1972

# Clifford F. Parker, Dorothy Edward And Douglas Edward v. General Motors Corporation Cadillac Motor Car Division And Owen Wright, Inc. : Brief of Plaintiffs-Appellants

# In the Supreme Court of the State of Utah

CLIFFORD F. PARKER,
DOROTHY EDWARD and
DOUGLAS EDWARD,
*Plaintiffs-Appellant,*

-vs-

GENERAL MOTORS CORPORATION, CADILLAC MOTOR CAR DIVISION and OWEN WRIGHT, INC.,
*Defendants-Respondents.*

Case No. 12718

## BRIEF OF PLAINTIFFS-APPELLANTS

Appeal from the Judgment and Order of the Third Judicial District Court for Salt Lake County, State of Utah, Honorable D. Frank Wilkins, Judge.


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## APPELLANTS' BRIEF

Appeal from the Judgment and Order of the Third Judicial District Court for Salt Lake County, State of Utah, Honorable D. Frank Wilkins, Judge.

## STATEMENT OF THE NATURE OF THE CASE

Plaintiffs brought an action against the seller and manufacturer of a Cadillac automobile alleging defects and failure to repair as the cause of injury resulting from a collision when plaintiff's westbound Cadillac veered across the centerline and struck a Volkswagen in the eastbound lane in which other plaintiffs were riding. (R-1; See also R-106)

## DISPOSITION OF CASE IN LOWER COURT

On January 7, 1970, in a memorandum decision, the Honorable Merrill C. Faux, Judge, granted defendants motion to dismiss that portion of plaintiff's amended complaint alleging cause of action based upon strict liability in tort, express warranty, implied warranty and res ipsa loquitur (R-139). The court reserved tort only plaintiffs cause of action based upon negligence in the manufacture, negligence in repair and warranty of repair. At a pre-trial hearing on February 10, 1971, plaintiffs moved the court to enlarge the issues to allow plaintiffs to present actions based upon strict liability in tort, res ipsa loquitur, express warranty and implied warranty. All of these were denied (R-170). On October 28, 1971, the day prior to trial, plaintiffs made an offer of proof as to what their evidence would show and again moved to enlarge the issues to include the aforementioned theories (R-172). The court denied the motion to enlarge the issues and dismissed plaintiffs complaint with prejudice on the grounds that, based upon the proffer, the plaintiffs could not prove that the manufacturer was negligent or that the dealer was negligent (R-181).

## RELIEF SOUGHT ON APPEAL

Plaintiffs-Appellants seek a reversal of the lower court's judgment.

## STATEMENT OF FACTS

Plaintiffs brought a products liability action against the defendants alleging that defects in the manufacture and repair of an automobile were the cause of an accident in which all of the plaintiffs were injured (R-1; see also R-106).

Plaintiffs were granted leave to file an amended complaint in which they alleged that the defendants would be liable to them on causes of action including strict liability in tort, implied warranty, express warranty, negligence and negligence based upon res ipsa loquitur (R.-106). The defendants moved to dismiss plaintiffs amended complaint on the ground that such failed to state a cause of action upon which relief could be granted (R-125).

The District Court granted defendants motion to dismiss plaintiffs cause of action based on strict liability in tort on the grounds that such theory does ot apply in Utah (R.-139).

The District Court dismissed plaintiffs cause of action based upon warranty as to Cadillac Motor Company on the grounds that there was no privity of contract between the plaintiffs and the manufacturer of the automobile. The same cause was also dismissed as to the defendant dealer on the grounds that there was

an exclusion of warranties, express and implied, in the sales contract between the dealer and the plaintiff purchaser of the automobile (R-139).

The court dismissed the cause of action based upon res ipsa loquitur on several grounds (R-139).

The Court left standing and reserved for trial the causes of action based upon the defendants negligence in the manufacture and repair of the Cadillac automobile (R-139).

At a later date the parties held a pretrial conference at which time the plaintiffs again moved the court to enlarge the issues to include theories of action based upon strict liability in tort, implied warranty, express warranty and res ipsa loquitur (R-170).

The pre-trial judge denied that motion.

On October 28, 1971, the day prior to trial, the parties met with the trial judge at which time the plaintiffs again moved to enlarge the issues to include strict liability in tort, implied warranty, express warranty and res ipsa loquitur. That motion was again denied (R-172).

