

1960

Hogan Dairy Co. v. Creamery Package Manufacturing Co. : Brief of Plaintiff and Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Stephens, Brayton & Lowe; Attorneys for Plaintiff and Appellant;

Recommended Citation

Brief of Appellant, *Hogan Dairy Co. v. Creamery Package Manufacturing Co.*, No. 9241 (Utah Supreme Court, 1960).
https://digitalcommons.law.byu.edu/uofu_sc1/3650

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

JUN 27 1960

HOGAN DAIRY COMPANY,
a corporation,

Plaintiff and Appellant,

—vs.—

CREAMERY PACKAGE MANU-
FACTURING COMPANY, a corpo-
ration,

Defendant and Respondent.

Clerk Supreme Court, Utah

UNIVERSITY OF UTAH

JUL 10 1967

LAW LIBRARY

BRIEF OF PLAINTIFF AND APPELLANT

STEPHENS, BRAYTON & LOWE

Attorneys for Plaintiff and Appellant

1001 Walker Bank Building
Salt Lake City, Utah

INDEX

	<i>Page</i>
Statement of Facts.....	1
Statement of Points.....	8
Argument:	
POINT I. INSTRUCTION NO. 13 IS ERRONEOUS....	8
POINT II. FAILING TO GIVE PLAINTIFF'S RE- QUESTED INSTRUCTION NO. 1 WAS ERROR.....	15
POINT III. FAILING TO GIVE PLAINTIFF'S RE- QUESTED INSTRUCTION NO. 3 WAS ERROR.....	20
POINT IV. FAILING TO GIVE PLAINTIFF'S RE- QUESTED INSTRUCTION NO. 5 WAS ERROR....	21
POINT V. ADMISSION OF EXHIBITS 11D AND 12D WAS ERROR	22
POINT VI. THE EVIDENCE IS INSUFFICIENT TO JUSTIFY THE VERDICT AND THE VER- DICT IS AGAINST LAW.....	23
POINT VII. THE COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL.....	23
Conclusion	24

TABLE OF CASES

Beagley v. United States Gypsum Company, 120 U. 487, 235 P.2d 783, 789.....	10
Boskovich v. Utah Const. Co. 123 U. 387, 259 P.2d 885, 886.....	20
Boudeman v. Arnold (1918) 200 Mich. 162, 166 N.W. 985, 8 A.L.R. 789.....	20
Brandon v. Holman, 41 F. 2d 586.....	16
Bridgeport v. Aetna Indem. Co. (1919) 93 Conn. 277, 105 Atl. 680	11
Campagnie Generale Transatlantique v. American Tobacco Co., 31 F. 2d 663.....	17
Cannan v. Curkeet, 86 F. 2d 573.....	16

INDEX—(Continued)

	<i>Page</i>
Citizens Trust & Sav. Bank v. Stackhouse, 91 S.C. 455, 74 S.E. 977, 40 L.R.A. (N.S.) 454.....	19
Colthurst v. Lake View State Bank, 18 F.2d 875.....	17
First National Bank & Trust Company of Muskogee v. Heilman, 62 F.2d 157	17
Florence Fish Co. v. Everett Packing Co., 111 Wash. 1, 188 P. 792	12
Gilbert v. Kennedy (1871) 22 Mich. 117.....	11
Illinois C.R.C. v. Doss (1910) 137 Ky. 658, 126 S.W. 349.....	12
Jackson v. Colston, 116 U. 295, 209 P.2d 566.....	20
Kentucky Distilleries & Warehouse Co. v. Lillard (1908) 87 C.C.A. 190, 160 F. 34.....	12
Lopeman v. Gee, 40 Wash. 2d 586, 245 P. 2d 183.....	11
Louisville & N.R. Co. v. Sandlin (1925) 209 Ky. 442, 272 S.W. 912	11
Louisville N.A. & C.R. Co. v. Sumner (1886) 106 Ind. 55, 55 Am. Rep. 719, 5 N.E. 404.....	13
Mason v. Sault, 93 Vt. 412, 108 A. 267, 18 A.L.R. 1426.....	19
Norfolk & W.R. Co. v. Amicon Fruit Co. (C.C.A. 4th) 269 F. 559, 14 A.L.R. 547.....	10
Sears Roebuck v. Grant, Wash., 298 P.2d 497.....	12

