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Norman H. Jordan v. Coca-Cola Bottling Company of Utah : Brief of Appellant

Utah Supreme Court

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Moreton; Christensen & Christensen; Elias L. Day; Attorneys for Defendants and Appellant;

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Case No. 7347

**IN THE SUPREME COURT
of the
STATE OF UTAH**

NORMAN H. JORDAN,
Plaintiff and Respondent,

VS.

COCA-COLA BOTTLING COM-
PANY OF UTAH, a corporation,
Defendant and Appellant.

APPELLANT'S BRIEF

MORETON, CHRISTENSEN & CHRISTENSEN,

ERIAS L. DAY

Attorneys for Defendant and Appellant.

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NORMAN H. JORDAN,
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PANY OF UTAH, a corporation,
Defendant and Appellant.

Case No. 7347

APPELLANT'S BRIEF

STATEMENT OF THE CASE

This is an appeal by the defendant from a verdict and judgment in favor of the plaintiff against the defendant in the sum of \$500.00, rendered by the Third District Court in a suit brought by the plaintiff to recover for damages claimed to have been sustained by him as a result of drinking from a bottle of contaminated Coca-

Cola. Defendant also appeals from the Order of District Court denying defendant's motion for a new trial.

In this brief, we shall refer to the parties as they appeared in the Court below.

THE FACTS

It is admitted by the pleadings that the defendant corporation is a Utah corporation, and is engaged in the bottling, distribution and sale of a soft drink generally known as Coca-Cola. (R. 6, 7 & 19.)

At the trial, plaintiff introduced evidence to the effect that he was an employee of the American Smelting and Refining Company (R. 78) and that on or about the 5th day of October, 1948, he purchased a bottle of Coca-Cola from a Coca-Cola Dispensing Machine, located on his employer's premises. (R. 79.)

The plaintiff drank from the bottle of Coca-Cola, what he described as "a big slug" of the beverage and at that time he discovered a large fly in his mouth. (R. 80.) About an hour later the plaintiff claims he became sick and nauseated and was sick intermittently for three days thereafter, suffering from nausea and diarrhea. (R. 81, 83.)

The plaintiff's Exhibit "A," a bottle of Coca-Cola containing two flies, was identified by the plaintiff as the bottle from which he drank, and was received in evidence by the Court. Plaintiff further testified that after he had purchased the bottle he removed the cap,

and that the cap came off "fairly hard" and about the same as caps from other bottles, which he had removed on the same day. (R. 89.) On cross-examination the plaintiff admitted that he did not consult a doctor and that he did not miss any time from work. (R. 905.) He further testified on cross-examination that he swallowed one fly and that he discovered another fly in his mouth, which he expectorated and then put back in the bottle, and that there was a third fly remaining in the bottle. (R. 93, 99.)

The testimony of the plaintiff, as to spitting out the fly after drinking from the bottle of Coca-Cola, was corroborated by the testimony of two fellow employees, Keith Wiseman (R. 99, 101) and Leslie L. Cramer (R. 112, 113.)

George D. Walker, a truck driver in the employ of the defendant, testified that the plant of the American Smelting and Refining Company was on his route (R. 103), and that he served the particular dispensing machine from which the plaintiff received the contaminated bottle of Coca-Cola. He testified that the dispensing machine was the type known as Venderlator number 242, and that that type of machine would hold ten cases of Coca-Cola. The machine had 22 racks, each holding 11 bottles of Coca-Cola. Coca-Cola was purchased from the machine by inserting a nickel in the slot provided for that purpose, which tripped a mechanism and automatically served a cold bottle of Coca-Cola. The machine also had a reserve compartment, holding 4 cases of

Coca-Cola. In addition to the reserve compartment in the vending machine, additional reserve stocks of Coca-Cola were kept in the office of the American Smelting and Refining Company's foreman. Guards employed by the refining company loaded reserve stocks into the dispensing machine on weekends. (R. 103.)

Les Anderson, Kelsey Rosander, or one of the guards employed by the American Smelting and Refining Company serviced the Coca-Cola dispensing machine on the night shift.

Bottles of Coca-Cola stored in reserve in the foreman's office were not locked up. They were stacked by the formen's desk. (R. 104.) The Coca-Cola delivered to the American Smelting and Refining Company was actually sold to the American Smelting and Refining Company. It was the custom for the witness to service the machine every day. (R. 106.)

On cross-examination, Walker testified that the dispensing machine was leased to the American Smelting and Refining Company and that the Coca-Cola was sold to the American Smelting and Refining Company in bulk. He reiterated on cross-examination that Coca-Cola might be removed from the reserve compartment of the vending machine to the mechanism of the vending machine by employees of the American Smelting and Refining Company. (R. 107.) The defendant corporation had nothing to do with money taken from the vending machine. (R. 108.)

Les Anderson, head guard for the American Smelting and Refining Company, testified that he, together with another employee of American Smelting and Refining Company, would collect the money from the vending machine and would refill the vending machine when necessary, which was about once a week. (R. 109.) The witness, together with Rosander and the guards employed by the American Smelting and Refining Company, had the keys to the dispensing machine and some of them filled the vending machine with Coca-Cola on the night shift at American Smelting and Refining Company as a part of their job.

The evidence on behalf of the defendant was to the effect that the most modern and best possible equipment was utilized by the defendant corporation in the washing of bottles, bottling of Coca-Cola, and inspection of the finished product; and that defendant corporation utilized every scientific invention known to man to assure that the product distributed by it for sale on the public market would be pure and wholesome.

Peter A. Hanes, the maintenance man for the defendant corporation, testified that he had been employed in that capacity by the defendant for the four years immediately preceding, and that he had been an employee of the defendant for seven years all together. Prior to that time he had worked for the Doctor Pepper Company, another bottler of soft drinks, for five years, also in the capacity of maintenance man. (R. 116.) The witness was familiar with the Bottler's Industrial Manual, a

trade journal of the bottling industry, which publication he received regularly. He had also visited bottling plants in other parts of the country and had observed their operation.

The witness identified the defendant's Exhibit 1, as a diagram of the Meyer-Dumore Washing Machine which was the type used by the defendant in its bottle washing operation. He testified that the washing machine was located in the front part of the defendant's plant in a room with a cement floor, plaster walls painted white and screened windows. The room was regularly sprayed with disinfectants. (R. 117.)

Mr. Hanes explained in some detail the defendant's bottle washing process, which can be briefly summarized as follows:

As the bottles enter the washing machine they first go into a rinse tube, which tube goes up into the bottle and rinses it for four seconds with water heated to a temperature of about 70°. The rinsing process is repeated at the next rack, making two rinses for each bottle.