Whereupon the plaintiffs made an offer of proof as to what their evidence would show as follows: (R-173; see also R-187)

Your Honor, if the plaintiffs were to go to trial Monday, the evidence which the plaintiff would hope to elicit during the course of the trial is that the plaintiff, Clifford Parker, in June of 1964, purchased a 1964 Cadillac automobile from the defendant Owen Wright; and that the Cadillac automobile was manufactured by the defendant, General Motors Corp.

The evidence would show that the plaintiff, Parker, had the car for some two (2) to three (3) months when a problem in the primary electrical system of the car manifested itself.

The problem would reveal itself in that the engine would cease running while the plaintiff was driving his automobile.

The evidence would show that at the time the engine would stop running, the plaintiff would lose the power equipment in the car, which included power steering and power brakes.

The evidence would further show that the plaintiff took the automobile in for repairs to the defendant, Owen Wright, in Layton, Utah, some twelve (12) to thirteen (13) times for repairs for the very same problem.

The evidence would further show that in February of 1965 the plaintiff wrote to the President of defendant, Cadillac Motor Company and complained of his automobile and outlined the problems that he was having with the Cadillac.

The evidence would show that on February 14 of 1965, the defendant responded expressing interest and concern over the problems with plaintiffs automobile and indicated that letters would be forwarded to their San Francisco Office and also requested Mr. Parker to take the car back into defendant, Owen Wright, the authorized Cadillac agency, for repair.

The evidence would show that on February 16 of 1965, the plaintiff Parker did that very thing when his automobile ceased operating again where upon he took his automobile into defendant Owen Wright's for repairs because of the same problem in the malfunction of the primary electrical system.

Defendant Owen Wright returned plaintiffs car on February 16 of 1965, and plaintiff did not drive the Cadillac again until February 20 of 1965.

On February 20 of 1965, the plaintiff Parker went on a fishing trip at Parley's Canyon and, on his return coming down the canyon, the engine ceased, again rendering the car without power systems; to-wit: no power steering or power brakes.

Without power, the plaintiff's automobile veered across the center of the road striking another automobile in which the plaintiffs' Edwards were riding.

> The evidence would show that at that time the plaintiffs suffered substantial injuries in the automobile accident including permanent partial disability.
>
> The evidence would further show that the service manager of Owen Wright, Inc. wrote to the highway patrol investigating the accident and indicated that the malfunction in the primary electrical system, causing the engine to stop, would not, in his opinion, render the car without power assistance.

The plaintiffs also offered to produce expert testimony which would indicate that the car was, in fact, defective; that the precise defect could not be located, with specifity; although it could generally be said to be in the primary electrical system of the automobile, that because of the short time that the automobile was driven before the defect manifested itself that in all probability the defect existed at the time of manufacture and was caused by the manufacturer of the automobile (R-181-7).

At the conclusion of plaintiffs' proffer of proof, the defendants moved to dismiss plaintiffs' complaint with prejudice on the grounds that if in fact they had produced the testimony and evidence that they proffered, such would not sustain the burden of proof on a theory of negligence in manufacture or negligence in repair. The motion to dismiss was granted and plaintiffs' appeal. (R-173; see also R-175).

## ARGUMENT

### POINT I.

### APPELLANTS WERE ENTITLED TO APPLICATION OF THE DOCTRINE OF STRICT LIABILITY IN TORT.

Although the Supreme Court of Utah has not yet adopted the policy of holding manufacturers and retailers of defective products strictly liable, it has become the majority rule, adopted by some two-thirds of the courts. (Prosser, the Law of Torts, page 655, 4th Ed. 1971).

Recognition of strict liability in tort as a theory supporting recovery of personal injury sustained through use of a defective product is a recent development in the law of products liability. (Products Liability, 1968 Utah Law Review, May, No. 2, 267, 278). This Law Review article notes that the landmark case is *Greenman v. Yuba Power Products, Incorporated,* 59 Cal. 2d 57, 377 P. 2d 897, 27 Cal. Rptr. 697 (1963), which was an action in negligence and breach of warranty and which held both the manufacturer and the seller of the machine strictly liable for injuries to the plaintiff. A prophetic statement of Dean Wade's is quoted at page 279:

> The trend for the future is clear . . . It will soon become the established rule in the United States that the manufacturer is subject to strict tort

> liability without regard to the requirement of privity . . . Gradually a majority of the courts will slough off the warranty language and will be ready to follow the lead of the Restatement and the California court in frankly and accurately describing the liability as strict tort liability.

