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Clerk, Supreme Court of Appeals
Richmond, Va.

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Record No. 6309

In the
Supreme Court of Appeals of Virginia
at Richmond

PEPSI-COLA BOTTLING CO., INC.

v.

DOROTHY REED YEATTS

FROM THE CIRCUIT COURT OF NOTTOWAY COUNTY

RULE 5:12 BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 6309

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 1st day of December, 1965.

PEPSI-COLA BOTTLING COMPANY, INCORPORATED, Plaintiff in error,

against

DOROTHY REED YEATTS, Defendant in error.

From the Circuit Court of Nottoway County
D. Carleton Mayes, Judge

Upon the petition of Pepsi-Cola Bottling Company, Incorporated, a writ of error and *supersedeas* is awarded it to a judgment rendered by the Circuit Court of Nottoway County on the 8th day of July, 1965, in a certain motion for judgment then therein depending wherein Dorothy Reed Yeatts was plaintiff and the petitioner was defendant.

And it appearing that a suspending and *supersedeas* bond in the penalty of twenty-five hundred dollars, conditioned according to law, has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, no additional bond is required.

RECORD

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page 1]

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MOTION FOR JUDGMENT

The undersigned hereby moves the Circuit Court of Nottoway County, Virginia for a judgment against you in the sum of Ten Thousand Dollars ($10,000.00), which sum of money is due to me, the undersigned plaintiff, from you to this, to-wit:

(1) That heretofore, to-wit, on, prior to and ever since the 7th day of June, 1962, the defendant was and is now engaged in the bottling and sale of a soft drink product known as Pepsi-Cola for sale to the public.

(2) The beverage mixed and prepared by the defendant was by it placed in glass bottles having metal caps. The process of mixing and bottling the extract with carbonated water was carried on by means of complex machines in the plant of the defendant at Petersburg, Virginia, almost the entire process of bottling the carbonated beverage after mixing being done automatically by machinery.

(3) That one of the media of merchandising said product was the placing of bottles in a pasteboard carton, which said cartons were stacked on a display rack.

(4) That some time prior to June 7, 1962 defendant sold and delivered a number of cartons of Pepsi-Cola to a place of business known as Burkeville Market, located at Burkeville, Virginia; that this quantity of Pepsi-Cola was sold to the said establishment for the purpose of resale to the public at large.

page 2] (5) That on June 7, 1962 plaintiff went to said Burkeville Market and there selected with the intention of purchasing one carton containing 6 bottles of Pepsi-Cola; that the contents were a part of the entire lot previously sold and delivered to said Burkeville Market by defendant; that the bottles in the said carton selected by the plaintiff were in the same condition as they were received by

the said Burkeville Market from defendant; that none of said bottles had been opened or tampered with in any manner by anyone after same were delivered by defendant to said Burkeville Market.

(6) That after selecting the carton containing 6 bottles of Pepsi-Cola from the display rack, the plaintiff turned from the display rack with the intention of placing the carton that she had selected in a shopping cart furnished to and used by customers of Burkeville Market, whereupon a bottle of Pepsi-Cola exploded and fragments thereof struck the plaintiff in her leg; that prior to this explosion this particular bottle and its contents were in the same condition as at the time said bottle was delivered by defendant to Burkeville Market; that the plaintiff did nothing to cause the explosion of said bottle and the explosion was caused by the negligence of the defendant, its agents and employees, which negligence was the proximate cause of the plaintiff's injuries.

(7) That as a result of the aforesaid bottle explosion the plaintiff was seriously injured and suffered great pain and mental anguish and still does so suffer and did also expend sums of money endeavoring to be healed and cured; that she has been permanently disfigured; that she is partially permanently disabled; all to the damage of the undersigned to the sum of Ten Thousand Dollars ($10,000.00).

page 3] Given under my hand this 5th day of June, 1963.

DOROTHY REED YEATTS
By C. H. WILSON
Counsel

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Filed in the Clerk's Office the 6 Day of June 1963

Teste:

HODGES S. BOSWELL Clerk
By GRAYCE D. FITZGERALD, D. C.

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page 7]

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GROUNDS OF DEFENSE

Comes now the defendant, by counsel, and for its grounds of defense to the motion for judgment filed herein states, as follows:

1. The defendant admits the allegations of paragraphs numbered one, two, three, and four of the motion for judgment.
2. The defendant does not know whether the facts exist as alleged in paragraphs numbered five, six and seven of the motion for judgment and therefore denies the same.
3. The defendant denies that it was guilty of any act or omission for which it is liable to the plaintiff.
4. The defendant alleges that the proximate cause of the plaintiff's injuries, if any, was the improper and careless handling or use of the carton of Pepsi-Colas claimed to be involved in this matter either by the plaintiff herself or by others for whom this defendant is not responsible or any combination thereof either jointly or severally.
5. The defendant denies that it is liable or indebted to the plaintiff in any amount whatsoever, for any reason whatsoever and reserves the right to amend its grounds of defense as it may be advised.

page 8]

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Filed in Clerk's Office June 26 1963

HODGES S. BOSWELL, Clerk
By GRAYCE FITZGERALD, D. C.

