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Article 14

Negligence - Unqualified Duty Reasonably to Inspect Before Sale Imposed on Used Car Dealers

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By refusing to declare such provisions void as against public policy, courts have left it within their power to decide each case on the equities involved. If the equities favor the insurance company, a literal interpretation of the provision will be deduced, thereby requiring manual delivery. Otherwise, the provision will be interpreted liberally and constructive delivery will suffice.

NEGLIGENCE–UNQUALIFIED DUTY REASONABLY TO INSPECT BEFORE SALE IMPOSED ON USED CAR DEALERS

The defendant, a seller of used cars, sold an automobile with defective brakes. The auto went out of control because of this defect, while being driven by the buyer. Plaintiff, a third party, sustained injuries from the accident, for which he brings this action against the vendor. Verdict was rendered for the seller; plaintiff moved for a new trial which was granted; on retrial, a judgment was rendered for the plaintiff, and seller appealed. The Supreme Court upheld the verdict of the trial court. In affirming the lower court, the Court of Appeals of Kentucky, with three justices dissenting, held that a dealer in used automobiles must exercise reasonable care in inspecting an automobile before sale; also, the tort liability of a dealer in used automobiles is based on foreseeability of injury to others, arising from his actions or failure to act, and does not depend on the dealer's representations, or knowledge of the defective condition. *Gaidry Motors, Inc. v. Brannon,* 268 S.W. 2d 627 (Ky., 1954).

The liability of a supplier of chattels to a third person not in privity of contract for damages resulting from defects in the chattel has been a field of much adjudication. Initially, it was held that the breach of a contract gave no cause of action for damages to a party not in privity.[1] This rule was extended to actions in tort, and the general rule developed, that the original seller is not liable for damages caused by defects to anyone except to his immediate buyer.[2] Although some exceptions to the rule developed, it was the general rule until 1916 when Judge Cardozo laid down the modern rule in the leading case of *McPherson v. Buick Motor Company.*[3] This decision placed the duty upon a manufacturer to exercise reasonable care in the manufacture of chattels which, if negligently made, became dangerous instrumentalities. The majority of the courts have adopted this rule to impose a duty of reasonable care

[1] Winterbottom v. Wright, 10 M. & W. 109, 11 L. J. Ex. 415 (1842).

[2] Prosser, Torts § 83 (1941).

[3] 217 N.Y. 382, 111 N.E. 1050 (1916).

upon automobile manufacturers.[4] The remainder of the courts have either rejected the rule or modified it.[5]

However, the courts did not so readily impose the same unqualified liability upon used car dealers for injuries suffered by a third person caused by defects in the automobile. One view taken by the courts is that liability would only attach when the dealer represented that the car had been reconditioned, when in fact there was a defect which could have been discovered upon reasonable inspection.[6] Another view taken by the courts is that liability for injuries to a third party attaches when the seller has knowledge of any defect and fails to inform the buyer.[7] And finally, some jurisdictions have held that a lack of privity between dealer and the third party is a bar to an action by the third party.[8]

The decision in the instant case removes the necessity for the third-party plaintiff to prove that the seller had knowledge of a defect and concealed such defect from the vendee; or that the automobile was represented as being reconditioned. But more important, it appears that the court would impose liability upon the dealer who sells a car "as is,"

[4] Hupp Motor Co. v. Wadsworth, 113 F. 2d 827 (C.A. 6th, 1940); Goullon v. Ford Motor Co., 44 F. 2d 310 (C.A. 6th, 1930); Johnson v. Cadillac Motor Car Co., 261 Fed. 878 (C.A. 2d, 1919); O'Hara v. General Motors Corp., 35 Fed. Supp. 319 (E.D. Mich., 1940); Miles v. Chrysler Corp., 238 Ala. 359, 191 So. 245 (1939); Rotche v. Buick Motor Co., 358 Ill. 507, 193 N.E. 529 (1934); Hechel v. Ford Motor Co., 101 N.J.L. 385, 128 Atl. 242 (S. Ct., 1925); Ritz v. Packard Motor Car Co., 261 App. Div. 908, 25 N.Y.Supp. 2d 213 (2d Dept., 1941); Quakenbush v. Ford Motor Co., 167 App. Div. 433, 153 N.Y.Supp. 131 (3d Dept., 1915).

[5] Dillingham v. Chevrolet Motor Co., 17 Fed. Supp. 615 (W.D. Okla., 1936). This decision releases a manufacturer from liability to those not in privity. Cohen v. Brockway Motor Truck Corp., 240 App. Div. 18, 268 N.Y.Supp. 545 (1st Dept., 1934). This decision refused to extend the rule in the *McPherson* case to those defects which made danger "possible, but not probable."