The doctrine grew out of a need for consumer protection against contract defenses, particularly disclaimers. At first, the coverage was limited to users and consumers, later it was extended to family members and guests. The most recent cases have held that the adoption of strict liability in tort against manufacturer and retailer is available to by-stander as well as user or consumer. In the case of *Caruth v. Mariani,* 11 Arizona App. 188, 463 P. 2d 83 (1970), the Arizona court extended strict liability protection to a plaintiff who was injured when his car was struck from the rear by another automobile with defective brakes. The decision was reached in a rehearing allowed because of the importance of establishing the public policy of the State of Arizona.

In extending the protection to "injured persons" and in holding the retailer liable as well as the manufacturer, the court said at 463 P. 2d, page 86:

> . . . The question resolves itself to a balancing of interest. Who should bear the loss? The injured member of the public or those persons who are in the chain of placing the defective goods on the market. We choose to protect the

> member of the public since those involved in the chain of marketing can distribute the risk between themselves by means of insurance and indemnity agreements. They should be better equipped economically to do so than some innocent member of the public . . .

The court noted that "all states which have adopted the theory of strict tort liability have extended the theory to the by-stander when called upon to do so . . ." (463 P. 2d at page 85).

In reversing its 1969 decision in the same case (See *Caruth v. Mariani,* 10 Arizona App. 277, 458 P. 2d 371 (1969), the court quoted favorably from *Elmore v. American Motors Corp.,* 70 A.C. 615, 75 Cal. Rptr. 652, 451 P. 2d 84 (1969):

> It has been pointed out that an injury to a by-stander "is often a perfectly foreseeable risk of the maker's enterprise, and the considerations for imposing such risks on the maker without regard to his fault do not stop with those who undertake to use the chattel. [A restriction on the recovery by by-standers] is only the distorted shadow of a vanishing privity which is itself a reflection of the habit of viewing the problem as a commercial one between traders, rather than as part of the accident problem." (2 Harper and James, The Law of Torts (1956) p. 1572, F.N. 6) (463 P. 2d at page 85).

The court emphasized that a by-stander needs greater protection than the consumer or user where the injury to the by-stander from the defect is reasonably foreseeable to the manufacturer and retailer, whereas the by-stander has no opportunity to inspect for defects or otherwise guard against them and to whom the injury is nearly always unforeseeable.

The collision in the *Caruth* case took place in 1964, prior to the time that Arizona had adopted the Uniform Commercial Code. In other words, the applicable law, the theories behind them and the problems facing the Arizona court were markedly similar to those facing the Utah court in the instant case. (The Parker accident took place in February, 1965, several months before Utah adopted the Uniform Commercial Code). As the Caruth court said at 463 P. 2d, page 87:

> . . . We really do not see any material difference for our purposes between the old Uniform Sales Act and the Uniform Commercial Code . . . the U.C.C. parallels the adoption of strict liability, but the two should not be confused with each other. They are "different breeds of cat." Strict tort liability is based upon public policy. Express and implied warranties under the U.C.C are based on contract. The U.C.C. still talks about disclaimers and notice. These are not tort concepts.

To this could be added a quotation from Prosser, The Assualt Upon the Citadel, 1960, 69 Yale L. J. 1099, 1134:

> There is no need to borrow a concept from the contract law of sales; and it is "only by some violent pounding and twisting" that "warranty" can be made to serve the purpose at all. Why talk of it? If there is to be strict liability in tort, let there be strict liability in tort, declared outright, without any illusory contract mask . . . there is nothing so shocking about it today that it cannot be accepted and stand on its own feet in this new [liability to the consumer] and additional field, provided always that public sentiment, public demand and "public policy" have reached the point where the change is called for.

Further authority may be found in the cases dealing with the question. In *Stewart v. Budget Rent-a-Car Corp., et. al.* Hawaii, 470 P. 2d 240 (1970), the Supreme Court of Hawaii affirmed a trial court decision in favor of plaintiff lessee extending strict liability in tort to the defendant lessor of a defective automobile.