TEXTS

81 A.L.R. 282 Annotation.....	11, 12
15 Am. Jur., Damages, Par. 28.....	10
53 Am. Jur., Trials, Par. 359, 361, 386.....	18, 19
McCormick, Damages, 140, Sec. 38.....	12
5 Moore's Federal Practice, 2314, Note 7.....	16

IN THE SUPREME COURT
of the
STATE OF UTAH

HOGAN DAIRY COMPANY,
a corporation,

Plaintiff and Appellant,

—vs.—

CREAMERY PACKAGE MANU-
FACTURING COMPANY, a corpo-
ration,

Defendant and Respondent.

Case No. 9241

BRIEF OF PLAINTIFF AND APPELLANT

STATEMENT OF FACTS

Plaintiff, Hogan Dairy, hereinafter referred to as HOGAN, is a Utah corporation, doing a dairy business in the Salt Lake Valley. Defendant, Creamery Package Manufacturing Company, hereinafter referred to as CREAMERY PACKAGE, is an Illinois corporation which manufactures and sells Milk Processing Equipment

including equipment known as Vac Heat and Ultra High Temperature Equipment, hereinafter referred to as VAC HEAT.

During the month of April 1958, Blaine Anderson, a salesman for Creamery Package, approached Hogan to sell it a Vac Heat unit. Anderson told Hogan what the machine would do in the processing of milk and gave Hogan literature put out by Creamery Package describing what the machine would do. (Ex. 2P) The representations by Creamery Package were two-fold; first, unappetizing flavors and odors would be eliminated from milk and the milk would thereby acquire a uniformly good flavor and odor; second, the milk processed would acquire a longer "shelf life" which, in the industry, is understood to mean keeping quality. (Tr. 8, 15) These were to be accomplished by subjecting the milk to ultra high temperatures, thereby getting a greater kill of bacteria normally present in milk and consequently increasing the shelf life because of less action of bacteria, and by putting the milk in a vacuum and drawing off the volatile portions which contain unwanted flavors and odors.

Hogan evidenced an interest in the machine and a desire to acquire it but was worried about being able to finance the transaction. Hogan asked if it could be acquired on a rental, instead of a purchase, basis inasmuch as Hogan did not have the \$6,300.00 cash needed to purchase it and would obtain a tax advantage by renting instead of purchasing on time. (Tr. 17, 65, 320) Cream-

ery Package had no rental set-up but said that it could arrange to accomplish this by having an equipment rental company, in the general business of renting all types of equipment, acquire the machine and simultaneously lease it to Hogan. National Equipment Ltd., hereinafter referred to as NATIONAL a New York corporation, was selected as the financing company.

It was agreed between Hogan and Creamery Package, in lieu of Hogan's buying from Creamery Package, Creamery Package would sell the Vac Heat to National and National would lease it to Hogan, but that delivery would be made directly from Creamery Package to Hogan and Creamery Package would plan and supervise the proper installation and initial operation thereof. (Tr. 17-19, 23, 24, 302, 328, 346)

Upon reaching an agreement that Hogan would get the machine, Hogan undertook a greatly expanded advertising program plugging the merits of milk processed by Vac Heat, advertising that it would have better keeping qualities and a "Hi-Fi" flavor. (Tr. 26, 180, 198) Cartons for Hogan milk were ordered which advertised the new process. (Tr. 85, 87, 101) In August of 1958, Creamery Package sold the Vac Heat to National and National leased it to Hogan, and it was delivered directly from Creamery Package to Hogan. (Tr. 27, 326) Creamery Package personnel drew plans and flow sheets and designs diagramming the installation, and supervised the installation of the Vac Heat, in accordance with the agreement. (Tr. 26-28, 328)

From the time the machine was first installed troubles developed. (Tr. 29, 30) The milk so processed had an unappetizing flavor, a scorched taste and offensive odor. (Tr. 31, 103, 106-122, 135-139, 151) In addition to the problems of flavor and odor, the milk so processed had a very short shelf life and putrefied rapidly. (Tr. 106-122, 172)

