense which include reasonable attorney's fees.

Cessna asserts that it was never adjudicated as being liable to the plaintiff in this case nor was the aircraft determined to have been faulty or negligently constructed, therefore, Trans-West has no cause of action.

In short, it is asserting the hypothesis that before Trans-West is entitled to indemnification there must have been a complete adjudication of the case on its merits.

It is respectfully submitted, that while many of the cases cited herein did in fact arise after the adjudication or liability of the manufacturer, still the damages suffered by the retailer, Trans-West, were complete and actual by merely defending the action brought against it and the manufacturer.

It is submitted that the law is or should be in Utah that all damages incurred by the retailer not through its fault or active negligent conduct are compensable from the manufacturer.

To compel the retailer to refuse to settle any case or actively attempt to block the settlement of the primary parties to litigation under the theory that to do otherwise would constitute a waiver of its rights of indemnification, is to not only invite continued litigation but to emasculate the settlement process which is one of the foundations of the legal profession.

If this is the law, then the law needs to be changed. If the law is unclear, then the Supreme Court should define what the law is in this regard so that future innocent retailers will know that once a product liability suit is filed, it must be tried to the ultimate and final conclusion, regardless of the wishes of the plaintiff or the manufacturer-defendant, and regardless of the merits of the case or that a good faith settlement may be made without the loss of rights to be made whole by the manufacturer. Cessna would have the Court reach this conclusion. Cessna asserts that this is the law.

Cessna further asserts that the settlement documents that it was instrumental in preparing specifically state that there is no admission of liability or of negligence on

the part of Cessna. Trans-West admits this. Any settlement document which is prepared by competent counsel would have such an exculpatory clause in it. However, it is submitted that such a clause does not repair the injury to the retailer-seller's pocketbook. It still had to defend itself against the slings and arrows of the plaintiff, and in raising its shield to do so, it defended the very product which it had no part of creating, designing, making or equipping, to the benefit of the manufacturer.

POINT SIX

THE LAW OF INDEMNIFICATION DOES NOT REQUIRE
THAT THE CLAIMS OF THE PARTIES BE FULLY
ADJUDICATED BEFORE THE PASSIVE DEFENDANT MAY
MAINTAIN HIS ACTION FOR INDEMNIFICATION.

The law is clear that a claim of indemnification will lie by way of cross-claim or third-party complaint whenever an action is commenced whereby a named party defendant has the right of claim against another defendant or another party.

Rule 13 (f) and Rule 14 (a), Utah Rules of Civil Procedure, authorize and sanction this procedure.

In Stanley Title Company v. Continental Bank and Trust Company, 26 U.2d 121, 485 P.2d 1400 (1971), the Utah Supreme Court observed:

"Under Rule 13 (f), U.R.C.P., it is no longer necessary that the liability sued upon in the cross claim must first have become fixed by a judgment as at common law." (Citing authority)

The Utah Supreme Court reversed a dismissal of a cross-claim for indemnification in the case of Sanone v. J. C. Penney Company, 404 P.2d 248 (Utah, 1965).

Thus, Cessna's contention that Trans-West cannot maintain its cross-claim against Cessna for indemnification is without merit.

POINT SEVEN

CESSNA KNEW THAT UPON READING THE COMPLAINT THAT TRANS-WEST WAS A PASSIVE SELLER AND THAT IT KNEW OR SHOULD HAVE KNOWN THAT IT HAD THE DUTY TO DEFEND THE ACTION.

It is obvious from the reading of the complaint of the plaintiffs in this matter that the responsibility of Trans-West was that of a passive seller of a product which had been manufactured by the defendant Cessna.

All of the allegations, while mentioning Trans-West, run to the manufacture, design, and equipping of the P-210 aircraft and to the method of financing carried on exclusively by Cessna or Cessna Finance Company, the wholly owned subsidiary of Cessna.

There is no one single allegation of the complaint that runs to alleged conduct of Trans-West which was not tied in as a seller of the product manufactured, designed and equipped by Cessna or which ran to the financing of the aircraft by Cessna Finance.