After rinsing, the bottles proceed to the number 1 caustic tank, which contains a 3% caustic solution, heated to a temperature of 110°. The bottles are in caustic tank No. 1 for four minutes. When the bottles are removed from the caustic tank the caustic is drained out of the bottles and the bottles continue into another tank heated to a temperature of 150° and containing a 2% caustic solution where the bottles remain for an additional period of four minutes. From the second caustic

tank the bottles proceed to still another caustic tank containing a solution of 1% caustic at a temperature of 130° and again they are bathed in the caustic solution for four minutes. After being drained the bottles go through a fresh water tank, heated to a temperature of 100° where they are thoroughly rinsed for a period of three and a half to four minutes. The bottles are again drained and then they go over to the first set of bottle brushes, which are outside brushes.

The bottles then go to the "first rinse," where they receive an inside rinse. The rinsing tube shoots water into the bottle at 60 pounds pressure cleaning the bottle on the inside as it goes up and down, and remains there shooting water for a period of four seconds. After leaving the rinse tube, bottles come to the first inside brushes, which are water lubricated. The brushes go inside the bottles and brush the bottoms of the bottles on the inside at 60 pounds pressure and at 1200 revolutions per minute. Water goes through the center of the brushes as they revolve. The brushes are inside the bottle a period of about 4 seconds. The brushing process is repeated by a second set of brushes. From the brushing process the bottles go through another set of rinses like the ones heretofore described. After two more rinses the bottles go past the visual inspector and on to the filling machine.

As bottles pass the inspector they are in a single line. The inspector is aided by a fluorescent light which has a non-glare plate behind it. It is the job of the

inspector to examine the bottles as they go by the inspection light and to remove any defective bottles. After inspection the bottles go to the syruper where syrup is deposited in the bottles. While the bottle is in the syruper, it is protected from contamination by "a little collar about 2 inches in diameter," which comes down over the bottle while it is being syrupered. The bottle then receives the charge of carbonated water and during this process it is similarly protected from contamination. From there the bottle goes to the crowner, where it is capped. After being capped the bottle moves to the mixer where it is turned upside down and spun at approximately three thousand revolutions per minute. The bottle then proceeds to the automatic electric eye inspecting machine. That machine automatically rejects any bottle having any defect, or containing any foreign substance.

Hanes further testified that water used in the bottling process is regular city water, specially treated and filtered, and that from the time such water is treated until it is placed in the individual bottles of Coca-Cola, it is always in a sealed container and never exposed to flies or insects. The syrup used in the Coca-Cola also is in sealed containers during the entire bottling process. The syrup is twice screened, once as it leaves the barrel in which it was received by defendant, and again just before it goes into the individual bottles.

Hanes further testified that the automatic electric eye inspecting machine had been tested by running

through it test bottles of Coca-Cola, containing various foreign substances.

Defendant's Exhibit 6 is a bottle of Coca-Cola containing a small 12 shot, defendant's Exhibit 5 is a bottle of Coca-Cola containing a piece of cork, and defendant's Exhibit 4 is a bottle of Coca-Cola containing a bristle from a brush. All of those bottles had been passed through the inspecting machine many times and in every case the inspecting machine had rejected those test bottles. (R. 118 to 128.)

Hanes further testified that the equipment used by the defendant was the most up-to-date and modern equipment in use in the bottling industry, and that there was nothing better or more modern any place. In his experience he had never seen a finer bottling plant than the defendant's. Hanes also testified that the brushes used in the bottle washing process were inspected twice a day for wear and tear.

Raymond Wilmert, a field engineer for the Radio Corporation of America, with four years of training at the University of Illinois and 20 years experience with Western Electric Company and R.C.A. (R. 138-9), testified as follows:

R.C.A. was a seller of bottle inspecting machines (hereinafter referred to as B.I.M.) and there was a B.I.M. machine installed at the defendant's plant and it was there in September and October of 1948. (R. 139.) The operation of the B.I.M. was described as follows:

At the time the bottles of Coca-Cola pass through the B.I.M. the bottles are standing still, but the fluid within them is whirling. Any sediment, particles of dust, or any foreign substance in the bottle of Coca-Cola will interrupt the beam of light and cause the reject mechanism on the B.I.M. to operate and "kick" the bottle out of the line. If anything goes wrong with the B.I.M. it rejects all bottles rather than permitting defective bottles to pass through. The most difficult part of the task of maintaining the machine is to keep it adjusted so that it doesn't reject too many bottles.

The B.I.M. receives a maintenance inspection once per month, which inspection is performed by the witness. During the time he had performed the maintenance of this machine, he had never found it so out of order that it would not kick out any bottles having foreign matter in them, and it would be impossible for the machine to get out of order in that manner.

Mr. Wilmert further testified very positively that the Plaintiff's Exhibit "A," which was the bottle of Coca-Cola containing flies and other foreign matter from which the plaintiff drank, could not possibly go through the inspecting machine without being rejected. He also testified that he had many times seen defendant's Exhibits 4, 5 and 6, test bottles used by the defendant and containing various foreign articles which have heretofore been described, pass through the machine on many occasions and that in every instance the machine had rejected them. The witness testified that he knew of no better machine on the market than the one used by the

defendant, and that he had never seen a better or more up-to-date bottling plant. (R. 140-143.)

On cross-examination, Mr. Wilmert testified that the B.I.M. would reject bottles with bubbles (R. 144) that the B.I.M. would reject a bottle containing a fly in the bottom covered with syrup (R. 145.) On redirect examination he testified that whenever the B.I.M. failed it rejected all bottles, and it was necessary for the defendant to suspend bottling operations until repairs could be effected. (R. 146.)

Dr. Louis R. Curtis, a bacteriologist and sanitarian had had four years training at Cornell University, a doctor's degree in bacteriology and chemistry, experience as a bacteriologist for the Dairymen's League in New York State, two years of service with the National Dairy in Baltimore, Maryland, and three years experience as Chief Sanitarian in Salt Lake City (R. 147), testified that the defendant's building was modern, well planned and the last word in construction (R. 148); that it would be impossible for a bottle to go through the defendant's washing machine with three large flies in it (R. 149); that the hot caustic baths would tend to dissolve any organic matter present in the bottle (R. 150); and that it was highly improbable that any bottle could go through the defendant's washing process and still contain flies in the condition of those contained in the bottle known as Plaintiff's Exhibit "A."

J. T. Holding, a health officer of Salt Lake City Corporation for six years, employed as an inspector of

food and drinks, testified that it was his duty, among others, to inspect the establishments of bottling companies, and that from March through September, 1948, he had inspected the defendant's plant regularly. (R. 154.) The inspection was a general inspection, and included inspection for rodents and insects and inspection of windows and toilets. In September, 1948, screens at the defendant's plant were up, and were well kept. (R. 155.) The defendant's plant was one of the best beverage plants in the city. It had good equipment and was well kept up. He had never had any complaint of the defendant's plant and had never seen insects in the defendant's plant. (R. 162.) His inspection records showed no flies present in defendant's plant. (R. 156).

