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

Utah Supreme Court

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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.

RESPONDENT'S BRIEF

FILED

AUG 12 1949

MARK S. MINER,

WENDELL R. JONES

*Attorneys for Plaintiff
and Respondent*

CLERK, SUPREME COURT, UTAH

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PANY OF UTAH, a corporation,
Defendant and Appellant.

} Case No. 7347

RESPONDENT'S BRIEF

STATEMENT OF FACTS

In this brief we shall refer to the parties as they appeared in the court below. This statement of facts is given for the purpose of supplying the court with the pertinent facts omitted in the defendant's brief.

The undisputed and uncontradicted evidence reveals that the plaintiff on or about the 5th day of October, 1948, purchased a bottle of coca-cola from a coca-cola dispensing machine owned by the defendant which was located just outside of the machine shop at the American Smelting and Refining Company at Garfield, Utah. This machine had been leased to the American Smelting and Refining Company, but was serviced daily, with the exception of week ends and holidays, by defendant's employees.

Standing in the plaintiff's immediate presence and by the coca-cola machine were two employees of the American Smelting and Refining Company, whose names are Keith Wiseman and Leslie L. Cramer. The plaintiff placed a nickel in the machine and was immediately served by the dispensing machine a bottle of coca-cola. He stepped up to the machine's bottle cap remover and removed the cap and immediately drank from the coca-cola bottle. In the process of drinking from the bottle the plaintiff swallowed one fly and a large blow-fly lodged in his mouth. The contents of the bottle were foul, poisonous and contaminated. The plaintiff spit out the blow-fly that had lodged in his mouth and put it back into the bottle. About an hour later the plaintiff became deathly sick and nauseated. For three days thereafter he suffered from nausea and diarrhea.

Keith Wiseman, a totally disinterested, subpoenaed witness, testified that he saw the plaintiff purchase the bottle. He further testified he saw Mr. Jordan drink out

of the bottle then spit the blow-fly out into his glove and put the fly back into the bottle of coca-cola. He positively identified the bottle of coca-cola introduced as plaintiff's Exhibit "A".

Leslie L. Cramer, who had been duly subpoenaed and who had no interest whatsoever in the outcome of the suit, testified: That he was present when Mr. Jordan bought the bottle of coca-cola. He saw the plaintiff take a "swallow" of the coke and then spit the fly into his hand, then replacing the fly in the bottle. Mr. Cramer further testified that the three men had held the coke up to the light and it could be plainly seen that there was other foreign material present in the bottle of coca-cola. (R-114).

George D. Walker, the coca-cola truck driver, testified that he serviced the dispensing machine from which the plaintiff purchased the bottle of poisonous coca-cola. He further testified that he was and is employed by the Defendant Coca-Cola Company. He stated that the trucks are loaded at the Defendant's plant on 875 South West Temple and the bottled coca-cola is under his exclusive control until placed in the machine or the Foreman's office. (R-105). On re-direct he testified he left coke in the foreman's office nearly every week-end. (R-108). But when questioned again three days later on the same subject he testified as follows:

Q. Mr. Walker, have you left any coca-cola in the foreman's office since the summer months?

A. I DON'T REMEMBER; IT'S BEEN A LONG TIME AGO. (R-183).

Mr. Walker further testified that he did not know of any other person servicing the machine in question. (R-179). When asked, "Do you know of anybody else that has a right to go out and sell coca-cola to the American Smelting and Refining Company?" He replied, "Not that I know of, no sir." He testified that he probably serviced the machine on October 5, 1948. (R-180).

Lester Anderson, Head Guard and Fire Chief at American Smelting and Refining Company, testified that no one could get into the dispensing machine without a key. (R-111). He further stated that there were only two keys to the money box of the machine, the one he had and the one held by Kelsey Rosandar. These keys were originally presented to him and Mr. Rosandar by the defendant Company. (R-175). He further testified that he had never known any company other than the defendant to service the machines. (R-175-176). He also testified that the defendant Company brought this dispensing machine from the 9th South and West Temple Plant. (R-177).

Peter Hanes, the maintenance man of the defendant Corporation, admitted under cross-examination, that if the water pressure of the washing machine should drop that the bottles would not be properly rinsed. (R-134).

Mr. Hanes made the bold statement that the de-

fendant's equipment was the "Most up to date in the industry". (R-129). Yet on cross examination, he made the following answers to the following questions: (R-131)

Q. How do you know there are no better plants
* * *?

A. I've been in a lot of plants.

Q. Does the company send you around to look at these plants?

A. No, sir.

Q. How do you visit them?

A. JUST VISITING ON MY VACATIONS,
AND WHENEVER I HAPPEN TO BE OUT OF
TOWN.

Raymond Wilmert, the field engineer for the Radio Corporation of America, testified that the electric eye which inspects the coca-cola bottles would kick out any bottle that had sediment, particles of dust or any foreign substance,—EVEN A BUBBLE!

