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Leslie Price and Lafe Morley v. Ashby's Inc. and General Motors Co., Pontiac Div. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

LESLIE PRICE and
LAFE MORLEY,

Plaintiffs and Appellants,

vs.

ASHBY'S INCORPORATED, a
Utah Corporation, and
GENERAL MOTORS
CORPORATION, PONTIAC
DIVISION,

Defendants and Respondents.

FILED

Civil No. 9165

BRIEF OF RESPONDENT ASHBY'S
INCORPORATED

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NATURE OF THE CASE

The plaintiffs brought this action against Ashby's Incorporated, then a dealer for Pontiac automobiles, and General Motors Corporation, Pontiac Division, the manufacturer of Pontiac automobiles, to recover for personal injuries and property damage alleged to have been received in an auto-

mobile accident which occurred on the 28th day of April, 1958 at the time the plaintiffs were riding in a Pontiac automobile owned by the plaintiff Leslie Price and in which Lafe Morley was a passenger.

The plaintiffs allege that the automobile was defective and dangerous for use and occupancy in that there was a leak in one of the metal tubes of the air suspension system, allowing the air to leak out of the system, and that this caused the accident. The theory upon which the plaintiffs tried the case was that the defendant General Motors Corporation was guilty of negligence in the manufacture or design of the automobile and that the defendant Ashby's Incorporated was guilty of negligence in failing to discover and repair or correct the defect (R. 16-19).

At the conclusion of the plaintiffs' evidence the court granted both the defendants' Motions To Dismiss based on the proposition that the plaintiffs had failed by a preponderance of the evidence to make out a cause of action against either defendant. The court based its dismissal primarily upon the failure of the plaintiffs to prove any causal connection between the alleged defect in the automobile and the accident of April 28, 1958 (R. 234).

This appeal has been taken from the order of the court in dismissing the actions.

STATEMENT OF FACTS

In order to understand the evidence in this case, it is first necessary that we understand the principles of the operation of an air suspension system such as that incorporated into the automobile which the plaintiffs were driving on April 28, 1958.

The air suspension system is designed to take the place of the leaf or coil springs found on the axles of other cars, upon which the body and frame of the automobile rest, and which permit the wheels of an automobile to move upward and downward as they pass over obstructions in the road with a minimum of shock to the passengers riding in the automobile. Essentially, it consists of what has been described as four rubber boots or air springs located on the axles near each of the four wheels. The body of the car is held up by compressed air in these boots or air springs and as the wheels of the car move up and down the shock is absorbed by the air in the cylinders. The air in the boots is supplied by a compressor, shown on the diagram (Exhibit P2, see also pages 3A-1 of Exhibit P3), which is driven by the engine of the automobile. The air travels from the air compressor through a flexible line to a check valve and then into a tank or air reservoir located at the right front of the automobile.

The compressor maintains air in the line and the tank or reservoir up to a maximum of 250

pounds per square inch (R. 187-188). When the pressure in the tank reaches the specified amount the valves of the compressor go into what is described as a fluid condition and the compressor does not thereafter pump air into the tank until the pressure in the tank drops below the specified amount (R. 208). Between the air compressor and the tank there is a check valve which prevents the air in the tank from flowing back to the compressor (see diagram, P3A-1, Exhibit 3). From the air reservoir tank the air flows through a line to a manual over-ride valve located on the driver's side of the car near the steering post. This valve regulates the air pressure to the air springs located on the wheels and also provides a manual control whereby the car can be raised to provide additional road clearance in certain situations if desired, as will be explained later (P3A-24, Exhibit P3). The manual control valve reduces the air pressure in the suspension system beyond that valve to 145 pounds per square inch so that as long as that amount of air pressure is fed into the manual control valve the suspension system will operate normally (R. 210). In fact, it only takes 100 pounds of air in each boot or air spring as it is called to operate that spring, so that 140 pounds delivered through the manual control valve is sufficient to operate the system (R. 210).

Contained within the manual control valve is

a check valve which prevents the air from returning to the intake line or the air tank (R. 200). From the manual control valve the air flows to one height control valve in the front of the car which controls both front wheels and two height control valves, each of which controls the air going to the rear boot or air springs on each of the rear wheels. All of these contain check valves which prevent air from returning to the manual control valve (R. 195, Exhibit P2).

