

1960

# Russell T. Palmer v. Wasatch Chemical Company : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

FILED

APR 15 1960

RUSSELL T. PALMER,

*Plaintiff and Respondent,*

—vs.—

WASATCH CHEMICAL COMPANY,

*Defendant and Appellant.*

Clerk, Supreme Court, Utah

Case No. 9199

APPELLANT'S BRIEF

KIPP AND CHARLIER  
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bumpers or cleats, a glass jar within which sulphuric acid is transported. The injuries took place when in some manner the carboy broke, causing acid to come in contact with plaintiff's body.

## STATEMENT OF FACTS

For a period of several years prior to July 28, 1958 defendant had been purchasing chemically pure (CP) Sulphuric Acid from General Chemical Division of Allied Chemical and Dye Corporation (Tr. 191). This acid was delivered packaged in several ways (Tr. 226). One of the methods of packaging was in a container known as a carboy. A carboy consists of a wooden box or frame which surrounds and encases a six and one-half gallon machine blown glass jar or bottle. The glass jar or bottle is supported at the top and bottom of its main body by rubber buffers or cleats which are in turn supported by the corner posts of the wooden box. The sides and bottom of the glass jar are separated from the sides and bottom of the wooden box by an air space (Tr. 216, 217, 155, 156, 158, Exhibit No. 3).

Also, for a period of several years defendant had been selling to General Mills at its Ogden Plant, chemically pure sulphuric acid in carboys and had been delivering same to the plant where the carboys and acid were stored in the basement (Tr. 6, 7, 42).

Plaintiff was a laboratory technician engaged in the conducting of various tests on grain as an employee of General Mills at its Ogden Plant and had been so em-

ployed for approximately fourteen and one-half years prior to the occurrence from which this action arose (Tr. 4, 38). The accident occurred on July 28, 1958 in the basement of one of the buildings at the General Mills Plant and in the area where the carboys and sulphuric acid were stored.

The last delivery of sulphuric acid made by defendant prior to the accident was made on May 16, 1958 (Tr. 47, 222), and neither defendants nor any of its employees had any opportunity to see, observe, inspect or examine, or in any way deal with the carboys containing the sulphuric acid from that date until the date of the accident. It is possible that the carboy in question was delivered prior to May 16, 1958, but it is not possible that it was delivered later than that date, and it was therefore in the complete care, custody and control of General Mills and its employees from May 16, 1958 to July 28, 1958, the date of the accident (Tr. 15, 48).

On July 28, 1958, plaintiff, accompanied by a fellow laboratory employee, Jack Winters, went from the laboratory on the second floor to the basement for the purpose of carrying a carboy full of acid back to the laboratory to replace an empty one (Tr. 10, 11). It was their custom to carry the carboy by means of a litter type device which consisted of two long rails which clamped underneath the flanges of the wooden box. They pulled the carboy involved in this accident out from its place in the corner, affixed the carrying device by tightening up the bolts and clamping the rails underneath the flanges on the

sides of the wooden box. Winters stepped between the rails at the front and the plaintiff between the rails at the back and they proceeded to lift the carboy directly upward from the floor (Tr. 11, 45). The bottom of the carboy had reached a height of approximately one foot to eighteen inches from the floor when in some manner the bottom of the carboy, or part thereof, and the glass jar, or part thereof, together with the acid fell to the floor (Tr. 11, 37). Some of the acid splashed on plaintiff's feet and ankles, causing a burning sensation. He attempted to make his way to the wash room to wash the acid off with water and while endeavoring to do so slipped and fell down in the acid, causing the acid to come in contact with other parts of his body and resulting in burning to those areas as well as his feet and ankles.

The carboy, including the wooden frame and the glass jar, was built in accordance with specifications set forth in Interstate Commerce Commission Regulations which strictly specify all details of construction (Tr. 41, 154, 155, Exhibit 131). It was at all times the property of General Chemical Division of Allied Chemical and Dye Corporation (Tr. 155, 156, 174, 190). It was in the possession of defendant and of General Mills only as a means of containing and transporting the sulphuric acid which had been purchased by defendant from Allied Chemical and Dye Corporation and in turn sold by defendant to General Mills, the employer of plaintiff in this case. Title to the carboy at no time passed from Allied Chemical and Dye Corporation to any other person, or corporation (Tr. 189, 190, 197, 198). The carboy was filled with the acid

at Denver by Allied Chemical and Dye Corporation, was shipped and transported in its filled condition to defendant at Salt Lake City (Tr. 191). Defendant in turn transported it to the plant of General Mills at Ogden where it was placed in the basement of a building at that plant and when it remained in its filled condition in the custody of General Mills until the time of the accident in question. The carboy was inspected outwardly, as were all containers, when it was handled at the plant of Wasatch Chemical Company, the defendant, in Salt Lake City, and there is no evidence that its appearance was other than that of a sound, adequate, properly constructed and properly maintained carboy, either at the time of its receipt in Salt Lake City by defendant, or at the time of its delivery to the premises of General Mills at Ogden, and, in fact, there is no evidence of any discoverable or discernable defect in the carboy in any way, or at any of the times covered by the evidence in this case (Tr. 141, 143, 163, 175, 176, 177, 198, 199).