* * * * *

page 18] 2

It is the duty of a manufacturer to exercise ordinary care in the preparation, bottling and inspection of its product, and the explosion of a bottle, not tampered with after it leaves

the possession of the manufacturer, is in itself evidence of negligence; and when that is shown by the evidence, a *prima facie* case of negligence on the part of the manufacturer is made out.

But the *prima facie* presumption above referred to may be rebutted by evidence showing that the defendant exercised ordinary care in the preparation, inspection and bottling of its product. The issue as to whether the defendant did exercise such an ordinary degree of care as to overcome such *prima facie* presumtion of negligence is for you to decide; and if upon the whole evidence you believe from a preponderance thereof that the defendant was negligent and that any such negligence was a proximate cause of injuries to the plaintiff, then, unless the plaintiff was guilty of negligence which proximately contributed to her injuries, you shall find your verdict in favor of the plaintiff.

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page 23A]

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MEMORANDUM IN SUPPORT OF
MOTION TO SET ASIDE JURY VERDICT

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page 23-I]

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We respectfully submit that the plaintiff has not shown that the defendant was guilty of any negligence which was a proximate or contributing cause of her injury and that this court should enter final judgment on the motion in favor of the defendant.

In the alternative the defendant is entitled to a new trial in any event as the giving of Instruction No. 2 was
page 23-J] error prejudicial to the defendant as it incorrectly states the law in setting out that the mere explosion of a bottle constitutes a *prima facie* case for the plaintiff. This is error in view of the fact that the plaintiff's

evidence does not in fact establish that an explosion occurred but rather that one might have occurred.

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ORDER

This case being before the Judge of this Court on a motion by the defendant to set aside the verdict of the jury and enter judgment for the defendant was taken by the court under advisement and after mature consideration of said motion and after considering written arguments by counsel for plaintiff and defendant, and after considering the law and the evidence, the court doth overrule the motion of the defendant to set aside the verdict of the jury, to which ruling of the court the defendant by counsel excepted.

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Enter: June 7, 1965.
D. CARLETON MAYES
Judge

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FINAL JUDGMENT

This day came the parties by counsel and it appearing to the Court that the defendant's motions to set aside the verdict and enter final judgment for the defendant on the ground that the same was contrary to the law and the evidence and without evidence to support it and, in the alternative, to grant defendant a new trial for misdirection of the jury was overruled by the Court on June 7, 1965, but that no judgment was then entered, on further consideration whereof IT IS OR-

DERED that the plaintiff recover of the defendant the sum of Two Thousand Dollars ($2,000.00) with interest thereon from the 16th day of October, 1964, until paid, as well as the plaintiff's costs in this behalf expended. To which action of the Court the defendant, by counsel, objected and excepted, and on motion of the defendant execution on said judgment is suspended for ninety days from this day, provided the said defendant or someone for it shall within thirty days from this day give bond in the amount of $2,500 with surety to be approved by the Clerk of this Court and conditioned according to law.

I ask for this:
CHARLES H. WILSON
Powell Street
Crewe, Virginia
Counsel for the plaintiff

Seen and objected to:

AUBREY R. BOWLES, III
901 Mutual Building
Richmond, Virginia 23219
Counsel for the defendant

Enter:
D. CARLTON MAYES
July 8, 1965

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ASSIGNMENTS OF ERROR

The defendant assigns the following errors:

1. The failure of the Court to strike the plaintiff's evidence and to enter final judgment for the defendant on the respective motions of the defendant made therefor at the conclusion of the plaintiff's evidence and at the conclusion of all

the evidence on the ground that the plaintiff had not sustained the burden of proof to establish any negligence of the defendant directly or indirectly causing her injury.

2. The failure of the Court to set aside the verdict of the jury and to enter final judgment for the defendant on the ground that the verdict is contrary to the law and the evidence and without evidence to support it, the plaintiff having failed to sustain the burden of proof to establish any negligence of the defendant directly or indirectly causing her injury.

3. The failure of the Court to set aside the verdict of the jury and, in the alternative, grant a new trial for its error in granting plaintiff's Instruction No. 2 on the grounds that the Instruction No. 2 was contrary to

page 31] the law and the evidence and without evidence to support it in that there was no evidence that a bottle exploded, no evidence that the bottle had not been tampered with after it left the possession of the manufacturer and no evidence that in any manner created a *prima facie* case for the plaintiff and that the instruction was misleading and confusing, allowing the jury to indulge in speculation concerning the defendant's duties and was highly prejudicial.

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Filed in the Clerk's Office of Nottoway County July 13 1965

HODGES S. BOSWELL, Clerk
By GRAYCE D. FITZGERALD, D.C.

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DOROTHY REED YEATTS,

plaintiff, was sworn, and testified in her own behalf, as follows:

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DIRECT EXAMINATION

By Mr. Wilson:

Q. Please state your name, age, and residence.

A. Dorothy Reed Yeatts; age, thirty-two; Burkeville.

Q. Do you live within the corporate limits of the town of Burkeville?

A. No, sir, I do not.

Q. How far do you live from the town of Burkeville?

A. Approximately two miles.

Q. On June 7, 1962, did you go to the Burkeville Market, for the purpose of making some purchases?

A. Yes, sir, I did.

Q. Will you tell the jury approximately what time of day it was that you arrived at the Burkeville Market?

A. It was approximately 3:15 to 3:30 in the

page 9] afternoon.