The defendants introduced exhibit "6" which was a bottle containing a small No. 12 shot. Defendant's exhibit "5" was a bottle containing a piece of cork and defendant's exhibit "4" was a bottle containing a bristle from a brush. It was testified that all of these bottles had been rejected by the electric eye. (NO EXHIBITS WERE INTRODUCED BY THE DEFENDANT

COCA - COLA COMPANY WHICH CONTAINED FLIES.)

Donald A. Carmichael, the manager of the defendant company, testified that the defendant company had an exclusive franchise to sell bottled coca-cola in the Salt Lake territory. (R-184). This territory includes the American Smelting and Refining Company at Garfield, Utah. (R-13). In answer to the following questions, Mr. Carmichael made the following replies:

Q. Do you let any of these other companies sell coca-cola in your territory?

A. We wouldn't permit them to. We wouldn't give them a contract to do that * * *. (R-184).

Q. But you don't permit the other bottling companies to sell coca-cola to your customers in the Salt Lake Area, would you?

A. We wouldn't authorize them to do it.

Dr. Leo R. Curtis admitted under cross-examination that he was a former employee of Salt Lake City of which Mr. Christensen, the defendant's attorney, is employed. The Salt Lake City inspector also testified in the defendant's favor.

All witnesses presented by the defendant company were employed directly or indirectly by the defendant except Dr. Leo R. Curtis and Mr. Holding, who were

employed or were formerly employed by the same corporation as was defendant's attorney, E. Ray Christensen.

CROSS ASSIGNMENTS OF ERROR

The plaintiff submits that the verdict of the jury and the judgment of the trial court should still be affirmed. The trial court was correct in submitting the cause to the jury on the theory of *Res Ipsa Loquitur*. Should this court be of the opinion that the trial court did err, the verdict and judgment should still be affirmed because had the trial court not erred in the rulings and orders, set forth below, the verdict and judgment would still remain the same. The plaintiff cross assigns the following errors made by the trial court:

(1) The trial court erred in refusing to give plaintiff's requested instruction No. III to the jury.

(2) The trial court erred in refusing to give plaintiff's requested instruction No. IV to the jury.

(3) The trial court erred in refusing to give plaintiff's requested instruction No. V to the jury.

(4) The trial court erred in refusing to plaintiff's requested instruction No. VI to the jury.

(5) The court erred in not instructing the jury to find in favor of the plaintiff on the theory of a breach of implied warranty.

ARGUMENT

POINT I

THE EVIDENCE IS OVERWHELMING THAT THE DEFENDANT, COCA-COLA BOTTLING COMPANY, BOTTLED THE POISONOUS BOTTLE OF COCA-COLA FROM WHICH THE PLAINTIFF DRANK. In this regard the court's attention is respectfully called to plaintiff's EXHIBIT "A", on the bottom of which there is plainly printed "^{msm}~~Bottled in~~ Salt Lake City, Utah." It is undisputed that there is but one coca-cola bottling company in Salt Lake City, Utah, and that company is the defendant.

It is further undisputed that the defendant company has the exclusive franchise to serve Salt Lake City and vicinity, which includes the American Smelting and Refining Company at Garfield, Utah.

It is undisputed that the defendant's truck driver, George Walker, daily services the machine from which the plaintiff took the contaminated bottle. It was proved beyond reasonable doubt by testimony of Frank Baer, the head of the accounting division of the American Smelting and Refining Plant at Garfield, Utah, that the defendant company was the only company which had received payment for coca-cola sold to the American Smelting and Refining Company and placed in the subject dispensing machine.

It is further undisputed that the vending machine is owned and serviced by the defendant company. Kelsey Rosandar and Lester Anderson further testified that the only two keys to the subject machine were issued to them by the defendant company. Mr. Carmichael positively testified that he would not permit any other coca-cola bottling company to service the territory over which the defendant company had an exclusive franchise. The court, in instructing the jury, required them to find, before entering a verdict for the plaintiff, that the defendant company bottled and produced the coca-cola put in evidence as plaintiff's EXHIBIT "A". It must be assumed that the jury was well satisfied from the evidence that the defendant company had bottled and produced the bottle of coca-cola introduced as plaintiff's EXHIBIT "A". It is hard for the plaintiff to comprehend how, after the introduction of such overwhelming evidence and with the bottle itself having clearly printed on the bottom, "~~Bottled in~~^{made in} Salt Lake City, Utah", that the defendant could assert that the plaintiff had failed to show that the coca-cola which poisoned the plaintiff had been produced and bottled by the defendant corporation.