At this point in the case both parties rested and the defendant moved for a directed verdict. After considerable argument and discussion, leave was given to the plaintiff to reopen his case for the purpose of showing that the contaminated bottle from which the plaintiff drank was actually bottled by the defendant corporation. (R. 162.)

Kelsey Rosander, an employee of the American Smelting and Refining Company (R. 164), testified that when the dispensing machine at the American Smelting and Refining Plant was dry, he put reserve stocks of Coca-Cola into the machine. He and Les Anderson had keys to the machine. (R. 165). On cross-examination he testified that the Chief Watchman at the American Smelting and Refining plant has a key to the vending

machine, and when the Chief Watchman was not present other employees of the American Smelting and Refining Company used the Chief Watchman's key. (R. 169.)

Frank Baer, an employee of American Smelting and Refining Company (R. 170), testified that it was his duty to O.K. bills to the defendant company and that he never O.K.'d any bills to any other Coca-Cola Company (R. 171.) On cross-examination he testified that American Smelting and Refining Company bought and received Coca-Cola from the defendant Company and that American Smelting and Refinery Company leased the vending machine.

Les Anderson, another employee of American Smelting and Refining Company testified that he, Rosander and the guards had a key to the vending machine and that all together 14 people had access to the vending machine. (R. 175, 177.)

George Walker testified on cross-examination that at times when he had been loading the vending machine men at the American Smelting and Refining Company plant had come to him and exchanged bottles of Coca-Cola, asking to receive a cold bottle in place of a warm bottle. When such exchanges were made the warm bottles were loaded into the machine. (R. 181.) Mr. Walker did not know where the men got the warm bottles. (R. 182.) On redirect examination, he testified that he never examined the warm bottles to see whether or not they had been opened. (R. 182.)

Donald A. Carmichael, manager of the defendant company (R. 183), testified that there were Coca-Cola Bottling Companies at Ogden, Payson, Logan and Vernal and that those plants were not owned by the defendant company. He further testified that Coca-Cola comes into the Salt Lake territory from other territories. (R. 184.)

In view of the fact that the verdict was for the plaintiff, we recognize that all conflicts in evidence must be, for purposes of this appeal, resolved in favor of the plaintiff and that all facts necessary to support the verdict must be accepted as true if supported by credible evidence. For purposes of this brief, we assume as true that the plaintiff received a contaminated bottle of Coca-Cola from the vending machine at the American Smelting and Refining Plant; that he drank from the same, and that by reason thereof he became ill as described by him.

On the other hand, the evidence on the part of the defendant to the effect that the defendant's plant was equipped with the most modern and best equipment for bottling and distributing Coca-Cola, and that every human and mechanical precaution had been observed in order to insure that the beverage produced by the defendant company would be pure and wholesome, must be accepted as true, since such evidence is powerfully corroborated by the testimony of disinterested experts and is uncontradicted in any way, shape or form. It must also be accepted as true that when Coca-Cola bottled by the defendant corporation was delivered to the American Smelting and Refining Company Plant, it passed

from the possession of the defendant corporation and into the possession and control of American Smelting and Refining Company and its employees. The defendant corporation did not have any control whatsoever over the bottle marked as plaintiff's Exhibit "A" at the time plaintiff purchased it. It had been delivered to the American Smelting and Refining Company's plant at some time previous to the incident and was under the complete control of the American Smelting and Refining Company and its employees.

ASSIGNMENTS OF ERROR

Defendant assigns as error the following Orders and Rulings of the Trial Court and actions on the part of counsel for the plaintiff and actions of the jury:

1. The Court erred in denying the defendant's motion for a directed verdict.
2. The Court erred in refusing to give defendant's requested instruction No. A.
3. The Court erred in refusing to give the defendant's requested instruction No. 1 in the language requested.
4. The Court erred in refusing to give defendant's requested instruction No. 5 in the language requested.
5. The Court erred in giving instruction No. 6.
6. The verdict is contrary to law and is unsupported by the evidence.

7. Counsel for the plaintiff was guilty of misconduct amounting to prejudicial error by continually referring to other law suits against this defendant, with the apparent purpose of causing the jury to believe that the defendant company was quite frequently in litigation of a similar nature and therefore was guilty frequently of putting contaminated Coca-Cola on the market. (R. 132, 144, and 159.)

8. The Court erred in denying defendant's motion for a new trial.

ARGUMENT

POINT 1.

THERE IS NO EVIDENCE IN THE RECORD OF NEGLIGENCE ON THE PART OF THE DEFENDANT; BUT, ON THE CONTRARY, THE RECORD SHOWS AS A MATTER OF LAW THAT THE DEFENDANT EXERCISED THE HIGHEST POSSIBLE DEGREE OF CARE.

The argument under this point will cover assignments of error numbered 1, 2, 3, 4, 5, 6 and 8.

A. THE EVIDENCE FAILS TO SHOW THAT THE CONTAMINATED BOTTLE OF COCA-COLA FROM WHICH PLAINTIFF DRANK WAS BOTTLED BY THE DEFENDANT CORPORATION.

It is the position of the defendant, insisted upon by it throughout the trial, that the plaintiff wholly failed

to show that the defendant bottled the bottle of Coca-Cola from which plaintiff drank. Apparently the trial judge agreed with the view of the defendant at the time both parties rested. However, when the trial court indicated his inclination to grant plaintiff's motion for a directed verdict, plaintiff requested and was granted leave to re-open his case for the purpose of showing that the contaminated bottle really was bottled by the defendant company.

Taking the evidence most favorable to the plaintiff's view, we find that the defendant did regularly sell to the American Smelting and Refining Company, Coca-Cola in case lots. We also have the testimony of Frank Baer, an employee of American Smelting and Refining Company, that it was his duty to O.K. bills to the defendant company, and that he never O.K.'d any bills to any other Coca-Cola company. That constitutes the entire evidence in the record which in any way tends to indicate that the defendant bottling company bottled the bottle of Coca-Cola from which the plaintiff drank.

On the other hand, there is the testimony of Mr. Carmichael, the manager of the defendant company, to the effect that there are other Coca-Cola bottling companies in Utah, located in Ogden, Payson, Logan and Vernal, and that such Coca-Cola bottling establishments are in no way connected with the defendant. Mr. Carmichael also testified that bottles of Coca-Cola bottled by other plants frequently came into the territory served by the defendant company.