The contention of Cessna that the complaint spelled out culpable negligence or misrepresentation on the part of Trans-West is just not spelled out in the complaint.

As stated in Insurance Company of North America v. King, 340 So.2d 1175 (Fla. App., 1976):

"A plaintiff should not be able to arbitrarily deprive a defendant of his right to indemnification from a third party by alleging that he was actively negligent when in fact that defendant is found not to have been actively negligent."

Wording this another way is to say that Cessna cannot take the unproven accusations of the plaintiffs' complaint and assert that as the plaintiffs asserted the active participation of Trans-West in either the breach of warranties or negligence, whichever theory the plaintiffs were proceeding on, and use this as a means of ducking out of an indemnification liability.

From the very wording of the complaint and a knowledge that Trans-West did not modify or alter the aircraft and in fact did not even have the physical facilities to do so, the defense of Cessna that Trans-West did not work the case into a posture of where Cessna should have taken over the defense is without merit and should be summarily dismissed.

POINT EIGHT

THE UNCONTROVERTED FACTS OF THIS CASE
ESTABLISH THAT TRANS-WEST WAS A PASSIVE
PARTY.

Cessna asserts that Trans-West is not entitled to indemnification because there was no court adjudication that

Trans-West was liable to and compelled to pay damages to the plaintiff.

Cessna did not dispute any of the uncontroverted facts asserted by Trans-West which factually establish it as a passive party or a passive tortfeasor.

Cessna asserts that there had to be an adjudication that the aircraft was faulty before indemnification arose.

It is submitted that this is not the law, or if it is the law in some jurisdictions, it should not be the law in Utah.

It is submitted that the better law is that where, if the status of being passive as opposed to active, is shown by the uncontroverted facts, whether or not ultimate liability is established is immaterial as to the passive party, as it is still obligated to defend and still incurs costs, expenses, and damages, including its attorney's fees, not through what it did, other than fall into the unhappy role of the ultimate retailer (seller), but by virtue of its status, while the manufacturer, whether or not it extricates itself from the charges, who caused the problem in the first place says, try the case, otherwise no indemnification.

Trans-West was ready to pick up the gauntlet as to the issues of there having been a faulty aircraft produced by Cessna and as to the passive position of itself, but was precluded from doing so by the trial court not permitting it to go forward and prove those things at the scheduled trial

that Cessna now claims were necessary before indemnification could be invoked.

Cessna espouses case after case which indicate that a full adjudication of the question of liability of the party seeking indemnification must be determined, but then asserts that it was entitled to summary judgment on the question of indemnification because the trial date was a few days after the date for the hearing of the motions for summary judgment.

If Cessna is right, then it is patently error for the trial court to strike the trial date and preclude that issue which Cessna claims is dispositive of Trans-West's right to indemnification.

This is a matter of seeking to have one's cake and eat it too.

POINT NINE

THE TRIAL COURT ERRED IN NOT ALLOWING
A TRIAL ON THE ISSUE OF THE DEFECTIVE
AIRCRAFT.

Cessna asserts that there was no showing that the aircraft in question was defective, thus, there was no responsibility for Cessna to indemnify Trans-West.

Further, there was no court adjudication that Trans-West was a passive party as opposed to an active tortfeasor.

These issues were set down for trial by the trial court, but then both parties filed motions for summary

judgment and the court struck the trial date and upon ruling in favor of Cessna dismissed Trans-West's cause of action, thus, the issue of the defectiveness of the aircraft in question has not been adjudicated, nor an adjudication of the status of Trans-West, although the uncontested facts clearly demonstrate that Trans-West was at best a passive negligent party.

If the Supreme Court determines that the law is that there must be an adjudication of the existence of a faulty product before indemnification of a seller will lie, then the trial court erred in not allowing a trial on this issue and that matter should be remanded back to the trial court for a determination of this issue.