Q. What were the weather conditions on that day?

A. It was very hot.

Q. How were you dressed?

A. In Bermuda shorts, and roll-up sleeve blouse.

Q. Did you drive your own vehicle?

A. Yes, sir, I did.

Q. When you got to the store, what did you do?

A. I entered in the left door, walked past the checkout counter, turned to my right, walked down the right aisle. I went first to the Pepsi-Cola rack —

Q. Excuse me for interrupting you, Mrs. Yeatts. Did you at any time select any container for your groceries?

A. Yes, sir.

Q. Tell the jury about that, please.

A. As I walked in the door, I selected a counter from the left, I took the counter, and pushed it past the checkout counter, turned to my —

Q. You say you selected a "counter?"

A. A basket.

Dorothy Reed Yeatts

By The Court:

Q. You mean one of those baskets that roll up and down?

A. Yes, sir. Selected a basket and walked past the check-out counter, turned to my right, and walked down
page 10] the right aisle. I selected a carton of six — a six pack carton of 16-ounce Pepsi-Colas, placed them in my basket, and proceeded to the meat counter.

By Mr. Wilson:

Q. Now, Mrs. Yeatts, let me interrupt you again, please. The Pepsi-Colas that you selected, where were they stored, or located in the store?

A. They were located in the right aisle of the store, to my left, and I walked straight from those to the meat counter.

Q. Do you know the type of rack, if any, that the cartons of Pepsi-Colas were stored on?

A. They were stored on a rack which had the plastic, cellophane bottoms, which supported them. When you lifted a bottle — a carton of bottles, the plastic receded back into the back, or back to the next carton.

Q. Can you tell the jury the *approximately* height of that rack, and the cartons of Pepsi-Colas that were stacked on it?

A. There were approximately — when I lifted mine off of the rack, it was approximately shoulder height.

Q. Shoulder height?

A. Yes, sir.

Q. Did you select your carton from the top of
page 11] the rack, the middle of the rack, or the bottom of the rack, or just where did you select your carton?

A. I selected my carton from the very top, the end one, that is, to the front.

Q. All right, now. Go ahead, after you selected your carton of six Pepsi-Colas; what did you do with them and what happened after that?

A. I placed them in my shopping basket and walked directly to the meat counter, and waited to be waited on for meat. While I was waiting, several minutes had elapsed, and I heard a muffled sound, sounded like an explosion. Immediately, I thought it was a can of frozen — not frozen — but a can of biscuits in the chiller; and the chiller is directly behind the Pepsi-Cola rack. Only afterwards, after I heard the sound

did I realize that I had a sharp pain in my leg. I looked down, and there was a jagged portion of a bottle, Pepsi-Cola top on the bottle, sticking in my right leg on the inside. I grabbed it out, looked in my basket, bewildered. My Pepsi-Colas were still intact in the basket. What I did with it, I don't know; I guess I dropped it and I screamed, and they carried me to the doctor.

Q. Approximately how far were you standing from the rack on which the Pepsi-Cola bottles and cartons were located, at the time that this sliver of glass penetrated

page 12] your leg?

A. I would say approximately 5 steps away.

By The Court:

Q. Point to something in here, as to how far that would be.

A. As far as from the corner here to the end of the table.

Q. Which table, now?

A. The end of our table.

The Court: For the record, gentlemen, how far would you say that is?

Mr. Bowles: Five feet.

The Court: What do you say, Mr. Wilson?

Mr. Wilson: I would say 3 to 5 feet.

The Court: All right.

By Mr. Wilson:

Q. At the time that this sliver of glass entered your leg, did you have your face or your side or your back to this rack of Pepsi-Colas?

A. You mean the rack of Pepsi-Colas where I took mine from? I did not have my face to it; I had the back side of me, left, back side.

Q. Now, you say that you pulled the sliver of glass from your leg; is that correct?

page 13] A. Yes, sir.

Q. Do you recall what you did with it?

A. No, sir, I do not.

Q. Do you know whether or not it was the remains of a broken Pepsi-Cola bottle?

A. I am positive it was, because it still had the Pepsi-Cola

bottle cap of the bottle, and that, I think, would be the reason why I looked back in my basket to see if mine were still there. I couldn't figure out where it had come from.

Q. You said they took you to the doctor; who else was in the store that you know of, and can recall, at that time?

A. Mr. Billy Collins, Mrs. Cecil Cardwell, Mr. Cecil Cardwell, and Mr. Earl Conant.

Q. Anyone else?

A. There was a colored woman at the meat counter with me, but I have no idea who she was.

Q. Anyone else?

A. I don't remember anyone else. There was a woman who has died since.

Q. I want you to tell the jury anyone, whether she is living or dead.

A. Mrs. Pugh, from Burkeville, was also in
page 14] the Burkeville Market, but she has died since.

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Q. Was this one sliver of glass that has been mentioned the only particles of glass that went into your leg?