POINT 2

THE PLAINTIFF PRESENTED MORE THAN AMPLE EVIDENCE OF DEFENDANT'S NEGLIGENCE AND WAS PROPERLY GRANTED A VERDICT BY THE JURY.

Once again the defendant is attempting to confuse the issues of this case by his "Red Herring" cry of no

evidence. It should be kept in mind that the plaintiff's right of recovery is based upon two theories:

- a. Res Ipsa Loquitur.
- b. Breach of implied warranty.

Under the two theories set forth above the plaintiff presented undisputed evidence by wholly disinterested witnesses that the bottle of coca-cola taken directly from the coca-cola machine, owned and stocked daily by the defendant company, was contaminated and polluted by blow-flies and other poisonous substances. * * *

It becomes undeniable that at some time or place that some person had failed to exercise the proper care to prevent blow-flies and other noxious matter (see EXHIBIT "A") from the infestation of this bottle of coca-cola.

The defendant attempts to shy away from the responsibility of its law imposed liability by asserting that the defendant company lost control of this particular bottle by placing the same in its machine which had been leased to the American Smelting and Refining Company.

To illustrate the possibility of negligence of the defendant company, as well as to exculpate the other, it must be remembered that the evidence fully discloses the fact that all bottles of coca-cola taken to the American Smelting and Refining were capped, bottled and sealed at the defendant's place of business. In such circum-

stances it must be concluded that the unfortunate incident was caused by the lack of proper care on the part of the defendant company. Such conclusion is a natural one which is deductible from the facts of the case.

The defendant, in the trial of the case and now in his brief, is attempting to cloud the issues as set up in the plaintiff's complaint by trying to try this case on the basis of ordinary negligence. Save with one or two exceptions the cases cited in defendant's brief supports the theory of ordinary negligence and therefore are not pertinent to the real issues of this case. In line with defendant's tactics to avoid the real issues the defendant attempts to avoid the doctrine of *res ipsa loquitur* on the ground that the plaintiff failed to prove exclusive control of the instrumentality causing the harm at the time of injury. In support thereof the defendant has cited those cases involving the furnishing and the serving of food *not* involving a sealed product, but has cited those cases involving the furnishing and the serving of food *not* in sealed containers. The only exception is a few cases as handed down by the courts of North Carolina. Nearly all other states have adopted the rule firmly established since the decision of *Thomas vs. Winchester* and 6 N.Y. 297-57 Am. Dec. 455, which held:

“That a manufacturer of articles intended for human consumption owes a duty of care to the ultimate consumer to see that they are fit for such consumption. This duty, as well as the duty of an inkeeper to exercise reasonable care in the preparation and inspection of food being well established, the doctrine of *res ipsa loquitur*

would seem particularly appropriate in cases resulting from contaminated food, since there is usually exclusive control on the part of the manufacturer'' * * *

The slightest perusal of the cases reveals that the overwhelming weight of authority has adopted the rule which permits an inference of negligence where the article for consumption is in a sealed container.

In this case the bottle was capped and sealed, therefore, the doctrine of *res ipsa loquitur* was applicable since the coca-cola company is deemed to have had exclusive control. (Coca-cola is a sealed product. See *coca-cola bottling works of Evansville vs. Williams*, 27 N.E. (2nd) 702. *Nehi Beverage Co. vs. Hall*, 174 S.W. (2nd) 509. *Searle vs. Coca-Cola Bottling Works of Lexington, Ky.*, 179 S.W. (2nd) 598.) Under this theory, which was applied without question by the trial court, the actionable negligence consists in the defendant placing on the market a bottle of poisonous coca-cola, and the question as to how the coca-cola became poisoned is not part of the plaintiff's case. See *Cook vs. People's Milk Company*, 152 N.Y.S. 465.

The defendant Coca-Cola Company, in selling the Coca-cola, bottled under seal, and delivering to its dispensing machines for distribution and sale (regardless of whether the machine is leased or owned outright by defendant) assumed the obligation to the public to provide a wholesome beverage; and under the rule of *res ipsa loquitur* all the plaintiff need prove is that the

plaintiff purchased a bottle of coca-cola, such as the defendant admitted placing in the dispensing machine at the American Smelting and Refining, and that the coca-cola contained substances that were poisonous, and in drinking the coca-cola plaintiff became sick and poisoned. These facts, which were proved to the jury's satisfaction and beyond doubt, established the plaintiff's prima facie case against the defendant. Whether the dispensing machine, from which the coca-cola was purchased, was leased or owned by the defendant, or whether the defendant's manner of cleansing the coca-cola bottle is faulty, is not material to the plaintiff's case. See *Cook vs. People's Milk Company*, 152 N.Y.S. 465; *Rozumailaski vs. Philadelphia Coca-Cola Bottling Company*, 296 Pa. 114, 145 Alt. 700.