The testimony of Frank Baer does not exclude the possibility of American Smelting and Refining Company having purchased Coca-Cola from other bottling establishments. Other employees of the American Smelting and Refining Company might well have O.K.'d such bills; or transactions, with other Coca-Cola companies, might have been handled on a cash basis. Moreover, there is the testimony of George Walker, an employee of the defendant company who testified for the plaintiff, that on occasions when he was loading the vending machine at the American Smelting and Refining plant, he frequently exchanged bottles of cold Coca-Cola for warm bottles of Coca-Cola which were brought to him by employees, and that he did not know where these warm bottles of Coca-Cola came from. Very possibly such warm bottles of Coca-Cola could have been purchased from dealers who received them from bottlers other than the defendant. Whether the bottle from which plaintiff drank was one of those bottled by defendant, or whether it originated elsewhere, cannot be determined from the record. In this case, the plaintiff failed, at the very outset, to carry his burden. Not only did he fail to show fault as we shall hereafter point out, but he absolutely failed even to show that the bottle in question was bottled by the defendant company.

B. THERE IS ABSOLUTELY NO EVIDENCE IN THE RECORD OF NEGLIGENCE ON THE PART OF THE DEFENDANT.

Assuming, without in any way conceding, that there is sufficient evidence in the record to justify an inference

that the defendant was the bottler of the contaminated bottle of Coca-Cola, there is absolutely no evidence of any fault on the part of the defendant in its bottling process. Plaintiff's entire case rests upon the fact that there were three flies and some other foreign material in the bottle of Coca-Cola from which he drank. There is not the slightest evidence as to when or how these impurities got into the bottle of Coca-Cola. One searches the record in vain for any hint as to any delict or shortcoming on the part of the defendant in its bottling process.

It is a fundamental principle of the law of negligence, too well established to require citation of authority, that the burden is on the plaintiff to prove, by a preponderance of the evidence, that the defendant was guilty of some act or omission causing the injury to the plaintiff. It is equally well established that negligence or wrong cannot be inferred from the mere fact of injury. This rule is well stated in 38 *Am. Jur.* 983-4, Negligence, Sec. 290, where it is said:

“Apart from the rule of res ipsa loquitur, negligence cannot be assumed from the mere fact of an accident and an injury. The mere fact that an accident happens is not evidence of negligence. Thus the mere fact that an injury has been sustained, if it can in any practical way be considered apart from other circumstances, certainly will not give rise to an inference or presumption that the injury is due to the negligence of one who is made defendant to an action based thereon. Clearly, mere proof that an accident injurious to the plaintiff has occurred does not justify a verdict

or judgment imposing liability therefor upon the defendant. If the evidence does not show any negligence on the part of the defendant, there can be no recovery, regardless of the freedom of the plaintiff from any negligence on his part. The cause of an injury must be connected with the one sued for damages resulting therefrom, by direct evidence either that it was his act, or that it was under his control, before it can be presumed that he was negligent. If the evidence does not show any negligence on the part of the defendant, there can be no recovery, no matter how free from negligence the facts show the plaintiff to be. The evidence must point to the fact that the defendant was guilty of negligence. A careful analysis of the better-considered decisions shows that negligence will not be inferred or presumed from the mere fact of injury when that fact is as consistent with an inference that the injury was unavoidable as it is with negligence; therefore, if it be left in doubt what the cause of the accident was, or if it may as well be attributable to the act of God or unknown causes as to negligence, there is no such presumption.” (Italics added.)

In the case of *Coca-Cola Bottling Company vs. Rowlan*, 16 Tenn. App. 184, 66 S.W. 2d 272, the facts were very similar to those in the case at bar. In that case the plaintiff had purchased a bottle of Coca-Cola from a newsstand and had taken it to a restroom to drink. She returned to the newsstand some ten minutes later with the bottle of Coca-Cola about two-thirds full and with a dead and decomposed mouse in it. The last previous delivery of Coca-Cola to the newsstand had been about six days before that incident. The Coca-Cola was kept

in a storeroom until it was needed in the cooler for sale. In that case, as in the case at bar, the only evidence of negligence was the presence of the foreign matter in the bottled beverage.

In reversing a judgment for the plaintiff, the Tennessee Court said:

“Without discussing the facts as described by the record further, we are of the opinion that the plaintiff has failed to show that the defendant was guilty of any negligence in the matter of bottling Coca-Cola. * * * We are constrained to reach the conclusion that there is no proof of negligence.”

The Tennessee Court also quoted with approval the following language from *Crigger vs. Coca-Cola Bottling Co.*, 132 Tenn. 545, 179 S.W. 155:

“However exacting the duty or high the degree of care to furnish pure foods, beverages, and medicines, we believe with Judge Cooley as expressed in *Brown vs. Marshall*, * * * (47 Mich. 576, 11 N. W. 392), that *negligence is a necessary element in the right of action, and the better authorities have not gone so far as to dispense with actual negligence as a prerequisite to the liability*. In fact, there is no logical basis of liability for personal injury without some negligent act of omission.” (Italics added.)

In the case of *Ash vs. Child's Dining Hall Co.*, 231 Mass. 86, 12 N.E. 396, the plaintiff, a guest in the defendant's restaurant, ate a piece of berry pie. A small

tack was imbedded in the pie, and the plaintiff was injured by eating it. The pie was baked by the defendant. In holding that there was no evidence of negligence, the Supreme Judicial Court of Massachusetts said:

“There is nothing in the record from which it can be inferred that the harm to the plaintiff resulted from any failure of duty on the part of the defendant. The precise cause of her injury is left to conjecture. It may as reasonably be attributed to a condition for which no liability attached to the defendant as to one for which it is responsible. Under such circumstances the plaintiff does not sustain the burden of proving tortious conduct upon the defendant by a fair preponderance of all the evidence, and the verdict ought to be directed accordingly.”

To the same effect see:

O'Brien vs. Louis K. Liggett Company, (Mass.) 152 N.E. 57;

Horn & H. Baking Company vs. Leiber, 25 F. 2d 449, 28 N.C.C.A. 189;

Werner vs. Armour & Co., 320 Pa. 440, 183 A. 48.

In the case of *Enloe vs. Charlotte Coca-Cola Bottling Co.*, 208 N. C. 305, 180 S.E. 582, the Supreme Court of North Carolina announced the rules governing cases of this sort in that jurisdiction. Proposition No. 4 stated by the Court was as follows:

“That the wholesomeness of the product which proximately results in injury to the consumer

must be traced to the negligence of the manufacturer, bottler, or packer. *Keith vs. Tobacco Company*, 207 N. C. 645, 178 S. E. 90."

This rule has subsequently been reiterated and followed in a number of subsequent North Carolina cases. See:

McLeod vs. Lexington Coca-Cola Bottling Company,
(N.C.) 194 S.E. 82.

Thompson vs. Dr. Pepper Bottlers Corporation,
(N.C.) 8 S.E. 2d 234.