A. No, sir.

Q. Tell the jury about that.

A. It was the only part of the glass that I saw at the particular time. But approximately five weeks afterwards, slivers — small slivers of glass came out of my arm and out of this leg. Then there also were slivers of glass in my clothes that I had on.

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Q. Mrs. Yeatts, I don't believe I asked you this:

page 23] Getting back to the day of the accident, when you selected your Pepsi-Colas from the rack, and placed them in your cart, did you do anything to disturb the other Pepsi-Colas that were on the rack?

A. No, sir.

Q. Did you knock any of them off?

A. No, sir.

Q. Was there anyone else in the store near enough to the Pepsi-Cola rack to have touched them?

A. No, sir.

Mr. Wilson: She is with you.

The Court: All right, Mr. Bowles.

CROSS-EXAMINATION

By Mr. Bowles:

Q. Mrs. Yeatts, talking now about right when this thing happened, did you ever see a broken bottle after this happened?

A. Only the part that I took out of my leg.

Q. I gather you were standing, you said, with your back and your side to the Pepsi-Cola display?

A. Yes, sir.

Q. And the distance away that you estimated was from the edge of the platform there, to the edge of Mr. Wilson's table?

page 24]

A. Yes, sir.

Q. Which side did you have towards the drinks, your left side or right?

A. Left side.

Q. Left?

A. Left side.

Q. And your back?

A. Yes, sir.

Q. Do you know of your own knowledge where the piece of glass that found its way into your leg came from?

A. No, sir.

Q. And I believe you said you didn't see any broken bottles?

A. No, sir.

Q. Afterwards?

Dorothy Reed Yeatts

A. Except for the piece.

Q. The piece that was in your leg?

A. Yes, sir.

Q. And the little pieces that you said worked out later on?

A. Yes, sir.

Q. Of your own knowledge, now, Mrs. Yeatts, do you know what happened? I mean, do you actually know
page 25] what happened, or did you see what happened, other than the fact that you found a piece of glass in your leg, after hearing a popping noise?

A. That is all.

Q. That is all you know?

A. Yes.

Q. As you came by the display rack, and made your selection of a carton of 16-ounce Pepsi-Colas, what sort of condition was the rack in? Do you know that?

A. It seemed to be in perfect condition, as far as I could see.

Q. But you didn't make any particular inspection of it, you just made a casual observation?

A. There were no bottles sitting out in the floor.

Q. No bottles on the floor?

A. No, sir.

Q. I believe the last question Mr. Wilson asked you had to do with other people in the store, standing there with your back to the display rack. Did you keep looking around behind you to see if there were other people coming in and out of the store?

A. Well, I was talking to the woman who was dead.

Q. You were talking to the woman who was dead?

A. Yes, sir.

Q. Where was she?

page 26] A. She was behind the colored woman at the meat. When I say "behind," now the meat counter was straight. She was to the side, I reckon you would say, instead of behind.

Q. Would that be to your left?

A. To my left, yes, sir.

Q. Close over near where the meat — I mean, knife-sharpening was going on?

A. Not any closer than I was.

Q. But you don't know, as a matter of fact, whether there was anybody behind you, by the Pepsi-Colas, or not, do you? I mean, of your own knowledge?

A. Of my own knowledge, I don't. There was not when I turned around and screamed.

Q. There was not then?

A. Yes, sir.

Q. But you don't know of the period of time that you left the rack, after having made your selection, and when you screamed; during that period of time, you just don't know whether there was anybody back there?

A. I can't say there was not, but I feel sure there was not.

Q. But you don't know?

A. Well, I can't say, no.

Q. I believe you said from the time you made
page 27] your selection and were standing over by the meat counter waiting to be waited on, and you were cut, that it was several minutes. Was it that long a time?

A. Several minutes before what?

Q. Before you were cut?

A. Several, I would say, moments; yes, sir.

Q. Was it as much as five minutes?

A. I can't truthfully say. I didn't time it. But it was long enough for me to get to the meat counter and I had said a few words with Mrs. Pugh.

Q. Do you recall the 30th of June —

Mr. Wilson: I object to that, Your Honor. If we are going to argue that, I think it ought to be without the jury.

The Court: All right. You all take a walk in the jury room.

(The jury retired to the jury room.)

The Court: All right, gentlemen, let's hear you.

Mr. Wilson: If Your Honor please, my position is — I think I anticipate Mr. Bowles' question — he is going to attempt to have this witness say what she did or did not say in a discovery deposition, which was taken; and Your
page 28] Honor will recall, at the time that the order was entered for the taking of these discovery *deoositions,* that I did not endorse the order. It was not submitted

to me for endorsement. And I objected to the Court entering the order for the taking of that type of deposition. The rules of the Court — I did not bring mine with me this morning — with reference to the taking of that type of deposition is not for the purpose of doing what he wants to do here this morning, to impeach this witness by a discovery deposition which was taken sometime ago.

So far as the facts are concerned, I think that the law is rather clear on it, and I would like to submit to the Court that those depositions if taken at all, were taken for the purpose of apprising counsel for defense the nature of the case, in the form that it would have been probably been a bill of particulars heretofore.