Counsel for defendant moved for a non-suit or dismissal with prejudice of plaintiff's action at the close of plaintiff's evidence and for a directed verdict after both parties had rested, both of such motions being denied by the trial court (Tr. 125, 234).

## STATEMENT OF POINTS

### POINT I

THAT THE COURT ERRED IN FAILING TO PROPERLY INSTRUCT THE JURY AND IN ERRONEOUSLY INSTRUCTING AS TO THE APPLICABLE LAW RELATIVE TO DEFENDANT AND APPELLANT'S DUTY AS A SELLER.

## POINT II.

THAT THE COURT ERRED IN IMPROPERLY INSTRUCTING THE JURY RELATIVE TO THE ISSUE OF PLAINTIFF AND RESPONDENT'S CONTRIBUTORY NEGLIGENCE.

## POINT III.

THAT THE COURT ERRED IN FAILING TO GRANT DEFENDANT AND APPELLANT'S MOTION FOR DISMISSAL AT THE CLOSE OF PLAINTIFF AND RESPONDENT'S CASE, AND DEFENDANT AND APPELLANT'S MOTION FOR DIRECTED VERDICT AFTER BOTH PARTIES HAD RESTED.

## POINT IV.

DEFENDANT AND APPELLANT RESERVES THE FILING OF A REPLY BRIEF ON THE POINTS RAISED BY PLAINTIFF AND RESPONDENT IN HIS CROSS APPEAL ON WHICH HIS BRIEF HAS NOT BEEN FILED AS OF THIS TIME.

## ARGUMENT

### POINT I

THAT THE COURT ERRED IN FAILING TO PROPERLY INSTRUCT THE JURY AND IN ERRONEOUSLY INSTRUCTING AS TO THE APPLICABLE LAW RELATIVE TO DEFENDANT AND APPELLANT'S DUTY AS A SELLER.

Plaintiff's cause of action in this case sounded in two counts, the first count being in Tort based upon alleged negligence on the part of defendant, and the second count being in Contract based upon breach of warranty on the part of the defendant.

At the close of the evidence, counsel for defendant moved for a directed verdict on plaintiff's complaint of



no cause of action and also moved to strike the first count of plaintiff's complaint which sounded in Tort. (Tr. 234) The Court granted the motion as to the first count and submitted the case to the jury on the basis of the second count sounding in Contract on the matter of Warranty. (Tr. 234) The Court thus undertook the burden of instructing the jury with respect to the law as it applied to the question of the alleged breach of warranty on the part of the defendant and on the issue of contributory negligence on the part of plaintiff. The latter issue is discussed under Point II of this brief.

The Court refused to grant Defendant's Requested Instructions Numbers One, Four, Five, Six, Seven, Eight, Nine, Ten, Eleven, Twelve, Thirteen, Fourteen, Fifteen, and Sixteen, and counsel for defendant excepted to this refusal (Tr. 238). It is the contention of defendant and appellant that the Court erred in several particulars in both the instructions given and in the refusal of defendant's requested instructions. Defendant's Requested Instruction Number One read as follows :

"You are instructed to return a verdict in favor of defendant and against plaintiff, no cause of action."

This, of course is tantamount to a directed verdict and based upon the applicable authorities which are cited hereafter, it is the contention of defendant and appellant that the case should not have been submitted to the jury on the question of warranty since no warranty of condition of the carboy, which was merely a container and means of transporting the acid which was the subject

matter of the sale, was ever made nor brought into effect by operation of law on the part of defendant and appellant. This subject matter was also covered by Defendant's Requested Instruction Number Eight which reads as follows:

"You are instructed that defendant had no duty to inspect the carboy which was involved in this case, and therefore, unless you find the carboy was made unsafe by some act of the defendant you must return a verdict in favor of defendant and against plaintiff."