Davis vs. Coca-Cola Bottling Company of Asheville,
(N.C.) 44 S.E. 2d 337.

It is submitted that the foregoing cases set forth the true and generally accepted rule, and they represent a particularized application to a case of this sort, of the general rule, well established in this jurisdiction, that proof of injury is no proof of negligence.

C. THE DOCTRINE OF *Res Ipsa Loquitur* IS NOT APPLICABLE TO THE FACTS OF THIS CASE.

The trial court apparently proceeded upon the theory that this was a *res ipsa loquitur* case, and in so doing committed prejudicial error resulting from a misconception of that doctrine. It is well established in this jurisdiction, as we shall hereafter more particularly

point out, and it is the view of the better reasoned judicial opinions, and of the best text writers, that the doctrine of *res ipsa loquitur* can apply only in those cases where the defendant had the exclusive control of the instrumentality causing the harm, at the time of the injury. As has been pointed out in the statement of facts contained in this brief, the bottle of Coca-Cola from which the plaintiff drank, was not in the exclusive control of the defendant, but, on the contrary, was completely beyond the control of the defendant, and was in the sole custody, possession and control of the American Smelting & Refining Company until it was purchased by the plaintiff, at which time it came within the plaintiff's exclusive control. These facts are established by the plaintiff's own evidence and cannot be doubted.

The rule is stated thus in 38 *Am. Jur.* 989, Negligence, Sec. 295:

“The conclusion to be drawn from the cases as to what constitutes the rule of *res ipsa loquitur* is *that proof that the thing which caused the injury to the plaintiff was under the control and management of the defendant*, and that the occurrence was such as in the ordinary course of things would not happen if those who had its control or management used proper care, affords sufficient evidence, or, as sometimes stated by the courts reasonable evidence, in the absence of explanation by the defendant, that the injury arose from or was caused by the defendant's want of care.” (Italics added.)

And at pages 996-7, Sec. 300, of the same reference, it is said:

“It is essential to the application of the doctrine of res ipsa loquitur that it appear that the instrumentality which produced the injury complained of was at the time of the injury under the management or control of the defendant or of his agents and servants. When, however, it appears that the victim had exclusive control of the offending thing, no imputation of responsibility will attach to the defendant. It is not only necessary to show that the offending instrumentality was under the management of the defendant, but it must be shown that it proximately caused the injury, or that the injury was caused by some act incident to the control of the instrumentality. The doctrine does not apply where the agency causing the accident was not under the sole and exclusive control of the person sought to be charged with the injury.” (Italics added.)

And at page 1000, Sec. 303, it is further said:

“The res ipsa loquitur rule does not apply where it appears that the accident was due to a cause beyond the control of the defendant, such as the presence of vis major or the tortious act of a stranger. Nor does it apply where an unexplained accident may be attributable to one of several causes, for some of which the defendant is not responsible. It should not be allowed to apply where, on proof of the occurrence, without more, the matter still rests on conjecture alone or the accident is just as reasonably attributable to other causes as of negligence. In other words, if facts and circumstances of the occurrence give

rise to conflicting inferences, one leading to the conclusion of due care and the other to the conclusion of negligence, the doctrine does not apply. * * * *The doctrine of res ipsa loquitur is not applicable where the defendant has no control over the premises, or where there is a divided responsibility and the damage may have resulted from a cause over which the defendant has no control.*" (Italics added.)

The rule is stated thus in *Shearman & Redfield on Negligence*, Revised Edition, 153, Sec. 56:

"Control is a necessary prerequisite to application of the rule of *res ipsa loquitur*. The rule is predicated amongst other things on the condition that the agency which has produced an injury is within the exclusive possession, control and over-sight of the person sought to be charged with negligence."

The rule is stated thus by Dean Wigmore in his very scholarly treatise on evidence:

"What the final accepted shape of the rule [*res ipsa loquitur*] will be can hardly be predicted. But the following considerations ought to limit it: (1) The apparatus must be such that in the ordinary instance no injurious operation is to be expected unless from a careless construction, inspection or user; (2) *both the inspection and user must have been at the time of the injury in the control of the party charged*; (3) the injurious occurrence or condition must have happened irrespective of any voluntary action at the time by the party injured." (Italics added.) *IX Wigmore on Evidence*, 380, Sec. 2509.

The facts of *Coca-Cola Bottling Company vs. Rowlan*, 16 Tenn. App. 184, 66 S.W. 2d 272, have been heretofore set forth in this brief, The court in that case rejected the doctrine of *res ipsa loquitur* as being not applicable to the facts of that case, in the following language:

“We fully agree that, in order to apply the rule of *res ipsa loquitur*, the thing causing the injury must have been under the control and management of the defendant at the time of the casualty.”

In *Enloe vs. Charlotte Coca-Cola Bottling Company*, 208 N.C. 305, 180 S.E. 502, the court, in rejecting the doctrine of *res ipsa loquitur*, said:

“That in establishing the alleged negligence of the manufacturer, bottler, or packer, the plaintiff is not entitled to call to his aid the doctrine of *res ipsa loquitur*. *Lamb vs. Boyles*, 192 N. C. 542, 135 S.E. 464, 29 A.L.R. 589; *Cashwell vs. Bottling Works*, 174 N.C. 324, 93 S.E. 901; *Perry vs. Bottling Company*, supra [96 N.C. 175, 145 S.E. 14]; *Dail vs. Taylor*, 151 N.C. 284, 66 S.E. 135, 18 L.R.A. (N.S.) 949; Note: 47 A.L.R. 148.”

The Enloe case has since been consistently followed by the North Carolina Supreme Court. See:

Hampton vs. Thomasville Coca-Cola Bottling Company, 208 N.C. 331, 180 S.E. 584;

Blackwell vs. Coca-Cola Bottling Company, 208 N.C. 751, 182 S.E. 469;

Tickle vs. Hobgood, (N.C.) 4 S. E. 2d 444;

Davis vs. Coca-Cola Bottling Company of Asheville,
(N.C.), 44 S.E. 2d 337;

Evans vs. Charlotte Pepsi Cola Company, (N.C.),
10 S.E. 2d 707.

The same principle is involved in cases where bottled beverages have exploded while in the possession of a retail dealer. In *Wheeler vs. Laurel Bottling Works*, 11 Miss. 442, 71 So. 743, the court, in rejecting the doctrine of *res ipsa loquitur* said:

“We do not think the doctrine of *res ipsa loquitur* applies in this case. The bottle at the time of the injury was not under the control or management of the manufacturer. The unfortunate occurrence appears to be one of those unforeseen accidents for which appellee under the facts of this case should not be held liable.”

See also *Winfree vs. Coca-Cola Bottling Works*, 19 Tenn. App. 144, 83 S.W. 2d 903, where the court said:

“The doctrine of *res ipsa loquitur* applies only when the instrumentality is wholly within the possession of the defendant and under its control and management at the time of the casualty.”