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Mr. Bowles: That was a discovery deposition.

The Court: What you are asking here is to try to find out if this woman said something at a different time.

Mr. Bowles: Yes, sir.

The Court: I am not going to allow that.

(Argument omitted.)

The Court: That is what you say, but I disagree, so I am going to overrule it.

Mr. Bowles: Note my exception.

The Court: Note your exception, and bring the jury back.

(The jury was returned to the courtroom.)

page 30] The Court: All right, Mr. Bowles.

By Mr. Bowles:

Q. Mrs. Yeatts, I believe you testified that you were there and that there was a time of several minutes between your getting your drinks and your being cut?

A. Yes, sir.

Q. Was it as long a period as five minutes?

A. I would say it was several minutes. Whether there were five, three, four. I would say it wasn't over five and I would say it wasn't under three.

Q. And you were standing there talking and waiting to be waited on?

A. Yes, sir.

Q. Do you know, during that period of time, where Mr. Collins was?

A. No, sir.

Q. Do you know where Mr. Cardwell was?

A. No, sir.

Q. Do you know where Mr. Conant was?

A. No, sir. Mr. Cardwell was behind the meat counter.

Q. That you were standing in front of?

A. Yes, sir.

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Q. Of your own knowledge, Mrs. Yeatts, I gather then, you really don't know what happened, other than you heard a noise and a piece of glass was in your leg, and that is all you know, of your own knowledge?

A. That was a piece of a Pepsi-Cola bottle.

Q. All right, a piece of Pepsi-Cola bottle. Getting back to this length of time that you were standing there, or the length of time between when you picked up the drinks and when you were cut, did you go and tell your attorney what happened after this occurrence?

A. I didn't hear the first part.

Q. Did you go and tell your attorney, Mr. Wilson, what happened?

A. After the injury, yes, sir.

page 33] Q. After the injury?

A. Yes, sir.

Q. Did you tell Dr. Jackson what happened, when you went to see him?

Dorothy Reed Yeatts

A. Yes, sir.

Q. This suit that you brought against Pepsi-Cola Bottling Company in Petersburg, in paragraph 6, sets out: "that after selecting the cartons containing 6 bottles of Pepsi-Cola from the display rack, the plaintiff turned from the display rack with the intention of placing the carton that she had selected in a shopping cart furnished to and used by customers of Burkeville Market, whereupon a bottle of Pespi-Cola exploded and fragments thereof struck the plaintiff in her leg;".

Now, that, to me, Mrs. Yeatts, implies, "with the intention of placing the carton," doesn't mean that you have already placed them.

A. I had placed it.

Q. Did you tell Mr. Wilson what happened? I presume Mr. Wilson prepared this statement from what you told him, did he not?

A. Well, I am sure that he would have.

Q. What I am getting at, how long an interval of time was it? Was it something that was small? When you

page 34] picked the drinks up, did it happen as you were intending to place them in your cart?

A. No, sir. While I was intending to place them, no, sir.

Q. Or did it happen in this three-minute interval after you placed them, and moved away?

A. This three-minute — this several minute interval after I had placed them.

Q. I realize you didn't draw this piece of paper, ma'am, but this, then, is not the correct version?

A. Well, if you say "intended" to place them, no.

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The Court: Let the jury go out one minute. I want to ask one question. You all can start smoking, if you want, because I am going to give you a five-minute break.

(The jury retired from the courtroom.)

By The Court:

Q. Did I understand that the cap was on, the Pepsi-Cola cap was on, this piece of sliver, the reason you thought it was a Pepsi-Cola?

A. In my leg?

Q. Yes.

A. Yes, sir.

Q. The cap was —

page 36] A. Still on it.

Mr. Bowles: Judge, if you are going to take a recess now —

The Court: Take a recess.

Mr. Bowles: May I read into the record what her answer was, on the time element?

The Court: Yes, sir. All right, take a five-minute recess.

(Witness stood aside.)

(During the recess, the following occurred:)

Mr. Bowles: On June 30, 1964, the defendant took the discovery deposition of the plaintiff, at which time, in response to questions regarding the length of time interval between picking up the drinks and when she was cut, at page 9, she was asked by the defendant's lawyer, "And waited approximately three minutes?"

Answer: "Five minutes."

Question: "Five minutes?"

Answer: "Yes, sir."

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JAMES EARL CONANT,

having been previously sworn, testified in behalf of the plaintiff, as follows:

DIRECT EXAMINATION

By Mr. Wilson:

Q. Will you state your name, age, address, and occupation, please, sir?

James Earl Conant

A. James E. Conant; thirty-nine years old; run the Burkeville Market, in Burkeville; and I reside in Burkeville.

Q. Were you the owner and operator of the Burkeville Market on June 7 of 1962?

A. I was.

Q. Were you present in your place of business, between 3:00 and 3:30 on the afternoon of June 7?

A. I was.

Q. Where were you standing or sitting, or where were you at the time that Mrs. Yeatts was injured?

A. I were working the cash register, checking out, myself.

Q. Approximately how far is that from the position Mrs. Yeatts was in when she received the injury?

A. Approximately 30, 35, or 40 feet.

Q. 30 to 40 feet?

page 38] A. Yes, sir.

