

1957

Lester A. Jones dba Engine & Air Service v. O. C.  
Allen dba O. C. Allen Co. : Brief of Defendant and  
Appellant

Utah Supreme Court

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NOV 8 1957

**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

LESTER A. JONES, dba ENGINE  
& AIR SERVICE,

*Plaintiff and Respondent,*

—vs.—

O. C. ALLEN, dba O. C. ALLEN  
COMPANY,

*Defendant and Appellant.*

**FILED**

SEP 6 - 1957

Clerk, Supreme Court, Utah

**BRIEF OF DEFENDANT AND APPELLANT**

Appeal from the District Court of the Third Judicial  
District, in and for the County of Salt Lake  
HONORABLE JOSEPH G. JEPSON, *Judge*

GUSTIN, RICHARDS & MATTSSON,  
and WILLIAM S. RICHARDS

*Attorneys for Defendant and Appellant*

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# IN THE SUPREME COURT of the STATE OF UTAH

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LESTER A. JONES, dba ENGINE  
& AIR SERVICE,

*Plaintiff and Respondent,*

—vs.—

O. C. ALLEN, dba O. C. ALLEN  
COMPANY,

*Defendant and Appellant.*

} Case No. 8709

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## BRIEF OF DEFENDANT AND APPELLANT

### STATEMENT

This is an action for damages for an alleged breach of an implied warranty in connection with gear lubricants delivered by the defendant to the plaintiff in its original containers. It was alleged by the plaintiff that the lubricant was used in certain vehicles, belonging to others which were in the plaintiff's shop for repair and that the vehicles were damaged by reason thereof. There was a jury verdict in favor of plaintiff. The parties will be referred to as in the court below.

## STATEMENT OF FACTS

The plaintiff, Lester A. Jones, is engaged in the business of overhauling trucks, stationary engines and air compressors. Prior to becoming self-employed, Mr. Jones was Superintendent for the Interstate Motor Lines. He had worked for them for a period of 17 years (R. 27), and while there he was in charge of the maintenance of motor trucks and equipment and used gear lubricant every day during the period of his employment. He used nothing but Kendall 200 oil in all of the equipment (R. 28). He has been self-employed since 1952 and continued the use of Kendall 200 gear lubricant in his business (R. 31).

The defendant, O. C. Allen, is engaged in the wholesale oil business and has been for 40 years (R. 121). He has been buying and distributing Kendall oil off and on during that period (R. 122). During all times material to this lawsuit the defendant has purchased Kendall oil and lubricants from the Williams Oil Company, a distributor for Kendall Oil Company. The product comes directly from the Kendall factory to the Williams Oil Company and is stored in its warehouse until ordered by and delivered to the defendant. The defendant would then store the lubricant in his warehouse until he received an order from one of his customers. The containers were never opened by the defendant (R. 122).

In the Fall of 1955, Mr. Bateman, a customer of the plaintiff, took to the plaintiff's shop five trucks for re-

pair (R. 32). Only two of the five trucks are alleged to have been damaged (R. 53-54) although the same lubricant was used in all (R. 53). The two trucks said to have been damaged were designated as Eaton 28 M (R. 34,37). On the 6th day of November, 1955, the plaintiff ordered from the defendant by trade name 100 pounds of Kendall SAE 90-140 gear lubricant (Exhibit 9). The gear lubricant was delivered by the defendant to the plaintiff in a 100 pound red can marked Kendall SAE 140 gear lubricant (R. 34, Exhibit 5). For the purposes of this lawsuit Kendall SAE 140 gear lubricant and Kendall 200 lubricant are the same (R. 162). The container described the lubricant as ordered. When the container was received by the plaintiff it was sealed (R. 75). Approximately 50 pounds of gear lubricant delivered on the 6th day of November, 1955, were used in the Eaton rear end assembly of the first truck alleged to have been damaged (R. 35).