In *Wasik v. Borg. v. Ford Motor Co.*, third party defendant, 423 F. 2d 44, (2d Circuit 1970) the United States Court of Appeals, Second Circuit upheld a decision of the United States District Court for the District of Vermont extending strict liability in tort to protect an innocent by-stander and his property. Although the Vermont Supreme Court had never specifically ruled on the question, Vermont had both juidcial and legislative developments allowing the Federal Court to project a likely development of law in the State of

Vermont. The case arose out of a collision in which the jury found that a defective throttle linkage had caused a Ford automobile driven by defendant Borg to crash into the auto driven by plaintiff Wasik. Borg brought in Ford Motor as third party defendant and since Borg was found free of contributory negligence by the jury, judgment was rendered directly against Ford.

In *Lamendola v. Mizell,* 115 N.J. Super 514, 280 A. 2d 241 (1971) the Supreme Court of New Jersey extended the protection of strict liability in tort to an innocent by-stander who was injured in a head-on collision, due, in part, to defective accelerator linkage on a new Pontiac driven by one of the defendants. The court found no inconsistency in the jury verdict holding the manufacturer and seller to strict liability in tort, while also finding that the driver was negligent.

In commenting upon the logic and language of *Elmore,* supra, the court said at 280 A. 2d page 245:

> It is this language, and the inherent good sense which gives it life, that renders all arguments to the contrary mere vapid, shallow breaths. In this age of sweeping social awareness and the attendant legal revolution, the concept of affording redress to by-standers on the basis of products liability is movement in an inevitable direction.

The same court noted that, although the concepts of privity had been virtually abolished by adoption of strict liability in tort, the forseeability test "found in the dominion of negligence" is still applicable. Thus, an innocent "bystander", whether pedestrian or passenger in a speeding automobile lawfully upon the public highways (as were the plaintiffs Edward in the instant case) are "within the realm of foreseeability" of those who may

> . . . be injured due to a defect in a vehicle that in some way inhibits or forecloses its control by the driver. This then is our holding today, a response to the simple and compelling case presented for determination. Thus, strict liability in tort, insofar as it applies to by-standards, provide a legal remedy where legal responsibility is properly placed. (280 A. 2d at page 246).

Adoption of strict liability in tort will not do great violence to the legal formulas which have long been employed by the Utah Supreme Court in settling such disputes.

In *Hewitt v. General Tire and Rubber Co.*, 3 Utah 2d 354, 284 Pac. 2d 471 (1955) this court, citing its own earlier decisions noted, at 384 P. 2d. page 472, essential elements of plaintiffs case for recovery against a manufacturer of a defective product. They include: (1)

defect; (2) defect present at the time of assembly: (3) defect discoverable by reasonable inspection; (4) injury due to the defect.

Merely by removing "discoverable by reasonable inpection" the modern formula is complete. (See Utah Law Review, Products Liability, P. 283, May, 1968).

In the *Hewitt* case, recovery was granted to the plaintiff by reinstating the jury decision which had been set aside by the trial court. By allowing negligence of the manufacturer to be proven by inference and circumstantial evidence, the Utah court reached exactly the same result as it would have under the lable of "Strict Liability in Tort." The court also quoted favorably from the Restatement of Torts: (284 Pac. 2d at 475). Adoption of Section 402 A and extending it to by-standers, therefore, would be simply one more logical step for the Utah court to take along the same path. (See *Webb v. Olin Matheson Chemical Corp.*, 9 Utah 2d 275, 342 P. 2d 1094 (1959).

Appellants ask that the Third District court decision be reversed and remanded for presentation to the jury under the theory of Strict Liability in Tort, extended to by-standers.

## POINT II.

### DEFENDANTS BREACHED AN EXPRESS WARRANTY TO REPAIR OR REPLACE DEFECTIVE PARTS AND THUS BECAME LIABLE IN CONTRACT FOR ALL THE FORESEEABLE CONSEQUENCES OF THE BREACH.