On the theory that care and preparation would have prevented the injury and that the manufacturer has exclusive control in "*Try-me Beverage Company vs. Harris*", 217, Alabama 302, 116, Southern 147, the court clearly sets forth the general rule: "The presence of foreign matter deleterious to health and sealed up in a bottle of soft drink IS EVIDENCE OF NEGLIGENCE."

The text book writers are in accord with the general rule that the theory of *res ipsa loquitur* applies to this type of case. Mark Shain in his recent book on *res ipsa loquitur* at page 447 states: "Courts are quite uniform in permitting an inference of negligence where the article for consumption is in a sealed container, on

the theory that care in preparation or inspection would have prevented the injury AND THAT THE MANUFACTURER HAD EXCLUSIVE CONTROL. (Emphasis ours).

The Maryland Courts in adopting the above rule held that the doctrine of *res ipsa loquitur* applied in the case of *Goldman and Freiman Bottling Co. vs. Sindell*, 140 MD. 488; 117 Atl. 866, saying: "FOR IT CERTAINLY CANNOT BE SAID that the presence of so dangerous a material as broken glass in a bottle of beverage represented as wholesome and safe, shown to be in it when sold by the manufacturer IS NOT EVIDENCE OF NEGLIGENCE ON HIS PART."

In a case involving practically the same circumstances as the instant case, the Pennsylvania Court applied the established rule. The case is titled *Rozumarski v. Philadelphia Coca-Cola Bottling Company* and is found at 296 Pa. 114; 145 Atl. 700, here the court said: "Where such substances get into the product, whose presence might possibly be due to that uncertain human quality,—carelessness, somewhere along the line, the manufacturer is responsible to a member of the Public injured thereby."

Mississippi adopted and applied the doctrine of *res ipsa loquitur* and held the Coca-Cola Company liable for damage in the case of *Chapman vs. Jackson Coca-Cola Company*, 106 Miss. 864, 64 So. 791, when a dead mouse was found in a bottle of Coca-Cola the

Court said: "When a manufacturer makes, bottles and sells to retail trade, to be again sold to the general public, a beverage represented to be refreshing and harmless, he is under a legal duty to see to it that in the process of bottling no foreign substance shall be mixed with the beverage, which, if taken into the human stomach, will be injurious." Citing *Watson v. Augusta Brewing Co.*, 124 Ga. 121, 52 S.E. 152, 1 L.R.A. (NS) 1178.

The Illinois Court applied the rule of *res ipsa loquitur* to a case presenting almost identical facts as the one at bar in the case of *Rost vs. Kee*, 216 Ill., App. 497.

In *Cook vs. Peoples Milk Co.*, 152 NYS 465, the New York Courts held the doctrine of *res ipsa loquitur* applies to sealed products and the manufacturer is liable for injuries caused by their sealed products, the Court in applying the general rule held: "The actionable negligence, which is denied by the defendant consists, if at all, in placing upon the market poisonous milk, and the question as to how the milk became poisoned is no part of the plaintiff's case. The defendant, in selling its milk bottled under seal, and delivered to merchants for distribution and sale, assumed the obligation to the public to provide wholesome milk; and if the plaintiff can establish the fact it purchased a quart of milk, such as the defendant admits having delivered to Mr. Emens (the grocery man) and that such milk contained active dangerous poison, and that in using such milk she was made sick, sore, etc., SHE HAS ESTABLISHED A

PRIMA FACIE CASE AGAINST DEFENDANT, AND THE PARTICULAR STORE IN WHICH DEFENDANT PURCHASED ITS BOTTLES, OR MANNER OF CLEANSING THE SAME, IS NOT MATERIAL TO PLAINTIFF'S CASE."

The court continued on page 468 after placing its stamp of approval on Thomas V. Winchester, *supra*, which originally set down the foregoing rule of law, said: "The principle of the above case (as set forth in the above paragraph) has been consistently followed both in this state and the Supreme Court of the United States. (Citing numerous cases.)