From the height control valve in front the air runs through an orifice tee and thus to the two boots or air springs on the two front wheels. From the two rear height control valves the air flows to the boots or air springs which control the two rear wheels. In each of the height control valves there is an exhaust valve which, when the occasion warrants, allows air to flow out of the air suspension along a separate line which is not part of the line supplying the height control valve with air. These exhaust lines run back to the manual control valve and from there to the air cleaner, through which air is exhausted when the occasion warrants (R. 195-196).

The air pressure in the boots or air springs is so regulated as to maintain the car at curb height as though five passengers were in the car. When the weight in the car is increased the pressure in

the boots is increased through air supplied through the intake lines and valves to compensate for the increase in weight. When the weight in the car is decreased the exhaust valves open and allow air to escape through the exhaust line to the manual control valve and then through the air cleaner (R. 196). A "hissing" sound, which is normal, is heard when the air is escaping through the air cleaner.

When the engine of the car is not running the compressor is not supplying air to the system. With the engine off and the car sitting still, the check valves prevent the air from escaping from the system and the car will maintain its height (R. 195). However, if the car is moved about or persons get in or out of the car or sit on the fenders, thereby increasing the weight on the particular wheels, the exhaust valves will continue to operate, which will allow the air to escape from the system (R. 196). For this reason, when the car is towed or lifted on a hoist special precautionary measures must be taken to prevent the escape of air from the air suspension system. This is done by pulling out on a lever designated as the "car lift knob" which is attached to the manual control valve. Pulling out on this lever closes the exhaust port in the manual control valve. This permits the air, which would normally flow out of the system through the exhaust lines and the air cleaner, to again flow past the

check valve in the manual control valve and back into the system and has the effect of conserving the air in the system (P3A-24, Exhibit P3).

As in other suspension systems, there are two rubber bumpers on each of the two front wheels which control the extreme upward and downward movement of the body of the car (R. 209). If the air is exhausted for one reason or another the car would then rest on the bumpers in the same manner as if a coil spring were to hit a bump and the body came down and the wheel went up to its maximum position. Resting on the bumpers in a maximum depressed position there is in the neighborhood of about 3 to 4 inches road clearance (R. 210).

The orifice in the air suspension system located between the two front wheels and beyond the check valve permits air to flow from one wheel to the other so that if the pressure is reduced in the air spring of one wheel it will be reduced accordingly in the opposite air spring and the front of the car would come down evenly on both sides.

With this preface, let us now turn to a consideration of the facts leading up to the accident insofar as they relate to any negligence on the part of the defendant Ashby's Incorporated or the causal connection between any defect in the system and the accident.

In the spring of 1958 Leslie Price purchased a

1958 Star Chief Pontiac equipped with an air suspension system as described above from Ashby's Incorporated of Delta, Utah (R. 33). He had no difficulty with the car for the first 2,000 miles (R. 34). He claims that after that when the car had been parked a considerable length of time (R. 80) he would come out and find the car tipped toward the right front wheel (R. 34). When he started the engine the car would right itself in a matter of seconds (R. 81). He spoke to Clay Broderick, a salesman for Ashby's Incorporated (Tr. 10), who told him that all cars so equipped would go down like that and that all he had to do was start it and it would come up, which he admits was the case (R. 11).

In March or April he took the car to Ashby's Incorporated where a mechanic from Ashby's Incorporated, Jay Fullmer, looked at it (R. 37-38) on two occasions. After each of these occasions the car behaved exactly the same as it had before Jay Fullmer looked at it (R. 42-43).

On April 28, 1958 the plaintiff Lafe Morley came to Delta, Utah (R. 39) specifically for the purpose of showing plaintiff Leslie Price some ranch property, Mr. Price having decided to leave mining, in which he was then engaged (R. 62). Mr. Morley came to Mr. Price's home some time around noon. Mr. Morley then left Mr. Price's home to go down

town to attend to a little business, part of which was to purchase a fifth of whiskey which he claims to have left in his car at Delta (R. 132).