Defendant's duty as to inspection was spelled out in Defendant's Requested Instructions Number Nine and Eleven. Requested Instruction Number Nine reads as follows:

"You are instructed that defendant had no duty to make a rigid inspection of the carboy involved in this case or to test it to determine its strength and condition. Defendant's only duty is to reasonably observe the outwardly apparent condition of the carboy and to remedy any defects which would be visible on such observation.

You are further instructed that plaintiff had the same duty to observe the condition of the carboy."

Deefndant's Requested Instruction Number Eleven reads as follows:

"You are instructed that if you find the acid involved in this case was spilled because of a hidden defect in the carboy which would be discoverable only by testing, you must return a verdict against plaintiff and in favor of defendant."

It is conceded that some authorities hold there is a duty to make a reasonable inspection on the part of seller, while other authorities hold in a situation such as this where the container itself is not the subject of the sale, that the seller has no duty to even inspect. The former situation is covered by Instructions Number Nine and Eleven as requested, and the latter situation is covered by Instruction Number Eight as requested. An essential element in any case is that the defect must be reasonably discernable or discoverable in the exercise of reasonable care and inspection on the part of the seller. In no event should the seller be held responsible for a hidden or latent defect and there is absolutely no evidence of any discoverable defect in this case. It is to be noted that the seller is neither the owner nor the manufacturer of the carboy involved in this accident. The sale actually involves only the sale of a certain quantity of chemically pure sulphuric acid from defendants to plaintiff's employer in a container which experience had shown to be of a safe type of construction. (Tr. 161, 163)

From these facts it is evident that the duty of defendant must be even less than the duty of a manufacturer. The manufacturer, of course, in this case is Allied Chemical and Dye Corporation.

The Court's attention is directed to Restatement of the Law of Torts, Section 402, at Page 716, 1948 Supplement, which reads as follows:

**"ABSENCE OF DUTY TO INSPECT CHATTEL.** A Vendor of a chattel manufactured by a third person, who neither knows nor has

reason to know that it is, or is likely to be, dangerous, is not subject to liability for harm caused by the dangerous character or condition of the chattel even though he could have discovered it by an inspection or test of the chattel before selling it."

Also found in Restatement of the Law of Torts, 1948 Supplement, Section 402, Page 717 is the following statement:

"b. There is a clear distinction between the liability of a manufacturer and that of a vendor for harm caused by a chattel made by the former and sold by the latter. The manufacturer of a dangerously defective chattel is the creator of something which is foreseeably dangerous when it is used for the purpose for which it is manufactured. The constructing of the chattel defectively, with knowledge it is to be sent out to be used, is an unreasonably dangerous activity. *On the other hand, the vendor who reasonably believes that the chattel he is selling is safe for use is not, in selling and delivering the chattel, doing anything which is foreseeably likely to cause harm. The slight risk inherent in the possibility the chattel may be defective is not sufficient to constitute an unreasonable risk. The burden on the vendor of requiring him to inspect chattels he reasonably believes to be free from hidden danger outweighs the magnitude of the risk that a particular chattel may be dangerously defective* (See Sec. 291-293). Negligence is determined in the light of the facts known to the actor. (See Sec. 282, Comment g)." (Italics added.)

It is to be noted that defendant, the seller in this case, relied not only upon the generally good and reliable

reputation of the manufacturer, Allied Chemical and Dye Corporation, but also upon the stringent requirements of the Interstate Commerce Commission regulations. (Tr. 161, 162, 192) There is no evidence that the carboy in question showed any discoverable defects at any of the times involved in this case and in fact, all evidence is that its outward appearance indicated it to be alright.

The Court's attention is directed to pages 718, 719 and 720 of the same section of the Restatement of Torts where the small minority of cases which do not follow the general rule are discussed and scathingly criticized and the text quotes with favor the great majority of authorities in support of defendant's position herein. The applicable ICC Regulations to which we have alluded herein are as follows:

“78.4-1 Compliance. (a) Required in all details.

78.4-4 (b) Marking. Each carboy bottle must be permanently marked in bottom as follows:

Maker's mark (to be registered with Bureau of Explosives)

Year of Manufacture

ICC-ID

“78-4-5 Glass carboy bottle. (a) Must be machine-blown, thoroughly and properly annealed, with screw thread finish having at least one continuous thread to accommodate closure; top of lip smooth and even; must contain 14 pounds of glass, tolerance minus 8 ounces plus 16 ounces. Minimum thickness to be .075 inch. Defective carboys not authorized.