These difficulties were at once apparent to Hogan, (Tr. 29, 31) not only from their own observations and tests but also because of the complaints of customers which at once skyrocketed. (Tr. 102, 141)

Hogan immediately and continuously complained to the Creamery Package men of the results obtained. Numerous changes in the installation were made by Creamery Package such as re-positioning valves, changing pipes, etc., to reduce the time the milk was exposed to ultra high temperatures. (Tr. 36, 289, 291, 292) On each occasion that a complaint was made by Hogan, Creamery Package men assured Hogan either that the difficulties were not caused by the Vac Heat unit or that the problems had been or would be remedied. (Tr. 46, 47, 144, 145, 147, 170, 192, 289, 291, 298, 299, 306, 309, 310, 333, 342, 343, 344, 397)

In November of 1958 an air leak in the machine was found. Hogan and Creamery Package had suspected a leak because excessive foam had always been encountered but it was not found until four months after installation. The leak was in a weld in the Vac Heat unit. (Tr. 38) The mechanical operation of the machine improved sub-

stantially after this air leak was plugged. After the plugging of the air leak, the modifications in installation, and the advent of cold weather, the problems ceased. They started to re-occur the next summer and when Hogan started again to get complaints from customers, it disconnected the machine and did not subsequently use it and the problems ceased. (Tr. 45)

The rental contract between National and Hogan made Hogan liable for rentals regardless of the quality or nature of the operation of the machine by an express disclaimer of any warranty on the part of National. (Ex. 4D) Hogan paid rentals and still has the machine for which it has no use. (Tr. 46)

It would be an understatement to say that Hogan customers were dissatisfied with the milk processed by Vac Heat between August and November. The advertising campaign was getting new customers but the number of new ones could not keep pace with the number of old customers quitting. Not only did many retail customers quit, but also wholesale outlets were lost, the most important of which were the Albertson stores, which had just been acquired. (Tr. 177)

Explanations given by some of the experts for the problems encountered were as follows :

A cooked flavor or a scorched taste was imparted to the milk by the ultra high heat. In addition to the scorched taste, in many instances, there was a putrid flavor which could be attributed to the fact that the ultra

high heat, in killing off most of the bacteria, killed those bacteria which normally create acid which sours milk. In doing so, other putrefying bacteria, which in their spore form can resist high temperatures and which normally are inhibited by acid formed by other types of bacteria were left free to develop. The heat resistant spores freely and uninhibitedly developed and the milk thereby became putrid instead of souring. (Tr. 130) It did so at a greatly increased rate so that the shelf life instead of being lengthened was shortened and a rotten odor rapidly developed in milk so processed if it was not ideally refrigerated by the user. (Tr. 105-121, 135-137)

Some of Creamery Package experts attributed the bad flavor and poor shelf life to factors other than the use of the Vac Heat unit because Vac Heat had been used by dairies in other sections of the country successfully. But bacteria present in raw milk, both in their spore form and otherwise, vary from area to area (Tr. 261, 385) so that a process might be successful in one area and not in another. The only units which had been tried in Utah were both unsuccessful and were removed because of problems with rapid putrefaction and bad odors. (Tr. 129, 132, 215) Hogan's practices in operation of the dairy did not change during the period involved except in the use of the Vac Heat machine and no such problems had arisen before nor did they arise after the removal of the unit. (Tr. 411)

Hogan attributed the following damage to the Vac Heat Unit:

Cost of replacement milk, (Tr. 48, 178)
 Loss of employees, (Tr. 152, 174)
 Loss of customers, (Tr. 157, 160, 171, 226)
 Loss of value of advertising, (Tr. 189)
 Loss of value of promotional expenditures, (Tr. 190)
 Loss of income, (Tr. 218)
 Loss of good will, (Tr. 183)

The Vac Heat unit could easily have been completely by-passed and eliminated from the treatment process by changing pipe connections, which would have taken about 20 minutes, (Tr. 295). The ultra high heat could have been eliminated by turning off the steam injection valve which would have taken a few seconds. Either would have eliminated the problems caused by the unit. (Tr. 365) Hogan did not do either although it knew that

- (a) The flow of milk through the unit was too slow and fluctuated excessively. (Tr. 29, 31)
- (b) Excessive foam occurred in the unit. (Tr. 31, 411)
- (c) The milk had a cooked flavor which did not dissipate as it should have done. (Tr. 31, 313)
- (d) The milk had a poor shelf life. (Tr. 151)
- (e) Some milk putrefied. (Tr. 138)
- (f) There was no cavitation (rattling sound) which is necessary for efficient operation. (Tr. 410)
- (g) Complaints of customers tremendously increased. (Tr. 141)
- (h) Customers quit. (Tr. 169)

STATEMENT OF POINTS

POINT I.

