

1960

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

Utah Supreme Court

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## Recommended Citation

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Case No. 9199

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

RUSSELL T. PALMER,

**FILED**

*Plaintiff and Respondent,* MAY 17 1960

-VS-

Clerk, Supreme Court, Utah

WASATCH CHEMICAL COMPANY,

*Defendant and Appellant.*

**RESPONDENT'S BRIEF**

LE ROY B. YOUNG, of

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# IN THE SUPREME COURT of the STATE OF UTAH

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RUSSELL T. PALMER,

*Plaintiff and Respondent,*

-vs-

WASATCH CHEMICAL COMPANY,

*Defendant and Appellant.*

## STATEMENT

In general respondent agrees with the sketchy statement of facts contained in appellant's brief. However, respondent deems it necessary to elaborate on appellant's statement and to point out the following facts which I believe are of great importance:

- A. It is admitted, by everyone, that chemically pure (CP) sulphuric acid, if permitted to escape from its container, is an inherently dangerous instrumentality which if it comes in contact with the human being is capable of placing human life and limb in imminent danger, which facts were well known to appellant.
- B. The acid which was in the glass jar when delivered weighed ninety eight pounds net and the empty glass jar and carboy weighed 35.5 pounds, making a total weight of the container and contents 133.5 pounds. Tr. 52.

C. That after the filled containers arrived in Salt Lake City at appellant's dock, they were unloaded from the car and placed on the dock; that thereafter said carboy was in the sole custody of appellant until delivered to respondent in the storage room used for that purpose; that in filling the order for General Mills on May 16, 1958 the three carboys were taken from the warehouse and placed in a truck owned and operated by appellant (whether the shipment contained additional carboys is unknown). Furthermore, there is no positive evidence as to how these three carboys were packed in appellant's truck for delivery. Tr. 145. Fred Mills, the driver who made the delivery, had nothing to do with the loading and he has no recollection as to how the carboys were fixed so as to prevent movement while enroute. Tr. 145; that there are lots of startings and stoppings of the truck enroute from Salt Lake City to Ogden. Tr. 146.

D. When Mills, the driver, arrived in Ogden at General Mills office building, he unloaded these three carboys weighing 133.5 pounds each from the truck and placed them on the ground. He then obtained a small two wheeler hand truck and placed each carboy on it so that about one-half of the bottom of the carboy rested on the foot brace. The remaining half had no support. He then transported them around to a rear stairway and trucked each down about twelve to fifteen steps to the place of storage. Tr. 138. He was asked:

Q. "Was there any bumping as you let them down the stairs?"

A. "Yes, very much." Tr. 139.

He then pushed the truck into the storeroom where the carboys were customarily stored and deposited the same on a cement floor. He made no inspection of the carboy when it was placed on the floor after its bumping ride down the steps. In fact, he made little or no inspection of the carboy from the time he started from Salt Lake City. When the bottom fell out of the carboy it was picked up, together with the broken bottom and parts, which were placed in the broken carboy; that it was not touched until about August Sixth when one of appellant's drivers picked it up and returned it to appellant's dock where it remained for an hour or so and then an employee of General Mills returned it to its plant where it remained under lock and key until brought into court. Only three of the bottom rubber bumpers or cleats which supported the glass bottle were produced (Tr. 12 and 106) and the whereabouts of the remaining one was not accounted for. In view of the evidence produced by defendant to the effect that if all bumpers are solidly placed the glass jar cannot drop from its position, it is fair to assume that the missing rubber bumper was absent when delivered to General Mills and that the bumping ride down the steps and into the storage room dislodged the bottle and permitted it to rest entirely on the bottom of the carboy; that the bottom was not designed to carry the weight of the glass bottle (98 pounds plus weight of the jar) and that when lifted from the floor the entire bottom became dislodged. Tr. 37. In fact, there can be no question but what the accident happened

in the manner detailed by respondent's witnesses.

- E. That the court submitted the issue of breach of warranty to the jury under eight special interrogatories, all of which were answered by the jury in plaintiff's favor. The answers thereto were amply supported by the evidence.
- F. That at the conclusion of the trial the court dismissed plaintiff's first count (negligence) on the theory, as stated by the court, that *res ipsa loquitor* cannot apply to a retailer even though it involves an inherently dangerous instrumentality.