When the oil from the first barrel was put in the Eaton assembly the plaintiff noticed that it was thinner oil than he had been getting (R. 78-79). The balance of the gear lubricant from the first barrel was used in the single drive International which sustained no damage (R. 53-54). The next vehicle to be repaired by the plaintiff was the other unit allegedly damaged, which unit also contained an Eaton rear end assembly (R. 34, 37). At the time this unit was repaired plaintiff was out of gear lubricant (R. 38). The plaintiff called the defendant and told him he needed another barrel of Kendall oil to get the truck out and the defendant delivered the same

on the 14th day of December, 1955 (Ex. 10), a duplication of the first order (Ex. 9). The lubricant was delivered in a 100 pound container marked Kendall gear lubricant (R. 39, Ex. 5) sealed in the same manner as the first barrel and in the same condition as received from the Kendall factory (R. 122).

The plaintiff in ordering the lubricant described the type he wanted by ordering Kendall 200 gear lube. He did not make known to the defendant how he intended to use the gear lubricant or what equipment he intended to use it in and the defendant made no representations in connection therewith (R. 38-39).

As quickly as the gear lubricant was delivered and opened the plaintiff noticed it was thin like the first barrel. Disregarding this fact, however, the plaintiff used approximately fifty pounds of the gear lubricant in the second truck containing an Eaton assembly (R. 40).

During the month of January, 1956, Mr. Long, who was employed by Mr. Bateman, the owner of the trucks being repaired, took the R 190, the first truck alleged to have been damaged, back to the plaintiff's shop. Mr. Long and the plaintiff drove the truck, the same vibrating considerably. The plaintiff told Mr. Long not to pay too much attention to it (R. 46-47). Mr. Long took the truck out of the shop, hauled one more load and then returned the truck to the plaintiff. The plaintiff examined the truck and found that the pinion shaft had been cut clear to a knife's edge and that the pinion in

the running gear was cut off almost to the same point. The rear end of the truck was removed, washed and inspected (R. 48). The R 191, the second allegedly damaged truck, was returned to the plaintiff's shop by Mr. Bateman and the identical damage was discovered. The plaintiff does not know if any lubricants were added to the rear ends of the R 190 or R 191 from the time they left his shop until they were returned by Mr. Long (R. 80). Mr. Bateman testified that the trucks were checked continually while in operation and if they were found to be in need of transmission oil the same was added (R. 94). Even though the plaintiff used the same gear lubricant in the other three pieces of equipment belonging to Mr. Bateman he could not find anything wrong with them, however, he put in new lubricant and the same are still operating as far as he knows (R. 53-54).

Sometime after the trucks were returned to the plaintiff's shop the plaintiff notified the defendant that there was something wrong with the oil. In response to the plaintiff's telephone call, the defendant went to the plaintiff's shop. They inspected the parts of the truck in question and the defendant took a sample of the oil from a pan in Mr. Jones' garage lying next to one of the trucks. The defendant does not know from which truck the oil was taken or how long it had remained in the pan. He sent the sample of the oil to the Kendall Oil Company (R. 134-135).

A letter was later received from the Kendall Oil Company which in substance and effect stated that the



sample submitted to it was not representative of the Kendall 200 gear lubricant (Ex. 11). The admitting of the exhibit into evidence was objected to by the defendant and will be referred to in greater detail in the argument.

The plaintiff put some of the oil remaining in the barrel in a pint fruit jar and sent it to the University of Utah for a test (R. 52). The oil was given to a Mr. George Petty, who at that time was working as a student instructor in the Chemistry Department of the University of Utah. Mr. Petty did not run any chemical test on the oil to determine its contents. The only thing done by him was to take the oil, heat it and measure it for viscosity (R. 18). Mr. Petty did not know whether he was testing motor oil or lubricant, however, he admits that there is a distinction and that the test would be different for motor oil and for gear lubricants (R. 19).