INSTRUCTION NO. 13 IS ERRONEOUS.

POINT II.

FAILING TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NO. 1 WAS ERROR.

POINT III.

FAILING TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NO. 3 WAS ERROR.

POINT IV.

FAILING TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NO. 5 WAS ERROR.

POINT V.

ADMISSION OF EXHIBITS 11D AND 12D WAS ERROR.

POINT VI.

THE EVIDENCE IS INSUFFICIENT TO JUSTIFY THE VERDICT AND THE VERDICT IS AGAINST LAW.

POINT VII.

THE COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL.

ARGUMENT

POINT I.

INSTRUCTION NO. 13 IS ERRONEOUS.

The instruction is as follows :

“You are instructed that if plaintiff continued to operate the machinery in question after it discovered, or should have discovered, that the machinery was not operating properly and that such defect in the Vac-Heat machinery was causing the contamination of plaintiff's milk product, then it was the duty of the plaintiff to desist and re-

frain from using said machinery and that if plaintiff did continue to use said machinery after discovering defects therein, or improper functioning of the same, then you are instructed that the plaintiff cannot recover for any damages resulting from continued use after plaintiff had knowledge, or in the exercise of reasonable care should have had knowledge of the defective operation of the Vac-Heat machinery and that such defect in the Vac-Heat machinery was causing the contamination of plaintiff's milk product."

The reason the use of the unit was not discontinued was that Creamery Package men were the experts supervising the installation and initial operation and they assured Hogan each time a complaint was made, that the problems were not caused by Vac-Heat, or the problems would be remedied, or the problems had been remedied by changes made. Hogan had had no experience with the unit and relied on the experience and ability of Creamery Package to get it operating properly as it had been agreed Creamery Package should do, and as its experts said it would and could do. Hogan's entire sales promotion was based upon its successful operation. Yet the court gave instruction No. 13 which prohibited any recovery if Hogan knew or should have known of defective operation of the Vac-Heat unit. That was the equivalent of giving a directed verdict in favor of Creamery Package because the evidence was uncontradicted that Hogan knew of flavor and mechanical problems from the time of installation and also knew of the shelf life or putrefaction problems from the time they arose. Hogan always attributed these problems to the Vac-Heat unit.

The correct rule qualifies the obligation to stop using the unit by relating it to what a reasonable man under the circumstances would have done.

The case of *Beagley v. United States Gypsum Company*, 120 U. 487, 235 P. 2d 783, 789, states the rule as being that plaintiff must do "all a reasonable person would have done under like circumstances in order to minimize his loss."

The rule is generally stated in 15 *Am. Jur.*, Damages, Par. 28, as follows:

"The measure of his duty is such care and diligence as a man of ordinary prudence would use under the circumstances, and the efforts required of him must be determined by the rules of common sense, good faith, and fair dealing. What constitutes reasonable care depends upon the circumstances of the particular case, taking into consideration time, knowledge, opportunity, and expense."

In applying this generalized statement, it is further stated as follows:

"An injured person may recover to the full extent of his injury where he shows reasonable grounds for his failure to make an effort to lessen his damages. Thus, the repeated assurance of the defendant after an injury has begun that he will remedy the condition is sufficient justification for the plaintiff's failure to take steps to minimize loss, so long, at least, as there is ground for expecting that he will perform."

Norfolk & W. R. Co. v. Amicon Fruit Co., (C.C.A. 4th) 269 F. 559, 14 A.L.R. 547.

An annotation in 81 A.L.R. 282 on "Duty to Mitigate Damages" discusses various cases, some of which discussion is quoted.

