1989

Fairway Distributing Co. v. Bangerton Construction Company and John mark Bangerter : Reply Brief

Utah Court of Appeals

Merlin O. Baker; Ray Quinney and Nebeker; James T. Ferrini; Richard P. Winter; Edward T. Kay; Clausen, Miller, Gorman Caffrey .
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BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

890107-CA

FAIRWAY DISTRIBUTING CO., FAIRWAY LIMITED, a partnership,

Plaintiffs and
Respondents,

vs.

No. 880076

89-0107-CA

BANGERTER CONSTRUCTION COMPANY; JOHN MARK BANGERTER; BONNEVILLE ENGINEERING, INC.; TRUSWAL SYSTEMS, INC. (Respondent); COLONIAL LUMBER, INC.; and DIEHL LUMBER COMPANY (Appellant),

Defendants.

JOHN MARK BANGERTER,

Third-Party Plaintiff,

vs.

AMERICAN CASUALTY COMPANY; CNA INSURANCE COMPANIES; TRUCK INSURANCE EXCHANGE and FARMERS INSURANCE GROUP,

Third-Party Defendants.

REPLY BRIEF OF DEFENDANT/APPELLANT DIEHL LUMBER COMPANY

Appeal From the Final Judgment Of
The Second Judicial District Court of Davis County,
The Honorable Douglas L. Cornaby Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

RULES

OTHER

ARGUMENT

POINT I

THE DISTRICT COURT HAD NO DISCRETION TO AMEND ITS ORDER TWENTY TWO MONTHS AFTER IT WAS ENTERED.

In a written order dated August 23, 1985, the district court gave Fairway 15 days to file a verified factual statement. (Adden. A.) On September 11, 1985, the district court wrote:

> On August 23, 1985, this court ordered the plaintiffs to file a verified factual statement about each party to be added. The court allowed the plaintiffs 15 days to file the document. Nineteen days have passed and no document has been filed with the court.
>
> The motion to amend is denied.

(Adden. B.) Twenty-two months later the district court amended that order. (R. 753-755, 787-792.)

Rule 60 governs the amendment of orders. In its "Motion to Correct the Court Order or in the Alternative to Amend the Complaint to Include the Cause of Action Based on Strict Liability" and supporting memoranda, (Adden. C.), Fairway appropriately invoked and cited Rule 60(b). Fairway claimed excusable neglect. Rule 60(b) grants no discretion to the district court to alter an order for the reason of excusable neglect after 30 days.

Fairway now claims Rule 15 applies. When there is conflict between rules, the more specific rule applies. See, e.g., North

Eastern Mining Co. v. Dorothy Coal Sales, Inc., 108 F.R.D. 657, 659 (D.Ind. 1985). Rule 60 is the more specific rule, and serves an important function in preserving the orderly, efficient administration of justice.

> It is true that our new rules of civil procedure were intended to eliminate undue emphasis on technicalities and to provide liberality in procedure to the end that disputes be heard and determined on their merits. However, this does not mean that procedure before the courts has become entirely "without form and void." The law itself is a system of rules designed to safeguard rights and preserve order, and administration of justice under it must necessarily be carried on with some degree or order. This can be accomplished only by compliance with the rules established for that purpose. Liberality in their interpretation and application should be indulged where no prejudice or disadvantage to anyone results, but where failure to comply with the rules will result in some substantial prejudice or disadvantage to a party, they should be adhered to with fidelity.

Utah Sand & Gravel Prods. Corp. v. Tolbert, 16 Utah 2d 407, 402 P.2d 703, 704 (1965) (footnotes omitted).

> Even though the new rules of procedure had as a part of their purpose the removing of undue technicalities and rigidities in the law, and are to be liberally construed to effectuate justice, nevertheless, they were designed to provide a pattern of regularity of procedure which the parties and the courts could follow and rely upon.

Drury v. Lunceford, 18 Utah 2d 74, 415 P.2d 662, 663 (1966).

POINT II

EVEN IF THE COURT HAD DISCRETION TO ALTER ITS EARLIER ORDER, IT ABUSED THAT DISCRETION.

Fairway claims Diehl's burden is "insurmountable," in other words, this court is powerless to review the discretionary acts of the district court. Fairway's claim is erroneous.

> In cases where abuse of discretion is raised [the appellate court] will review the discretionary act and, if abuse is involved, correct the abuse.

Puckett v. Cook, 586 P.2d 721, 723 (Okl. 1978).

Fairway's Motion to Correct the Court Order or in the Alternative to Amend the Complaint to Include a Cause of Action Based on Strict Liability was filed on June 16, 1987, (Adden. C.), 40 months after the claim arose, 31 months after the Complaint was filed, following 2 pretrial hearings, and a little more than 1 month before trial. When a party seeks to amend the pleadings late and on the eve of trial, the trial court must require a reasonable explanation of the delay. Girard v. Appleby, 660 P.2d 245, 248 (Utah 1983); Chadwick v. Nielsen, 763 P.2d 817, 820 (Utah App. 1988); Tripp v. Vaughn, 746 P.2d 794, 797-98 (Utah App. 1987).

Fairway has never attempted to give an explanation of why a strict liability claim was not stated in the original complaint. Fairway alleged the closely related claim of breach of warranty, which requires a sale. Why could it not have alleged strict

liability, which Fairway claims requires little more than a remote involvement in the sale of a product? Fairway is unable to give a reasonable explanation of the delay in seeking an amendment of the 1985 Order.