The two plaintiffs left Delta at about 4:00 P.M. in the Price automobile to see a ranch north of Garrison located about 80 to 85 miles from Delta. They found no one at the ranch (R. 42) and then went on to Garrison where they met a person by the name of Jim Deardon (R. 41-42) who took them out to see some of his holdings. Upon their return to Garrison Mr. Deardon volunteered to take them to Baker and buy them a sandwich. The trio arrived in Baker, Nevada about 7:00 or 7:30 (R. 43) where apparently Mr. Deardon bought both plaintiffs two coke highballs (R. 44, 133). From the cafe in Baker the trio returned to Garrison and at about 9:00 o'clock P.M. the plaintiffs left Garrison for Delta, Utah (R. 134).

As they were coming into a curve about two miles south of Delta the car went off the road (R. 46), which was a good oiled surface highway (R. 47), turning over and coming to rest in the barrow pit against a fence some six feet from the edge of the road (R. 52).

Following the accident the plaintiff Leslie Price was taken to Dr. Lyman at the Delta Hospital in Delta, Utah (R. 49) where a blood test was taken (R. 74). Plaintiff Price returned to the scene of

the accident the next day where he observed brake marks on the oil (R. 54). These brake marks were along the oiled surface of the highway until one reached the shoulder of the road where it appeared to be shoved to the right about 18 inches and then went over the embankment (R. 75). There were no other marks on the highway and no gouge marks or anything of that kind (R. 75). The car, according to this witness, was apparently functioning in a normal manner and was not rough riding or anything of that nature immediately prior to going off the highway (R. 76).

Leslie Price further admitted that the air springs of the car had never at any time prior to this accident gone down while the car was being operated and did not testify that anything of that nature happened at the time of the accident (R. 74).

Plaintiff Morley's version of the accident was that he and Price were on their way back to Delta, just talking about the possibilities of working out a deal on a farm (R. 135), and that he did not notice anything of an unusual nature about the automobile or the way it was being operated until as they were rounding a curve when the car just started going over and they were upside down (R. 137).

The following day Mr. Morley and Mr. Price returned to the scene of the accident (R. 150).

Morley observed one black mark on the highway, pointed out to him by Mr. Price, and what he identified as a "scuff" mark. The scuff mark was not on the oiled surface of the road but off on the shoulder in the dirt (R. 151).

The car was eventually taken to Carleson Motor Company in Salt Lake City to be repaired (R. 53), where it was worked on by a mechanic by the name of Milo Solomon (R. 87). During the course of repairing the automobile Mr. Solomon found a very small hole in the air line of the air suspension system leading from the air tank or reservoir to the manual control valve (R. 88, Exhibit P2). This hole was so small that the mechanic had considerable difficulty even finding it at all and had to use soap suds on the line to locate it (R. 104). Plaintiffs would have us infer that this hole was so large that Mr. Solomon could not get the air suspension to lift the car (Appellants' Brief, page 5). At the time Mr. Solomon was having difficulty getting air into the air suspension system he was attempting to fit a boot in one of the air springs (R. 88) and was having difficulty trying to put the apparatus in the right wheel together (R. 109). This was explained by Stanley Renshaw, the resident service instructor of the General Motors Training Center, as follows:

"Each of these air springs has a metal tin can, so to speak, it is a heavy gauge metal,

quite hard to dent, over the opening. One end of this is open the other end is sealed off, sealed as such. Over this one end we have what we would classify a rubber boot with a hole about this big in the center of it. In other words, it is a piece of rubber, that is rubber welded to this container, it has a hole this size, (indicates) about two inches in diameter, or three inches in diameter, in which fits a sealed metal cannister to close off and seal the air boot, as such, or the air spring, as such.

“If in the assembly of the lower piece of the air spring to the upper piece of the air spring, there is not a good tight seal, or if the mechanic has difficulty in putting the bottom piece up to meet the rubber bellows part of the upper piece, and we have a leak, it could occur to the point where it would be difficult for the compressor operating at its full capacity to build up the system with air.” (R. 213).

Mr. Solomon further testified that even with all of the air out of the air suspension system the car would be close to but not touching the ground; nor would the body of the car touch the tires; so that even with all of the air out of the suspension system the car could still be moved (R. 129-130). He gave as his opinion that the small hole in the air suspension system occurred by reason of the fact that the air line was too close to the upper control arm of the right wheel, which had rubbed a small hole in it. There was no evidence that this line had been changed or worked on by Ashby's Incorporated

or any other person prior to the time he worked on it (R. 106).

