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# Case Digests

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CONTRACTS: Lost Credit Cards

*Allied Stores of New York, Inc. v. Funderburke*, 52 Misc. 2d 872, 277 N.Y.S.2d 8 (New York City Civ. Ct. 1967).

The plaintiff, operator of a department store, issued to the defendant in 1961 a credit card pursuant to a retail installment credit agreement (flexible charge account) signed by the defendant. By the terms of the agreement defendant agreed "(t)o pay for all purchases made by any person presenting the identification plate which Seller will lend me, until Seller receives my notice by certified mail that same has been lost or stolen." *Allied Stores of New York, Inc. v. Funderburke*, — Misc. 2d —, 277 N.Y.S.2d 8, 10 (New York City Civ. Ct. 1967). A monthly payment arrangement was established by the agreement; anytime the balance of the account was over 200 dollars, arrangements for monthly payments were to be made with plaintiff's credit office.

For a period of four years the defendant used her credit card to make purchases in the plaintiff's store and dutifully paid her bills; on June 26, 1965, she made a payment on the account reducing her balance to eighty-six dollars. On June 30, 1965, she left New York City to visit her mother.

Between the period of June 16, 1965, and July 13, 1965, the defendant's credit card was used in making 237 separate purchases in plaintiff's store totaling 2,460 dollars. The defendant's signature was forged on the sales slips. The plaintiff sought to recover for the amount of the purchases on the basis of the agreement signed by the defendant and the state statutes which acknowledge and regulate such agreements in New York. N.Y. GEN. BUS. §§ 511-13 (McKinney Supp. 1966). Section 512—as quoted by the court—provides in part:

> A provision to impose liability on an obligor for . . . use of a credit card after its loss or theft is effective only if it is conspicuously written or printed in a size at least equal to eight point bold type either on the card, or on a writing accompanying the card when issued or on the obligor's application for the card, and then only until written notice of the loss or theft is given to the issuer.

The agreement signed by the defendant conformed with the provisions of section 512.

The Civil Court of New York City held that the agreement and the statute do not apply to a situation where the defendant is not

aware that the credit card is missing and is thus unable to comply with the conditions imposed by the agreement *i.e.* report the loss of the card. The court says that "the agreement does not expressly provide that the holder assumes all risk occasioned by loss or theft of the credit card where the credit card holder is unaware of such facts and thus is unable to give the required notice." *Allied Stores of New York, Inc. v. Funderburke*, — Misc. 2d —, 277 N.Y.S.2d 8, 11 (New York City Civ. Ct. 1967). The court held that since the agreement did not expressly place liability on the holder when she was unaware that the card was missing the agreement did not apply and the case would have to be decided on tort principles. Since no fault was shown the defendant could not be held liable in tort. When such agreements are enforced they in effect split the risk between the holder and the issuer. The holder assumes the risk of loss prior to notice of loss or theft and the issuer takes the risk after it receives the notice. See *Union Oil Co. v. Lull*, 220 Ore. 412, 349 P.2d 243 (1960).

In *Texaco Inc. v. Goldstein*, 34 Misc.2d 751, 229 N.Y.S.2d 51 (New York City Mun. Ct. 1962), *aff'd mem.*, 39 Misc. 2d 552, 241 N.Y.S.2d 495 (Sup. Ct. 1963) an agreement similar to the one in *Funderburke* was upheld and the defendant to whom a Texaco credit card had been issued was held liable for all the purchases made by an unknown person using his lost card. The court in *Funderburke* distinguished the *Goldstein* and *Lull* cases on the basis of the type of credit card involved. In *Funderburke* the card could be used only in the issuer's department store whereas the *Goldstein* and *Lull* cases involved oil company credit cards that could be used in numerous retail outlets.

This distinction may be a valid one were the cases to be decided on strict tort principles—but such is not the case. The courts in all three cases were confronted with a valid agreement signed by the holder of the card at the time the card was procured from the issuer. Where the holder expressly agrees that he will be liable for all purchases until he gives notice to the issuer, any distinction as to the number of retail outlets that will honor the card appears to be irrelevant. This factor becomes a relevant consideration only in a tort action when it becomes necessary to establish a standard of care to which both parties will be held. The issuer who has only one retail store where the card might be used is likely to be held to a higher standard in scrutinizing the use of the card in his store than is the issuer who has 40,000 retail outlets; and conversely, the holder of an "omnipotent credit card" is likely to be held to a higher standard than the holder of a card that is honored in only one retail outlet.

The court in *Funderburke* applied tort principles to a contract issue to reach what they apparently considered a just result. They in effect held that since the holder of the card was not at fault (a tort principle) in losing the card, therefore the contract agreement does not apply. This holding renders the agreement nugatory despite the fact that the New York Legislature acknowledged the validity of such agreements. If the holder were aware of the loss, but didn't report it he would undoubtedly be in violation of his duty and liable to the issuer in tort; resort to the agreement would be unnecessary.

The court in *Funderburke* makes note of the great amount of liability that could accrue to the consumer who loses his credit card through no fault of his own if the agreement were enforced. The court fails, however, to recognize the losses the merchant could sustain (which would ultimately be passed on to the customers) by the unauthorized use of lost credit cards that go unreported for a month or longer because the holder "did not know it was lost." Under this theory the issuer would have to show that the holder knew, or should have known, that the card was lost before he can enforce an agreement voluntarily entered into by the consumer. It would be a burdensome task.