The same principle is also followed in cases involving impurities in foods. See:

Ash vs. Child's Dining Hall Company, 231 Mass. 86,
120 N.E. 396;

Jacobs vs. Childs Co., 166 N.Y.S. 798.

For an excellent discussion of the whole question of the necessity for defendant to have the exclusive control of the instrumentality causing the injury at the time of the accident in order to make the doctrine of *res ipsa loquitur* applicable, see *Stanolind Oil and Gas Co. vs. Bunce*, (Wyo.), 62 P. 2d 1297.

We turn now to the Utah cases.

We have been unable to discover any Utah case closely similar in point of fact to the case now before the Court. However, the doctrine of *res ipsa loquitur* has been discussed by this court in many different cases. No useful purpose could be subserved by reviewing the Utah decisions treating this general subject. We merely invite the court's attention to two of the more recent opinions dealing with this question.

In the case of *Jenson vs. S. H. Kress & Co.*, (Utah), 49 P. 2d 958, the plaintiff was injured by coming in contact with a splinter of glass projecting from a showcase in the defendant's store. The evidence did not show how or when the glass was cracked. This court unanimously held that the doctrine of *res ipsa loquitur* was not applicable.

The court, speaking through Mr. Justice Wolfe, said:

“There was no evidence as to how the glass got cracked, or how long it had been cracked before the plaintiff was cut by it. The plaintiff's evidence did not go any further than to show that the plaintiff had been injured by this piece of

glass penetrating her abdomen while she was brushing up against the counter. * * *

“The respondent contends that a case of negligence has been made out by showing that the piece of jagged glass penetrated her abdomen while she was moving along the counter. * * *

“We cannot see how this case differs from the Quinn Case, [Quinn vs. Utah Gas & Coke Co., 42 Ut. 113, 129 P. 36, 43 L.R.A. (N.S.) 328]. In that case a bottle of ink had spilled, and plaintiff's dress was damaged by the ink running upon it. In this case there was a cracked panel in the showcase and the person of plaintiff was injured. In neither case did any one know how the ink was spilled or the glass broken. In both cases the cause of the spilled ink or the broken glass may have been caused by some representative of the company without negligence and unnoticed when it was done, or, in both cases, it may have been caused by the negligence of the company through a servant. *The difficulty is that it is in the realm of speculation, and under such circumstances the doctrine of res ipsa loquitur cannot apply. It applies where the thing from or by which the apparent negligence speaks is shown to be under the control or the management of the store and the accident is such as, in the ordinary course of things, does not or would not happen if those who had the management used the proper care. Where the way in which the accident happened warrants an inference of negligence, then the mere happening speaks for itself. Even then it is only evidence from which the jury may infer negligence. It is not negligence in law. See Williamson v. Salt Lake & Ogden R. Co., 52 Utah 84, 172 P. 680, L.R.A. 1918F 588. If the circumstances are equally consistent with a cause which would*

not be attributable to negligence, then the doctrine does not apply.'' (Italics added.)

The facts of the case at bar may well be paralleled to the facts of the Jenson case. In the Jenson case there was no evidence as to how the glass was cracked, or how long it had been cracked, before the plaintiff was cut by it. In the case at bar, there is no evidence as to how the impure matter got into the bottle of Coca-Cola, or for how long it had been there at the time the plaintiff drank from the bottle. In both cases the plaintiff's evidence went no further than to show the injury. In both cases the circumstances of the injury were such that the injury might be as well attributed to causes for which the defendant would not be responsible as to causes for which the defendant would be responsible. In the Jenson case it was held that the doctrine of *res ipsa loquitur* was not applicable, and a similar result should follow in the case at bar.

In the recent case of *Loos vs. Mountain Fuel Supply Company*, (Ut.), 108 P. 2d 254, in an action by the plaintiff against the gas company for injuries sustained by the plaintiff as a result of an explosion of gas in a certain cabin of the Utah Motor Park, it was held that the doctrine of *res ipsa loquitur* could not be enforced against the gas company because it did not have any control over the gas facilities where the explosion occurred. In that case, employees of the gas company went on the premises of the Utah Motor Park only by invitation. In the case at bar, employees of the defendant

company went on the premises of the American Smelting & Refining Company only at the invitation of the American Smelting & Refining Company. They had no control over the vending machine from which the plaintiff purchased the bottle of Coca-Cola. That machine was leased to the American Smelting & Refining Company, and was under its exclusive control.

From the foregoing authorities it is apparent that the trial court erred in submitting this case to the jury under the doctrine of *res ipsa loquitur*, which is clearly not applicable to the facts of this case.

D. THE EVIDENCE ON THE PART OF THE DEFENDANT IS SO OVERWHELMING AS TO REQUIRE A HOLDING AS A MATTER OF LAW THAT DEFENDANT WAS NOT GUILTY OF NEGLIGENCE.

We have heretofore argued at some length that the plaintiff failed to produce sufficient evidence to put to the jury on the question of negligence. If the court agrees with our argument in that respect, it will be unnecessary for the court to consider the "D" portion of our argument under this point. However, without in any way waiving our contentions under "A," "B," and "C," of Point 1, we deem it advisable to present this additional argument to the court in the event that the court should not agree with our earlier contentions.

We have pointed out at some length in our statement of facts the great pains and extent to which the defendant company went to insure that no impure products should be bottled by the defendant. Not only was

there extensive testimony by the defendant's employee, Mr. Peter Hanes, as to the meticulous care with which bottles are washed, filled and inspected, but there is also very strong corroborating testimony on the part of three disinterested expert witnesses, Mr. Raymond Wilmert, Dr. Louis R. Curtis, and Mr. J. T. Holding. The testimony of these men was to the effect that it would be virtually impossible for a bottle containing dead flies to go through the defendant's washing and bottling process and through its double inspection system and reach the open market. The plaintiff attempted in vain to discredit the testimony of these witnesses. No question could be raised as to their expert qualifications nor as to their freedom from bias. The plaintiff did not come forward with any rebuttal testimony tending in any way to discredit in any respect the testimony of any of these witnesses.

It is the position of the defendant that if there were flies in the bottle from which the plaintiff drank (which fact we assume to be true), either the bottle was bottled by some bottler other than the defendant, or else those flies were placed in that bottle by some mischief-minded third person after the bottle passed from the possession and control of the defendant and into the control of American Smelting & Refining Co. In view of the overwhelming evidence presented by the defendant as to the care exercised by it in its bottling process, no other conclusion is tenable. We do not concede that it would be possible for flies to get into a bottle of Coca-Cola during

any phase of the washing and bottling operations carried on by the defendant.