In *Richenbachver v. California Packing Corp.*, 250 Mass. 198, 203, 135, N. E. 281, 282 (1924), the doctrine of *res ipsa loquitur* was applied to canned good as well as sealed bottles. In a case involving a piece of glass found in a can of spinach, the Massachusetts court said: "The fact that the glass got into the can during the preparation of the spinach and before the can was sealed, was a circumstance which warranted an inference that some person whose duty it was to see that the system was observed was negligent in the examination of the contents of the can before it was sealed, if not negligent in preventing the presence of glass at a place where it could be put or might fall into the can."

In *Dryden v. Continental Baking Co.*, 77 P (2nd) 835, that California, in applying the rule of *res ipsa loquitur* said: "It goes without saying that any manufacturer intending his product for human consumption should

exercise a high degree of care to see that his products do not contain any foreign substance which, if swallowed, might cause bodily injury or death to the consumer * * *. In view of the above it seems only fair to presume that the presence of deleterious substances in a package of food occurs through some negligent act of omission or commission on the part of the agents of the manufacturer, citing *Linker vs. Quaker Oats*, 1 Fed. Supp. 794, and *Rozumailaski v. Philadelphia Coca Cola Bottling Co.*, 296 Pa. 114, 145 A 700."

The Court is urged to read the following cases which deal with facts and circumstances similar with this case: Each case cited upholds the trial court and the plaintiff by sustaining the application of the doctrine of *res ipsa loquitur* in this type of case:

Coca Cola Bottling works of Evansville, Inc., v. Williams (1941) 37 N.E. (2nd) 703; *Nehi Beverage Co. v. Hall* (1943) 174 S.W. (2nd) 509; *Seale v. Coca-Cola Bottling Works of Lexington, Ky.*, 179 S.W. (2nd) 598; *Kelly v. Ouachita Dairy*, 175 So. 199; *Auzenne vs. Gulf Public Service Co.*, 181 S.O. 54; *Hollis v. Ouachita Coca-Cola Bottling Co.*, 196 So. 376; *White v. Coca-Cola Bottling*, 16 So. (2nd) 579 (1944).

Should the court accept the defendant's theory and require positive evidence that the defendant was negligent in preparing this particular sealed product, such a rule would completely deprive this plaintiff of a remedy in court. It must be conceded that the furnishing of such proof is impossible. It was situations such as this

that resulted in the birth of the doctrine of *res ipsa loquitur*. The courts have long recognized that the remedies of injured consumers ought not be denied because of the intricacies of the law. Every consideration of law and public policy require that the consumer should have a remedy. See *Davis vs. Van Camp Packing Co.*, 189 Iowa 775; 176 N.W. 382. This being a sealed product the plaintiff respectfully submits that the doctrine of *res ipsa loquitur* applies on the theory that care in preparation or inspection would have prevented the injury and that the manufacturer had exclusive control. (North Carolina, being the only authority to the contrary.) This doctrine having been properly applied by the trial court and the jury having decided that the defendant was negligent in accordance with instruction No. 6 (R-188); and the defendant having failed to prove he was not negligent in accordance with instruction No. 7 (R-189) the jury's decision should stand. It is obvious that the jury was not impressed by evidence such as was introduced by Mr. Hanes, that defendant's plant was most up-to-date and he knew for he visited other plants "ON MY VACATIONS, AND WHENEVER I HAPPEN TO BE OUT OF TOWN."

Mr. Wilmert's testimony that the electric eye would kick out a bottle if it had a bubble in it was evidently more than the jury could "swallow". Especially when he testified the bottles are spun 1500 R. P. M., then stopped; then spun 3000 R.P.M., then stopped; then spun 3000 R.P.M., then stopped, and on the second stop carried pass the electric eye. (R-140).

It was evident that the jury was not too impressed with the testimony of Louis R. Curtis, a former fellow employee of Mr. Christensen, the defendant's attorney, who was effectively led by Mr. Christensen throughout his testimony which was obviously colored by prejudice. He admitted that he was appearing as a paid professional witness for the defendant coca-cola company. The testimony of Mr. Holding was likewise colored with prejudice and probably had little effect on the jury.

Under the law and facts as presented aforesaid the plaintiff respectfully submits that the District Court and Jury correctly found that there was a causal chain stretching between the act or omission on the part of the defendant and the injury to the plaintiff and that the defendant failed to prove he was not negligent. The jury's verdict should be affirmed.

POINT 3

THE PLAINTIFF PRESENTED MORE THAN AMPLE EVIDENCE FOR RECOVERY UNDER THE BREACH OF WARRANTY THEORY.

It is noted that the Plaintiff has cross assigned as error the trial Court's refusal to give Plaintiff's instructions No. III, No. IV, No. V, No. VI. These instructions were submitted to the court in accordance with the Plaintiff's second and alternative theory set forth in the Complaint—BREACH OF IMPLIED WARRANTY.