The trial court must next consider whether prejudice would occur by allowing the amendment. Bekins Bar V Ranch v. Huth, 664, P.2d 455, 464 (Utah 1983); Kelly v. Utah Power & Light, 746 P.2d 1189, 1190 (Utah App. 1987).

> It is true that our new rules should be "liberally construed" to secure a "just . . . determination of every action", but they do not represent a one-way street down which but one litigant may travel. The rules allow locomotion in both directions by all interested travelers. They allow plaintiffs considerable latitude in pleading and proof, to the point where some people have expressed the opinion that careless legal craftsmanship has been invited rather than discouraged. Be that as it may, a defendant must be extended every reasonable opportunity to prepare his case and to meet an adversary's claims. Also he must be protected against surprise and be assured equal opportunity and facility to present and prove counter contentions, - else unilateral justice and injustice would result sufficient to raise serious doubts as to constitutional due process guarantees.

Taylor v. E.M. Royle Corp., 2 Utah 2d 175, 264 P.2d 279, 280 (1953) (quoting Rule 1(a) U.R.Civ.P.).

The district court acknowledged that Diehl was prejudiced by the amendment, (Adden. D.), and delayed the trial 3 months in an effort to minimize that prejudice. Unfortunately, no amount of delay in the trial could reduce the prejudice.

One of the justifications for extending strict liability to sellers other than the manufacturer is that there is little prejudice to those sellers because the loss can be passed by those sellers to the manufacturer. See e.g., Vandermark v. Ford Motor Co., 61 Cal.2d 256, 37 Cal.Rptr. 896, 391 P.2d 168, 172 (1964). The Utah Court of Appeals has now made that right of indemnity very significant. A remote seller can recover attorneys fees, costs and any liability to the plaintiff. Hanover Ltd. v. Cessna Aircraft Co., 758 P.2d 443 (Utah App. 1988). Fairway's unreasonable delay destroyed Diehl's indemnity right.

The warehouse in question was constructed in 1979. The trusses in question were made in July, 1979. As of July, 1986, Diehl's claim for indemnity against Truss Teck was barred by Utah Code Ann. § 78-12-25.5 (1953).

Truss Teck was dissolved on December 31, 1984. (T.R. 318; Def. Ex. 2, R. 1570.) As of December 31, 1986, Diehl's indemnity claim against Truss Teck was barred by Utah Code Ann. § 16-10-100 (1953). Had Fairway raised a strict liability claim before July 1986, Diehl could have and would have asserted a claim for indemnity against Truss Teck.

A claim for contribution "arises" only when a defendant pays more than his fair share. Unigard Ins. Co. v. City of LaVerkin, 689 P.2d 1344, 1346 (Utah 1984); Utah Comparative

Negligence Act, 1973 Utah Laws Ch. 209, § 3. An indemnity claim "does not arise until the liability of the party seeking indemnity results in his damage." Perry v. Pioneer Wholesale Supply, Co., 681 P.2d 214, 218 (Utah 1984). A statute of limitation ordinarily does not begin to run until a claim "accrues" or "arises". This, however, has nothing to do with statutes of repose, which begin to run regardless of when the claim arises:

> Statutes of repose . . . are different from statute of limitations . . . . A statute of limitations requires a lawsuit to be filed within a specified period of time after a legal right has been violated or the remedy for the wrong committed is deemed waived. A statute of repose bars all actions after a specified period of time has run from the occurrence of some event other than the occurrence of an injury that gives rise to a cause of action.

Berry v. Beech Aircraft Corp., 717 P.2d 670, 672 (Utah 1985) (citations omitted).

> A specific statutory limitation period that seeks ultimate repose of causes of action will control over a general statute of limitations, even to cut off an indemnity action that technically has not accrued.

Perry v. Pioneer Wholesale Supply Co., 681 P.2d 214, 218 (Utah 1984).

Fairway claims that Diehl chose not to sue Truss Teck because the president of Diehl was the father of the president of Truss Teck. Fairway's attempt at clairvoyance is in error. If Diehl were not insured against liability, its officers and

directors would owe a fiduciary responsibility to shareholders to seek indemnity, irrespective of their personal feelings. Since Diehl does have liability insurance, the insurance carrier has the right to direct the defense and it could have, and would have, insisted upon a claim of indemnity regardless of Larry Diehl's asserted altruism.

Diehl never had any exposure until the strict liability claim, as this appeal well illustrates.

As Fairway has admitted, there never was any evidence of Diehl's negligence or breach of warranty. At most, any claim of Diehl against Truss Teck on the negligence claim would have been for contribution, not indemnity. Diehl had no claim against Truss Teck on the warranty claim, as Diehl did not purchase the trusses from Truss Teck. Any warranty claims against Diehl or Truss Teck were barred by the Statute of Repose found in Utah Code Ann. § 70A-2-725 (1953), even before Fairway filed its original complaint. Perry v. Pioneer Wholesale Supply Co., 681 P.2d 214, 218 (Utah 1984).

Diehl's claim of indemnity against Truss Teck never even accrued before the judgment. Ordinarily, claims cannot be raised before they accrue. E.g., Jahnke v. Palomar Financial Corp., 22 Ariz.App. 369, 527 P.2d 771, 775 (1974). There is, by rule, an exception to this principle. Rule 14 allows a defendant to "cause a summons and complaint to be served upon a

person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." There is no similar provision which allows a defendant to file a third-party complaint seeking contribution or indemnity for a claim which may, possibly, someday be stated by the plaintiff. The rule applies only after the plaintiff has stated the claim for which indemnity is sought.