We also wish to point out to the court that the defendant is not liable as an insurer. The only duty imposed upon the defendant is the exercise of reasonable care. While we readily concede that reasonable care in the case of a person bottling beverages for human consumption would involve a very high degree of diligence, we submit that the highest possible degree of diligence and care has been exercised by the defendant in this case. Assuming, without in any way conceding, that flies and other impurities got into the bottle of Coca-Cola from which the plaintiff drank, during the defendant's bottling process, such an event would have to be attributed to inevitable accident, and not to negligence on the part of the defendant. What further care could possibly have been exercised by the defendant? Wherein can the defendant be said to have breeched its duty? What possible further step could have been taken by the defendant to insure that its products would be wholesome and fit for human consumption? The plaintiff has failed to come forward with even a suggestion as to what additional care the defendant might exercise for the greater protection of the consumers of its product. The evidence is overwhelming and uncontradicted that the bottling and washing process employed by the defendant is safe, and is the best known to man. The evidence is equally clear that the inspection procedure of the defendant is as "fool-proof" as the ingenuity of man can devise. If, then, by some wild stretch

of the imagination, it could be said that the flies did get into the bottle while it was in the possession and control of the defendant, that event must be charged to inevitable accident. It can in no wise be said that the defendant failed in the performance of its duty to exercise the highest degree of diligence and to assure that its product reached the market in a safe, sanitary and wholesome condition. These views have been followed by the courts in similar cases.

In *Coca-Cola Bottling Company vs. Rowlan*, 16 Tenn. App. 184, 66 S.W. 2d 272, the defendant produced evidence as to its washing and bottling process quite similar to the evidence of the defendant in the case at bar. The washing process employed by the defendant in that case was very similar to that employed by this defendant. However, in that case the defendant produced no evidence of an electric eye inspection machine, whereas in the case at bar the defendant produced evidence of this additional safety factor.

Said the court in the Rowlan case:

“Without discussing the facts as disclosed by the record further, we are of the opinion that the plaintiff has failed to show that the defendant was guilty of any negligence in this matter of bottling Coca-Cola. To the contrary, we think that under the facts of the record, it would have been physically impossible for a dead mouse to have been bottled up in the Coca-Cola at the plant.

“We are constrained to reach the conclusion that there was no proof of negligence, and that any presumption that may have been created by the mere finding of a dead mouse in the bottle of Coca-Cola is fully met by the evidence in the nature of physical facts introduced by the defendant and hence the physical facts as shown by the manner in which the Coca-Cola was processed make it not only highly improbable, but practically impossible for the mouse to have been in the bottle at the time it was filled with Coca-Cola, and delivered to the stand for sale.”

The Court also quoted with approval from *Crigger v. Coca-Cola Bottling Company*, 132 Tenn. 545, 179 S.W. 155:

“That he who prepares and puts on the market in bottles or sealed packages, food, drugs, beverages, medicines or articles inherently dangerous, owes a high duty to the public in the care and preparation of such commodities, and that a liability will exist regardless of privity of contract to anyone injured for a failure to properly safeguard and perform that duty. * * *

“*This liability is based on an omission of duty or an act of negligence and the way should be left open for the innocent to escape.* However exacting the duty or high the degree of care to furnish pure foods, beverages and medicines, we believe with Judge Cooley as expressed in *Brown vs. Marshall* * * * [47 Mich. 576, 11 N.W. 392], that negligence is a necessary element in the right of action and the better authorities have not gone so far as to dispense with actual negligence as a prerequisite to the liability. In fact, there is no logical basis for liability for personal injury

without some negligent act or omission.” (Italics added.)

The foregoing quotation was also quoted with approval in *Merriman vs. Coca-Cola Bottling Co.*, (Tenn.), 68 S.W. 2d 149. The same thought was also expressed in *Enloe vs. Charlotte Coca-Cola Bottling Co.*, supra. See also *Blackwell vs. Coca-Cola Bottling Company*, 208 N.C. 751, 182 S.E. 469, and *Horn & H. Baking Company vs. Lieber*, supra.

See also 38 *Am. Jur.* 1005, Negligence, Sec. 308, where it is said:

“In no event, however, will the application of this doctrine [*res ipsa loquitur*] affect the broad, well settled, rule that when the evidence is so clear and convincing that reasonable minds would not differ in their conclusions therefrom, the question of defendant’s negligence is for the court and not for the jury.”

And, to the same effect, see 38 *Am. Jur.* 1063, Negligence, Sec. 335.

We submit that the defendant conclusively demonstrated that its washing and bottling process was the best and safest devisable by the ingenuity of man, and that no further steps to safeguard life, health and safety of the consuming public could have been taken by the defendant, and it must therefore be held as a matter of law that the defendant was free of negligence.

POINT 2.

PLAINTIFF'S ATTORNEY WAS GUILTY OF MISCONDUCT AMOUNTING TO PREJUDICIAL ERROR SUCH AS TO REQUIRE THE SETTING ASIDE OF THE VERDICT AND JUSTIFYING AN ORDER GRANTING A NEW TRIAL.

During the cross-examination of Peter Hanes, counsel for the plaintiff asked the witness the following question:

“I notice that your attorney is checking your questions quite carefully with the transcript. Have you testified a good deal in these cases?”

Objections were promptly interposed by the defendant, and the court struck the question and the answer and instructed the jury to disregard it. (R. 132.)

Notwithstanding the court's ruling that any reference to other trials was improper, counsel for the plaintiff persisted in seeking to inject into the record the notion that the defendant company was frequently called upon to defend suits of this nature.

Again at R. 144, counsel for the plaintiff, on cross-examination of Raymond Wilmert, asked this question:

“If the Coca-Cola Company should lose a few of these lawsuits * * *”

Again objection was interposed. Counsel for the plaintiff did not persist in the question at that time, but

shortly thereafter, on re-cross-examination of Mr. J. T. Holding, counsel asked the witness:

“You have been subpoenaed before to testify in these cases for Mr. Moreton, haven’t you?”
(R. 159.)

Again objection was promptly interposed and again the court sustained the objection and struck it from the record, and instructed the jury to disregard it.

The only apparent purpose for such questions could be to convey to the jury the impression that the defendant was frequently called upon to defend lawsuits involving impure products. Counsel persisted in attempting to put this notion before the jury although the court consistently, and quite correctly, ruled that such matters were entirely improper. While there is no way of showing that the jury was influenced, or was not influenced, by these irrelevant matters, it is only fair to assume that such had a prejudicial effect upon the defense interposed by the defendant.

It must be remembered that the defense relied upon principally by the defendant was that its bottling process was so efficient and so perfect that it would be impossible for impure or foreign materials to get into its bottled product. Insinuations that the defendant was frequently called upon to defend suits of this nature would naturally cause the jury to believe that the process was not as efficient as testified to by the defendant’s witnesses.