"The obligation to minimize damages never requires a party to exercise more than reasonable care to that end (*Louisville & N. R. Co. v. Sandlin* (1925) 209 Ky. 442, 272 S.W. 912)

"The rule is simply one of good faith and fair dealing. *Gilbert v. Kennedy* (1871) 22 Mich. 117. It does not require one to do his utmost to minimize damages, without regard to his own interests, but only what is reasonable under the circumstances. *Bridgeport v. Aetna Indem. Co.*, (1919) 93 Conn. 277, 105 Atl. 680."

The case of *Lopeman v. Gee*, 40 Wash. 2d 586, 245 P.2d 183, deals with a similar problem. Headnote 7, is as follows:

"Where owners of stored onions complained to agents of warehouseman that onions were sweating and becoming damp and mouldy and, upon each occasion, were assured that the storage conditions complained of would be remedied, owners were entitled to rely upon these assurances and did not have duty to mitigate damages by taking onions out of storage as soon as they learned of threatened loss."

The Court said:

"Appellant urges it was respondents' duty to mitigate damages by taking the onions out of storage as soon as they learned of the threatened loss. It is true, one is ordinarily required to make rea-

sonable efforts to avoid the consequence of another's wrongful act by avoiding any consequences resulting therefrom. However, if, after an injury is begun, there are repeated assurances from the wrongdoer that the condition complained of will be remedied, there is no duty upon the part of the injured party to take steps to minimize the loss so long as there are grounds to expect that he will perform. *Florence Fish Co. v. Everett Packing Co.*, 111 Wash. 1, 188 P. 792; *McCormick*, Damages, 140, Sec. 38; Annotation, 81 A.L.R. 282 at page 284.

"The trial court found that 'plaintiffs complained to agents of defendant in charge of said storage and upon each occasion were assured that the storage condition complained of would be remedied.' Plaintiffs, under the circumstances of this case, were entitled to rely upon these assurances."

See also *Sears Roebuck v. Grant*, Wash., 298 P. 2d 497.

The repeated assurances of the defendant after an injury has begun, that he will remedy the condition, is sufficient justification for the plaintiff's failure to take steps to minimize loss, so long, at least, as there is ground for expecting that he will perform. *Kentucky Distilleries & Warehouse Co. v. Lillard* (1908) 87 C. C.A. 190, 160 F. 34; *Illinois C.R.C. v. Doss* (1910) 137 Ky. 658, 126 S.W. 349.

Furthermore, the duty to mitigate damages does not relate to the performance of the primary obligations of the contract. So, where one whose duty it is to do work

necessary to fulfill a contract had equal knowledge of the consequences of noncompliance and opportunity to fulfill the obligation, he alone may be depended on to perform the duty, and it will not avail him to say the injured party might have lessened the damages. *Louisville, N.A. & C.R. Co. v. Sumner* (1886) 106 Ind. 55, 55 Am. Rep. 719, 5 NE 404. Therefore, since the primary obligation of the agreement was that Creamery Package would install the machine and get it functioning properly, Creamery Package could not defend on the ground that Hogan is barred because it knew the unit was operating improperly.

The trial court in its memorandum decision denying a motion for a new trial tacitly admitted that instruction No. 13 is erroneous by stating "Although the Instruction No. 13 might have been modified to meet the criticisms of the cases cited by counsel for plaintiff, it seemed to fit the circumstances and requirements of our lawsuit and is thought not to be prejudicial in any event" because of Instruction No. 16. But Instruction No. 16 was merely an instruction that damages must be the natural and probable result of the breach of contract. Instruction 16 reads as follows:

"INSTRUCTION NO. 16

"If you resolve in favor of the plaintiff the issue as to whether or not there was a contract between the parties, as required by the foregoing instruction, you are instructed that the damages which plaintiff is entitled to recover in respect to such breach of contract are those as may fairly and reasonably be considered, either arising

naturally and probably, that is, according to the natural course of things, from such breach, and as such as may reasonably be supposed to have been in contemplation of the parties at the time they made the contract, as the probable result of its breach.