Both the oil companies and the manufacturers of the various trucks and equipment make recommendations as to the type of oil or gear lubricant to be used in certain pieces of equipment. The Eaton Manufacturing Company, which company manufactures the tandem drive axle found in the R 190 and the R 191, require a hypoid E.P. lubricant in order to have trouble free operation (Ex. 7), a gear lubricant different from Kendall 200 as ordered by plaintiff (Ex. 11).

Even though the plaintiff was familiar with the Eaton recommendations and knew that a hypoid lubricant was recommended on the theory that it helps the oil

to stick to the gears (R. 70), he disregarded recommendations and used one type of oil in all equipment repaired (R. 66-67). The plaintiff did this partly from experience and partly for his own convenience in servicing the trucks in his shop (R. 68).

The plaintiff readily admits that after the incident in question he followed the recommendations of the manufacturers and used the recommended type of lubricant for the type of rear end in question and had no further problems (R. 84).

The defendant's position, by his pleading and requested instructions, was to the effect that the lubricant ordered by plaintiff was ordered by the trade name and number; that plaintiff did not advise the defendant for what type of trucks the lubricant was to be used or to what use the lubricant was to be put; that defendant, at the special instance and request of plaintiff, delivered in sealed drums or barrels the type of lubricant ordered by plaintiff (R. 5).

The jury rendered a verdict of \$1168.86 against the defendant (R. 179). Subsequently the court overruled and denied defendant's motion for judgment in accordance with motion for directed verdict and in the alternative the defendant's motion for a new trial (R. 183-184).

## STATEMENT OF POINTS

1. The court erred in its instructions to the jury. Under this point attention will be called to Instruction No. 2 and Special Verdict Group 4 (R. 157, 177, Exception

139), and Instruction No. 10 (R. 164, Exception 139). Under the Special Verdict Group 4 and the corresponding Instruction No. 2 the court improperly instructed the jury as to the burden of proof. Under Instruction No. 10 the court held the defendant to the consequences of a warranty and confused the situation with a guaranty by the defendant to the plaintiff.

2. The refusal of the court to give Defendant's requested Instructions 2 (R. 170), 3, 4, 5 (R. 151), 6 (R. 152) and 7 (R. 153), for which exceptions were duly taken (R. 140-141), is error under this point. The requests in the main placed the responsibility on the plaintiff, who got just what he ordered, and that the lubricant was sold in the manufacturer's container by trade name. Furthermore, that there was no implied warranty on the part of the defendant and the evidence is insufficient to show that he knew or had any reason to know of the alleged defect in quality of the lubricant so supplied.

3. The court erred in denying defendant's motion for a directed verdict and in the alternative his motion for a new trial; the former on the ground that the evidence was insufficient and both motions raising the question of the sufficiency of the evidence to support a verdict in favor of plaintiff. The motion for a new trial raised the question of the confusion in the instructions and the admissibility of Exhibit 11.

4. The verdict and the judgment entered thereon are contrary to law and not supported by the evidence.

## ARGUMENT

## POINT I

THE TRIAL COURT'S INSTRUCTIONS ARE ERRONEOUS AND CONFUSING.

It becomes obvious on reading the Special Verdict Group 4 and corresponding Instruction No. 2 that the court improperly instructed the jury as to the burden of proof. In Instruction No. 2 the court placed upon the defendant the burden of proving that an ordinarily prudent truck repairman would not have relied on the said oil as being 200 Kendall SAE 140. In the same instruction the court does not require the plaintiff to prove, by a preponderance of the evidence, that an ordinarily prudent truck repairman would have relied on the said oil as being 200 Kendall SAE 140. The plaintiff in his complaint alleges reliance, which is one of the essential elements to be proved by a person alleging a breach of warranty. In the case of *Topeka Mill & Elevator Co. v. Triplett* (Kan.), 213 P.2d 964, the plaintiff commenced an action to recover the balance due on an account for chicken feed. The defendants filed a cross petition for damages from the plaintiff by reason of the alleged false and fraudulent representation concerning the feed. The court held that the evidence failed to establish an express warranty on the part of the plaintiff as to the quality of the feed sold or what it would accomplish or that there was any reliance on an alleged warranty by the defendants. In this case the Court stated:

“Absent the establishment of her reliance upon the alleged warranty no actionable warranty existed.