Utah law is clear that where there is a material genuine issue of fact undecided, summary judgment will not lie. Cowen & Co. v. Atlas Stock Transfer Co., 695 P.2d 109 (Utah, 1984); Hobelman Motors, Inc., v. Allred, 685 P.2d 544 (Utah, 1984)

The trial court could not close its eyes to the issues of the ultimate liability of Trans-West under the facts of the plaintiff's case, if that ultimate liability was in fact and law necessary to decide the case.

If the Supreme Court decides that those ultimate facts had to be decided, then clearly, Trans-West is entitled to its day in Court to prove those elements which are required

to invoke indemnification. Gadd v. Olson, 685 P.2d 1041 (Utah, 1984); McBride v. Jones, 615 P.2d 431 (Utah, 1980). It has not been afforded this constitutional and statutory right in this matter, and, thus, the trial court's summary judgment must be reversed and the matter remanded back for trial on the issues.

This would be a material genuine issue of fact which would preclude summary judgment in favor of the plaintiff in this matter and which was clearly before the Court.

CONCLUSION

It is respectfully submitted that under the equitable principles as recognized by the State of Utah, either by the adoption of common law or by the better case law adopted throughout the United States, which Utah should adopt, that where a retail seller is beset with having to defend a manufacturer for a manufacturer defect in a product, the seller is entitled to recoup its losses for defending the action, which it is a party to by reason of its being a passive tortfeasor, or by being a party to an implied contract of indemnity.

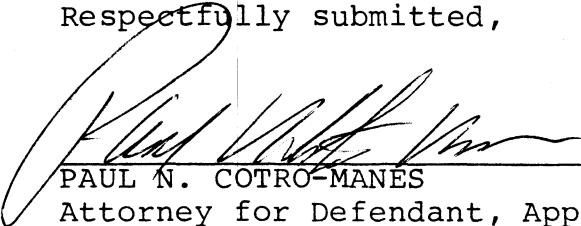
It is further respectfully submitted that the better law throughout the United States would afford relief to Trans-West in this matter for its attorney's fees and costs as a part of the damages suffered by Trans-West that it was compelled to obligate itself in defending against the

claims of plaintiffs, who were seeking, and did in fact assert and compel a substantial settlement from the manufacturer, thus, showing that the airplane was indeed faulty and subject to the claims of the plaintiffs for design and manufacturing defect.

It is respectfully submitted that the damages which include attorney's fees sought in this matter should be granted and that Trans-West Aircraft Sales, Inc.'s motion for summary judgment should have been granted as against Cessna Aircraft Company.

It is respectfully submitted that in the alternative this matter should be remanded back to the Trial Court for a trial on the issues of the status of Trans-West being a passive party and the question of the alleged defective product being sold to the plaintiff thereby raising the right of indemnification.

Respectfully submitted,



PAUL N. COTRO-MANES
Attorney for Defendant, Appellant
Trans-West Aircraft Sales, Inc.
Suite 280, 311 South State Street
Salt Lake City, Utah 84111-2377

INDEX OF ADDENDA

	Page
Judgment of Dismissal of Cross-claim	39-41
Rule 13(f), Utah Rules of Civil Procedure	42
Rule 14(a), Utah Rules of Civil Procedure	42
Pages 85-87, Deposition, Brook Grant, Original not filed	43-46

ATTORNEYS AT LAW
TWELFTH FLOOR, 310 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84101-2171

H. WAYNE WADSWORTH (#3347)
R. L. KNUTH (#3625)
of and for
WATKISS & CAMPBELL
Attorneys for Defendant
Cessna Aircraft Company
310 South Main, 12th Floor
Salt Lake City, Utah 84101
Telephone: 801/363-3300

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

HANOVER LIMITED, a partnership;	:	
WESTERN MAINTENANCE AND	:	
MANAGEMENT, INC., a Utah corpor-	:	
ation; and BROOKE GRANT, an	:	
individual,	:	
 Plaintiffs,	:	JUDGMENT OF DISMISSAL
	:	OF CROSS-CLAIM
-vs.-	:	
 CESSNA AIRCRAFT COMPANY, a	:	Civil No. C 82-4799
Kansas corporation; CESSNA	:	
FINANCE CORPORATION, a Kansas cor-	:	(Judge David B. Dee)
poration; TELEDYNE INDUSTRIES,	:	
INC., a California corporation;	:	
AAR NORTHWEST, INC., a Delaware	:	
corporation; and TRANS WEST	:	
AIRCRAFT SALES, INC., a Utah	:	
corporation,	:	
 Defendants.	:	