“Recoverable elements of damage may include, among other elements, injury to business reputation, loss of business standing, loss of customers or business, loss of employees. The profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages which may be recovered if they are the natural and proximate result of the breach complained of and are capable of ascertainment with reasonable certainty.”

Reading 16 and 13 together the plain meaning is that 13 restricts 16 so that those damages which are the natural and probable result of the breach of contract are recoverable only if Hogan did not and should not have known that Vac-Heat was causing the trouble. How can an instruction which bars recovery be non-prejudicial?

The trial court further stated in its memorandum decision that “Instruction 13 was directed to and related only to what might be called subsequent damages—The conclusion seems justified, therefore, that the jury found that there was no contract.” Such reasoning would be true only if there were an initial period during which Hogan did not blame Vac Heat for the problems encountered. The evidence is clear that Hogan knew of improper functioning beginning with the very first oper-

ation in August and continuing into November. (Tr. 29-32, 46, 144, 145, 192, 289, 291, 299, 307, 313, 332) Under instruction 13 Hogan had a duty to immediately stop using the unit and therefore the jury could not find in its favor.

POINT II.

FAILING TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NO. 1 WAS ERROR.

The requested instruction was as follows:

“INSTRUCTION NO. 1

“You are instructed that the evidence is uncontradicted, that plaintiff and defendant agreed as follows:

“Defendant agreed to sell to National Equipment Rental Limited a Vac Heat Unit. Plaintiff agreed to lease said Vac Heat Unit from the Rental Company. Defendant did sell to the Rental Company and plaintiff did lease from the Rental Company said unit. Defendant further agreed that for and in consideration of plaintiff agreeing to lease said unit from the Leasing Company defendant would ship said unit directly to plaintiff, defendant would supervise the installation of said unit according to plans and specifications furnished by defendant, defendant would furnish the technical personnel necessary to install said unit in proper operating condition, defendant would furnish qualified personnel to instruct plaintiff in the proper operation of said unit. The evidence is further undisputed that defendant represented and agreed with plaintiff that if plaintiff acquired said unit and used it in the processing of its milk that said unit would improve the flavor of milk so processed and would improve the keeping qual-

ities or shelf life of said milk. You are therefore instructed that there is no issue as to whether or not there was an agreement between the parties and you are instructed that there was an agreement as above described.”

The evidence of the facts set forth in the request is uncontradicted. The testimony of Max Hogan (Tr. 6-24) established the agreement. This testimony was not only not contradicted but was corroborated by the testimony of Blaine Anderson who made the agreement on behalf of Creamery Package and who certainly would have corrected any misstatement by Max Hogan. It was therefore the duty of the court to instruct that there was a contract and submit to the jury only the question of breach and damage rather than to let the jury speculate on the existence or non-existence of an agreement.

Moore, in discussing the Federal practice, which Utah should follow, says:

“Where no evidence is adduced to disprove the prima facie case of the plaintiff and his evidence stands uncontradicted and unimpeached, the court should direct.” 5 *Moore’s Federal Practice*, 2314, Note 7.

In *Cannan v. Curkeet*, 86 F. 2d 573, the court said:

“It is elementary that, in Federal courts, where undisputed evidence demands a verdict in favor of one of the parties, it is the duty of the judge to direct it.”

In *Brandon v. Holman*, 41 F. 2d 586, a bank cashier, according to the undisputed testimony, improperly paid out money for his own gain. In affirming a verdict for

the plaintiff the court said:

“The verdict should be directed when the evidence . . . with all inferences that the jury could draw from it, leads to but one conclusion.”

In *Colthurst v. Lake View State Bank*, 18 F. 2d 875, in a suit on a note, where the only evidence was to the effect that plaintiff was a holder in due course without notice, a directed verdict for the plaintiff was affirmed. The court said that defendant does not have the right “to have a jury pass upon his claim” nor does “credibility of an uncontradicted and unimpeached witness in all cases” present a jury question.

In *Campagnie Generale Transatlantique v. American Tobacco Co.*, 31 F. 2d 663, in affirming a directed verdict for the plaintiff, the court said:

“When the plaintiff in error failed to make answer to the prima facie evidence offered . . . it was the duty of the court below to direct the verdict.”