### STATEMENT OF POINTS

- Point 1.* The trial court was correct in submitting the issue of breach of warranty (Count Two) to the jury under special interrogatories.
- Point 2.* The trial court was in error in dismissing respondent's first count (negligence) and in refusing to submit this issue to the jury.

### ARGUMENT

We admit at the outset that the subject of liability in the so called "products liability field" both in adjudicated cases and text writers is fraught with difficulty and uncertainty. The reason for this no doubt is due largely to a gradual break down of the strict common law rule which shield unreasonably both the manufacturer and jobber or retailerr where injury resulted to a purchaser or consumer of manufactured goods or



commodities. The first case to break away from the old rule was,

McPherson vs. Buick  
111 N.E. 1050

which was decided in 1916. The late Justice Cardozo is the author of this opinion. The case itself involved personal injury to a subvendee of an automobile having a latent defect. There was injected into the case the element of a dangerous instrumentality which because of a latent defect made the auto a dangerous instrumentality, although in the absence of such a defect it was entirely harmless.

Harper and James, professors of law, Yale University, have recently authored a new text in three volumes covering the law of torts. It is of course impossible to quote at length the discussions found therein, all of which are supported by citations in the foot note. However, we will refer to a few general statements founded in this excellent work.

Volume 2, Chapter 28, commencing at Page 1535, undertakes a discussion of the subject of liability of suppliers of chattels. Section 28.1 is an introductory discussion of the subject wherein it is stated, among other things,

“The older restrictive doctrine was well adapted to protect the manufacturer from burdens on his activity, but it did so at the expense of the victims of his mistakes. The citadel of privity has crumpled, and today the ordinary tests of duty, negligence and liability are applied widely to the man who supplies a chattel for the use of another. *This trend was responsive to ever-growing pres-*

*sure for protection of the consumer, coupled with a realization that liability would not unduly inhibit the enterprise of manufacturers and that they were well placed both to profit from its lessons and to distribute its burdens."*

Section 28.2, Page 1536:

"Anyone who supplies a chattel for use or custody or possession by another comes under some duties arising out of the transaction. This is so whether the transaction is a gift, a sale, a loan, lease, or other bailment \* \* \* \* \*. And the supplier will come under these duties whether he is owner, seller, maker, bailee, bailor, or custodian of the chattel."

Page 1539:

"Since the supplier's duty of care extends to all who may foreseeably be hurt by lack of care, it is scarcely surprising that this duty is not necessarily satisfied by disclosures of dangers."

Page 1599:

"If the dealer has been negligent, his liability is no more circumscribed by privity than is the maker's. It extends to anyone who might foreseeably have been injured by the defect."

Section 28.30, Page 1599 discusses the subject of retailers strict liability.

"1. *Liabilities under warranties.* The most common source of a retailer's liability for injury caused by defective chattels is either the implied warranty of fitness for a particular purpose, or that of merchantability—which is increasingly recognized as including a warranty of fitness for usual purposes. The injured person is more often in privity with the retailer than

with the maker; hence, a warranty theory is more often available in these cases."

"The principal controversy concerning the retailer's liability rages over the question whether or not he warrants the fitness of products obtained from reputable suppliers and sold in their containers under circumstances where the buyer realizes that his seller could not and did not inspect the contents of the container. *Probably the majority of the American courts (both at common law and under the Sales Act) now hold the retailer strictly on his warranty.*"

*"The retailer should bear this as one of the risks of his enterprise. He profits from the transaction and is in a fairly strategic position to promote safety through pressure on his supplier. Also, he is known to his customers and subject to their suits, while the maker is often unknown and may well be beyond the process of any court convenient to the customer. Moreover, the retailer is in a good position to pass the loss back to his supplier."*

Page 1602,

"For the most part the same considerations that call for strict liability of the retailer also support strict liability of the wholesaler to the victim. Surely if the retailer is to be held in warranty, he should be able to look to his supplier on a similar warranty."