**“78.4-6 Outside containers. (a) Wooden boxes completely enclosing body and neck of car-boy, with 4 vertical corner posts, two cleats for shoes and two carrying cleats. An opening not exceeding 3 inches in width may be provided directly above the neck of bottle, if the top of the box is made up of not more than two pieces of lumber of 25/32 inch thickness. Bottom board of the two ends of the box must be constructed of lumber at least one inch thick, must be flush with the carrying cleats and be at least 2¾ inches in width. Cleats or other fasteners used to secure cover must not extend beyond carrying cleats.**

**(b) Lumber to be well seasoned, commercially dry, and free from decay, loose knots, knots that would interfere with nailing, and other defects that would materially lessen the strength.**

**(c) Assemble sides and ends with grain of wood horizontal and nail as specified. Nail bottom to sides and ends; fasten top by any efficient means. Cleats for shoes to be along edges of bottom parallel to carrying cleats and at right angle to the direction of bottom board or boards.**

**“78.4-8 Tests—(a) Apparatus. Standard required. Detail prints can be obtained from Bureau of Explosives, 30 Vesey Street, New York 7, N.Y.**

**(b) Method. Fill with water to lower edge of neck; swing 55° measured from wall to nearest bottom edge of basket:**

**(1) Side shock; test at least 10 carboys.**

**(2) Bottom shock, test at least 5 carboys.**

**(c) Acceptable results. 90 percent of carboys must not break under side shock; same for bottom shock.**

(d) When required. By each manufacturing and each filling plant; during each 6 months of each year, one series each year to be witnessed by representative of Bureau of Explosives; separate tests required for:

- (1) New package (those with new outside container).
- (2) Used packages.
- (3) Packages differing in kind of cushioning."

All of these regulations apply to Allied Chemical & Dye Corporation, the manufacturer, not to defendant who is only a vendor of the acid (Tr. 156, 160).

Thus, Defendant was entitled to rely not only on the good reputation of its supplier, but also on the double safeguard of the stringent construction and testing requirements of the ICC Regulations which govern persons or corporations that own and fill such carboys.

The following holding is found in *Witt Ice and Gas Company v. Bedway*, 1951 Arizona, 231 P. 2nd 952, where the Court said:

"A wholesale or retail dealer, who sells in their original packages goods brought from reputable manufacturers, acts as a conduit through which the goods pass from manufacturer to consumer, who buys them in reliance upon the manufacturer's reputation for competence and care. A vendor of such goods, therefore, is under no duty to subject them to rigid inspection or tests before selling them."

While it is clear that the manufacturer has some duty of inspection, the rule of *Hewit v. General Tire and Rub-*

*ber Company* (Utah 1955) 3 Utah 2d, 354, 284 P. 2d 471, holds that mere proof of an injury will not justify a verdict or judgment imposing liability upon a manufacturer and if the evidence does not show any negligence on the part of the manufacturer, there can be no recovery regardless of the fact that the injured person was not negligent. Certainly, defendant's duty as the seller is not as great as the duty of the manufacturer and even under the manufacturer rule, defendant could not be held in warranty in this case.

The Hewitt case follows the law as set forth in a prior Utah case, *Hooper v. General Motors Corporation*, 260 P. 2d 551, which says:

“Thus, to impose liability on an assembler of an automobile, certain necessary elements must be made out. Plaintiff is required to show: (1) A defective wheel at the time of automobile assembly; (2 )Such defects being discoverable by reasonable inspection; (3) Injury caused by failure of the wheel due to its defective condition.”

It is to be noted that there is absolutely no evidence on just what sort of defect did exist in the carboy at or immediately prior to the happening of the accident from which this action arises. There is certainly no evidence that there was any discoverable defect and there is ample evidence that defendant, through its employees, made reasonable inspection of this and all carboys, both in its Sat Lake Plant and in the course of delivery, and that no defect was observed prior to the time that the carboy was deposited in the building of General Mills in Ogden,



Utah. In fact, the carboy withstood shipment from Denver to Salt Lake by truck (Tr. 191) unloading at the Salt Lake Plant of defendant, reloading onto the truck of defendant at the Salt Lake Plant (Tr. 175), transportation by truck with no padding or other means of preventing the normal jarring of riding in a truck between Salt Lake and Ogden, unloading at Ogden and placing on a two-wheeled hand truck by defendant's employee, and bumping down a flight of stairs to the basement by means of being lowered from step to step on the two-wheel hand truck in the process of delivery by defendant's employee. (Tr. 138, 139) Throughout all of this the carboy remained in tact and the acid remained within its container. Certainly if there was a defect which would have been discoverable by Defendant it would have showed up and been discovered in the course of such handling. However, after remaining in the basement of the General Mills building for approximately two and one-half months with no evidence of leakage the carboy was simply slid a distance of a few feet across the floor and was then lifted directly up some twelve to eighteen inches at which point it gave way. Nowhere in the Court's instructions is the matter of "such defects being discoverable by reasonable inspection" treated or discussed. In fact, in Instruction Number Eight the Court instructed the jury as follows:

"Mr. Palmer has not only the burden of proving that the defect was present at the time of delivery, but also that the defect was a 'substantial defect.' A substantial defect in this case is defined as one that rendered the package so unsafe that

a reasonably prudent person, exercising ordinary care for the safety of others would not have delivered a package with such a defect, or would have specifically warned the receiver of the presence of the defect. Also, it must have been such a defect that its delivery would have been withheld or warned of because a reasonably prudent person exercising ordinary care for the safety of others would have foreseen the risk of an incident of the general type of the incident alleged by Mr. Palmer.”

There is no evidence that defendant knew of the defect and there is no evidence that defendant could have known of the defect in the exercise of reasonable care or ordinary inspection of the carboy. Thus, under the Court’s instructions the defendant is placed in the position of being a virtually absolute insurer of plaintiff’s well being, despite the fact that defendant could reasonably have done nothing to guard against the mishap which occurred.

A similar question is involved in the Federal case of *Burgess v. Montgomery Ward and Company*, 264 F2d 495 (10th Cir. Kan. 1959), which holds:

“In a case such as that now before us it is completely unreasonable to expect the shopkeeper to perform the inspection or test which would have revealed to an expert the defect in the ladder rail. (Defendant) is operating a retail store, not a testing laboratory.”

A similar rule is established in *Willey v. Fyrogas* 251 SW 2d 635 (1952 Mo.).

The Utah case of *Matievitch v. Hercules Powder Company*, 3 Utah 2d, 283, 282 P.2d 1044, is a case involving explosion of dynamite, which holds that there is no absolute liability or insurability on the part of a manufacturer of explosives. Again it is noted that the burden certainly is greater upon a manufacturer than it is upon a seller in the position of defendant in this case. If there was a defect in the carboy prior to or at the time of its delivery, not later than May 16, 1958 by defendant, such defect was hidden and not discernable to defendant unless exhaustive laboratory type tests were conducted. Defendant certainly does not have the duty to conduct such tests.

The California case of *Simmons v. Rhodes and Jamieson, Ltd.*, 293 P.2d 26, says:

“In absence of evidence of feasible means of discovering defects or danger in commodity sold, seller is not liable for an injury resulting from the use of the commodity.”

The Utah case of *Winchester v. Egan Farm Service*, 4 Utah 2d 129, 288 P. 2d 790, involving a seller of farm machinery who also did assembling of the machinery says:

“Where the implement dealer assembled machinery according to the manufacturer’s design and instructions, the fact that a bolt of a different size might have fit better did not place the responsibility or duty on the implement dealer to place such bolt thereon and did not make the dealer liable to purchaser for injuries suffered when lever unlocked and struck purchaser in the

face as dealer had no obligation to redesign machinery.”

The recent Washington case of *Smith v. American Cystoscope Makers, Inc.*, 266 P. 2d 792 goes even one step further in holding that:

“One selling a chattel, manufactured by another, without knowledge or reason to know that it is or is likely to be dangerous, is not liable for harm caused by its dangerous character or condition, though he could have discovered danger by inspection or tests of chattel before selling it.”

The evidence in this case is that carboys of the type involved, constructed under rigid government specifications and tested in accordance with government requirements, have been proven by long use to be safe containers. In fact, the evidence introduced by experts on behalf of defendant indicates that despite long experience these experts had never seen the bottom fall completely out of a carboy. (Tr. 163)

A further ground for the granting of Defendant's Requested Instruction Number One is the lack of privity between defendant and plaintiff. The contract for sale of the acid was between defendant and General Mills, Incorporated, plaintiff being a laboratory employee of the latter. The general rule on this point is found in American Jurisprudence, Sales, Sec. 810 p. 934.

“Liability to Remote Buyer or Other Third Person General Warranty — Liability of Seller. It has been held that the buyer's tenant, the buyer's employee, or a member of the buyer's family

who is injured through the article sold cannot base his action against the seller on an express or implied warranty."

Cited in support of this statement with respect to "the buyer's employee" is the case of *Berger v. Standard Oil Company*, 126 Ky. 155, 103 S.W. 245, which says:

"A warranty is always a matter of contract. For its breach, damages may be recovered by any party to the contract injured thereby, including any person for whose benefit the contract is made, but strangers to the contract have no right of action upon it. There is lacking privity, mutuality, consideration and every other element essential to constitute the contractual relation between the claimant and the person sued."