Diehl, like the district court, assumed that if Fairway was serious about amending its complaint, it would have complied with the court's order of September 11, 1985:

> The court assumed that if the plaintiff had been serious about the cause of action, counsel would have filed the required statement.

(Adden. D.)

Diehl assumed that Fairway would be required to comply with Rule 60. Diehl assumed Fairway would be required to act timely. Diehl assumes, even now, that the "rules" of civil procedure are something more than mere suggestions. Diehl also assumed that if Fairway had been serious about the strict liability claim, Fairway would have sued Truss Teck. While Truss Teck was dissolved in 1984, there may well have been insurance coverage or traceable assets.

Fairway champions a double standard. It says it was reasonable for it to have made an "assumption" - unsupported by any record before this court - that the district court had dealt

with the proposed amended complaint in portions, rather than as a whole, and that the court had dealt with the strict liability claim differently than the claims against new parties. This, despite a written order to the contrary. If Fairway really believed it had raised a strict liability claim, why didn't it insist on an answer to that claim?

Fairway, on the other hand, claims it was unreasonable for Diehl to rely upon the written order of the court, the pleadings, and the rules of civil procedure in failing to assert a claim that had not accrued, might never do so, and could not be filed under Rule 14.

Fairway's claim before this court is: Fairway is to be excused for failing to read the court's written order. Diehl is to be dammed for failing to read the mind of Fairway's counsel.

The loss of its indemnity rights is not the only prejudice suffered by Diehl. Fairway's strict liability claim came 8 years after the trusses were made and 40 months after the accident. In that time, witnesses died, memories dimmed, businesses dissolved, and business records were lost or destroyed. Neither 3 months, nor 3 years of additional discovery could have cured that prejudice.

Abuse of discretion occurs when the trial court:

1. exceeds bounds of reason;

2. disregards rules; or

3. disregards principles of law or practice, to the detriment of a party litigant. E.g., Gakiya v. Hallmark Props., Inc., 722 P.2d 460, 463 (Haw. 1986).

Here the district court:

1. exceeded the bounds of reason;

2. disregarded Rule 60;

3. disregarded the rule of law requiring it to deny amendment absent a reasonable explanation of the delay from Fairway; and

4. ignored patent and unavoidable prejudice to Diehl.

POINT III

ONE WHO NEGOTIATES THE SALE OF PRODUCTS BETWEEN BUYER AND SELLER IS NOT STRICTLY LIABLE FOR DEFECTS IN THOSE PRODUCTS.

Persons who negotiate a sale between buyer and seller are not strictly liable for defects in the goods sold. See, Brejcha v. Wilson Machinery, Inc., 160 Cal.App.3d 630, 206 Cal.Rptr. 688, (Cal.App.Ct. 1984). In that case, the California Court of Appeals held an auctioneer who received a metal-rolling machine on consignment and advertised and sold the machine, "as is", as the agent of the seller, was not strictly liable for defects in the machine. The court based its decision on the fact that the defendant had not taken title to the machine and had not made any warranties or representations. 206 Cal.Rptr. at 694.

Fairway claims a great deal of authority for the proposition that a "broker" is strictly liable. Careful examination of those cases discloses no such support.

Fairway claims the Illinois Supreme Court in Hammond v. North American Asbestos Corp., 97 Ill.2d 195, 454 N.E.2d 210 (1983), found the defendant strictly liable "because it acted as a sole sales agent for Cape's [Cape Asbestos Company, the manufacturer] product." Fairway does not mention that the defendant was the wholly owned subsidiary of Cape. Id. at 213. While the defendant claimed to be only a broker, Id. at 216, it does not appear that position was accepted by either the jury or the Illinois Supreme Court:

> Defendant's annual reports to the Secretary of State of Illinois from 1955 to 1961 listed defendant's business as the manufacture and sale of asbestos.
>
> Many of the documents were submitted by plaintiff to prove that defendants sold large quantities of raw asbestos to Calabrian Industries (Calabrian) a barter corporation. . .
>
> Joan Holtze, a former employee of defendant from 1953 until 1978, testified defendant was incorporated to be a contact point in north America for Cape customers. While admitting defendant made a few direct sales of asbestos, she said it primarily functioned as a message relay center between Cape and Cape's North American Asbestos' customers . . . .
>
> . . . .
>
> One of defendant's former presidents testified that defendant neither accepted any orders or contracts for asbestos on behalf of Cape nor had authority to do so. He acknowledged, though, that he represented defendant as its attorney in the preparation and negotiation of

> the agreement with Calabrian to supply asbestos under the barter contracts . . . .

Id. at 213-14.

The court in Hammond never discussed whether a broker could be held strictly liable. It simply held:

> There was ample evidence from which the jury could conclude defendant's role in marketing the asbestos was sufficient to support liability under strict liability theory.

Id. at 217.

The Illinois Court of Appeals unequivocally rejected the argument that the defendant was a broker:

> Irrespective of defendant's role in the marketing of asbestos in its normal course of business, this argument ignores the evidence adduced concerning the government contract sales. The testimony and documents disclose that Calabrian directly negotiated contracts between defendant and itself to supply asbestos for the federal government's stockpile of critical materials. Thus, insofar as the government contract sales are concerned, defendant became a seller within the meaning of the Restatement for which liability attaches.

Hammond v. North American Asbestos Corp., 105 Ill.App.3d 1033, 435 N.E.2d 540, 544-45 (Ill.App.Ct. 1982).