\* \* \*

We think appellants’ evidence failed to establish an express warranty and that such a warranty, if made, was relied upon by Mrs. Triplett.”

It is also a fundamental rule of law that the plaintiff has the burden of proving by a preponderance of the evidence each and every material allegation contained in his complaint. The court in its Special Verdict Group 4 and the corresponding Instruction No. 2 wrongfully placed this burden upon the defendant.

Instruction No. 10 is contrary to the evidence, does not properly state the law, is ambiguous, confusing and inconsistent with other instructions given by the trial court. In the first part of the instruction the Court instructs the jury that it was immaterial that the oil was delivered in a sealed container and in the same condition as received from the Kendall factory. In 77 C.J.S. Sales, Section 325, page 1179 it is stated:

“\*\*\* Where a wholesaler sells goods to a dealer for resale, there is no implied warranty of fitness for use, especially if the dealer sells the merchandise in unbroken packages received by him from the wholesaler.”

Under the same section the author cites the case of *Maroney v. Montgomery Ward & Co.*, 34 S.E. 2d 302, 72

Ga. App. 485, *Bell v. Adler*, 11 S.E. 2d 495, 63 Ga. App. 473, and states as follows:

“A dealer does not impliedly warrant that an article in a perfect appearing original package manufactured by a reputable manufacturer, which in practical use in retail trade could not be examined for imperfections, is suitable for purposes intended, and the only warranty by dealer in such circumstances is that article is manufactured by a reputable manufacturer.”

In 77 *C.J.S.* Section 330, page 1191, it is stated:

“It has been held that there is no implied warranty of quality or fitness on the part of a retailer who sells fertilizer in the original packages.”

To hold otherwise would place an unreasonable burden upon the defendant and would allow the plaintiff to escape liability, even though he is negligent.

Instruction No. 10 also interprets a warranty as a guarantee, while in fact, the two are clearly distinguishable. A guarantee places liability upon the defendant regardless of whether or not he made representations in connection with said oil and ignores the question of inspection by and negligence of the plaintiff. Not only is the instruction ambiguous in the above particulars, but the Court by using the following language:

“\*\*\* the theory of warranty which is a doctrine of the law requiring of sellers that they guarantee to the purchasers that the product

which they furnish is as ordered by the purchaser and in accordance with the representation made when the product purchased is delivered." (R. 164).

implied that certain representations were made by the defendant to the plaintiff, while in fact, no representations were made whatsoever and the implication would necessarily mislead and confuse the jury.

## POINT II.

### THE TRIAL COURT ERRED IN REFUSING DEFENDANT'S REQUESTED INSTRUCTIONS.

The trial court erred in refusing Defendant's Requested Instructions No. 5 and 8 pertaining to sales under patent or trade name. The oil delivered by the defendant was ordered under a trade name and delivered in a sealed container. The plaintiff, in ordering the oil, described to the defendant the type of oil he wanted, but did not make known to the defendant how he intended to use it and the defendant made no representations in connection therewith. The plaintiff acted on his own desires and took his own chances as to the fitness of the article. *B. F. Sturtevant Co. v. LeMars Gas Co.* (1920), 188 Iowa 584, 176 N.W. 338.

If a thing is ordered for a special purpose and supplied and sold for that purpose there may be an implied warranty that it is fit for that purpose, but this rule is limited to cases where a thing is ordered for a special purpose and must not be applied in cases where a special,

definite described thing is ordered, although it is intended for an undisclosed special purpose. In fact, where there is a sale of a known, described, definite article there is no warranty of fitness for a particular purpose. In Section 60-1-15, Subsection (4), *Utah Code Annotated* 1953, it is provided:

“In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.”