[6] Egan Chevrolet Co. v. Bruner, 102 F. 2d 373 (C.A. 8th, 1939); McLeod v. Holt Motor Co., 208 Minn. 473, 294 N.W. 479 (1940); Jones v. Raney Chevrolet Co., 213 N.C. 775, 197 S.E. 757 (1938); Bock v. Truck & Tractor, 18 Wash. 2d 458, 139 P. 2d 706 (1943); Flies v. Fox Brothers Buick Co., 196 Wis. 196, 218 N.W. 855 (1928). The court in the *Flies* case uses language very similar to the decision as laid down in the instant case. But it qualifies the rule by stating that a duty to exercise reasonable care in inspecting the vehicle exists "especially" where by representation or warranties that the article is safe, the seller induces the sale. As the facts were that the car had been rebuilt and such representations had been made, it is only a matter of conjecture that the court would have applied the rule set forth in the instant case had such representations and warranties not been made.

[7] Bergstressor v. Van Hoy, 142 Kan. 88, 45 P. 2d 855 (1935); Barni v. Kutner, 6 Terry 850, 76 A. 2d 801 (Super. Ct. Del., 1950); Trust Company of Chicago v. Lewis Sales, Inc., 306 Ill. App. 132, 28 N.E. 2d 300 (1940).

[8] Dillingham v. Chevrolet Motor Co., 17 Fed. Supp. 615 (W.D. Okla., 1936); Shepard v. Kensington Steel Co., 262 Ill. App. 117 (1931); Gordon v. Bates-Crumley Chevrolet Co., 158 So. 223 (C.A. La., 1935). Although the court in the *Trust Company of Chicago* case, supra, discussed the rule as laid down in the *Shepard* case, the decision was based on other grounds.

that is, makes no representations as to its condition and has no knowledge of any defect, if it was in a dangerously defective condition which could have been discovered by reasonable inspection. This position, the courts have been reluctant to take, predicating liability either upon knowledge of a defect, or upon the dealer's affirmative act of representing the car as reconditioned.[9]

The court in the instant case relied mainly upon two decisions.[10] In the *Standard Oil Co. v. Leaverton*[11] case the fact situation differed materially from that in the instant case. There, the defendant allowed another person to use a vehicle with defective brakes in order for the other person to try out the automobile with a view toward buying it. While using the automobile the brakes failed to work, and the car damaged property belonging to the plaintiff. The court ignored previous decisions regarding used car dealers' liability to third parties and based its decision upon three cases,[12] which were concerned with and decided upon the liability of a bailor of a chattel for injuries suffered by a third party due to defects in the chattel. One of these cases was *Vaughn v. Millington Motor Co.*,[13] which stated:

> This duty (to exercise reasonable care to avoid putting forth a machine with defects) does not rest upon the contract of a bailment, but arises from the obligation which the law imposes upon every man to refrain from acts of omission or commission which he may reasonably expect would result in injury to third persons.[14]

Although this rule is specifically applied to one who lends automobiles in the course of business, it appears that the court in the instant case feels that it is not too harsh to impose the same duty upon one who sells automobiles without taking affirmative steps to recondition or repair them, that is, one who sells them "as is."

A portion of the facts in the *Thrash v. U-Drive-It*[15] case were almost identical to those in the instant case. The court, in ruling upon that phase of the case, stated:

> . . . when a dealer in second hand or used motor vehicles sells a used car which he knows, or in the exercise of ordinary care should know, is imminently dan-

[9] Authorities cited notes 6 and 7 supra. However, a recent decision released a seller of a used car from liability in tort to the vendee who took the car "as is" without guarantee. Pokrajac v. Wade Motors, Inc., 266 Wis. 398, 63 N.W. 2d 720 (1954).

[10] Standard Oil Co. v. Leaverton, 239 Mo. App. 284, 192 S.W. 2d 681 (1946); Thrash v. U-Drive-It Co., 93 Ohio App. 388, 113 N.E. 2d 650 (1951).

[11] 239 Mo. App. 284, 192 S.W. 2d 681 (1946).

[12] Saunders System Birmingham Co. v. Adams, 217 Ala. 621, 117 So. 72 (1928); Spelky v. Kissel-Skiles Co., 54 S.W. 2d 761 (C.A. Mo., 1932); Vaughn v. Millington Motor Co., 160 Tenn. 197, 22 S.W. 2d 226 (1929).

[13] 160 Tenn. 197, 22 S.W. 2d 226 (1929).

[14] Ibid., at 198 and 227.