Section 28.32 summarizes the entire chapter and deals with choice of remedies and Section 28.33, Page 1605 evaluates the rules as previously discussed.

It is to be noted from the foregoing authorities that the injured person may combine in one suit lia-

bility both for negligence and breach of warranty. Plaintiff by his amended complaint relied upon both. However, the court took from the jury the question of negligence but submitted to the jury under special interrogatories the question of breach of warranty.. We reserve for future discussion this alleged error. Appellant contends that the court erred in refusing to give his requested instructions, all of which were designed to be submitted to the jury under a general verdict. As previously noted, the court submitted the case to the jury on special interrogatories. We think the court's instructions fully and correctly instructed the jury and that no prejudicial error resulted.

In answer to these interrogatories, the jury found as facts that:

- A. Plaintiff and his fellow employee raised the container in a reasonably prudent manner.
- B. That the acid was released when the carboy was being lifted.
- C. That the release of the acid presumably caused by the defects present in the bottle or carboy, or both.
- D. That the facts as found were inconsistent with any other reasonable hypothesis but that a defect, or defects, in the bottle or carboy proximately caused the release of the acid.
- E. That the facts as found were inconsistent with the hypothesis that the defect present on delivery was a substantial defect.

Bearing in mind the oft repeated rule that the findings as made by the trier of the fact will be sus-

stained if there is any substantial evidence or any logical inference to support the same, we contend that these findings are amply supported by the evidence or logical inferences deducted therefrom and that the instructions are ample to support a special verdict.

Appellant cites cases and texts writers relating to the liability of a retailer who merely acts as a conduit through which the goods pass from manufacturer to consumer. However, it must be noted that in this case the defendant was not merely a conduit through which the goods passed but here we are dealing with a situation where the retailer or jobber (defendant) delivered a commodity to the consumer by transporting the same from Salt Lake City to Ogden and then delivering the package to the place of storage, which gave rise to a situation that if in making this delivery and in exposing the package to dangers by the method adopted in bumping the same down a flight of stairs and then failing to inspect the same after the package had reached its destination, this would amount to a breach of warranty and negligence. In other words, the jobber was an active participant in the delivery of a commodity which, if improperly secured, became a highly dangerous instrumentality.

We believe that this court in two recent decisions has recognized this distinction:

Schneider vs. Shuhrmann, etal

7 Utah 2nd.....

327 P. 2nd, 822

Bondon vs. Shuhrmann, etal

7 Utah 2nd.....

327 P. 2nd, 826

In both of these cases suit was brought against both the manufacturer and the retailer. Judgment, however, was rendered against the retailer. The facts in these cases are that the retailer rendered a service to the commodity after he acquired the product from the supplier. If he failed to render this service properly then he was guilty of both negligence and breach of warranty, so in our case the jobber (defendant) rendered a service by delivering the commodity to the purchaser. If in the course of rendering that service he was negligent or if as a result of this service the product was rendered inherently dangerous, a jury may find him guilty of negligence, or if as a result of this service the product was rendered inherently dangerous there is a breach of implied warranty of merchantability.

Appellant appears to make some point from the fact that the carboy and container were not sold to the purchaser. We fail to appreciate this distinction. Certainly it involved a bailment of the carboy and jar and there would certainly be a representation that the same would hold the acid. Appellant contends there was a lack of privity between plaintiff and defendant. (See Page 20 of his brief). We have already cited authority to the effect that lack of privity is no longer adhered to when dealing with a dangerous instrumentality, the question being whether or not it was foreseeable that some third person might be injured while using the same.

We cite the following additional cases which sustain our position:

DiVello vs. Gardner Machine Company  
Ohio

102 N. E. 2nd, 289

Burr vs. Sherwin-Williams, etal  
California

268 P. 2nd, 1051

Spencer vs. Madsen

Tenth Circuit

142 Fed. 2nd, 820

State Insurance Fund vs. City Chemical Corpor-  
ation

New York

48 N.E. 2nd, 262

Mueller vs. Bronx-Syhon Company

New York

6 N.Y. 2nd, 903

See also 11 ALR Annotation commencing at Page 1251  
Chapman Chemical Company vs. Taylor  
222 S.W. 2nd, 820