Q. And that, I believe, is at the front of the store, the cash register and the checkout counter?

A. Yes, sir.

Q. And Mrs. Yeatts was near the rear of the store, at the meat counter?

A. That is right, sir.

Q. Mr. Conant, did you, on June 5 of 1962, receive a delivery of Pepsi-Colas from the Pepsi-Cola Company of Petersburg?

A. According to my records, I did not, sir. The last record I have is June 2.

Q. On the last delivery that you did receive, would you tell the jury the way and manner in which the delivery was made?

A. It is brought in the front door by the Pepsi-Cola representative; he takes and puts all of the Pepsi-Colas on the display unit, himself, and there is none stored in the back.

Mr. Wilson: Now, Your Honor, I would like to have that rack brought in.

The Court: All right.

Mr. Wilson: Would you mind bringing that rack in?

page 39] By The Court:

Q. Is this rack similar to the one?

A. Yes, sir.

By Mr. Wilson:

Q. Mr. Conant, will you tell the jury whether or not that is substantially the same type of rack that you had in your store on June 7, the day that this injury occurred?

A. Yes, sir, it is.

Q. When you say that the representative of the Pepsi-Cola Company comes in or brings in the product, just how does he place them on this rack?

A. Places them on the celluloid, pulling them out and holding them out, and places them up until they come all of the way out. Then they lock in the celluloid. As you pick your carton up, the celluloid goes back in against the next carton, locking it in.

Q. Do you recall whether or not at the time, the rack was full, or practically full?

A. No, I cannot.

Q. I mean, at the time of the delivery?

A. That, I don't know, either, sir.

Q. The Pepsi-Colas that are brought into your place, are they brought in in the six-carton packs, or are they *brougnt* in in a crate?

page 40] A. They are brought in in a crate. The bottles are in the six-carton packs in the crates. There is four of them in a crate.

Q. And the cartons, as I understand you, are removed from the crate and placed on this rack?

A. On that type rack.

Q. On that type of rack?

A. Yes, sir.

Q. By the representative of the Pepsi-Cola Bottling Company?

A. That is correct, sir.

Q. Did you, or, as far as you know, did any of your employees, have anything to do with the servicing of the rack?

A. No, sir, they did not.

Q. Do you know whether you or any of your employees even touched any of the cartons, cases, Pepsi-Cola bottles, or the rack?

A. Well, if somebody asks for a carton of Pepsi, we will naturally take them off for them.

Q. Do you know whether they had done that?

James Earl Conant

A. No, I do not know whether anyone had taken one off or not.

page 41] By The Court:

Q. Were the customers allowed to wait on themselves?

A. Yes, sir. That is a normal procedure, unless one of us is standing there to take it for them.

By Mr. Wilson:

Q. Do you know when Mrs. Yeatts came into your store that afternoon?

A. No, sir, I do not.

Q. When is the first time that you knew she was in your store?

A. Well, I had seen her in the store walking around, but I couldn't tell you what time it was she come in.

Q. You knew she was in your store?

A. I knew she was in the store.

Q. That afternoon?

A. Yes, sir.

Q. Did you hear any unusual noise or scream or yelling of any kind?

A. I heard the breakage of glass and I heard Mrs. Yeatts scream. And I thought maybe — it was some children in the store and I thought maybe somebody had been cut, and I went running back there. There, I found Mrs. Yeatts with a cut on her leg. I looked at it to see how bad it was, and, as soon as I saw how bad it was, I immediately called Mr. page 42] Collins to put a compress on it, and Mr. Cardwell and Mrs. Cardwell to take them to the doctor.

Q. You say you called Mr. Collins; was he an employee of yours?

A. Yes, sir. He also was on the emergency squad.

Q. Do you know where he was located, at the time of this accident?

A. He was behind me, bagging groceries.

Q. He was near you?

A. Yes, sir.

Q. Do you know where Mr. and Mrs. Cardwell were?

A. Mrs. Cardwell was to the left of the store, over on the

shelves. There is an aisle of shelves here, and an aisle, gondolas, another aisle, gondolas, and then you come to the dairy case, and she was to the left shelving.

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By Mr. Wilson:

Q. Mr. Conant, I ask you to examine that photograph which has been marked Plaintiff's Exhibit No. 1, and tell the jury whether or not that further represents the general layout of your store as of June 7, 1962.

A. Yes, sir, it does.

Q. In the rear of the store, the picture depicts a meat counter; will you tell the jury whether or not that has been moved, or is the same as it was?

A. It is the same as it was then.

page 46] Q. It would be a meat case, rather than a counter, wouldn't it?

A. Yes, sir.

Mr. Wilson: Change that, please, sir.

