1960

Daniel K. Milligan v. Coca Cola Bottling Co. and Safeway Stores, Inc. : Petition for Rehearing and Brief and Support Thereof

Utah Supreme Court

Rawlings, Wallace, Roberts & Black; John L. Black; Attorneys for Plaintiff and Appellant;

Case No. 9161

IN THE SUPREME COURT
of the
STATE OF UTAH

DANIEL K. MILLIGAN,

Plaintiff and Appellant,

— vs. —

COCA COLA BOTTLING COMPANY OF OGDEN, a corporation, and SAFEWAY STORES, INC., a corporation,

Defendants and Respondents.

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

RAWLINGS, WALLACE,
ROBERTS & BLACK
JOHN L. BLACK
Attorneys for Plaintiff and Appellant
530 Judge Building
Salt Lake City, Utah

INDEX

CASES CITED

IN THE SUPREME COURT
of the
STATE OF UTAH

DANIEL K. MILLIGAN,
Plaintiff and Appellant,
— vs. —
COCA COLA BOTTLING COMPANY OF OGDEN, a corporation, and SAFEWAY STORES, INC., a corporation,
Defendants and Respondents.

Case No. 9161

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

PETITION FOR REHEARING

COMES NOW Daniel K. Milligan, appellant herein, and respectfully petions this Honorable Court for a rehearing in the above-entitled case and to vacate the order of the Court herein, affirming the judgment for respondents.

This Petition is based on the following grounds:

POINT I.

THIS COURT FAILED TO CONSIDER ALLEGATIONS OF BREACH OF IMPLIED WARRANTY AND VIOLATION OF THE ADULTERATION STATUTES.

POINT II.

THIS COURT FAILED TO VIEW THE EVIDENCE IN A LIGHT MOST FAVORABLE TO PLAINTIFF.

Accompanying this Petition and filed herewith is a Brief in support hereof.

RAWLINGS, WALLACE,
ROBERTS & BLACK
JOHN L. BLACK
Attorneys for Plaintiff and Appellant
530 Judge Building
Salt Lake City, Utah

CERTIFICATE OF COUNSEL

I hereby certify that I am one of counsel for the appellant, petitioner herein, and that in my opinion there is good cause to believe the judgment objected to is erroneous and that the case ought to be re-examined as prayed for in said Petition.

DATED this ..... day of ....., 1960.

JOHN L. BLACK

BRIEF IN SUPPORT OF PETITION FOR REHEARING

POINT I.

THIS COURT FAILED TO CONSIDER ALLEGATIONS OF BREACH OF IMPLIED WARRANTY AND VIOLATION OF THE ADULTERATION STATUTES.

This court, by failing to consider plaintiff's allegations of breach of warranty and violation of adulteration statutes, has deprived plaintiff of his day in court. This court has, in effect, told the plaintiff that he cannot prove facts which would entitle him to recovery under either of these two grounds. We wonder, what more any plaintiff could prove in a case of breach of implied warranty or violation of adulteration statutes other than the fact of consuming adulterated food? Certainly plaintiff has made a prima-facie showing of purchasing a bottle of coca cola and opening said bottle and finding it to be adulterated to his injury and damage.

It was frankly conceded at argument of this case that the *res ipsa loquitur* ground is the weakest of the three grounds argued. The only reason for alleging, *res ipsa loquitur* was that it was felt that the Jordan case was one of a small minority of poorly-reasoned cases in this country, that this court should have an opportunity to review the Jordan case and to overule it and move with the growing majority of cases in this country. This court decided not to reverse the Jordan case, held against plaintiff on that ground and refused to consider the two major grounds alleged by plaintiff

in his complaint, breach of implied warranty and violation of adulteration statutes.

A new case has come out of the State of New Jersey since the argument of the case at bar. This case is already being heralded throughout the country as a landmark case on the order of the case of *MacPherson vs. Buick.* This is the case of *Henningsen vs. Bloomfield Motors, Inc., and Chrysler Corporation,* New Jersey, May 9th, 1960, 161 A2 69. This landmark case sets the law easily and logically at rest in the field of implied warranty and disposes of all of the artificial bugaboos that have been created by prior rulings in various states. The case deals with a suit against both the retailer and manufacturer of a new automobile. The evidence showed that the car operated smoothly for ten days; that at the time in question it was being operated by the buyer's wife on a smooth road in normal weather; that suddenly the steering wheel and front wheels went out of control; that the car veered to the right and smashed into the wall. The car was demolished, and, as a result, the exact cause of the occurrence could not be ascertained. The court brushed aside such defenses as lack of privity and the disclaimer clause contained in the contract in affirming judgment for the plaintiffs. The court, in regard to the propriety of sending the case to the jury on the proof presented, stated at page 98:

> "Obviously, there is nothing in the proof to indicate in the slightest that the most unusual action of the steering wheel was caused by Mrs. Henningson, Mrs. Henningson's operation of the

automobile on this day, or by the use of the car between delivery and the happening of the incident. Nor is there anything to suggest that any external force or condition unrelated to the manufacturing or servicing of the car operated as an inducing or even concurring factor.

"It is a commonplace of our law that on a motion for dismissal all of the evidence and inferences therefrom must be taken most favorably to the plaintiff. And if reasonable men studying the proof in that light could conclude that the car was not merchantable, the issue had to be submitted to the jury for determination. Applying that test here, we have no hesitation in holding that the settlement of the question of breach of warranty as to both defendants was properly placed in the hands of the jury. In our judgment, the evidence shown, as a matter of preponderance of probabilities, would justify the conclusion by the ultimate triers of the facts that the accident was caused by failure of the steering mechanism of the car and that such failure constituted a breach of warranty of both defendants."