[15] 93 Ohio App. 388, 113 N.E. 2d 650 (1951).

gerous to life or limb when put to ordinary use, *without notice to the purchaser of its defects or bad qualities,*[16] or when, by representations and warranties that the vehicle is in good operating condition, he or it induces the sale, such dealer is liable to any person who suffers an injury as a proximate result of a defective condition of the vehicle (existing at the time of the sale) when said vehicle is being used for the normal purpose for which it is designed.[17]

This rule seems to do little more than state the law as held in previous cases, and although it does charge the dealer with constructive knowledge of ascertainable defects, it implies that the liability can be discharged by informing the vendee of any known or discovered defects. This decision does not, as in the instant case, unqualifiedly impose a liability on a seller of used cars for injuries suffered by a third party due to defects which could have been discovered by the exercise of reasonable care. The rationale adopted by the court in the instant case for this broad rule is, that ". . . the used car dealer is in a better position, by reason of his opportunity, than his average customer, to discover what defects might exist in any particular car to make it a menace to the public."[18]

The decision in the instant case, as pointed out in the dissenting opinion, represents a reversal of previous holdings in Kentucky. Although there is no prior case in this jurisdiction involving liability of a used car dealer, it had been held that a maker of automobiles was not liable to a third person not in privity of contract for defects in the automobile unless the dealer knew of the defect which made the automobile dangerous and concealed the defect or represented that the automobile was in good condition.[19] In addition, it had been held that a vendor of articles not inherently dangerous did not have a duty to make an inspection of the article before sale.[20]

Although the decision stated by the majority opinion is attempting to accomplish a worthwhile objective, there are criticisms voiced in the dissenting opinion which merit consideration, especially in view of the fact that the court is apparently imposing a duty, not only upon the dealer who sells the automobile as reconditioned or who conceals knowledge of a defect, but also upon the dealer who takes no affirmative steps, selling the car "as is" without knowledge of any defect. The dissenting opinion questions the decision as being vague and indefinite in so far as it does not state whether the rule applies only to dealers or to anyone

[16] Italics added.

[17] Thrash v. U-Drive-It Co., 93 Ohio App. 388, 393, 113 N.E. 2d 650, 655 (1951).

[18] 268 S.W. 2d 627, 629 (Ky., 1954).

[19] Olds Motor Works v. Shaffer, 145 Ky. 616, 140 S.W. 1047 (1911).

[20] Rankin v. Harlan Retreading Co., 298 Ky. 461, 183 S.W. 2d 40 (1944); Peaslee-Gaulbert Co. v. McMath's Adm., 148 Ky. 265, 146 S.W. 770 (1912).

who sells a used car. Furthermore, the decision does not state whether the dealer can release himself from liability by telling the vendee that the automobile is in defective condition, or that it has not been inspected for defects (although the dissenting opinion feels that the necessary implication is that there is an absolute duty to inspect and correct such defects as might prove dangerous to third parties). Finally, the dissent points out that the decision does not state whether this duty extends to dealers in other second hand merchandise such as farm tractors, road machinery, cook stoves, and the like. Although these questions seem unduly searching in view of the fact that the court ruled specifically upon the duty of used car dealers, and the duty of dealers in other second hand merchandise is not in issue, it is still problematical whether the dealer can release himself from liability by informing the vendee of a defect or by informing him that no inspection had been made.

On the question of vagueness of the majority decision, the dissent rather dramatically stated:

> When a court sets itself up as an instrument of social progress and embarks on a crusade, it should not merely shoot a scatter gun in the general direction of a supposed target. The shots should be zeroed in with some degree of accuracy and innocent bystanders should be given reasonable opportunity to remove themselves from the line of fire.[21]

In view of the fact that the questions posed by the dissent must be answered, it appears that the court, by placing this vague, unqualified duty upon used car dealers, has also broadened the field of litigation between used merchandise dealers and third parties not in privity where the article sold, if defective, becomes a dangerous instrumentality.

POWERS–PARTITION GRANTED PRIOR TO TERMINATION OF EXECUTOR'S POWER OF SALE

Testatrix died in 1938 leaving a one-third interest in the annual gross rents of her farm to her husband as long as he remained unmarried. The remainder was left to her four children equally in fee simple with a power of sale in her executors, which power was to last for five years after the termination of her husband's interest. A devisee of one of the remaindermen sued for partition in 1952, which was only two years after the death of the husband. The defending executors moved to strike, alleging that the plaintiff had no interest to which a suit for partition would attach. They alleged that they as executors became invested with legal title as trustees, and that an equitable conversion occurred leaving the remaindermen as equitable owners of personalty. The Illinois Supreme Court in allowing partition held that in the absence of an imperative

[21] 268 S.W. 2d 627, 631 (Ky., 1954).