At the conclusion of their case plaintiffs proffered evidence to the effect that if the manual control lift knob is not tied or blocked in the "out" position when the car is being towed the jouncing may cause exhausting of air from the system, which is explained in the foregoing part of this brief, since air is being expelled through the exhaust system and the pressure is not being maintained by the engine which would not be running while it was being towed (R. 229).

The Statement Of Facts is more significant by reason of that which is not found in the evidence than it is for anything which is found in the evidence. There is no evidence that the air ever leaked out of the air suspension system during the time the engine was running and the car was being operated on any occasion prior to this accident. There is no evidence that the air leaked out of the system at the time of this accident as the car continued to ride and perform in a normal way up until the time it left the road and rolled over. There is no evidence that any part of the car, except the tires, ever touched or came in contact with the oiled surface of the road prior to the time that the car left the highway. There is no evidence that the car could not have been operated over the road in question,

or any road, with all of the air out of the suspension system and the car resting on the bumpers with three or four inches of road clearance. There is no evidence that the absence of air in the air suspension system would affect the performance of the car in any way except possibly for the smoothness of the ride. And there is no evidence of such a defect in the air suspension system as would have caused a sudden collapse of the system without its being noticed prior to the time the car went off the road, and neither plaintiff claimed to have noticed anything of this nature prior to this accident.

STATEMENT OF POINTS

POINT No. I.

PLAINTIFFS FAILED TO PROVE ANY CAUSAL CONNECTION BETWEEN ANY ALLEGED DEFECT IN THE AIR SUSPENSION SYSTEM AND THE ACCIDENT IN QUESTION.

POINT No. II.

PLAINTIFFS FAILED TO PROVE ANY NEGLIGENCE ON THE PART OF ASHBY'S INCORPORATED.

ARGUMENT

POINT No. I.

PLAINTIFFS FAILED TO PROVE ANY CAUSAL CONNECTION BETWEEN ANY ALLEGED DEFECT IN THE AIR SUSPENSION SYSTEM AND THE ACCIDENT IN QUESTION.

The primary question in this case is an issue of fact and that is, assuming that there was a small

hole in the air line leading from the air reservoir on the Pontiac automobile to the manual control valve, did this small hole or defect proximately cause the accident of April 28, 1958?

We submit that the plaintiffs may have proved that there was a small hole in the air line but that they have not proved anything more. There is no evidence that the compressor supplying air to the air suspension system was not capable of supplying enough air to operate the system even though some air may have been lost between the air reservoir and the manual control valve. In fact, the evidence argues against this since it is admitted that the air compressor would bring the car up to level within seconds after the time the engine was turned on and that on no occasion did the air suspension system go down while the engine was being operated. There is no evidence that the air could escape from the air suspension system suddenly. There were two check valves, one in the manual control arm and one at the front wheels between the boot or air spring on the right wheel and the hole from which it is claimed the air escaped. The evidence shows that the plaintiff Leslie Price, himself, testified that the only time he had trouble with the level of his car was after he let it stand without the engine running for a considerable time (R. 80). The evidence is that with all the air out of the air suspension sys-

tem the car would still have had a road clearance of from three to four inches, and there is no evidence in this record that on the oiled highway in question the clearance of three to four inches would not be sufficient. There is no evidence that even if all of the air were exhausted from the air suspension system the car could not have been operated over the highway. The testimony of both plaintiffs at the time of the accident does not indicate that there was anything wrong with the automobile immediately prior to the accident, both of them merely testifying that suddenly the car went off onto the shoulder and was thrown off the road.

It is significant in this case that there were no marks on the highway prior to the time the car left the oiled surface of the highway, except two brake marks. Neither of the plaintiffs said anything about any dropping of the car, sudden or otherwise, or about "fighting" to maintain control of the automobile. The most logical explanation of the physical evidence is that for some reason plaintiff Leslie Price, in approaching the curve, determined he could not make it, applied his brakes and slid onto the shoulder, which threw him out of control and turned the car over.