It can be seen from the foregoing that it is clearly a question of fact for the jury as to whether or not the paper clips got into the bottle while in the possession of the defendants or while in the possession of the plaintiff. If the jury should find that the clips came into the bottle while in the possession of defendants, then plaintiff has a right to recover under the voluminous law cited by plaintiff in his brief on either of these two grounds. This court, by its peremptory handling of these two allegations, has denied plaintiff his fundamental

right to a jury trial. It is respectfully submitted that such a holding is patently wrong and improper.

POINT II.

THIS COURT FAILED TO VIEW THE EVIDENCE IN A LIGHT MOST FAVORABLE TO PLAINTIFF.

This court, in its opinion, failed to view the evidence in a light most favorable to plaintiff, has assumed the function of a jury and has in effect held as a matter of law that the paper clips in question came into the bottle after leaving the control of the Coca Cola Bottling Company. This conclusion is based on the fanciful assumption that an unknown third party prankster maliciously burglarized plaintiff's home for the sole purpose of removing the bottle cap and placing the paper clips therein and carefully replacing the cap again, or that a grown-up guest in plaintiff's house engaged in the same malicious practical joke.

This court without justification has assumed that defendant could and would produce evidence of the most reliable type to show the utmost of due care in the manufacturing and bottling process. In addition, without defendant even making an offer of proof, this court has assumed that it would be a simple matter to take off a bottle cap and replace it without detection. We emphatically deny that such is the case. It seems that common sense would indicate that once a cap has been removed much of the fizzing would take place so that on a second occasion it would hardly be noticeable. This court has failed to give plaintiff the benefit of an inference

that things happened in the normal way and that the bottle had not been tampered with while in the possession of plaintiff. Plaintiff was prevented from testifying as to how the bottle felt while it was being opened and the fact that it popped and fizzed. Further, he was prevented from bringing to Court the bottle opener which would fit perfectly the bottle cap which was admitted in evidence. We call attention to the fact that no markings other than the one made by the bottle opener while the bottle was being opened were on the bottle cap.

It seems obvious that the question is one for a jury to decide. This court, by its action, has, in effect, held as a matter of law that the paper clips were introduced into the bottle as a result of tampering after leaving the factory. As Justice Wade has so aptly pointed out in the dissent, an inference of tampering before leaving the factory is every bit as tenable as an inference of tampering after leaving the factory.

In peremptorily disposing of plaintiff's allegations of breach of warranty and violation of the adulteration statutes, the main opinion states that there is nothing in the complaint but general allegations of breach and violation and that there is nothing in plaintiff's deposition suggesting facts probative of such allegations. It is earnestly wondered just what facts could be developed in any case of breach of warranty or ~~a breach of~~ statutory violation other than the facts that the goods in question were opened and consumed and found to be adulterated. By its cursory disposal of plaintiff's alle-

gations this court has in effect held as a matter of law that the paper clips were not in the Coca Cola bottle at any time while in the possession and control of the Coca Cola Bottling Company or the Safeway Stores. This has resulted in denial of plaintiff's right under the New Rules of Civil Procedure to have his lawsuit tried on its merits.

CONCLUSION

It is respectfully submitted that this court has failed to give adequate consideration to implied warranty and adulteration statutes allegations. Plaintiff pleaded three separate and independent grounds for recovery. This court disposed of one ground and failed to adequately consider the other two. If a jury could find from the evidence that the paper clips were in the bottle while in the possession of either or both defendants, then we insist that the law allows recovery against said defendant under implied warranty and statutory violation. The evidence clearly makes this a jury question. Can it be said that from the evidence produced and offered and clearly available to plaintiff all reasonable persons would conclude that the clips were placed in the bottle after leaving the factory and the store? If this question cannot be answered in the affirmative then we insist that plaintiff is entitled to have his day in court and to have a jury determination.

Is it not unfair to plaintiffs to allow trial courts to dismiss their lawsuits for the sole reason that a fanciful speculation about a remote possibility offers

a way out for defendant? Would it not be eminently more fair to let such a speculation be argued to a jury to stand or fall in the light of reason?

Is it not true that every person must literally place his life into the hands of the canners and bottlers every time he opens a can or bottle and trustingly partakes? Supposing said contents are poisonous? Should the future of the innocent victims depend on fanciful speculations or should it depend on "a preponderance of probabilities"?

It should be remembered that we are not now arguing *res ipsa loquitur,* but whether or not we should be entitled to a jury trial on warranty or statutory violation. The authorities submitted to this court on these subjects are unassailed and unassailable. These issues have not been met.

This court has failed to recognize the realities involved in this type of case. When will a victim ever be able to prove specific negligence? Who has ever known of an instance where practical jokers have played such a diabolical joke as this court's opinion would have us think is a common occurrence? If a joke is played on a person, is not someone supposed to enjoy a laugh out of it? Is not the entire purpose defeated if it is never brought to light or if the time, place and victim are unknown and left to chance? We are asking these questions not in the light of res ipsa but in the light of this court's failure to consider plaintiff's arguments on warrany and statutory liability.

We urge this court to grant plaintiff a rehearing so that further argument may be received on warranty and statutory liability. The welfare of the inhabitants of this state demands some kind of protection to the innocent victims of adulterated food and drink.

Respectfully submitted,

RAWLINGS, WALLACE,
ROBERTS & BLACK
JOHN L. BLACK
Attorneys for Plaintiff and Appellant
530 Judge Building
Salt Lake City, Utah