In *First National Bank & Trust Company of Muskegee v. Heilman*, 62 F. 2d 157, in a suit on a note, where the only evidence was to the effect that plaintiff was a holder in due course without notice, a directed verdict for the plaintiff was denied by the lower court. This was reversed. The court said:

“There are two classes of cases in which the trial court should direct a verdict at the close of the evidence (1) cases in which the evidence is undisputed and (2) cases in which the evidence is conflicting but is of so conclusive a character

that the court in the exercise of a sound judicial discretion ought to set aside a verdict in opposition thereto. . . . The rule applies notwithstanding the party introducing the evidence has the burden of proof. . . . The instant case clearly falls within the first class and the trial court erred in not directing a verdict in favor of the bank.”

53 *Am. Jur.* Trials.

“359. Undisputed Facts Supporting One Conclusion. — The presence or absence of conflicting testimony in a case is a consideration by which the courts are governed in directing verdicts. Where the material issues or controlling facts are conceded, or the proof offered to establish them is undisputed, uncontradicted, or uncontroverted, or such facts are conclusively established or established beyond dispute, or the evidence is all one way, and is unconflicting and uncontradictory, and only one legitimate inference may be drawn, and there are no circumstances which tend to impair or impeach it, and it is not susceptible of inherent weaknesses, improbabilities, and incongruities which in and of themselves naturally arise to contradict or impeach the weight and credibility of the utterances of the witnesses, the only question being one of law, the court may, should, and must, direct a verdict.”

“361. Uncontradicted Oral Testimony.—While it is the province of the jury to determine not only the weight and sufficiency of the evidence, but the credibility of the witnesses who testify, this rule is not to be taken as necessarily requiring the trial court to overrule a motion for a directed verdict and submit a case to the jury

in order to permit the jury to pass upon the credibility of a witness whose testimony is unimpeached and uncontradicted, and reasonably susceptible to but one conclusion. — the more generally approved rule is that it is not only permissible, but proper, for a trial court to direct, upon unimpeached oral testimony given in behalf of the party having the burden of proof, where such testimony is direct, positive, and unequivocal, is not contradicted either directly or indirectly, and is not susceptible of inherent weakness, improbability, or incredibility. This principle underlies the great majority of the cases cited in the preceding sections which recognize it to be not only within the power, but the duty, of the court to direct verdicts when undisputed facts support only one conclusion, or where a contrary verdict would have no support in the evidence.”

“386. When Verdict May Be Directed. — Again, the plaintiff is entitled to a direction in his favor where the right to recover is overwhelmingly shown, where the plaintiff’s evidence is sufficient to warrant a verdict in his favor and no evidence has been adduced by the defendant appreciably tending to overthrow the case made by the plaintiff.”

“Where there is no evidence, direct or circumstantial, tending to impeach the witness upon whose testimony an issue is based, the court should give mandatory instruction.” *Citizens Trust & Sav. Bank v. Stackhouse*, 91 SC 455, 74 SE 977, 40 LRA (NS) 454.

“Where the plaintiff’s evidence makes a prima facie case, and the defendant offers no evidence, the court should, on motion, direct a verdict for the plaintiff.” *Mason v. Sault*, 93 Vt. 412, 108 A. 267, 18 ALR 1426.

“It is fundamental that where there is no evidence upon a material part of the plaintiff’s claim, it is the court’s duty to direct a verdict. In deciding a motion for a directed verdict, the court must consider the evidence in the light most favorable to the party against whom the motion is directed and must resolve every controverted fact in his favor. *Jackson v. Colston*, 116 Utah 295, 209 P. 2d 566. The inquiry, then, must be directed toward whether reasonable minds could disagree in this case on the evidence presented so as to provide a question for the jury.” *Boskovich v. Utah Const. Co.*, 123 U. 387, 259 P 2d 885, 886.

“The credibility, sufficiency, and weight of the evidence on a given subject are for the jury; the question whether there is any evidence on the subject is for the court. Where the testimony is all one way, uncontradicted by any testimony given in the case, either from a party’s own witnesses or the other side, either in direct or cross-examination, or by any facts or circumstances in the case, and is not in itself in any way improbable or discredited, and but one legitimate inference may be drawn from it, and a case is thereby made for the plaintiff or the defendant, the duty rests upon the court to direct a verdict.” *Boudeman v. Arnold* (1918) 200 Mich. 162, 166 NW 985, 8 ALR 789.