Thus, while defendant does not concede that there was any warranty of the carboy by defendant to anyone, it is also argued that even had there been such a warranty, such warranty could not inure to the benefit of plaintiff in this case.

46 Am. Jur. Sales, Sec. 306, 487

"Liability of seller to third persons. The fact that a seller warrants the condition or quality of a thing sold does not itself, according to one view, impose any liability on him to third persons who are in no way parties to the contract. In such a case there is no privity of contract between the seller and the third persons and this precludes any right on their part to any advantage or benefit to be derived from the warranty. There is authority to the effect that there can be no implied warranty without privity of contract and it has been held that a manufacturer is not liable for breach

of warranty to third persons who are strangers to the contract of manufacturer or sales for the results of any defects which may later develop in his product.”

Numerous cases are cited in support of this statement and the Court's attention is directed to the footnotes under numbers sixteen, seventeen, eighteen, nineteen and twenty, found on pages 487 and 488 of Vol. 46 of Am. Jur.

There are a number of cases in point and supporting the general rule requiring privity. Following are some of these cases and their holdings.

*Wood, et al v. General Electric Co., et al.*, 159 Ohio 273, 112 N.E. 2d 8 (1953)

“Although a subpurchaser of an inherently dangerous article may recover from its manufacturer for negligence in the making and furnishing of the article, causing harm to the subpurchaser or his property from a latent defect therein, no action may be maintained against a manufacturer for injury, based upon implied warranty or fitness of the article so furnished.”

*Crystal Coca-Cola Bottling Co. v. Cathey*, 83 Ariz. 163, 317 P. 2d 1094 (1958):

“A a general rule, no implied warranty inures in absence of privity of contract; but in the case of food, beverages and drugs, on implied warranty by the manufacturer that goods are pure and free from deleterious foreign substances inures to benefit of ultimate consumer of those goods, by operation of law even in the absence of privity of contract.”

Odell v. Frueh, 146 Cal. App. 2d 504, 304 P. 2d 45 (1957) :

“The seller of goods other than food stuffs is bound by his unadvertised warranty only to parties with whom he is contractually obligated.”

*Collum v. Pope and Talbot, Inc.*, 135 Cal. App. 2d 653, 288 P.2d 75 (1956) :

“Exceptions to general rule that privity of contract is required in action for breach of either express or implied warranty have been made in cases involving food stuffs and a few cases where purchaser of a product relied on representations made by manufacturer on labels or advertising material.”

*Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682, 268 P.2d 1041 (1954) :

“Generally, privity of contract is required in an action for breach of either express or implied warranty, and there is no privity between the original seller and a subsequent purchaser who is in no way a party to the original sale.”

*Abercrombie v. Union Portland Cement Co.*, 35 Id. 231, 205 P. 1118 (1922) :

“The general rule, to which there are certain well established exceptions is that a manufacturer or vendor of an article is not liable to any person, other than the immediate purchaser of such article because of defect therein.”

*Burgner-Bowman Lumber Co. v. McCord - Kestler Mercantile Co.*, 114 Kan. 10, 216 P. 815 (1923)

A contractor engaged in construction of a building ordered from plaintiff, a dealer, some Portland Cement

for purpose of constructing a hard surfaced concrete floor. He advised plaintiff of the purpose for which it was wanted and requested Portland Cement. Plaintiff delivered the cement which was of poor and inferior quality which caused the floors to check, crack and dis-integrate.

The Court held doctrine of caveat emptor has no application and that there was an implied warranty of quality.

In the same action to recover for the price of the cement and to establish a mechanic's lien, a cross petition was filed by the owner of the building who sought to recover for damage to the building caused by the defective cement.

The Court held that as there was no contractual relations between the dealer and the owner of the building the trial court properly denied the owner the right to recover damages.

*Miller v. Hand Ford Sales, Inc.*, 340 P.2d 181 (Ore. 1959) :

“The theory of breach of an implied warranty arises only out of privity of contract.”

*Cockran v. McDonald*, 23 Wash. 2d 348, 161 P.2d 305 (1947) :

“A dealer is not liable on express warranty of a manufacturer which is put out with or attached to goods manufactured unless the dealer adopts warranty and makes it his own when selling goods



to another, and mere sales does not adopt warranty as dealer's own.

"The whole saler was not liable to buyer of anti-freeze on express warranty which manufacturer had affixed to container of anti-freeze."