AUTOMOBILES: Products Liability

*Schemel v. General Motors Corp.*, 261 F. Supp. 134 (S.D. Ind. 1966).

The plaintiff was riding as a passenger in an automobile being driven on a public highway at a speed of fifty-five miles per hour, which was hit from behind by a car manufactured by the defendant which was being driven at a speed of 115 miles per hour. The plaintiff was severely injured and brought suit against the manufacturer alleging that the defendant was negligent in manufacturing and selling an automobile capable of producing such speeds in the hands of the ordinary consumer; in failing to install a governor which would make it impossible for the consumer to drive at such speeds; in designing an automobile for public use which was more dangerous than was reasonable or necessary; and by encouraging driving at speeds in excess of 100 miles per hour through mass advertising of the capabilities of such automobiles. The defendant's motion to dismiss was granted.

The area of products liability has greatly expanded in the past few years, but it has not expanded far enough to make General Motors liable on such a theory as was alleged here. The plaintiff failed to charge breach of implied warranty and strict tort liability

as a basis of recovery along with negligence, but it is doubtful that these theories would have been successful either. *Evans v. General Motors Corp.*, 359 F. 2d 822 (7th Cir. 1966).

In the first place the defendant has a duty to design its automobiles so that they are fit for the purpose for which they are made. There is no contention that the automobile which the defendant manufactured was not functioning properly, in fact at 115 miles per hour the car must have been performing well. The only defect was in the inherent nature of the auto. Therefore, it is difficult to see how the manufacturer breached its implied warranty of fitness for purpose.

The theory of strict tort liability which is set out in RESTATEMENT (SECOND) OF TORTS § 402A (1965), can be disposed of just as easily since there is no "defective condition" in the automobile which causes it to travel at speeds in excess of 100 miles per hour.

The court in *Schemel* effectively handled the negligence allegation stating that there is no duty on the manufacturer to restrict its cars to a particular speed since it is impossible to predict that accidents will occur "in any certain way or at any certain speed." *Schemel v. General Motors Corp.*, 261 F. Supp. 134, 135 (S.D. Ind. 1966).

Perhaps it would be best to require manufacturers to restrict the speed capabilities of their automobiles, but this is a job for the legislature, *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950), *Evans v. General Motors Corp., supra, Schemel v. General Motors Corp., supra,* and the legislature has chosen not to set up such a requirement. Traffic and Motor Vehicle Safety, 15 U.S.C.A. 1381-1425. (1966).

It is doubtful that the law will ever be extended to make a manufacturer liable in a situation such as this without a legislative mandate restricting the speed capabilities of automobiles. The court held that the plaintiff's allegation that the defendant encouraged fast driving via advertising was far too speculative to impose liability, and it is hard to see why liability should be directed toward the manufacturer when the unlawful act involved in the accident was the consumer's act of driving the car in excess of the speed limit. Of course the manufacturer can foresee that the car will be driven illegally in excess of the speed limit; but "the defendant also knows that its automobiles may be driven into bodies of water, but it is not suggested that defendant has a duty to equip them with pontoons." *Evans v. General Motors Corp.*, 359 F.2d 822, 825 (7th Cir. 1966); similarly, he has no duty to provide governors.

DIVORCE: Corroborative Evidence

*Humann v. Humann*, 180 Neb. 719, 144 N.W.2d 723 (1966).

Plaintiff instituted a divorce action on the ground of extreme cruelty. To support her allegation, she testified to various acts and conduct of the defendant. She testified that the defendant had struggled with her, shoved her to the floor and then tried to push her down some steps. She further testified that this resulted in the sustaining of several bruises. The testimony of her husband was directly in conflict with hers. Corroborative testimony was received from a doctor who testified that the plaintiff had consulted him two days after the alleged incident; when questioned as to the origin of her injuries, the plaintiff told the doctor she had received the bruises from her husband, who had manhandled her. The lower court granted an absolute divorce on the ground of extreme cruelty.

On appeal, the main issue was whether the evidence given by the doctor was sufficient independent corroborative evidence under the provisions of the Nebraska statutes. The court *held* that under the facts and circumstances of the case the corroboration was sufficient.

NEB. REV. STAT. § 42-335 (Reissue 1960), states that a divorce will not be allowed merely on the testimony of the parties, but that in each case there must also be other satisfactory evidence of the facts alleged in the petition before a divorce will be granted. The degree or amount of corroboration required in a divorce action must be determined on the facts and circumstances in each case. *Read v. Read*, 179 Neb. 637, 139 N.W.2d 829 (1966). In an earlier case, the court held that declarations, confessions or admissions to a third party are not sufficient corroboration. *Hahn v. Hahn*, 179 Neb. 481, 138 N.W. 2d 722 (1965).

The decision in *Humann* may have an effect on corroborative evidence in future divorce actions. In this case, the doctor was allowed to testify that he saw the bruises and that the paintiff told him how she received them. Does this testimony amount to competent and independent evidence of the plaintiff's allegation that she received her bruises from a beating administered by her husband? It would seem that the court failed to consider the question of whether the evidence offered by the third party was merely testimony as to self-serving statements made to him by the plaintiff, inadmissible as hearsay. Under this analysis, the doctor should have been allowed to testify only about the existence of the bruises and not about their cause, because he only had the statement of

the plaintiff to use in determining the source of her injuries. Since it was the beating, or manhandling, which was the ground relied upon for the decree of divorce, and not merely the fact of injury, it would seem that the "corroborative evidence" requirement may now be satisfied in Nebraska by rather indirect, dependent, circumstantial evidence.