The only warranty is that the goods are fit for the purpose for which the article is ordinarily or generally sold. The cases apparently hold that where the selection of the article is actually made by the buyer, the foregoing rule applies even though the seller knows that the buyer is purchasing the article for some special use. 46 *Am. Jur.*, Sales, Section 351, pages 535-536; 90 *A.L.R.* 410; *Landes & Co. v. Fallows*, 81 Utah 432, 19 P.2d 389. In the case of *Green Mountain Mushroom Co. v. Brown* (Va.), 95 A.2d 679, page 683, it is stated:

“The general rule is that if an article known under a patent name or trade-name is ordered and furnished, there is no implied warranty for a particular purpose, since the buyer received what he bargained for.”

The above rule is controlling where goods are sold by a trade name. In the instant case a particular purpose was not made known to the defendant, the article was not supplied for any particular purpose and the plaintiff



did not rely on the seller's skill and judgment, therefore, it falls squarely within the rule set forth above.

The refusal to give defendant's instructions as to inspection and sealed containers was error. In the instant case the oil was delivered from the Kendall Oil Company factory to the Williams Oil Company and later delivered to the defendant. The defendant then placed the oil in his warehouse in the same container as received from the Williams Oil Company where it remained until ordered by and delivered to the plaintiff in the same condition as received from the Kendall factory. The container was not subject to inspection until opened by the plaintiff and placed in a dispenser for the purpose of being used in the equipment in his shop for repair. The plaintiff, and not the defendant, had the first opportunity to inspect the oil and, in fact, did inspect the same. Upon said inspection the plaintiff noted that the oil was thin. The plaintiff made the same observation in connection with both barrels of oil delivered by the defendant. Where the buyer of goods has a better opportunity for inspection than the seller, and where such an inspection ought to have revealed an existing defect there can be no warranty of fitness. *National Cotton Oil Co. v. Young* (1905), 74 Ark. 144, 85 S.W. 92.

The plaintiff has been engaged in the business of servicing trucks for a period in excess of 33 years. He is thoroughly familiar with oils and has been advised by various manufacturers and distributors of oil and equipment as to the proper type of oil to be used in the equip-

ment which he repairs. The plaintiff claims that the damage to the equipment involved in this lawsuit was caused by an oil which was too thin and for that reason failed to properly lubricate the gear mechanism. The defect which the plaintiff himself discovered on inspecting the oil was the same defect which he claims defendant should respond for in damages. The plaintiff by using the gear lubricant after discovering the defect is estopped from asserting a breach of warranty in light of Section 60-1-15, Subsection (3), *Utah Code Annotated* 1953, which reads as follows:

“If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.”

He is further precluded from recovering from the defendant under the doctrine of negligence. If the defendant were in any way negligent in supplying to the plaintiff oil of a defective quality, the plaintiff was contributorily negligent in using the same after discovering the defect. In 46 *Am. Jur.*, Sales, Section 807, page 931, it is stated:

“Contributory Negligence.—In spite of his negligence, a seller is, of course, not liable therefor to a buyer who, by his own negligent conduct, has contributed to the injury. And while the use of the purchased article in a particular manner which would otherwise appear to be negligent may be proper where the buyer relies, and has a right to rely, upon the seller’s assurance that it is safe to use the article in such a manner, a buyer

who uses the article after he discovers the danger will be held to have assumed all the risk of damage to himself, notwithstanding the seller's assurance of safety. \* \* \*

This is true even though the seller may have given some assurance to the buyer of the safety in using said oil. Where it is clearly apparent from casual observation that the defendant delivered something different than that ordered, and with full knowledge of that fact he used the thing ordered to his detriment, the plaintiff is negligent and cannot recover.