*Dobbin v. Pacific Coast Coal Company*, 170 P.2d 642 (1947):

A purchaser of new house with faulty furnace which was sold by distributor to retailer who installed the furnace for builder before house was sold, could not recover against distributor, retailer or builder on theory of breach of warranty express or implied or any other contractual theory, since there was no privity between purchaser and any of defendants.

The Court further erred with resulting prejudice to defendant in Instruction Number Three which reads in part as follows:

"General Mills bought from Wasatch Chemical Company acid. The law implies in their agreement not only that the acid would be as specified but also that it would be delivered in a reasonably safe container. The law also implies that the duty to deliver in a reasonably safe container runs not only to General Mills, but also to General Mills employees who would reasonably be expected to handle the container."

The third sentence of this instruction is in error on the basis of the authorities cited above. The second sentence is in error on the basis of the authorities dealing with the matter of warranty and the duties of defendant with respect to the container which have been previously cited.

Instruction Number Three is also erroneous and prejudicial in its fourth paragraph which reads as follows:

“The defendant alleges that all of the containers they delivered were reasonably safe, therefore they have not breached their contract and are not liable for any damages.”

This is only a part of defendant's position and defendant also specifically alleged and argued to the Court that defendant had no duty or obligation to see to the safeness or condition of the containers and certainly had no obligation or duty to test them to discover latent or hidden defects.

Instruction Number Four of the Court is erroneous in that it places a burden upon defendant to deliver a container which would “be sufficiently safe to withstand reasonable handling.”

Instruction Number Six given by the Court is also erroneous and prejudicial as it improperly states the law with respect to the duties of defendant relative to the carboy and its condition.

Instruction Number Seven is erroneous and prejudicial as it improperly states the law and further proposes an illustration which infers a condition to have existed on which there is absolutely no evidence, and which inference is prejudicial to defendant.

The instruction in this regard says:

“Such as if acid was present and attacking the carboy when delivered, but did not sufficiently

weaken the carboy to make it unsafe until after it had acted for a time at the General Mills place."

There is absolutely no evidence that any acid was present except as contained within the glass jar at the time of delivery and the evidence is clear that if acid were spilled within the container its action would be complete within a matter of hours.

It must be concluded from the foregoing that the Court erroneously and improperly instructed the jury and that the defendant's position was prejudiced by such instruction.

#### POINT II.

THAT THE COURT ERRED IN IMPROPERLY INSTRUCTING THE JURY RELATIVE TO THE ISSUE OF PLAINTIFF AND RESPONDENT'S CONTRIBUTORY NEGLIGENCE.

It is clear from the pleadings and the record in this case that one of the issues of fact which was always before the court and which was submitted in a somewhat round about way to the jury was the issue of contributory negligence on the part of plaintiff. It certainly must be conceded that if the jury had found, under Instruction Number Four, that the plaintiff was raising the container in other than a reasonably prudent manner when the incident occurred the verdict would have had to be no cause of action in favor of defendant.

However, in Instruction Number Three, the Court failed completely to instruct the jury with respect to the defendant's contention that plaintiff was contributorily negligent. Instruction Number Four as given by the Court relates only to the manner of handling of the

carboy by plaintiff, but does not instruct the jury upon the duty of plaintiff to exercise reasonable care and to make a reasonable inspection of the carboy to ascertain whether there were any discernable defects or evident damage which would render it unsafe to handle. It is again noted that the plaintiff was an expert in dealing with substances such as the sulphuric acid contained in the carboy, being a trained laboratory technician who had been engaged as a technician for fourteen and one-half years by General Mills. The matter of negligence was covered by Defendant's Requested Instruction Number Six which read:

“Negligence is the failure to do what a reasonable and prudent person would have done under the circumstances, or doing what such person under such circumstances would not have done. The fault may lie in acting or in omitting to act.”

Contributory negligence was covered by Defendant's Requested Instruction Number Seven:

“Contributory negligence is negligence on the part of a person injured which, cooperating with the negligence of another, assists in proximately causing his own injury.

“One who is guilty of contributory negligence may not recover from another for any injury suffered because if both parties were at fault in negligently causing an injury the degree of negligence cannot be weighed by the jury.”

Defendant's Requested Instruction Number Ten also dealt with the degree of care to which plaintiff was held. It read:

“You are instructed that the plaintiff had a duty to use reasonable care for his own safety.

If you find that he did not exercise such care in the handling of the carboy involved in this case and that his failure to exercise reasonable care contributed to the accident and his injuries, you must return a verdict against the plaintiff and in favor of the defendant."