Q. Mr. Conant, would this be the righthand aisle of your store?

A. Coming in the store, yes, sir, looking from front to back.

Q. Will you point out to the jury where your knife sharpener was?

A. You can't see it, because it's back of all of this, back over in this corner here.

Q. Was it an electric motor type sharpener?

A. Yes, sir.

Q. Did it make any particular amount of noise?

A. This particular one did, yes, sir; quite a bit of noise.

Q. Do you know whether or not at the time of Mrs. Yeatts' injury that that motor was running or not?

A. I didn't pay that much attention to it. Mr. Cardwell can answer that for you, sir. When you are running the cash

James Earl Conant

register, you don't hear anything else.

Q. You said that you heard a scream and you ran back in the store where Mrs. Yeatts was?

page 47] A. That's right, sir.

Q. Where was she?

A. Just to the right of the Pepsi-Cola display, in front of the meat case.

Q. Did you see this sliver of glass that came from her leg?

A. No, sir, I did not.

Q. Then you said, after you saw the seriousness of the wound, that you had her sent to a doctor, after applying some kind of an application; is that correct?

A. Mr. Collins, I think, made a compress or a tourniquet for her leg, to stop the bleeding.

Q. Do you know whether or not the remains of the broken bottle are in existence at the present time?

A. So far as I know, they are not, sir.

Q. Do you know who cleaned up the debris?

A. To my best of my knowledge, I think Mr. Collins did.

Q. Mr. Conant, Mrs. Yeatts, as you have heard her testify, I believe, on that particular occasion was wearing shorts. Do you know whether or not that is correct?

A. That, I cannot recall, sir.

Q. You do not recall?

A. No.

page 48] Q. The reason I asked you that, is your store air-conditioned?

A. Yes, sir, it is.

Q. Mr. Conant, from the time of the delivery of the Pepsi-Colas to your place of business, until the afternoon of June 7, 1962, when Mrs. Yeatts received this injury, did you personally touch any of the cartons or bottles that were on that Pepsi-Cola rack?

A. No more than if I had picked one up to give it to a customer.

Q. Do you know whether or not you did that?

A. That, I do not.

Mr. Wilson: All right, sir. He's with you.

James Earl Conant

CROSS-EXAMINATION

By Mr. Bowles:

Q. Did you see this accident happen?

A. No, sir, I did not.

Q. Of your own knowledge, do you know what happened?

A. No, sir, I do not.

Q. When you got back there, where was the glass? What did you see?

A. When I went back, the first thing — I didn't pay any attention to what anything was but her. I wanted

page 49] to see how bad she was hurt.

Q. Of course.

A. After I had her out to the doctor and had to clean up the store, we found one Pepsi-Cola carton on the floor with four bottles in it, intact, one broken bottle still in the carton, and one other bottle was just disintegrated and missing. It was part of that glass in her. And there was glass in the general area of five, I say, to seven or eight feet around in that area.

Q. And this carton was on the floor?

A. It was on the floor.

Q. And there were four whole bottles in it?

A. Four whole bottles in it.

Q. And I gather, parts of a broken bottle in one of those containers?

A. Yes, just like it broke and sat there, and the other one went to pieces.

Q. And the other one was just scattered all over the place?

A. Yes, sir.

Q. And you made no effort to preserve the pieces?

A. No, sir, I didn't.

Q. But this was on the floor, not up on the display?

A. The carton was setting on the floor.

page 50] Q. Do you remember whether the carton was upright, on its side, or on its end, or what?

A. That I can't remember.

Q. But you do remember the particulars of how many bottles, and where everything else was?

A. I do remember that there was one bottle broken and the other one was just in pieces.

James Earl Conant

Q. Right. But don't know the position of the cartons?
A. No, I don't.
Q. Was it close to the rack, or far away from the rack?
A. Oh, I would say it was, oh, about a foot from the rack.
Q. And I believe you said your records show that the last delivery you got prior to June 7 was on June 2?
A. It was.
Q. What size Pepsi-Colas were these?
A. 16 ounce.
Q. The big ones?
A. Yes, sir.
Q. In the month of June, did you do a fair business of selling Pepsi-Colas?
A. I would think so, yes, sir.
page 51] Q. Is it normal for people to come into your store and take Pepsi-Colas off of the rack?
A. Yes, sir, it is normal procedure.
Q. And if you are asked, I gather that you would take them off of them?
A. That's right, sir.
Q. Is it a normal procedure, in the grocery business, during the month of June, do you find, that people come in and will mix drinks, that they will take two Cokes, and take them out of a carton and put two Truades in, and that sort of thing?
A. That is possible.
Q. That happens?
A. I didn't say that happened.
Q. No, I said that happens?
A. Yes, sir, it does.
Q. Is that something that went on during the month of June?
A. That, I couldn't answer. I would say so.
Q. As much as it would any other time?
A. As much as any other time.
Q. When they buy soft drinks from you, some people, of course, return the empties to you, don't they?
A. That's right.
page 52] Q. Where do you put those?
A. In the back room.
Q. Do they ever put those out with the full ones? Did you ever have to clean the place up?

A. They have to be cleaned up, yes, sir, but they usually set them on the floor.

Q. In front?

A. Yes, sir.

Q. In the process of running your store and taking care of it, do you ever find that people, in moving the drinks in the displays, particularly, the Pepsi-Cola display, disarrange it, or people are inclined not to always take the top one, but might take one under the top one, and that sort of thing?