In this regard the Court's attention is respectfully called to Sec. 81-1-15 U.C.A. 1943, sub-paragraph 2, which supplies the basic law for this contractual theory. This section provides that such a warranty exists:

"I. Where a buyer, expressly or by implication, makes known to the seller the particular purpose for which goods are required, and it appears that the buyer relies on the seller's skill or judgment there is an implied warranty that the goods shall be reasonably fit for such purpose."

A great number of the states that have adopted the Uniform Sales Act, of which Sec. 81-1-15, sub-paragraph 1, U.C.A., 1943, is a part, have permitted recovery under the theory of implied warranty in this type of a case where food is served in a sealed container. This theory is urged upon the court. It is conceded that this court has never passed directly upon this point.

The trial court refused to instruct on the above theory because he said there was no privity of contract existing between the plaintiff and defendant. In this regard, it is urged that none need exist because the beverage purchased was in a sealed container.

In *Rachlin vs. Tibby—Owens—Ford Glass Company*, 96 F (2nd) 597 to 600, the court commented upon the fact that although the orthodox rule requires privity of contract between the parties in an action for breach of warranty, "Several Courts have recognized an exception to the general doctrine in the case of medicines

and food stuffs, and have held a manufacturer to warrant to the ultimate consumer that the article is fit for human consumption.”

In Volume 1, Uniform Laws Ann. pages 118, 119, there is written, “It has, however been declared that foodstuffs do not fall within the rule of want of privity between the manufacurer and ultimate consumer, with retailer intermediate.” Also see *Hertzler vs. Manshum* (1924) 228 Mich. 416, 200 N.W. 155; *Ward Baking Company vs. Trizzino* (1928), 161 N.E. 557.

Likewise, in *Williston on Sales*, Volume 1, Page 489, the author stated that in the more modern and up to date cases the courts have imposed absolute liability of a warrantor on the manufacturer in favor of the ultimate purchaser. (Citing, among other authorities, *Dothan Chero-Cola Bottling Company vs. Weeks*, 16 Ala. app. 639, 80 So. 734; *Davis vs. Van Camp Packing Company*, 189 Iowa 775, 176 N.W. 382, 17 A.L.R. 649, *Parks vs. Yost Pie Company*, 93 Kan. 334 144 P. 202 LRA 1915 C 179; *Ward vs. Morehead City Seafood Company*, 171 NC 33, 87 S.E. 958; *Catani vs. Swift & Company*, 251 Pa., 52, 95A931, RA 1917 B 1272; *Mazetti vs. Armour Company*, 75 Wash. 622, 135 p 633, 48 LRA, NS 213; *Flesscher vs. Corstens Packing Company*, 93 Wash. 48, 160 P. 14.

In the case of *Ward Baking Company vs. Trizzino*, 27 Ohio App. 475, 161 N.E. 557, the court in dealing with this problem, held: “The groceryman, who is in ef-

fect merely a distributing medium for the articles of food furnished by the Baking Company, having full knowledge of the fact dealt with each other and entered into a contractual relationship for the benefit of the public which is the Ultimate Consumer. In other words, this contract between the groceryman and the Ward Baking Company, to all intents and purposes was a contract entered into for the benefit of a third party, to wit, the Ultimate Consumer." The Court continued: "Consideration of public policy demand that the utmost care and caution be extracted from the manufacturer of articles of food, who not only manufactures the same, but causes the same to be delivered to grocerymen for the purpose of general distribution to the general public. THE CONSUMER HAS A RIGHT TO RELY ON THE IMPLIED REPRESENTATION OF THE BAKING COMPANY THAT THESE ARTICLES BEARING ITS NAME ARE NOT ONLY FREE FROM INJURIOUS SUBSTANCES, BUT ARE FIT FOR CONSUMPTION AS FOOD. (Emphasis ours).

And in the case entitled *Anderson vs. Tyler*, Iowa, 274 N.W. 48, 50, it was held that the duty of a manufacturer is "to see to it that food products put out by him are wholesome"; that the implied warranty that such products were fit for use ran with the sale, and to the public, for the benefit of the consumer, rather than to the wholesaler or retailer; and that privity of contract was not controlling.

In *Dow Drug Co. vs. Nieman*, 57 Ohio App. 190, 13 N.E. (2d) 130, 135, it was said: "That there is a liability upon a negligent manufacturer who sells articles knowing they are intended for resale to subpurchasers is clear from the trend of modern authorities. The only controversy is as to the basis of the liability, some holding that the implied warranties are made for the benefit of the subpurchasers and form the basis of liability. (Citing cases.)"