In his disposition, taken on May 9, 1967 (R-19), Clifford F. Parker, plaintiff, stated under oath that he purchased a brand new 1964 Cadillac automobile from Owen Wright, Inc., Layton, Utah, equipped with power steering and power brakes (R-141). That shortly after he accepted delivery of the car, he began to experience trouble which was manifested by the abrupt stopping of the motor. At page 14 of Parker deposition he was asked:

> Q. How many times did you have it in Owen-Wright?
>
> A. Well I would say a dozen or more.
>
> * * *
>
> Q. And you took it into Owen-Wright on an average of once a month?
>
> A. Oh Yes.
>
> Q. Or oftener?

A. Probably oftener.

* * *

Q. And was it operating in February like it had every month before?

A. Yes. That is right. I got it out of the garage on a Thursday, my son brought it down for me on a Thursday night, and it set in the garage and I got in it Saturday morning to see if would run and drove up where we was fishing and it quit me coming down the canyon.

And at page 15.

Q. During the time it was being worked on at Owen-Wright did you notice any change in the way it operated at all?

A. Not a bit.

Q. You mean that the twelve or so occasions that they worked on the car and it wasn't improved at all?

A. Not a bit.

The record also shows that the car motor died abruptly while being test driven by the mechanics of Owen Wright, Inc. (Deposition of Kenneth Pilcher, page 24) There is little dispute that a defect existed in the

automobile, that it was brought to the attention of the dealer on numerous occasions, whose failure to repair eventually led Clifford Parker to write a letter to the president of Cadillac Motors, complaining of the defect.

As stated by Addison Mueller:

> A contractual limitation of liability to repair the defective product does not mean that a consumer must put up forever with the dealer's or a service center's futile efforts. The limitation of remedy carries in it the promise to repair and reading "within a reasonable time" into such a promise is standard judicial engineering. Once the dealer has made a certain number of unsuccessful attempts at repair, therefore, the promise to repair has been breached, the protection is gone, and the dealer is liable in contract for all consequences of the breach . . . ("Contracts of Frustration" The Yale Law Journal, Vol. 78: 576, 592 (1969), also see *Seeley v. White Motor Co.*, 63 Cal. 2d 9, 45 Cal. Reporter 17, 403 P. 2d 145, (1965).

In a brief submitted to the court in support of their motion for dismissal, defendants make the statement that there was no privity of contract between the defendant General Motors and plaintiff Parker (R-146). Their statement is negated by the terms of the express warranty which accompanied the 1964 Cadillac that was sold to plaintiff Clifford Parker and which states in part:

> Cadillac Motor Car Division of General Motors Corporation, as manufacturer, warrants each new motor vehicle purchased including all equipment and or accessories thereon (except tire and tubes), manufactured or supplied by Cadillac Motor Car Division and delivered to the original retail purchaser by an authorized Cadillac dealer, to be free from defects in material and workmanship under normal use and service (R-141; R-147)

The warranty goes on to limit the liability of General Motors where the car had been subject to misuse, negligence or accident; repaired or altered outside of the authorized Cadillac dealership and, in any case, to twenty-four (24) months after purchase or the first 24,000 miles of use (R-141). It is not disputed that plaintiff, Parker complied with all of the conditions of the warranty. (R-147)

The undisputed facts show that Clifford Parker bought a car from General Motors which was expressly warranted to be free from defects of material and workmanship. That he used the car for the normal purpose for which it was intended. That a defect became noticeable soon after he had purchased it and well within the warranty period and that he notified the dealer and the manufacturer of defect. That neither the dealer nor the manufacturer made good on their express warranty of repair although given ample opportunity to do so.

Mr. Parker was a very good customer, having purchased four (4) Cadillacs prior to the defective one in question. Either the dealer or the manufacturer could have repaired the car, furnished Mr. Parker with a new car, or a suitable substitute car. Instead, they chose to make token repairs and even went so far as to furnish Mr. Parker with a "Jumper Wire" which allowed him to by-pass all of the electrical circuitry in the car, thus acknowledging that they knew of the defect and its general location. (Parker deposition, page 12)

In *Seeley v. White Motors,* supra, the plaintiff had had difficulty with a truck which he had purchased from defendant through their authorized dealer, Southern Truck Sales. The dealer, with the aid of factory representatives, had made several unsuccessful attempts to correct the violent bouncing known as "galloping." Defendant set up the defense of limitation contained in warranty which the court found "untenable." The court said at 403 P. Page 148:

> When, as here, the warrantor repeatedly fails to correct the defect as promised, it is liable for the breach for that promise as a breach of warranty (citing cases). Since there was an express warranty to plaintiff in the purchase order, no privity of contract was required. (Citing cases)