Fairway claims the defendant in Zamora v. Mobile Corp., 101 Wash. 2d 199, 704 P.2d 584 (1985), "was a broker of propane gas." That description is in error. The defendant in Zamora purchased and resold the product on its own behalf, not as another's agent:

> Significantly, respondent never had possession or control of the propane here. It bought and sold the gas completely as a paper transaction.

Id. at 587. The court found a sale had occurred and the defendant was a "seller" within the meaning of 402A.

Fairway represents that the defendant, Pacor, in Weber v. Johns-Manville Corp., 630 F. Supp. 285 (D.N.J. 1986), was a "broker" a "voice over the phone" and that the brokerage service "was an isolated and limited feature of its overall business." Fairway's interpretation is in error. The court in Weber framed the issue as follows:

> [W]e are called upon to predict what a New Jersey court would do if confronted with the two critical issues presented here, namely, whether self-styled mere brokers may be held strictly liable in tort and, perhaps more fundamentally, whether Pacor is in fact a "mere broker."

Id. at 286. The court never reached the first issue.

> Pacor was not an ordinary broker or, to use Story's words, "strictly a middleman." . . . Against this background it would be a mischaracterization of the record to characterize Pacor as a "mere broker;" perhaps "broker plus" would be more apropos. In any event, because the mere broker label does not apply, Pacor's motion premised on that notion need not be addressed further and will be denied.

Id. at 287-88 (emphasis in original).

The Weber case is the only case cited by Fairway where the court clearly defined the term "broker."

The only "broker" case cited by Fairway which appears to give some support to Fairway's position is Hoffman v. Loos &

Dilworth, Inc., 307 Pa.Super. 131, 452 A.2d 1349 (1982). The holding in that case, however, is far from clear. In that case the plaintiff's decedent received fatal injuries in a fire caused by rags soaked in linseed oil. The plaintiffs sued Loos & Dilworth, Inc., which filed claims against Honeymead Products Company, C.J. Osborn Chemicals Company and E.W. Kaufmann Company. The trial court granted Kaufmann summary judgment. Loos & Dilworth and Honeymead appealed. Loos & Dilworth and Honeymead claimed Kaufmann had purchased, taken title to and resold the linseed oil in question. Id. at 1352 n. 1. E.W. Kaufmann claimed it usually took title to linseed oil it resold, but did not do so with respect to oil sold to Loos & Dilworth. Id. at 1353 n. 2.

The appellate court reversed the summary judgment. The court, however, does not appear to have resolved the issue of whether Kaufmann actually purchased and resold the linseed oil on its own behalf.

The tort law of Utah is, with few exceptions, based upon the principals of negligence. Fairway claims the exceptions have swallowed the rule. Such an assertion is simply unsupportable.

For example, courts have generally denied application of strict liability to hospitals or medical practitioners for injuries suffered from medical products used in treatment. In Silverheart v. Mount Zion Hosp., 20 Cal.App.3d 1022, 98 Cal.

Rptr. 187 (Cal.App.Ct. 1971), the court rejected the application of strict liability to a hospital in an action by a patient injured when a surgical needle broke. In Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 538, aff'd, Magrine v. Spector, 53 N.J. 259, 250 A.2d 129, (N.J. 1969) the court refused to impose strict liability upon a dentist who's patient received injuries when a hypodermic needle broke. See also Annot., 54 A.L.R.3d 258 (1974).

Generally, the courts have refused to apply strict liability to financing lessors. E.g., Abco Metals Corp. v. J.W. Imports Co., 560 F. Supp. 125 (N.D.Ill. 1982) aff'd, Abco Metal Corp. v. Equico Lessors, Inc., 721 F.2d 583 (7th Cir. 1983) (applying Illinois law). See also, Annot. 28 A.L.R.4th 326 (1984).

While there is some authority to the contrary, persons who overhaul or rebuild products and place them back into service are not strictly liable for defects. E.g., Barry v. Stevens Equip. Co., 176 Ga.App. 27, 335 S.E.2d 129 (1985); Swenson Trucking & Excavating, Inc. v. Truckweld Equip. Co., 604 P.2d 1113, 1116-17 (Alaska 1980); See also, Annot., 29 A.L.R.3d 1425 (1970).

While there may be authority to the contrary, installers have generally not been held strictly liable for defects in products installed, even where the products are of no use unless and until installed. E.g., Hinojasa v. Automatic Elevator Co.,

92 Ill.App.3d 351, 416 N.E.2d 45, 47-48 (Ill.App.Ct. 1980); Hoover v. Montgomery Ward & Co. Inc., 270 Ore. 498, 528 P.2d 76 (1974).

Generally, strict liability has not been extended to persons who provide products for transportation where there is no sale. For example, strict liability was held not to apply to the owner of a ski tram in Bolduc v. Herbert Schneider Corp., 117 N.H. 566, 374 A.2d 1187 (1977). In Ruiz v. Southern Pacific Transp. Co., 97 N.M. 194, 638 P.2d 406, 411-12 (N.M.App. 1981), a person injured by a freight train could not recover under a theory of strict liability. See also, Siciliano v. Capital City Shows, Inc., 124 N.A. 719, 475 A.2d 19, 25 (1984) (amusement ride).