The plaintiffs set forth their theory on page 16 of their Brief as follows:

"When the hole in the air mechanism line became sufficiently enlarged that the

compressor could not compensate for its existence, the operation of the automobile exhausted all the air in the system and the automobile became lower and lower on the highway until clearance between the edge of the automobile and the surface of the road was, as stated in the Manual, at a minimum. Then, as Price attempted to make a slight turn to the North at the place where the tip-over occurred, some portion of the automobile came in contact with the surface of the road, caused loss of control of the automobile.”

This is an interesting theory, but where is the evidence to support it? The hole in the air mechanism line, when observed after the accident, was so small that the mechanic had to use soap to find it. Are we to assume the check valves were not working? Are we to assume that the plaintiffs could ride on mile after mile with the air leaving the air suspension system, the car getting closer and closer to the ground and the ride getting rougher and rougher and still not notice the condition? If, as plaintiffs argue, the car swayed and some part of the car touched the ground, are we also to assume that the plaintiffs did not observe this? Where is the evidence on the road that any part of the car, other than the tires, touched the road prior to the time that the car went off onto the shoulder? There is no conflict in the evidence that the body of the car was prevented by the bumpers from ever coming within less than three or four inches of the road.

Are we to assume that the laws of physics became inoperative at this particular time, that is unless the plaintiff went around the curve so fast as to lift the wheels on the inside of the curve off of the surface of the road, in which event the speed and not any defect in the automobile proximately caused the accident?

The proposition that plaintiffs have the burden of proving a causal connection between an alleged act of negligence and the resulting injury is fundamental to our law. In the case of *Rogers v. Rio Grande Western Ry. Co.*, 32 Utah 367, 90 Pac. 1075, which was an action brought against the railroad company for killing a traveler upon the highway, in which it was shown that the statutory signal had not been given by the railroad, Justice Frick said:

“ . . . Counsel argue that the failure to give the statutory signals constitutes negligence per se, and therefore respondent's negligence was established, and this being so, the necessary proof entitling appellants to recover existed and could be defeated only by proof of contributory negligence. It may be conceded that the failure to comply with the statute with regard to warning signals generally constitutes negligence per se, as was held by this court in *Smith v. Min. & S. S. Co.* (Utah) 88 Pac. 683, but proof of negligence without more, however, is not enough. In addition to this the party upon whom rests the burden of proof must show by some competent evi-

dence that the negligence proved was the proximate cause of the injury complained of, or, where there is more than one cause, that it at least was one of the causes. A prima facie case is not established until this is done, and hence the existence or nonexistence of contributory negligence, under such circumstances, is immaterial. . . .”

Restatement Of The Law Of Torts, defining the elements of a cause of action for negligence, states in section 281, page 734:

“The actor is liable for an invasion of an interest of another, if:

“(a) the interest invaded is protected against unintentional invasion, and

“(b) the conduct of the actor is negligent with respect to such interest or any other similar interest of the other which is protected against unintentional invasion, and

“(c) the actor’s conduct is a legal cause of the invasion, and

“(d) the other has not so conducted himself as to disable himself from bringing an action for such invasion.”

And in section 430 of the *Restatement Of The Law Of Torts* it is said:

“In order that a negligent actor shall be liable for another’s bodily harm, it is necessary not only that the actor’s conduct be negligent toward the other in the particulars stated in § 281, Clause (b), and Comment

thereon, but also that the negligence of the actor be a legal cause of the other's harm."

In *Hewitt v. General Tire And Rubber Company*, 3 Utah (2d) 354, 284 Pac. (2d) 471 an action was brought against a tire manufacturer for injuries sustained when the tire exploded. The court said that mere proof of an injury to plaintiff will not justify a verdict, and the court quoted the following from *Hooper v. General Motors Corporation*, 123 Utah 515, 260 Pac. (2d) 549:

"Thus, to impose liability on an assembler of an automobile certain necessary elements must be made out. Plaintiff is required to show: (1) A defective wheel at the time of automobile assembly; (2) Such defect being discoverable by reasonable inspection; (3) Injury caused by failure of the wheel due to its defective condition."