The California court viewed the *Seeley* controversy as a commercial one and decided it on a contract warranty

theory rather than one of tort. However, it should be noted that White Motor was found liable for all of the damages caused by the defect. The jury rightfully found that the defect did not cause the truck to overturn and the Supreme Court did not tamper wih their decision. It upheld that portion compensating "the loss directly and naturally resulting in the ordinary course of events from the breach of warranty." (403 P. 2d at 148)

The *Seeley* case, and those following it, is persuasive authority for the Utah Supreme Court to reverse the decision of the trial court in the instant case and to rule as a matter of law that defendant General Motors Corporation breached an express warranty to plaintiff Parker and therefore became liable to him for all the consequences of the breach. In the alternative, the court should remand the question of breach of an express warranty to be presented to the jury. (See Prosser, the Law of Torts, Section 97 Warranty, Page 651, 4th Edition, 1971).

## POINT III.

### DEFENDANTS BREACHED AN IMPLIED WARRANTY OF MERCHANTABILITY; AN IMPLIED WARANTY OF FITNESS FOR A PARTICULAR PURPOSE; AN IMPLIED WARRANTY OF REPAIR AND THUS BECAME LIABLE FOR ALL OF THE FORESEEABLE CONSEQUENCES OF THE BREACH.

Appellants contend that the disclaimer which defendants have set up as a defense (R-140) and which was accepted by the lower court (R-139) was a contract of adhesion with no equality of bargaining between the parties and should be declared unconscionable and contrary to public policy.

In *Henningsen v. Bloomfield Motors, Inc.*, 32 N. J., 358, 161 A. 2d 69 (1960), the landmark case the manufacturer and dealer were held strictly liable for injuries resulting from breach of implied warranty for defects in products put in the stream of commerce. The court stated at 161 A. 2d 76:

> It is perfectly clear, then, that even if the sale be under a trade name there is implied an obligation on the part of the seller that the article delivered will be the same quality, material, workmanship and availability for use as articles generally sold under such name. It would be wholly unreasonable to hold that, if one were to purchase, for example, an automobile under the trade name of "Ford" or "Buick" or "Cadillac" or the like, no implied warranty of merchantable quality could be asserted by the purchaser even though the particular car delivered was in such bad condition, so gravely defective in materials and construction, that it could not be operated at all and was wholly useless for the ordinary purpose which an automobile was designed to serve.

And later, at page 77, the court said:

> The Uniform Sales Act codified, extended and liberalized the common law of sales. The motivation in part was to ameliorate the harsh doctrine of caveat emptor, and in some measure to impose a reciprocal obligation on the seller to beware. The transcendant value of the legislation, particularly with respect to implied warranties, rest in the fact that obligations on the part of the seller were imposed by operation of law, and did not depend for their existence upon express agreement of the parties. And of tremendous significance in the rapidly expanding commercial society was the recognition of the right to recover damages on account of personal injuries arising from a breach of warranty. (Citing statutes and cases). The particular importance of this advance resides in the fact that under such circumstances strict liability is imposed upon the maker or seller of the product. Recovery of damages does not depend upon proof of negligence or knowledge of a defect. (Citing cases).

After a blistering commentary on the automobile industry's attempts to limit their liability and the "illusory character of the security presented by the warranty" and specifically stating a 161 A 2d 80 that an "express warranty against defective parts and workmanship is not inconsistent with an implied warranty of merchantability" and after dealing with the

specific question of the manufacturer's attmept to hide behind the retailer and claim lack of privity with the customer, the court said:

> It would be unjust to recognize a rule that would permit manufacturers of goods to create a demand for their products by representing that they possess qualtities which they, in fact, do not possess and then, because there is no privity of contract existing between the consumer and manufacturer, deny the consumer the right to recover if damages result in the absence of these qualities, when such absence is not readily noticeable. (161 A. 2d at Page 81)

In analyzing the legislative purpose in enacting the Sales Act and its authorization to allow buyer and seller to qualify the warranty obligations of an agreement, the *Henningsen* court found that the legislature had contemplated a bargain between parties of "relatively equal bargaining strength" and held that a disclaimer was void as a matter of law. In so finding, they upheld a jury decision which established that the disclaimer was "not fairly obtained."