Even though the evidence in the instant case conclusively shows that the plaintiff ordered oil under a specific trade name in a sealed container, and made an inspection upon delivery, the court refused to grant the Defendant's Requested Instructions 2, 3, 4, 5, 6, and 7. By failing to give said instructions the trial court not only disregarded the evidence in the case, but also the law on sales.

### POINT III.

THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A DIRECTED VERDICT AND IN THE ALTERNATIVE HIS MOTION FOR A NEW TRIAL.

What has previously been said under point 2 properly supports the defendant's motion for a directed verdict or in the alternative for a new trial. The only thing left to be covered under this point is the admissibility of Exhibit 11 into evidence.

Exhibit 11 is a letter from the Kendall Oil Company to the defendant acknowledging the receipt of oil allegedly removed from one of the pieces of the equipment damaged. The letter was offered in evidence by the plaintiff and objected to by the defendant as being incompetent. The trial court admitted the exhibit over the defendant's objection. The second paragraph of the letter reads as follows:

“Our laboratory report, number 56156, found the gear lube sample to be an SAE 90 EP Gear Lubricant with a viscosity index of only 89.6. In other words, the sample submitted to us was not representative of Kendall #200 Gear Lube, which had been reported as having been used in the above mentioned rear axle.”

The defendant takes the position that Exhibit 11 is hearsay and for that reason incompetent, and further is prejudicial. There is nothing in the letter to indicate how the examination of the oil was made. In the letter certain material facts are missing, which facts cannot be put before the court and jury as the writer is not in court subject to cross examination. Had the plaintiff called Mr. Hulme, the writer of the letter, as a witness, then the defendant would have had an opportunity to examine him in connection with the test made by his company. The fact that the oil had been placed in the truck and run for a certain period of time, and that there was a possibility of certain impurities and solvents being in the oil and how the test itself was run are material elements in determining the accuracy of the statement contained in paragraph 2 of the letter.

The subject matter of this letter is addressed to the most vital fact in controversy, namely: whether or not the gear lubricant sold by the defendant, and used by the plaintiff, was representative of Kendall 200 gear lubricant. The letter offered in evidence to prove the facts asserted therein is an out of court statement, not subject to cross examination and not under oath, and is hearsay. *Baird v. Denver & R. G. R. Co.*, 49 Utah 58, 162 P. 79; *Bucher v. Equitable Life Assur. Soc. of United States*, 91 Utah 179, 63 P.2d 604.

A hearsay statement offered as proof of the matters asserted therein cannot be accepted because it has not been made at a time and place where it can be subjected to certain essential tests or investigations calculated to demonstrate its real value by exposing latent sources of error. It is an untested assertion. The fundamental test of evidence is the right of cross examination. The reason for this is that many possible deficiencies, suppressions, sources of error and untrustworthiness, which may lie underneath the bare untested assertions of a witness, may be best brought to light and exposed by the test of cross examination. See *Wigmore on Evidence*, Vol. 5, 3rd Ed., Sections 1361-1362. Where it appears that the evidence admitted is in fact incompetent and prejudicial its admission is grounds for reversal.

#### POINT IV.

THE VERDICT IS CONTRARY TO LAW AND NOT SUPPORTED BY THE EVIDENCE.

From what has been previously stated the verdict of the jury and the judgment entered thereon are contrary to the evidence and the law as it pertains to warranties.

## CONCLUSION

The fact the gear lubricant was ordered by the plaintiff under a trade name, was delivered in a sealed container, was inspected by the plaintiff and appeared to be thin, was placed in equipment requiring a different type lubricant and of which plaintiff was aware, and the fact that the plaintiff did not make known to the defendant how he intended to use the lubricant, and the defendant made no representations in connection therewith, are all sufficient to support a reversal.

The errors of the court in refusing Defendant's Requested Instructions, improperly instructing the jury as to the burden of proof, the definition of a warranty and the admission of Exhibit 11 into the evidence, added fuel to the fire. In the interest of substantial justice between the parties this judgment should be reversed.

Respectfully submitted,

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