Fairway claims "licensors" are strictly liable and cites for this proposition the case of Garcia v. Halsett, 3 Cal. App. 3d 319, 82 Cal.Rptr. 420 (1970), where a young boy was injured by a washing machine at a local laundry mat. That position does not appear to have wide acceptance. See, Siciliano v. Capital City Shows, Inc., 124 N.H. 719, 475 A.2d 19, 25 (1984) (amusement ride); Keen v. Dominick's Finer Foods, Inc., 49 Ill.App.3d 480, 364 N.E.2d 502, 504-05 (Ill.App.Ct. 1977) (strict liability does not apply to a grocery store customer injured by shopping cart). Wagner v. Coronet Hotel, 10 Ariz.App. 296, 458 P.2d 390, 394-95 (Ariz. App. 1969) (hotel not strictly liable when guest injured by defective bath mat); Dixon v. Four Seasons

Bowling Alley, Inc., 176 N.J.Super. 540, 424 A.2d 428, 430-31 (1980) (bowling alley not strictly liable for defects in bowling ball made available for use by patrons).

At least one student of products of liability does not share Fairway's view of the explosion in strict liability:

> The Restatement (Second) of Torts provision on strict liability in tort imposes the liability on one who sells a product in a defective condition unreasonably dangerous to the use or consumer. It limits its application to a seller who is engaged in the business of selling such products and the cases where it is expected to and does reach the user or consumer without substantial change in the condition in which it was sold.
>
> Under this rule, the sale of a chattel is an element of its application. In the discussion which has preceded this section, it was pointed out that in some instances strict liability in tort has been applied even though there was no sale. The most common situation of this is the case of a lease of goods, as demonstrated by the Cintrone [(Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965)] decision. But the departure from the Restatement rule to achieve this strict liability result is not particularly startling since that case involved a lessor whose business it was to put goods into the stream of commerce by leases instead of through sales transactions. In other words, the case did involve a situation of the distribution of goods.
>
> Without a sale, and aside from the type of case involved in Cintrone, cases have been very sparce in applying strict liability in tort.

2 L. Frumer & M. Freedman, Products Liability § 3.03[4][vi], pp. 3-444 through 3-447 (1988).

People who design or engineer products without manufacturing them are not strictly liable. See, Huang v. Garner, 157 Cal.App.3d 404, 203 Cal.Rptr. 800, 804 n. 5 (Cal.App.Ct. 1984);

Castaldo v. Pittsburgh-Des Moines Steel Co. Inc., 376 A.2d 88, 90-91 (Del.Supr. 1977).

Fairway tries to create more exceptions to the general rule of negligence law than actually exist. Fairway claims that "distributors" and "importers" are also examples of strictly liable nonsellers. Careful examination of the cases cited by Fairway reveals that the "importers" and "distributors" were simply sellers.

Contrary to Fairway's assertions, there appears to be at least a legislative trend toward restricting the application of strict liability to manufacturers. Colorado, Kentucky, Nebraska and Tennessee have statutes which limit the application of strict liability to manufacturers, at least where the manufacturer is subject to service of process and solvent. Colo. Rev. Stat. § 13-21-402 (1987); Ky. Rev. Stat. Ann. § 411.340 (Michie/Robbs-Merrill Supp. 1988); Tenn. Code Ann. § 29-28-106 (Supp. 1988); Neb. Rev. Stat. § 25-21, 181 (1943).

The proposed Model Uniform Product Liability Act imposes strict liability on a nonmanufacturing seller only if that seller makes an express warranty or the manufacturer has been judicially declared insolvent or the court determines it is highly probably the claimant would be unable to enforce a judgment against the manufacturer. 3 L. Frumer & M. Freedman, Products Liability, § 9.02[2], p. 9-45 (1988).

The proposed federal Product Liability Reform Act of 1986 does not impose liability upon nonmanufacturing sellers unless those sellers had a reasonable opportunity to inspect the product and reasonably should have discovered the defect, or the manufacturer is not subject to service, or the court determines the claimant would be unable to enforce a judgment against the manufacturer. 3 L. Frumer & M. Freedman, Products Liability, § 9.09[2], p. 9-437 (1988).

Fairway argues that lessors and bailors do not "sale" products. In layman's terms that may be correct. In legal terms, that is a very simplistic view:

> A "sale" consists of the passing of title from the seller to the buyer for a price . . . .

Utah Code Ann. § 70A-2-106(1) (1953).

This section does not say that fee simple absolute title need be conveyed, although that is certainly a laymen's view of the term "sale." A title interest may involve a leasehold interest. Courts have expanded the term "seller" consistent with the Anglo-American concept that property title consists of a bundle of divisible rights. Courts have not divorced strict liability completely from the concept of title, or the law of warranty from whence it sprang. Strict liability should be limited to those who convey some title and make some implied representations of quality.

Instead of this concrete and understandable test, Fairway suggests the following shibboleth: "Participation in the chain of distribution."

If the "chain" referred to is not the chain of title or the chain of possession, what does this mean? Does the worker on the production line "participate in the chain of distribution?" Does the trucker that hauls the product "participate in the chain of distribution"? Does the bank that finances the dealer's purchase of products and factors accounts receivables "participate in the chain of distribution"? Does the retail sales clerk "participate in the chain of distribution". Without these people, products cannot move from manufacturer to user in today's world.

Fairways test if tautological. We first decide if strict liability should be imposed, then we recant the shibboleth: the defendant "participated in the chain of distribution."

Without the requirement of a sale, there is no rational way to exclude the application of strict liability to those who provide services. Does a doctor provide a hypodermic needle, or services? Does the professional engineer who designs a product provide services, or the product? Does an auctioneer provide a service or the items sold? Does a broker provide the service of getting buyer and seller together, or a product? Does the individual car salesman provide a service or the car?

The answer, of course, depends upon semantics. Without the requirement of a sale, the application of strict liability will be limitless.