Likewise, in the case entitled *Hertzler vs. Manshum*, 228 Mich. 416, 200 S.W. 155, 156, which was an action against both the miller and a retailer of flour, for death caused by the presence of arsenate of lead in the said flour, which had been used in the preparation of food eaten by the deceased, the court said: "Defendant Hanchett contends for no liability under the general rule that the manufacturer of an article or commodity sold a retail dealer is not liable to a subsequent purchaser upon an implied warranty for injuries due to defects or impurities therein. This general rule is based on want of contractual relation. BUT FOODSTUFFS DO NOT FALL WITHIN THE RULE OF WANT OF PRIVILEGE BETWEEN THE MANUFACTURER AND ULTIMATE CONSUMER, with a retail dealer intermediate."
* * * The implied warranty, so called, reaching from the manufacturer of foodstuffs to the ultimate purchaser for immediate consumption is in the nature of a representation that the highest degree of care has been exercised, * * *. We are fully persuaded that the manufacturer of foodstuffs is liable to respond in damages to

the purchaser thereof, for immediate consumption, injured by a foreign poisonous substance therein; that the retail dealer may be joined as a party defendant; and the liability of both may be counted on in tort for negligence OR BREACH OF IMPLIED WARRANTY AS MENTIONED.” (Emphasis ours).

And in *Davis vs. Van Camp Packing Co.*, 189 Iowa 775, 176 N.W. 382, 389, 17 A.L.R. 649, it was held that one seeking damages from a food manufacturer for injuries caused by eating unwholesome food was not compelled to elect between implied warranty and negligence as a ground for recovery. In that case also it was contended by the defendant packing company that there could be no warranty, express or implied, because there was no privity of contract between the defendant and plaintiff. There the court said: “The remedies of injured consumers ought not be made to depend upon the intricacies of the law of sales. The obligation of the manufacturer should not be based alone upon privity of contract. * * * every consideration of law and public policy require that the consumer should have a remedy,” * * * In the case of *Parks vs. C. C. Yost Pie Co.*, 93 Kan. 334, 144 P. 202, L.R.A. 191C, 179, 181, * * * The court says: “A manufacturer or dealer who puts human food upon the market for sale or for immediate consumption does so upon an implied representation that it is wholesome for human consumption” * * * In *Boyd vs. Coca-Cola Bottling Works*, 132 Tenn. 23, 177 S.W. 80, the court said: “* * * Some of the cases place the liability on the grounds heretofore stated; others say there

is an implied warranty when goods are dispensed in original packages, which is available to all damaged by their use; and another case says that the liability rests upon the demand of social justice.” * * * We are of opinion that the duty of a manufacturer to see to it that food products put out by him are wholesome, and the implied warranty that such products are fit for use runs with the sale, and to the public, for the benefit of the consumer, rather than to the wholesaler or retailer, and that THE QUESTION OF PRIVITY OF CONTRACT IN SALES IS NOT CONTROLLING, and does not apply in such a case.” (Emphasis ours).

Also, the case entitled *Mazetti vs. Armour & Co.*, 75 Wash. 622, 135 P. 633, 48 L.R.A., N.S., 213, Ann. Cas. 1915C, 140. In discussing the question of liability of the meat packer the court said: “Although the cases differ in their reasoning, all agree that *there is a liability in such cases irrespective of any privity of contract in the sense of immediate contract between the parties.* * * * Our holding is that, in the absence of an express warranty of quality, a manufacturer of food products under modern conditions impliedly warrants his goods when dispensed in original packages, and that such warranty is available to all who may be damaged by reason of their use in the legitimate channels of trade.

The following are among the more recent cases holding that the ultimate consumer may bring his action direct against the manufacturer: *Meshbesher v. Channel-lene Oil & Mfg. Co.*, 107 Minn. 104, 119 N.W. 428, 131

Am. St. Rep. 441; Tomlinson v. Armour & Co., 75 N.J. L. 748, 70 A. 314, 19 L.R.A., N.S., 923; Salmon v. Libby, McNeill & Libby, 219 Ill. 421, 76 N.E. 573; Haley v. Swift & Co. (152 Wis. 570), 140 N.W. 292; Watson v. Augusta Brewing Co., 124 Ga. 121, 62 S.E. 152, 1 L.R.A., N.S. 1178, 110 Am. St. Rep. 157; Ketterer v. Armour & Co., D. C., 200 F. 322. * * *

And in the case entitled *Manaker v. Supplee-Wills-Jones Milk Co.*, 125 Pa., 76, 189 A. 714, 715, it was held that: "A manufacturer who puts upon the market food intended for human consumption in a sealed bottle or original package is held to represent to *each purchaser*, even though the purchase is made through a third dealer, that the contents thereof are wholesome and suitable for the purpose for which they are sold. *Nock v. Coca-Cola Bottling Works*, 102 Pa. Super. 515, 521, 156 Alt. 537; *Rozumailski v. Philadelphia Coca-Cola Bottling Co.*, 296 Pa. 114, 145, Alt. 700; *Cantani v. Swift & Co.*, 251 Pa. 52, 95 Alt. 931, L.R.A. 1917B, 1272."