There is another point which we wish to develop in connection with the liability of the supplier to the purchaser. This matter is discussed in Harper and James, Vol. 2, Section 28.28 at Page 1594 under the heading "WHO IS A MAKER". It is true that the name Allied Chemical and Dye is found on a label attached to the carboy but there is nothing contained therein which would indicate that the product was not in fact prepared by defendant. General Mills had purchased this product from defendant and there is nothing to indicate that it ever knew that defendant was not in fact the maker of this product. The authors state at Page 1594:

"Under the prevailing modern rule, one who

represents a product to be his own is subject to the same liability as though he were its maker even if in fact it was manufactured by another."

See large number of cases cited in note, Reinstatement torts, Section 400, comment D.

There seems to be considerable confusion as to whether there must be privity of contract between the seller and the injured consumer and whether the strict liability of warranty implied in law is limited to foods or whether it should be extended to all dangerous instrumentalities liable to cause human suffering or death. Thus subject is discussed in,

Harper and James, Vol. 2, on Page 1569 and after some general discussion the authors at Page 1571 state:

"But where commodities are dangerous to life and health, society's interest transcends that of protecting reasonable business expectations. It extends to minimizing the danger to consumers and putting the burden of their losses on those who best can minimize the danger and distribute equitably the losses that do occur. And since the warranties involved in these cases do not represent the expressed or implied-in-fact intent of bargainers, but are warranties imposed by law as vehicles of social policy, the courts should extend them as far as the relevant social policy requires.

Then after a general discussion the author at Page 1573 concludes as follows:

"No valid reason appears for distinguishing between food cases and others so far as the privity requirement is concerned."



and in the footnote it cites the case of,

Pillars vs. R. J. Reynolds Tobacco Co.  
78 Southern, 365

wherein the defendant contended that the maker of chewing tobacco should not be held liable for impurities negligently incorporated therein because tobacco was not food and privity was required for liability in cases not involving food, beverages, etc. The court conceded that tobacco was not food "but we are of the opinion that we are not restricted to this narrow question, nor have we reached the limit when we admit that tobacco is not a beverage, or a condiment, or a drug. The fact that the courts have at this time made only the exceptions mentioned to the general rule does not prevent a step forward for the health and life of the public." The authors then conclude with the following comment under Note 14:

"Even if it should be felt that the restriction should be relaxed gradually and first in the field of greatest danger, the food area is not necessarily the most dangerous field. Greater peril lurks in a defective automobile wheel than in a pebble in a can of baked beans."

Two interesting cases dealing with impure foods, privity contract and absolute warranty are,

Decker vs. Kapp  
164 SW 2nd, 828

a suit against the manufacturers of impure foods; and,

Gregg Canning Company vs. Josey  
164 SW 2nd, 835

decided the same day by the same court, this latter case involving a suit by consumer against retailer. In both

instances the court held that in the case of impure food both the manufacturer and retailer are absolutely liable under a warranty implied in law without reference to how the food was prepared or packed, or as to whether the manufacturer or seller had notice of the impurities.

It seems to us that if this rule applies to impure foods and if as the authors suggest, there is no valid reason for distinguishing between food cases and others, then it seems to us that this same doctrine should be extended to explosives, or sulphuric acid which if allowed to escape is deadly in character.

## POINT TWO

**CONTRIBUTORY NEGLIGENCE:** Appellant complains of the failure of the trial court to instruct properly as to the law of contributory negligence. As a matter of fact, the court, when ruling on defendant's motion for a directed verdict, said: Tr. 234.

"I'll rule out contributory negligence in this case on strict warranty. I can't see any possibility to it. I don't see enough facts to support contributory negligence."

We think the trial court was correct in his ruling as to contributory negligence. It seems rather difficult to understand how defendant could contend that it was not negligent in failing to discover the defect and then claiming plaintiff was himself negligent in what he did. Furthermore, the answer of the jury to the special interrogatories absolved plaintiff of any negligence.

We contend, therefore, that the issue as to breach of implied warranty presented an issue of fact to be

submitted to the jury; that the court was justified in submitting this issue through special interrogatories; that the instructions of the court were full and complete and that in any event no prejudice resulted therefrom. We contend, therefore, that the judgment should be affirmed.