The reciprocal motions for summary judgment of cross-claimant Trans West Aircraft Sales, Inc. and cross-defendants Cessna Aircraft Company and Cessna Finance Corporation came on regularly for hearing before the Honorable David B. Dee on

Thursday, December 5, 1985 with Paul N. Cotro-Manes representing the cross-claimant, H. Wayne Wadsworth representing cross-defendant Cessna Aircraft Company and Robert L. Stevens representing cross-defendant Cessna Finance Corporation.

After argument of counsel, the Court took the matter under advisement and now being fully advised in the premises and good cause appearing therefor,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. The motions for summary judgment of Cessna Aircraft Company and Cessna Finance Corporation be, and the same hereby are, granted and judgment is entered in favor of said cross-defendants dismissing the cross-claim of Trans West Aircraft Sales, Inc. with prejudice and upon the merits; and

2. The motion for summary judgment of cross-claimant Trans West Aircraft Sales, Inc. be, and the same hereby is, denied.

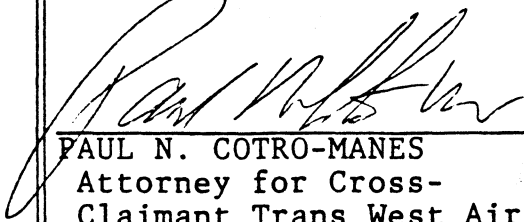
DATED this _____ day of December, 1985.

BY THE COURT:

DAVID B. DEE
DISTRICT JUDGE

ATTORNEYS AT LAW
TWELFTH FLOOR, 310 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84101-2171

APPROVED AS TO FORM:



PAUL N. COTRO-MANES
Attorney for Cross-
Claimant Trans West Aircraft
Sales, Inc.



H. WAYNE WADSWORTH
Attorney for Cross-
Defendant Cessna Aircraft
Company

ROBERT L. STEVENS
Attorney for Cross-
Defendant Cessna Finance
Corporation

RULE 13 (f), Utah Rules of Civil Procedure

(f) **Cross-Claim Against Co-Party.** A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

RULE 14 (a), Utah Rules of Civil Procedure

THIRD-PARTY PRACTICE

(a) **When Defendant May Bring in Third Party.** At any time after commencement of the action a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than ten days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * *

HANOVER LIMITED, a partnership; :
WESTERN MAINTENANCE AND :
MANAGEMENT, INC., A Utah :
corporation; and BROOKE GRANT, :
an individual, :

Plaintiffs, :

Civil No. C 82-4799

-vs- :

Deposition of:

CESSNA AIRCRAFT COMPANY, a :
Kansas corporation; CESSNA :
FINANCE COMPANY, A Kansas :
corporation; TELEDYNE INDUSTRIES :
INC., a California corporation; :
AAR NORTHWEST, INC., a Delaware :
corporation; AND TRANS WEST :
AIRCRAFT SALES, INC., a Utah :
corporation, :

BROOKE GRANT

Defendants. :

* * *

BE IT REMEMBERED that on the 7th day of December, 1982,
the deposition of BROOKE GRANT, produced as a witness herein
at the instance of the defendant herein, in the above-entitled
action now pending in the above-named court, was taken before
VIKI HATTON, a Certified Shorthand Reporter and Notary Public
in and for the State of Utah, commencing at the hour of 9:30
a.m. of said day at the offices of WATKISS & CAMPBELL, 310
South Main Street, Salt Lake City, Utah.

That said deposition was taken pursuant to notice.

VIKI E. HATTON
LICENSE #91

Beehive
Reporting
Service

#9 Exchange Place Suite 814
Salt Lake City, Utah 84111
801-363-1458

1 way I got to him.