In a discussion of the implied warranty of the dealers as compared to the manufacturer, the *Henningsen* court found that the Sales Law annexed an implied warranty of merchantability to the agreement between the purchaser and the dealer. All but eight (8) states are

said by Prosser to have followed *Henningsen* in rejecting privity of contract as a prerequisite to strict liability (Prosser, the Law of Torts, page 655, 4th Edition, 1971).

The *Henningsen* case was the forerunner of the present doctrine holding manfuacturers and dealers strictly liable in tort for injures caused by defects in products which they have put on the market. If strict liability in tort is adopted in Utah, there is no need to talk of warranties. Nevertheless, the *Henningsen* case is persuasive authority for invalidating disclaimers in warranties of products that later prove defective.

Cadillac Motor's attempt to limit their liability in the purchase order and contracts of sale (R-141) to Mr. Parker should be declared invalid as a matter of law and, at least as to plaintiff Parker, the case should be submitted to the jury on the question of whether or not an implied warranty was breached.

Appellants ask that the District Court's decision should be reversed and remanded for trial on the question of breach of an implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose and breach of an implied warranty to repair.

## POINT IV.

## THE DOCTRINE OF RES IPSA LOQUITUR SHOULD BE APPLIED TO DETERMINE THE LIABILITY THROUGH NEGLIGENCE OF DEFENDANTS IN THE MANUFACTURE AND REPAIR OF THE DEFECTIVE CADILLAC.

In *Hewitt v. General Tire & Rubber Co.*, 3 Utah 2d 354, 284 P. 2d 471 (1955), the Utah Supreme Court had before it the question of proof necessary to hold a manufacturer negligent and therefore liable for injuries sustained by the plaintiff service station operator while mounting a defective tire on a truck wheel. The court said at 284 P. 2d 472:

> The direct evidence which can be produced on either side in a case such as this is limited by the very nature of the action. Generally, plaintiff can only testify to the condition of the item after the accident and defendant has little opportunity to prove contributory negligence against the plaintiff. For this reason, the circumstantial evidence giving rise to certain inferences become of great importance . . . The question which we confront in the present case is whether there is evidence which would indicate that some flaw in the tire, resulting from some act or omission during the manufacture, existed prior to the explosion and was the proximate cause of it, and which would be discoverable upon reasonable inspection.

The court noted that, whereas the plaintiff had no way of proving negligence in manufacture since he was not present at the factory, neither could the defendant prove that no negligent acts or omissions had occurred in the assembly of the tire even by detailed evidence concerning its normal procedure in manufacture. The court said at 284 P. 2d 475:

> The present case might be likened to the cases involving exploding bottles. Some of these . . . have been decided on the principle of res ipsa loquitor, whereas, others have been allowed to go to the jury upon the circumstantial evidence of (1) a short time between the injury and the time when the item left the defendants control, (2) the type of break, (3) experiments and expert opinion, (4) no intermediate rough handling and (5) no negligence on the part of plaintiff. In these cases, evidence of defendant's care in manufacture was also submitted for the jury's determination of whether or not defendant had met his duty of care in manufacture and inspection.
>
> Under the circumstances, here present defendant's negligence or lack of neglience was properly a question of fact for the jury . . . .

In the case of *Milligan v. Coca Cola Bottling Co. of Ogden*, 11 Utah 2d 30, 354 P. 2d 580 (1960) (Dissenting Opinion), Justice Wade in his dissent cited *Hewett* and and other Utah cases in elaborating upon the doctrine of res ipsa loquitur as it applies in Utah:

> Res ipsa liquitur, as I view the decisions of this court, is simply a rule governing circumstantial evidence which permits the jury to draw from the occurrence of an unusual event the inference that it was more probable than not the result of defendant's fault.

In their "Memorandum of Authorities" (R 142-147), the defendant's in the instant case maintain that the "control" factor of res ipsa loquitur is missing, since the defendants, General Motors Corporation and Owen Wright, Inc. were not driving the automobile at the time of the accident. (R 143-144) The element of control in the doctrine of res ipsa loquitur applies to the time of the negligence. Appellant's maintain that the negligence which caused the defect in the Cadillac took place at the time of manufacture, or at the time of repair, all of which were exclusively under the control of the defendants.