There is nothing in the evidence which establishes by inference or otherwise any causal connection between the small hole in the air line of plaintiffs' Pontiac automobile and the accident which occurred on April 28, 1958. Plaintiffs were represented by an able attorney and it is fair to assume that no evidence of the causal connection between the alleged defect and the accident was presented because in fact and in truth there was none. As Justice Frick said in the case of *Rogers v. Rio Grande Western Ry. Co.*, supra, until this causal connection has been established the question of whether or not

the plaintiffs were contributorily negligent is immaterial or, in other words, in this case the plaintiffs having failed to establish any causal connection between the alleged negligence of the defendants and the accident of April 28, 1958 it was proper for the judge to dismiss the action at that point and not to require the defendants to assume the burden of proving why the accident happened, although this may have been informative and interesting.

POINT No. II.

PLAINTIFFS FAILED TO PROVE ANY NEGLIGENCE ON THE PART OF ASHBY'S INCORPORATED.

The evidence shows that the defendant Ashby's Incorporated did nothing to cause the condition which the plaintiffs claim was responsible for the accident in this case. The alleged defect, according to the plaintiffs' theory, was a small hole in the air line leading from the air reservoir to the manual control valve caused by a rubbing of the upper control arm of the right front wheel upon the line, which was in turn caused by the line being placed too close to the upper control arm. Plaintiffs' witness testified that there was no evidence of this line ever having been moved by Ashby's Incorporated or others. The plaintiffs' theory of negligence, in so far as Ashby's Incorporated is concerned, seems to be that it did nothing. The interesting query is what plaintiffs would say had defendant Ashby's Incor-

porated moved the control arm. We assume that it would then be that we had done something which we should not have done.

We are not concerned with any theory of implied warranty in this case since it was stipulated at the pre-trial that the theory of the plaintiffs' case is negligence only, and based upon the allegations thereof as set forth in the pre-trial (R. 17).

The ground of negligence claimed against the defendant Ashby's Incorporated is that upon repeated occasions plaintiff Price took the automobile to the defendant for repair and correction of the defect and that it failed, neglected and refused to properly repair the defect or to make said automobile reasonably safe and free from said defect.

The modern automobile is a very complex machine. The fundamental question in this case would appear to be just how much an automobile mechanic in Delta, Utah would be expected to know about the machine or, to state it otherwise, did the plaintiffs prove that a reasonably competent mechanic in the area of Delta, Utah, exercising the care which a reasonably competent mechanic in that area would exercise, would have discovered the defect in the Price automobile. It is submitted that any such evidence is absent from the record. Assuming that there was a hole in the air line leading from the air reservoir to the manual control

valve of the plaintiffs' automobile and that this hole became large enough to allow air to escape from the air suspension system and to cause the accident of April 28, 1958, which we do not believe to be a fact, the proximate cause of this defect, according to the plaintiffs' evidence, was that the air line was placed too close to the manual control arm of the right front wheel. The evidence is further to the effect that the line was placed in the position in which it was found after the accident at the time the car was manufactured. The defect, if any, then arose out of the design of the automobile and not out of anything which the defendant Ashby's Incorporated did. As was said in *Winchester v. Egan Farm Service*, 4 Utah (2d) 129, 288 Pac. (2d) 790, which involved an action by a farmer against an implement dealer for injuries suffered when a lever attached to the baler unlocked and struck the farmer in the face, a dealer has no obligation to change the manufacturer's design of a product. In that case it appeared that a bolt of a different size might have fit better than that provided by the manufacturer. The court said:

"... The designing of this machinery was an engineering job undertaken by the manufacturer and defendant was not negligent if he assembled this lever in accordance with such design and the manufacturer's instructions."

As stated in 5A *Am. Jur.* 655:

"The general rule that one who sells ar-

ticles manufactured by others is under no obligation to test them for the purpose of discovering latent or hidden dangers is applicable to automobile dealers and distributors selling new cars. Such a dealer or distributor generally is not held chargeable with liability for injuries resulting from latent defects in a new automobile sold to a customer, any such liability being the liability of the manufacturer rather than of the seller.

“While an automobile dealer is under no obligation to test a new car for the purpose of discovering latent defects or hidden dangers, he is required to observe the cars as they are received, operate them to see if they operate properly, investigate the cause of any unusual conditions, and investigate the condition of and check the operation of parts or appliances which he might reasonably expect, as a result of his experience and knowledge of the cars, would need attention before being delivered to purchasers. But a dealer is not required to dismantle the automobile to determine whether it is properly built in order to absolve himself from responsibility for damages resulting from defects therein not visible on the usual customary and careful inspection.”