The instructions of the Court are insufficient in their definition of the terms of negligence, contributory negligence and the burden or duty of care placed upon plaintiff, and are also prejudicial to defendant in that they do not submit the issue as raised and involving all elements of handling the container by plaintiff, particularly in view of his special training and experience.

#### POINT III.

THAT THE COURT ERRED IN FAILING TO GRANT DEFENDANT AND APPELLANT'S MOTION FOR DISMISSAL AT THE CLOSE OF PLAINTIFF AND RESPONDENT'S CASE, AND DEFENDANT AND APPELLANT'S MOTION FOR DIRECTED VERDICT AFTER BOTH PARTIES HAD RESTED.

It is clear from the transcript that the Court submitted this case to the jury under plaintiff's second count and on the question of breach of warranty only. It is contended by defendant and appellant that there was no privity between defendant and plaintiff in this case and that thus plaintiff could not be the beneficiary of any warranty, express or implied if such existed. Further, that there was no warranty of the carboy, which was merely a container, running from defendant to General Mills. The only warranty to which defendant could be held as a vendor would be that the goods (that is the chemically pure sulphuric acid) would be suitable for the

purpose for which they were intended. The carboy was never a part of any sale and in fact title to the carboy remained at all times in Allied Chemical and Dye Corporation.

The authorities relating to defendant's position as a vendor and on the question of whether or not defendant could be held to any warranty express or implied with respect to the carboy, have been set forth and discussed under Point I of this brief.

The evidence is clear that there was no discernable or discoverable defect in the carboy and the evidence is also clear that defendant, through its employer made reasonable inspections of this carboy as well as all carboys which passed through its hands prior to and at the time of delivery of such carboys. Defendant cannot be held to be an absolute insurer of plaintiff's well being and cannot be held on a theory of virtually absolute liability for a latent or hidden defect in the carboy if such defect results in injury to plaintiff. If any such duty exists that duty must be on the part of the manufacturer, Allied Chemical and Dye Corporation, and not upon defendant in this case. This position is further supported by the Interstate Commerce Commission Regulations cited herein which place the duty of compliance with construction requirements and of compliance with strict testing requirements on the owner and manufacturer, that is Allied Chemical and Dye Corporation. Since the only basis on which defendant could be held liable was that of warranty, and since under the applicable law no warranty existed, it is contended that the Court erred

in submitting the case to the jury and in failing to grant defendant's motions for dismissal and directed verdict in its favor.

#### POINT IV.

DEFENDANT AND APPELLANT RESERVES THE FILING OF A REPLY BRIEF ON THE POINTS RAISED BY PLAINTIFF AND RESPONDENT IN HIS CROSS APPEAL ON WHICH HIS BRIEF HAS NOT BEEN FILED AS OF THIS TIME.

Defendant and appellant has received notice of cross appeal from counsel for plaintiff and respondent notifying that the plaintiff and respondent cross appeals from the order of the District Court, Honorable John F. Wahlquist, Judge thereof, granting defendant's motion to dismiss plaintiff's first count and in withdrawing from the jury any and all matters set forth and alleged in the first count wherein plaintiff sought to recover judgment against the defendant on the theory of negligence. The Court found that there were insufficient facts to prove either negligence by specific testimony or under the doctrine of *res ipsa loquitur*. (Tr. 234) Defendants contends that this was a proper ruling and that it is supported by the record in this case. There is not sufficient evidence to eliminate the possibility under the doctrine of *res ipsa loquitur* of negligence on the part of the manufacturer Allied Chemical and Dye Corporation, prior to the time that the carboy in question was delivered to defendant in this case. There further is not sufficient evidence to rule out the possibility of negligence on the part of some other person during the period of approximately two and one-half months that the carboy was in the ex-

clusive, care, custody and control of General Mills, Inc. at its Ogden plant between the last possible date of delivery by defendant and the date of the accident in this case. Defendant and appellant therefore reserves the right to file a reply brief after receiving plaintiff and respondent's cross appeal brief on this point so that authorities and further argument may be offered to the Court on this point.

### CONCLUSION

Based on the foregoing argument and authorities it appears clear that the Court erred with resulting prejudice to the defendant and appellant in failing to grant defendant and appellant's motion for dismissal and motion for directed verdict in favor of defendant and appellant, and further that the Court erred in improperly and erroneously instructing the jury on material issues and questions of law.

It is, therefore, the conclusion of defendant and appellant that this Court should reverse the District Court and should find the issues in favor of defendant and appellant and direct a verdict of no cause of action, or in the alternative and without prejudice to the foregoing conclusion it is urged that the Court should remand the matter for a new trial on the basis of the other errors assigned.

Respectfully submitted,

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