The question here under consideration also has been the subject of review in the various law journals. For comments, see: 42 *Harvard Law Review*, 417; 46 *Harvard Law Review* 162; 52 *Harvard Law Review* 328; 23 *California Law Review* 621. See generally: 17 A.L.R. 709 105 A.L.R. 1511; 111 A.L.R. 1251.

It will be seen from a reading of the foregoing authorities that the modern trend permits a consumer to recover, for injuries received in consuming poisonous

foodstuffs from a sealed container, from the manufacturer.

It is apparent that a bottle of coca-cola which is full of flies and other foreign substances (see plaintiff's exhibit "A") is not fit for human consumption. That the plaintiff became deathly sick from consuming the poisonous coca-cola is disclosed by the evidence. Certainly this evidence and the abundance of adjudicated cases directly in point herein certainly supply an abundance of authorities for the affirmation of the judgment given by the District Court herein.

In conclusion the court's attention is called to the case of Klein vs. Duchess Sandwich Co., 93 P (2nd) 799, a 1939 case in which the California Supreme Court after a careful analysis of the cases held:

"In adopting the statute here concerned as a part of the Uniform Sales act, it was the clear intent of the legislature that, with respect to foodstuffs, the implied warranty provision therein contained should inure to the benefit of any ultimate purchaser or consumer of food; and that it was not intended that a strict "privity of contract" would be essential for the bringing of an action by such ultimate consumer for an asserted breach of the implied warranty."

It is submitted that the plaintiff's theory of breach of implied warranty is amply supported by authorities and is based upon sound principle. The trial court should have instructed the jury in accordance with

plaintiff's instructions 3, 4, 5 and 6. Had the trial court done so—the result would have remained the same, therefore it is contended that the jury's verdict should be affirmed on both theories set forth in plaintiff's complaint.

POINT 4

THE SCOPE OF CROSS EXAMINATION IS NOT LIMITED WHEN DIRECTED AT THE CREDIBILITY, BIAS OR INTEREST OF A WITNESS.

It is indeed gratifying to the plaintiff to find that the defendant Coca-Cola Company, after a two-day trial resulting in a 110 page transcript of evidence was so lacking in grounds for appeal that they have devoted 8 pages of the precious space in their brief to complain of two questions asked by plaintiff's counsel on cross-examination. (The defendant sets forth three questions—but as revealed by the record at page 144 the defendant did not object to plaintiff's question asked Raymond Wilmert. Not having objected, the defendant is certainly not now entitled to complain.)

Every witness produced by the defendant was admittedly bias and prejudiced. Certainly the plaintiff was entitled to question the witnesses concerning their interest and bias in this suit. If Mr. Hanes is a paid professional witness who earns his livelihood by testifying for the defendant company, the jury was entitled to know this fact and to consider this bias in weighing his testimony. On the other hand if Mr. Holding is a per-

sonal friend of Mr. Moreton and testifies daily for him the jury was also entitled to know and weigh his testimony accordingly.

Our Utah courts have always permitted any question to be asked on cross examination which tends to test veracity or credibility and this court has directed that the courts should be especially liberal where such question is aimed to show bias or prejudice. See *Holt v. Nelson*, 109 Pac. 470, 37 Utah 566; *Fissure Min. Co. v. Ole Susan Min. Co.*, 220438, 63 P. 587. The questions complained of:

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

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

were asked for the purpose of showing that defendant's witnesses were bias and prejudiced. It is submitted that they were a proper part of cross examination. Possible inferences and tender feelings have never abrogated the long established rule permitting inquiries of this type and nature. See *Stewart v. Kindel*, 25 P. 990; 15 Colo. 539; *McCowan v. Northeast Siberian Co.*, 84 P. 614; 41 Wash. 675.

It should be noted that in both of the instances complained of by the defendant the court ordered the question stricken and instructed the jury to disregard

it. If the question was in error, which the plaintiff denies, the error was certainly wiped out by the court's ruling and instruction.

It is submitted that the verdict rendered by the jury in District Court should be affirmed.

Respectfully submitted,

MARK S. MINER

WENDELL R. JONES,

*Attorneys for Plaintiff
and Respondent*