2 Q He hadn't called you back, had he, to find out whether or
3 not you were still interested in the aircraft?

4 A I may have some phone messages to verify that or not, but
5 that would be hard for me to tell at this stage.

6 Q Anyway, when you went in to see Mr. Battocchio, you'd
7 already made up your mind, had you not, to buy a Cessna P-210?

8 A That's -- I try and never make up my mind on buying
9 anything until I make sure I can cut the kind of deal I want.
10 My business consists of negotiating with situations and
11 people, so I try -- if your mind is made up, you're not going
12 to be able to get a good buy.

13 Q So when you walked in to see Mr. Battocchio, it wasn't the
14 performance of the airplane, or the type of airplane, it was
15 how much you were going to pay for the aircraft that made the
16 determination as to whether you were going to buy or not; is
17 that true?

18 A I'd like it to be that open or shut but I don't
19 believe it was. We talked a great deal about the airplane,
20 about what they could do.

21 Q What did he tell you that you didn't already know about
22 it?

23 A That's -- let see, as I can remember, we talked about the
24 economics of owning it, talked about the capability it had, I
25 think I talked with him about the aspect of putting a

1 Robertson stole on it, whether or not that would add to the
2 safety of it, something I ultimately did not do.

3 Q With respect to the capabilities, did he tell you
4 anything about that aircraft, what it could do or didn't do
5 that you already didn't know?

6 A That's hard for me to say. I was amassing so much,
7 trying to amass so much information about it. He gave me some
8 of the advertising brochures that detailed a fair amount about
9 the airplane. I think I've got at least one of them that's
10 still got the Trans West name on it, so, you know, as to
11 reliance and whether I was -- I don't think I was selling him
12 on the airplane, I think he was selling me on it.

13 Q Over and above the information contained in that brochure
14 or those brochures, did he tell you anything additional that
15 was in those brochures about the performance of the aircraft?

16 A I don't think so. You mean did he make any
17 recommendations outside of what Cessna was representing? I
18 don't remember. I don't remember that he did.

19 Q Would that be true not only of the performance but as to
20 the economics of owning that aircraft?

21 A No. We had some conversations regarding how fast it
22 would depreciate and what would happen on the curves of --
23 210's tended to be a very good airplane to own, they and
24 Beechcrafts were the best single engine, so we had some
25 discussions on that that I don't think Cessna was representing

1 in their material.

2 Q Of course, you knew as a businessman and as a banker that
3 the economics of owning an aircraft and the resale value of an
4 airplane are highly dependent upon the economical situation in
5 the country, are they not?

6 A Well, I'm not one of thw world's experts on owning
7 aircraft, as maybe this case demonstrates. I, you know, I'm
8 aware that most things have to do with the economic nature of
9 the country, but this was the first really major investment I
10 had made in aircraft. Before this, the dollar amounts were
11 minuscule. So, you know, I did rely to some extent on the
12 experts and I considered Gene one of them.

13 Q And you relied upon what he had told you the economics of
14 the situation was with respect to this aircraft?

15 A I think that's probably a fair statement.

16 Q Would you please tell me now specifically what you relied
17 upon what he told you?


18 A I think that we discussed whether purchasing the plane at
19 the price we were talking about, approximately \$132,000, would
20 be a good economic decision, whether in buying something
21 \$32,500 less than its list would enable me to own the plane
22 for, I think I put two years as a number on it, without
23 suffering very much in the way of depreciation.

24 Q At the end of that two year period of time, you didn't
25 sell this aircraft, did you?

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of May 1986, I caused to be mailed by United States Mail, postage prepaid, four copies of the Brief of Appellant to the following:

H. Wayne Wadsworth, Esq.
R. L. Knuth, Esq.
Watkiss & Campbell
Attorneys for Respondent
310 South Main, 12th Floor
Salt Lake City, Utah 84101

A handwritten signature in cursive script, appearing to read "R. L. Knuth", is written over a horizontal line.