POINT III.

FAILING TO GIVE PLAINTIFF’S REQUESTED INSTRUCTION NO. 3 WAS ERROR.

Requested Instruction No. 3 was as follows:

“INSTRUCTION NO. 3

“You are instructed that if you believe that the unit, as designed by defendant, would not

process milk properly and if you further believe from a preponderance of the evidence that defendant had agreed with plaintiff that the machine would process milk properly, then defendant is liable to plaintiff for the natural and probable results of the breach of said agreement, if any."

One of Hogan's theories upon which it might recover under the evidence before the jury was that even if the mechanical functioning of the machine were satisfactory, that the design and plan of installation of the machine was such that, as installed in the Hogan Dairy, the milk processed through it acquired a scorched or a burned flavor and putrefied rapidly. By failing to give this instruction, the court presented to the jury only the question of whether or not the machine functioned properly. The court thereby eliminated the questions of whether or not the machine was properly engineered and whether or not the design and plan of installation were proper. The testimony that many changes were made by Creamery Package in the initial installation, including subsequent repositioning of valves which cut the time of exposure of milk to ultra high heat in half, (Tr. 40, 293, 307) was proper evidence upon which the jury might well have found that the initial installation was improperly designed and planned resulting in scorching and related problems.

POINT IV.

FAILING TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NO. 5 WAS ERROR.

The requested instruction was as follows:

“If you find in favor of Plaintiff and find that milk processed by Vac Heat did not have a longer shelf-life as represented by Defendant that it would have, it is no defense on the part of Defendant that bacteria or spores were already in the milk as it came from the farmers if it could reasonably be anticipated that, under usual and ordinary circumstances in the area involved, such spores or bacteria would be present in such milk.”

Defendant's witness, Mr. Hedrick, testified that in his opinion flavor problems could have been caused by bacteria which were in the raw milk. (Tr. 360-361) George Donald, the manager of Cloverleaf Dairy, testified that in his opinion the rapid putrefaction of milk was caused by killing only a part of the bacteria and spores which were already in the raw milk, but killing substantially all acid forming bacteria so that bacteria which caused putrefaction had an unhibited growth. (Tr. 130) Requested Instruction No. 5 was therefore necessary in order to cover fully the factual situation presented to the jury.

POINT V.

ADMISSION OF EXHIBITS 11D AND 12D WAS ERROR.

These two exhibits were blank forms, one being an order blank and the other being a form for a contract of conditional sale. In both of them Creamery Package disclaimed liability for defective equipment. Hogan had never seen either these or similar documents. (Tr 351)

Hogan had no knowledge of the disclaimer of liability contained therein and yet the court allowed the introduction of both of these documents over strenuous objection that they were not material to the issue in the case. (Tr. 340). Counsel for defendant used these exhibits and the disclaimers contained therein in his argument to the jury, arguing that the disclaimer of liability contained therein exonerated defendant from liability. Such an uncommunicated limitation and disclaimer of liability should not have been presented to the jury. Defendant should not be exonerated from responsibility for its express representations as to what Vac Heat would do by provisos in blank forms it takes out of its office files of which plaintiff has no knowledge whatever.

POINT VI.

THE EVIDENCE IS INSUFFICIENT TO JUSTIFY THE VERDICT AND THE VERDICT IS AGAINST LAW.

The evidence is uncontradicted that there was a contract that defendant would install the unit and get it operating properly. The evidence is also uncontradicted that the unit did not operate properly and that Hogan suffered damage. There is therefore no legal basis for the verdict of no cause of action rendered by six of the eight jurors.

POINT VII.

THE COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL.

The above points were raised by plaintiff on its motion for new trial which the court, in the exercise of sound discretion, should have granted.

CONCLUSION

Prejudicial error was committed and the judgment should be reversed.

Respectfully submitted,

STEPHENS, BRAYTON & LOWE,
Attorneys for Plaintiff and Appellant.

1001 Walker Bank Building
Salt Lake City, Utah