And in 5 *Am. Jur.* 690 it is said:

“... No liability rests upon a dealer in secondhand automobiles to a person who is injured by the operation of a car sold by him, in the hands of one to whom it is sold, from the mere fact that the car is defective. There must be knowledge of the defect, either actual or constructive.”

For a collection of such cases, see 99 *A. L. R.*

240. And in an annotation having to do with injuries caused by defective brakes and the liability of an automobile dealer for such injuries, found at 170 A. L. R. 674, it is said:

"It is generally recognized that an automobile dealer is not required to dismantle the automobile to determine whether it is properly built in order to absolve himself from responsibility for damages resulting from defects therein not visible on the usual customary and careful inspection . . ."

The defect, if any, which we are involved with in this case is a small hole in the air line leading from the air tank reservoir to the manual control valve, so small that, even if we give plaintiffs the benefit of any possible inference which might be drawn from the evidence, it did not materially affect the operation of the car except to permit the right side of the car to go down after a considerable length of time, which was corrected within a matter of seconds when the engine was turned on. The defect was in a line which was up under the frame of the car and was only discovered after the wheel mechanism had been dismantled. Even then it could only be discovered by the most minute of examinations. It is submitted that there is no evidence from which the court could have found that the defendant Ashby's Incorporated was guilty of any negligence in failing to discover the defect which the plain-

tiffs alleged existed in the automobile at the time of the accident.

CONCLUSION

Plaintiffs sought in this action to recover for injuries they claim to have sustained in an automobile accident which occurred on the night of April 28, 1958 when the automobile in which they were riding turned over while rounding a curve south of Delta, Utah. In their pleadings they allege that the accident was proximately caused by a defect in the air suspension system of the automobile in which they were riding and that this defect was caused by the negligence of the defendant General Motors Corporation in the designing of or manufacturing of the automobile. They alleged further that the defendant Ashby's Incorporated was guilty of negligence in failing to discover the alleged defect, which proved to be a small hole in one of the air lines of the air suspension system of the Pontiac automobile which plaintiff Price had previously purchased from Ashby's Incorporated and which had been manufactured by the defendant General Motors Corporation.

Viewing the evidence in its most favorable light, the plaintiffs proved the happening of the accident and some injuries resulting therefrom. They may also have proved that there was a small hole in the line leading from the air reservoir tank to the manual

control valve of the Pontiac automobile in which the plaintiffs were riding. They failed to prove how this small hole in the air line could have had anything to do with the accident which occurred on April 28, 1958 or that the defendant Ashby's Incorporated was negligent in failing to discover or correct the defect.

The district judge who tried the action in the court below dismissed both of the actions by reason of plaintiffs' failure to prove any causal connection between the defect and the accident. The appellants in their Brief cited a number of cases defining the duty of the manufacturer of an automobile to exercise reasonable care to discover and correct defects in the manufacture of an automobile and the duty of a dealer to exercise reasonable care in making repairs. No contention is made that these cases do not correctly reflect the law applicable to such situations but their Brief fails to point out any evidence from which this court may find a causal relationship between the alleged defect and the accident. The case is similar to that reported in *170 A.L.R. 675* wherein it is said:

“Where in an action against an automobile dealer for the death of a guest who without the knowledge of the dealer was riding with a prospective purchaser in the dealer's automobile there was evidence showing that the brakes of the automobile were not perfect, but adequate to control the automobile when operated at a reasonable speed, and

it appeared that the accident which caused the death of the guest was caused by the excessive speed at which the motor vehicle was driven, followed by the breaking of one of the rear wheels, and there was nothing in the record to indicate that the condition of the brakes had any causal connection with the accident, it was held in *Foley v. John H. Bates, Inc.* (1936) 295 Mass. 557, 4 NE 2d 349, 1 NCCA NS 233, that it was proper to order a verdict for the defendant dealer, since there was no evidence that the automobile was being operated by the defendant or its agent at the time of the accident nor that the condition of the automobile was in any way the proximate cause of the injuries to the decedent."

It is submitted that both plaintiffs, Leslie Price and Lafe Morley, failed at the time of the trial of this case to prove a cause of action against either of the defendants and that, therefore, the order of the trial court dismissing the action should be sustained.

Respectfully submitted,

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