Fairway is critical of Diehl's insistence that this court at least examine the public policy of strict liability. Again Fairway adopts a simplistic approach: what's best for the consumer is "the ultimate," the beginning and the end, all that matters.

It sometimes seems that the obvious has escaped those dealing with strict liability. This court cannot make the loss in question go away, it can only reassign it. Fairway would have this court create a chosen class, "the consumer," who can transfer their loses to any nonnegligent person remotely connected with the product who is not of the chosen. This, despite equal protection guarantees of the state and federal constitutions.

POINT IV

FAIRWAY'S ASSERTION THAT DIEHL DID NOT ADEQUATELY OBJECT TO INSTRUCTION 15 IS WITHOUT MERIT.

Diehl's objection to Instruction 15 was as follows:

> MR. DRANEY: On behalf of defendants, Diehl Lumber Company, your Honor, we would like to make the following exceptions to the jury instructions of the Court as indicated that it would give.

First of all, Instruction No. 15. This was an instruction submitted by the plaintiffs and it states: 'The law involved in this lawsuit is known as the law of strict products liability. Pursuant to this law, manufacturers, distributors, brokers, as well as all other parties in the chain of distribution are strictly liable for damages caused by defectively designed products.'

THE COURT: Can I ask you not to read it. Just state your objections.

MR. DRANEY; All right. I apologize, your Honor. I went through an appeal where there was some confusion about the number and that's the reason why.

THE COURT: All right. If you feel like you need to, go ahead.

MR. DRANEY: 'This is true so long as that party is in the business of, and gains profit from, distributing or otherwise disposing of the "product" in question through the stream of commerce.'

I think I read enough so we can find it and understand what instruction we are talking about. Particularly take exception, your Honor, to the part that says, 'The primary justification for extending strict liability to all in the chain of distribution is to provide the "maximum of protection" to the consumer.'

Maximum protection is in quotes. I think that misstates the law. I think strict liability was intended to relieve plaintiffs of a burden of proof and I don't think that that is the only consideration it implies. It says, 'This policy is as applicable to those who never handle or control the product, as it is to those who do possess or control the product.'

Again, one of the issues we are talking about here is a broker and whether a broker possesses a product, he dos control it and if we didn't control it in some sense, then we are not responsible in strict liability. This says that we are.

It goes on to say, 'In either case, consumer' --

THE COURT: I don't think you need to give all of your argument before me.

MR. DRANEY: I am not. I am just trying to make my record. I am not trying to argue, your Honor.

THE COURT: I understand, but I think you only have to object to the instruction just briefly, don't you?

MR. DRANEY: No. I think you have to state the grounds, your Honor. You do have to state your grounds to protect your record.

It says, 'In either case, consumer protection is the ultimate factor considered.' I think this emphasis or it tries to imply to the jury that they can disconcern themselves with all of the other facts and to get to the heart of it and that is, pay these people because they had a product that didn't work right. I think there's more to it than that. I think it misstates the law and I think it's misleading, your Honor.

Diehl's objection was certainly clear enough to convey to the district court Diehl's objection that the "ultimate factor" language encouraged the jury to ignore all else, except that which was good for the "consumer." The instruction directed a verdict against Diehl.

POINT V

FAIRWAY'S CLAIM THAT DIEHL WAS "AFFORDED THE OPPORTUNITY TO FULLY LITIGATE THE ISSUE OF TRUSWAL'S FAULT AT TRIAL" IS IN ERROR.

The district excused Truswal from trial without entering a default judgment on the cross-claim or determining whether the

settlement between Truswal and Fairway complied with the statutes covering contribution among joint tortfeasors. The district court had indicated it would not submit Truswal's negligence to the jury, until it reversed itself only the morning before the case was submitted to the jury. When the case was submitted to the jury, the court refused to give a simple instruction outlining Diehl's claims against Truswal (Tr. 452). Parties are entitled to have their case presented to the jury. E.g., Goode v. Dayton Disposal, Inc., 738 P.2d 638 (Utah 1987).

CONCLUSION

For the foregoing reasons, the judgment against Diehl should be reversed with instructions to the district court to enter a judgment of no cause of action in favor of Diehl. In the alternative, this matter should be reversed for a new trial.

Respectfully submitted this 23rd day of January, 1989.

SNOW, CHRISTENSEN & MARTINEAU

By _____
Shawn E. Draney
Attorneys for Appellant Diehl Lumber Company

SCMSED565

In the District Court of the Second Judicial District

IN AND FOR THE

County of Davis, State of Utah

FAIRWAY DISTRIBUTION CO., Plaintiff, vs. BANGERTER CONSTRUCTION, et al., Defendants.	RULING ON MOTION TO FILE AMENDED COMPLAINT Civil No. 37017

The plaintiff's motion to file an amended complaint came before the court on August 13, 1985, with Merlin O. Baker appearing for the plaintiff and David S. Cook appearing for the defendant. After oral argument, the court took the motion under advisement.

Courts should liberally grant motions to amend complaints. However, this liberality is not absolute. In this case, the defendants have challenged the plaintiff's application to file such an amendment. This court is not satisfied it has sufficient facts to rule on the motion. The plaintiffs are ordered to file a verified factual statement about each party to be added, stating the evidence which justifies adding them as a party. In addition, the defendants claim the insurance company to be added is, in fact, defendant's insurance company. The court will allow the plaintiff fifteen days to file the required statement with the court, after-which time the court will rule on this motion.

Dated August 23, 1985.