It is a well recognized rule that misconduct on the part of counsel such as results in the opposite party being denied a fair trial, is prejudicial error and grounds for granting of a new trial or reversal on appeal. Thus it is said in *39 Am. Jur.* 71, New Trial, Sec. 53:

“Misconduct of counsel for one party, if of such a nature as to influence a verdict in favor of that party, or to prevent the adverse party from having a fair trial is, if proper and timely objection thereto is made, ground for a new trial. * * * Where there is any misconduct on the part of counsel for the prevailing party which appears to have been liable, even though not intended to have a pernicious effect upon legal proceedings, or a prevailing influence on the jury, there is reason for treating the trial as a mistrial and directing that the judgment be set aside.”

And at page 72, Sec. 54 it is said:

“Improper remarks and comments of counsel for a party, made in the presence and hearing of the jury, if of such character as to influence a verdict, prevent a fair trial, etc., may, when the complaining party has made proper and timely objection and sought to have the harmful effect thereof removed by an instruction to the jury, furnish good grounds for a new trial.”

See also *3 Am. Jur.* 608, Appeal and Error, Sec. 1060, where it is said:

“Thus, it has been held reversible error for counsel in examining witnesses, to bring before the jury irrelevant evidence of collateral matters

for the purpose of prejudicing, or tending to prejudice, the jury against the opposing parties, as, for example, in a negligence action, the fact that the defendant is insured. * * *

“Asking the opposing party questions which he knows to be wholly improper, in order to place before the jury inadmissible evidence, and attempting to introduce previously excluded evidence by making statements of alleged facts in asking questions of witnesses may also be reversible error.”

It is interesting to observe that in recent years there has been an increasing tendency on the part of attorneys to bring improper matters before the jury by ingenious and devious methods. In *39 Am. Jur.* 80, New Trial, Sec. 65, it is said:

“Misconduct of counsel may consist in attempting to get before the jury matters not in issue and not properly matters for the consideration of the jury by means of asking witnesses improper questions or making improper offers of proof. In recent years there has been a decided increase in the number of cases in which complaint has been made of prejudice suffered by reason of such misconduct, and frequently a new trial is sought and granted on this ground, particularly where an attorney persistently pursues a wholly unjustified and prejudicial course of interrogation, notwithstanding the objections made by counsel for the opposing party litigant and sustained by the court.”

And at page 81 it is said:

“Unsupported statements of fact which have been made by counsel for the prevailing party in the presence of the jury, and which were prejudicial to the opposing party, will also afford cause for a new trial.”

The same thought is expressed in the excellent annotation on this question in 109 A.L.R. 1089 where it is said:

“An examination of the case digests shows that in the last twenty years there has been a decided increase in the percentage of jury cases wherein complaint has been made of prejudice suffered by reason of the misconduct of counsel in the examination of witnesses. Much of this misconduct has consisted of knowingly asking improper questions. In many cases the attorney complained of has persistently pursued a wholly unjustified and prejudicial course of interrogation, notwithstanding objections made and sustained, clearly called to his attention, if such a thing could be deemed necessary, that the questions asked were without any plausible legal foundation. Reversals have frequently been granted in cases of that extreme character.”

And at page 1096, by way of summary of the annotation, it is said:

“In fine, one may say that the extent to which, in jury trials, the practice of knowingly asking witnesses improper and prejudicial questions has come to be indulged in, indicates the need for a policy which will make the practice unprofitable.

The fact that attorneys have earnestly argued that they are entitled to the 'benefit' before the jury of their opponent's action in objecting to such questions is significant of the extent to which fidelity to the ideal of justice has yielded to the unbridled notion that the administration of the law is a game in which victory belongs to him who is most ingenious in turning the existing rules to his advantage. Verdicts so gained should not be retained. To use the language of the Kentucky Supreme Court, 'No litigant should be permitted to profit by such practice.' "

We have been unable to discover a case exactly in point with the facts of the case at bar. Perhaps the closest is *Louisville & Nashville Railway Co. v. Payne*, 133 Ky. 539, 118 S.W. 352, 19 Ann. Cases 294. In that case, plaintiff's counsel repeatedly asked incompetent questions attempting to establish that the servants in charge of the defendant's trains on other occasions had been guilty of acts of negligence similar in character to that for which recovery was sought in that case. In reversing the verdict and judgment for the plaintiff, the Supreme Court of Kentucky said:

"* * * in a case like that here presented, where counsel persistently pursues a line of interrogation which the court rules to be wrong, and which one reasonably well acquainted with the rules governing the admission of evidence must know to be improper, the conclusion is irresistible that it is done for the purpose of influencing and prejudicing the minds of the jury in arriving at a verdict. No court should countenance such conduct; and, when the trial judge, be-

cause of his kindness of heart, or long-suffering and forbearing nature, permits it to go unpunished, there remains nothing to do but deprive the one offending of the fruits of his victory thus earned. This case must be reversed for other reasons; but, if there were none such, this misconduct upon the part of plaintiff's counsel would furnish abundant grounds for reversal.

“Where the record shows that an attorney persistently and dogmatically pursues a line of interrogation over the objection of opposing counsel and the adverse ruling of the court to the extent here shown, the conclusion is irresistible that such was not due to error of judgment, but in pursuance of a determination to present the matter about which the questions are asked to the jury in spite of court and counsel. Such conduct should neither be tolerated nor excused by the trial court, and no litigant should be permitted to profit by such practice.”

For other authorities supporting the same general rule, see *6 Ann. Cases 224*, *19 Ann. Cases 296*, *Ann. Cases 1917A 441*.

It is with some reluctance that we have urged this point upon the court and, in so doing, we do not wish to be understood as accusing counsel for the plaintiff of deliberate bad faith. However, regardless of the motives that may have prompted him in bringing these irrelevant matters before the jury, it can only be fair to assume that the jury was improperly influenced and that such conduct redounded to the prejudice of the defendant. Verdicts gained by the aid of such method should not be

retained. As said by the Kentucky Supreme Court in the case of *Louisville & Nashville R. Co. v. Payne*, supra:

“No litigant should be permitted to profit by such practice.”

CONCLUSION

It is respectfully submitted that the record contains no evidence whatsoever of any negligence on the part of the defendant, but that, on the contrary, the record conclusively shows that the defendant exercised the highest possible degree of care in the bottling of its product.

Therefore the judgment of the Trial Court should be set aside and the Trial Court directed to enter a judgment in favor of the defendant, no cause of action.

It is further submitted that the misconduct on the part of plaintiff's counsel resulted in the defendant being denied fair trial.

Respectfully,

MORETON, CHRISTENSEN & CHRISTENSEN,

ELIAS L. DAY

Attorneys for Defendant and Appellant.