## RESPONDENT'S BRIEF IN SUPPORT OF HIS CROSS APPEAL

1. We contend that the court was in error in taking from the jury the issue as to negligence. We realize that if the judgment is sustained then this ruling becomes moot but if this court should reverse and order a new trial then this matter would become important and should be examined. The trial court based his ruling upon the grounds that the rule of *res ipsa loquitur* cannot be invoked against a retailer. We think, therefore, that the trial court was clearly in error. We contend first that independently of the application of the rule there was sufficient evidence of defendant's negligence to submit to the jury. In support of our contention we again call to the court's attention the fact that after defendant had obtained possession of the carboy, it undertook to render an additional service; namely, to transport it to Ogden and deliver it to the basement of General Mills. If in rendering this service defendant was negligent and if such negligence contributed to the accident, then this became an issuable fact to submit to the jury.

2. Secondly, we contend that the doctrine of *res ipsa loquitur* applies in this case and that the application of the rule makes it an issuable fact to be sub-

bitted to the jury.

1. Considering the deadly effect of sulphuric acid; the breakable nature of glass jars; the weight of the container, 133.5 pounds; the fact that only one-half of the bottom of the carboy was supported by the hand truck and then to bounce the same down twelve to fifteen steps and then make no inspection of the carboy to ascertain the effect or condition, is sufficient in itself to justify submitting the issue of negligence to the jury.

2. *Res ipsa loquitur*: For an excellent discussion of this doctrine see,

Harper and James, Vol. 2, commencing at Section 19.5 Page 1075 and extending to Page 1107.

We can only refer to some general observations. At Page 1081 the authors point out that the following conditions for the application of the doctrine are:

1. The accident must be one that ordinarily would not occur in the absence of negligence.
2. Both inspection and use must have been at the time of the injury in defendant's control.
3. The injurious occurrences or conditions must have happened irrespective of any voluntary act on plaintiff's part.

The text then proceeds to discuss each of these propositions. Section 19.6 discusses point one. We think there can be little question but what the facts come within point one. Point two is discussed in Section 19.7, Page 1085. It will no doubt be argued by defendant that the defendant parted with control when it deposited

the carboy in the storage room on May 16, 1958. However, as the text points out, the term "exclusive control" is frequently misunderstood and that the courts do not generally apply this requirement as it is literally stated.

"The requirement as it is generally applied is more accurately stated as one that the evidence must afford a rational basis for concluding that the cause of the accident was probably such that the defendant would be responsible for any negligence connected with it."

The jury by its affirmative answer to interrogatories 4A and B found as a fact that the defect was present at the time defendant delivered the carboy. This finding precludes any possibility that the defect arose or was created after the carboy had been delivered to General Mills. Point three is discussed in Section 19.8 at Page 1093. Here again the jury found that the plaintiff and his assistant raised the container in a reasonably prudent manner. (Interrogatory No. 1.) We contend, therefore, that the evidence, together with the answers of the jury, brought the case strictly within the rule. For an exhaustive discussion of the rule and its application see,

Yborra vs. Spangard  
Calif.

154 P. 2nd, 687

This court has recently had occasion to discuss the rule in the case of

Joseph vs. L. D. S. Hospital  
348 P. 2nd, 935.

It is true that in this case this court held that the rule did not apply for the reason that the evidence disclosed that the accident could occur without negligence on anyone's part but we are confident that this objection cannot apply. The evidence points unerringly to the fact that this accident could not have happened but for negligence of either the defendant or Allied Chemical, or both.

We have found no case nor text writer which has suggested that the rule cannot apply to a retailer, the reason advanced by the trial court. We can see no logical reason why it should not apply to a retailer as well as a manufacturer if the retailer undertook to render a service involving a dangerous instrumentality where the jury might well find that the defect was caused by some act of the retailer.

It is respectfully submitted that the judgment of the trial court should be sustained but that in the event this court should reverse the trial court then that this court should direct the reinstatement of plaintiff's first count and submit the issue of negligence to the jury applying the doctrine of *res ipsa loquitur*.

Respectfully submitted,

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