In discussing "control," Prosser states:

> There is now quite general agreement that the fact that the plaintiff is sitting on the defendant's stool when it collapses, or has possession of an exploding bottle, or a loaf of bread with glass baked inside of it, or is using an appliance, which the defendant has manufactured, will not prevent the application of res ipsa loquitur when the evidence reasonably eliminates other explanations than the defendant's negligence. Some courts have said that it

> is enough that the defendant was in exclusive control at the time of the indicated negligence. It would be far better, and much confusion would be avoided if the idea of "control" were discarded altogether, and we were to say merely that the apparent cause of the accident must be such that the defendant would be responsible for any negligence connected with it. (Prosser, the Law of Torts, page 220 221, 4th Ed. 1971) See also *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P. 2d 436 (1944).

Defendant's second contention, that res ipsa loquitur is not applicable in the instant case because there is more than one defendant (R-145), cites cases which acknowledge that the doctrine applies to multiple defendants whose control and possession is joint. Their contention, apparently, is that the manufacturer and retailer must be viewed as separate and diametrically opposed to one another. Appellants maintain that such is not the case.

In the case of *Vandermark v. Ford Motor Company*, 37 Cal. Rptr. 896, 391 P. 2d 168 (1964) the court found that the manufacturer is subject to vicarious liability for negligence of his suppliers or subcontractors resulting in defects in the completed product. Likewise the court held that the manufacturer had delegated the final steps in the process of assembly to its authorized dealer. The court said at 391 P. 2d 171:

> Since Ford, as the manufacturer of the completed product, cannot delegate its duty to have its cars delivered to the ultimate purchaser

> free from dangerous defects, it cannot escape liability on the ground that the defect in Vandermark's car may have been caused by something one of its authorized dealers did or failed to do.

The court was here talking about negligence, even though it resolved the case under the doctrine of strict liability in tort.

Vicarious liability between or among defendants, makes res ipsa loquitur applicable where it might be barred because of the diversity of control and adverse interests normally found in multiple defendants.

Modern concepts in products liability hold manufacturer and retailer equally liable and therefore may be viewed as a single defendant.

In the instant case:

(1) The defect in the Cadillac which caused the engine to die unexpectedly would not normally occur in the absence of negligence.

(2) The indicated negligence was within the scope of defendant's duty to the plaintiff (See *Northern v. General Motors Corporation*, 2 Utah 2d 9, 268 P. 2d 981 (1954); *Hooper v. General Motors Corporation*, Utah. 260 P. 2d 549 (1953).

(3) No other responsible cause, including the conduct of the plaintiff, has been demonstrated to have caused the accident.

From this, the court can determine that an inference of negligence may reasonably be drawn by the jury, and therefore this case should be remanded for the jury's determination based on the application of the doctrine of res ipsa loquitur.

## CONCLUSIONS

Under the modern concept of products liability cases, whether in negligence, breach of warranty or strict liability, recovery against the manufacturer and seller depends on three elements being simultaneously present:

(1) The product was defective;

(2) The defect existed at the time the manufacturer or seller relinquished control; and

(3) The defect caused the injury.

All of these elements must be proven and are questions to be decided by the finder of fact.

In the instant case it was established that:

(1) The Cadillac was defective;

(2) The defect existed before coming into the control of the purchaser, plaintiff Parker.

(3) Whether the defect was the cause of the injuries sustained by the plaintiffs may be shown by expert testimony, circumstantial evidence and inference. See *Hewitt v. General Tire & Rubber Co., supra.*, also see *Webb v. Olin Matheson Chemical Corporation*, 9 Utah 2d 275, 342 P. 2d, 1094 (1959), in which it was stated at 342 P. 2d 1101:

> If . . . the court is in doubt whether reasonable men . . . might arrive at different conclusions, then this very doubt determines the question to be one of fact for the jury and not one of law for the court.

In all of the cases cited in this appeal, the Supreme Courts of the various jurisdictions show great respect for the jury system and are invariably willing to rely on the jury's ability to sift the evidence and reach a conclusion as to the facts.

Appelants ask only to be able to present their case to a jury which has been instructed under the modern established concepts set forth in this brief. Appellants ask, therefore, that the decision of the Third District Court be reversed and the case remanded for trial.

Respectfully submitted,

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