BY THE COURT:

JUDGE

ADDENDUM A

Certificate of Mailing:

This is to certify that the undersigned mailed a true and correct copy of the foregoing Ruling to Merlin O. Baker, P. O. Box 3850, Salt Lake City, Utah 84110-3850; David S. Cook, 85 West 400 North, Bountiful, Utah 84010; and Max D. Wheeler, P. O. Box 3000, Salt Lake City, Utah 84110 on August 23, 1985.

Kathy Potts
Deputy Clerk

In the District Court of the Second Judicial District

IN AND FOR THE

County of Davis, State of Utah

FAIRWAY DISTRICT CO., Plaintiff, vs. BANGERTER CONSTRUCTION, et al., Defendant.	RULING ON MOTION TO FILE AMENDED COMPLAINT Civil No. 37017

On August 23, 1985, this court ordered the plaintiffs to file a verified factual statement about each party to be added. The court allowed the plaintiffs 15 days to file the document. Nineteen days have passed and no document has been filed with the court.

The motion to amend is denied.

Dated September 11, 1985.

BY THE COURT:

JUDGE

Certificate of Mailing:

This is to certify that the undersigned mailed a true and correct copy of the foregoing Ruling to Merlin O. Baker, P. O. Box 3850, Salt Lake City, Utah 84110-3850; David S. Cook, 85 West 400 North, Bountiful, Utah 84010; and Max D. Wheeler, P. O. Box 3000, Salt Lake City, Utah 84110 on September 11, 1985.

Kathy Potts
Deputy Clerk

MERLIN O. BAKER (A0180) of
RAY, QUINNEY & NEBEKER
Attorneys for Plaintiffs
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79 South Main Street
P. O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY

STATE OF UTAH

----ooOoo----

FAIRWAY DISTRIBUTING CO., FAIRWAY LIMITED, a partnership Plaintiffs, v. BANGERTER CONSTRUCTION COMPANY; JOHN MARK BANGERTER; BONNEVILLE ENGINEERING, INC.; TRUSWAL SYSTEMS, INC.; COLONIAL LUMBER, INC.; and DIEHL LUMBER COMPANY, Defendants.	MOTION TO CORRECT COURT ORDER OR IN THE ALTERNATIVE TO AMEND COMPLAINT TO INCLUDE A CAUSE OF ACTION BASED ON STRICT LIABILITY
JOHN MARK BANGERTER, Third-Party Plaintiff, v. AMERICAN CASUALTY COMPANY OF READING PENNSYLVANIA; CNA INSURANCE COMPANIES, TRUCK INSURANCE EXCHANGE and FARMERS INSURANCE GROUP, Third-Party Defendants.	Civil No. CV 37017

----ooOoo----

COME NOW the plaintiffs pursuant to Rule 60(b) and Rule 15 and move the Court to correct an Order dated September 11, 1985, in which the Court denied plaintiffs' Motion to Amend their Complaint to add certain parties defendant and an Eighth Cause of Action based on strict liability, or in the alternative, to allow plaintiff to amend its Complaint to include a cause of action based on strict liability. As grounds for said Motion, the plaintiffs represent to the Court as follows:

On July 16, 1985, the plaintiffs filed a Motion to Amend their Complaint to add as parties defendant James Mark Bangerter, d/b/a Bangerter Construction Corporation, J.C. Bangerter & Sons, Inc. and Bangerter Development Corporation, and to add an Eighth Cause of Action based on strict liability. No opposition was filed by any of the parties to the Motion to Amend the Complaint to add a strict liability count.

At the hearing on the Motion to Amend on August 13, 1985, David Cook, attorney for John Mark Bangerter, appeared and opposed that part of the Motion to Amend which sought the joinder of additional parties defendants. None of the attorneys representing the defendants, Colonial Lumber, Inc., Diehl Lumber Company or Truswal Systems, Inc. appeared at the hearing to oppose the Motion to Amend the Complaint to add a count based on strict liability, nor was there any objection by David Cook to this additional cause of action.

The argument before the Court involved whether or not the aforementioned Bangerter defendants should be added as parties

defendant. The Court took the Motion under advisement, and on August 23, 1985, issued an Order indicating that the plaintiffs had within 15 days to supply the factual basis upon which the Court could determine whether or not the additional parties should be added. This Order is attached as Exhibit "A".

Subsequent to the Order of August 23, 1985, the plaintiffs determined that they would not seek to add the additional parties defendant and accordingly the Motion to Amend to add additional parties was moot. On September 11, 1987, the Court entered its Order denying plaintiffs' Motion to Amend the Complaint. A copy of this Order is attached as Exhibit "B".

Since the argument and the focus of the hearing before the Court had been on the joining of the additional parties, the plaintiffs' attorney assumed that the Motion to add the cause of action on strict liability had been granted and by oversight did not request a clarification of the Court's Order relative to the addition of the strict liability count inasmuch as it had not been opposed by any of the parties.

The plaintiffs, in their present Complaint, have alleged a cause of action based upon implied warranty which is similar to strict liability as indicated in the case of Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah, 1979). This case also involved a roof collapse.

> The jury also found defendant had breached its implied warranty of merchantability to the plaintiff and that such breach proximately caused plaintiff damage. The elements of both actions [implied warranty and strict liability] are essentially the same and analysis for the purpose

> of determining defenses to breach of implied warranty parallels that for strict products liability.

Id. at 159. A copy of the Hahn case is attached as Exhibit "C".

The causes of action and the elements of proof of strict liability and implied warranty are similar. The defendants will not be prejudiced by the inclusion in the Complaint of a count based on strict liability. The Court's Order of September 11, 1985 should be corrected to reflect that plaintiffs' Motion to Amend the Complaint to add a cause of action in strict liability should have been granted, or in the alternative, the plaintiffs should be allowed to amend their Complaint at this time to include a cause of action based on strict liability.

DATED this 16 day of June, 1987.

RAY, QUINNEY & NEBEKER

Merlin O. Baker

Merlin O. Baker

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 16 day of June, 1987, a true and correct copy of the foregoing Motion to Correct Court Order or in the Alternative to Amend Complaint to Include a Cause of Action Based on Strict Liability was hand-delivered to:

Shawn E. Draney, Esq.
R. Brent Stephens, Esq.
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145
Attorneys for Bonneville Engineering and Diehl Lumber

Phillip S. Ferguson, Esq.
CHRISTENSEN, JENSEN & POWELL
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Salt Lake City, Utah 84101
Attorneys for Defendant
Truswal Systems, Inc.

Don J. Hanson, Esq.
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Attorneys for Third-Party Defendants
Truck Insurance Exchange and
Farmers Insurance Group

Scott W. Christensen, Esq.
HANSON, DUNN, EPPERSON & SMITH
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Salt Lake City, Utah 84101
Attorneys for CNA Insurance Companies

and mailed, postage prepaid, to:

Norman O. Fox, Esq.
686 West 3100 South
Bountiful, Utah 84010
Attorney for Colonial Lumber, Inc.

David S. Cook
85 West 400 North
Bountiful, Utah 84010
Attorney for Defendants
Bangerter Construction Co.
and John Mark Bangerter

0455b

In the District Court of the Second Judicial District

IN AND FOR THE

County of Davis, State of Utah

FAIRWAY DISTRIBUTING,	)	
Plaintiff,	)	RULING ON MOTIONS
vs.	)	
BANGERTER CONSTRUCTION, et al.,	)	Civil No. 37017
Defendants.	)	

A number of motions in this case came before the court for oral argument on June 23, 1987. After oral argument, the court took the motions under advisement.

The plaintiff's attorney, Merlin O. Baker, complained bitterly because the court had denied his motion to file an amended complaint. On August 23, 1985, the court gave the plaintiff fifteen days to file a verified factual statement justifying the amended complaint. No such statement was ever filed by the plaintiff. On September 11, 1985, the court denied the motion to file an amended complaint. Counsel of record at the time, other than plaintiff, expressed relief that strict liability was not going to be an issue. The intent of the court was not to prevent the plaintiff from being heard on a legitimate cause of action. The court assumed that if the plaintiff had been serious about the cause of action, counsel would have filed the required statement. Opposing counsel now cry "foul" because they have not prepared for trial on strict liability.

The court grants the plaintiff's motion to amend the complaint to include a cause of action for strict liability. The plaintiff is ordered to file the amended complaint within ten days from today. This prejudices opposing counsel in their

readiness for trial. The current trial date of July 29, 30, 31 is vacated. A new trial date of October 28, 29, 30, 1987 at 9:00 A. M. is ordered by the court. A new pre-trial date of October 6, 1987, at 4:00 P. M. is ordered.

The court is also going to sever some aspects of this case from the initial trial. No insurance company, as a party, will be involved in the initial trial. Fairway Distributing Company will be the plaintiff and John Mark Bangerter, Bangerter Construction Company, Colonial Lumber, Inc., Diehl Lumber Company, and Truswall Systems, Inc. will be the defendants. All cross-claims and counter-claims which each of these parties have against the others will be heard at the initial trial.

The plaintiff is still ordered to prepare a pre-trial order, but not until after final pre-trial on October 6, 1987.

The court will separately rule on defendant, Bangerter's motion for summary judgment when time allows. Other motions will likewise be ruled on or delayed until the initial trial of the case.

The plaintiff is ordered to draw a formal order based on this ruling.

Dated July 9, 1987.

BY THE COURT:

JUDGE

Certificate of Mailing:

This is to certify that the undersigned mailed a true and correct copy of the foregoing Ruling to Merlin O. Baker, P. O. Box 45385, Salt Lake City, Utah 84145-0385; David S. Cook, 85 West 400 North, Bountiful, Utah 84010; Don J. Hanson, 1300 Continental Bank Building, Salt Lake City, Utah 84101; Shawn E. Draney, P. O. Box 45000, Salt Lake City, Utah 84145; Scott W. Christensen, 650 Clark Leaming Office Center, 175 South West Temple, Salt Lake City, Utah 84101; Phillip S. Ferguson, 510 Clark Leaming Building, 175 South West Temple, Salt Lake City, Utah 84101; and Norman O. Fox, 686 West 3100 South, Bountiful, Utah 84010 on July 9, 1987.

Kathy Pett

Deputy Clerk

CERTIFICATE OF SERVICE

STATE OF UTAH)
:ss.
COUNTY OF SALT LAKE)

SHAWN E. DRANEY, being duly sworn, states that he is the attorney for appellant Diehl Lumber Company and that he served four copies of the attached:

APPELLANT DIEHL LUMBER COMPANY'S REPLY BRIEF

on the following parties:

Merlin O. Baker, Esq.
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Attorneys for American Casualty and CNA Insurance Company

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Salt Lake City, Utah 84101

Attorneys for Defendant Truswal Systems, Inc.

and caused the same to be mailed first class, postage prepaid, on the 23rd day of Jan, 1989.

SUBSCRIBED AND SWORN to before me this 23rd day of January, 1989.

Lynette Farmer
Notary Public
Residing in the State of Utah

My Commission Expires:

5-14-90