A. I have never seen anyone take one under the top one.

Q. But have you seen disarrangement of the display?

A. Well, they pick them, whatever one they come to, as they come to them, whichever one is convenient to them.

Q. Have you ever had occasion to rearrange the displays?

A. After they mix those bottles up like they do, we have to take them and put them in our soft drink box and cool them.

That is what we use to take back to the back, is page 53] those mixed-up drinks.

Q. But in the normal course of keeping your store in tip-top shape, if you saw that a customer had left a case of drinks sort of hanging over a little bit, you would put that back where it belonged?

A. If I saw one. But I don't see — you don't see them sitting out. They way you have those racks, when you take the one bottle up, the celluloid goes back in against them and holds them.

Q. Do you find that people will put a loose drink in the rack, along with the cartons?

The Court: What do you mean "a loose drink?"

Q. (Continuing) A loose carton, not bottle in the carton.

A. You mean set it up on the rack?

Q. Yes.

A. No, sir.

Q. I believe you said Mr. Collins was up with you bagging groceries?

A. That is right, sir.

Q. From your position at the cash register, and Mr. Collins' position bagging groceries, can you see where this incident occurred?

A. You could see the top of the heads, but you
page 54] can't see anything else. You are looking right over top of the displays.

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E. C. CARDWELL
was sworn, and testified in behalf of the plaintiff, as follows:

DIRECT EXAMINATION

By Mr. Wilson:

Q. Please state your name, age, residence, and occupation.

A. E. C. Cardwell; forty-one; Burkeville, Virginia; work in the store.

Q. On June 7, 1962, where were you employed?

A. Mr. Conant's store, Burkeville Market.

Q. What was the general nature of your employment in that store?

A. Well, most of the time I was working the meat counter.

Q. On the afternoon of June 7, 1962, do you know whether or not Mrs. Yeatts was injured, while in that store?

page 55] A. Yes, sir.

Q. At the time of her injury, where were you?

A. Well, I was standing behind the meat counter well, not exactly behind the meat counter, but over on the end of it, sharpening some knives with an electric grindstone.

Q. Will you take this photograph and show the jury, as near as you can, approximately where you were at that time?

A. You can't exactly see. But here is the meat counter, this is the approximate end of it. Where I was at is just about this pole, just on the other side of this pole here. It's a pole there, with a clock on it, and I was standing right behind here. The meat counter — there is a table back here where I put my grinder on, and I was back there, over behind the counter itself, back in this corner.

Q. What were you doing at that particular time?

A. Sharpening some knives.

Q. Can you tell the jury the type of sharpener that you were using?

A. It's an electric motor. It's mostly homemade, you would

call it. We bought it off another fellow. It's an electric motor with two grindstones on it, with a belt turning both of them at one time, mounted on a big block and slab of wood.

Q. What type of noise does that motor make

page 56] when it is running?

A. It makes a whole lot.

Q. Was it running on this particular occasion?

A. Yes, sir.

Q. When did you first discover that Mrs. Yeatts had received this injury?

A. Mr. Conant said, "Get her to the doctor."

Q. Did you hear her scream?

A. Well, I heard her scream, but who it was, I couldn't tell you.

Q. When you heard the scream, what did you do?

A. Well, I looked up; but with the stuff setting there, the position I was in, all I could see was the head.

Q. Did you go to Mrs. Yeatts?

A. Yes, sir.

Q. Where was she, with reference to that meat counter?

A. Well, she was standing in front of the meat counter, somewhere right along in here. Exactly where, I could not say, to be truthful about it; I mean, at that particular time.

Q. Did you see the sliver of glass in her leg?

A. No, sir.

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Q. Now, Mr. Cardwell, do you know when these Pepsi-Colas were delivered?

A. No, sir. It was on the usual date, but what date, I could not tell you.

Q. It has been testified by Mr. Conant that this is substantially the same type of rack that was used in his store, on which Pepsi-Colas were stored. Do you know whether or not that is correct.

A. That is correct.

Q. On the day, June 7, 1962, do you know whether or not the case was empty, half-full, full, or approximately full?

A. That, I do not know, sir. I couldn't say.

Q. You don't remember?

A. No, sir; because that, I did not pay too much attention to.

Q. Did you, as an employee of Burkeville Market, at any time between the date of the delivery of those Pepsi-Colas and the injury of Mrs. Yeatts, touch the Pepsi-Colas or the rack in any way?

A. Not to my knowledge, no, sir.

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Q. Did you see or examine the wound?

A. I saw it, sir, but I didn't examine it.

Q. Could you tell the jury whether or not the wound was made by an article coming from a height going downward or straight in, or from downward upward?

Mr. Bowles: I am going to object to that, unless he shows his qualifications.

By The Court:

Q. Could you tell?

A. I could tell which way the cut was.

Q. You just describe the cut as you saw it.

A. Well, the cut was cut at the top and kind of laying open-like. I was at the doctor's office, when I really saw it, after he cleaned it off.

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page 61] CROSS-EXAMINATION

By Mr. Bowles:

Q. Mr. Cardwell, you were back sharpening knives and,

looking in the front of the store, in the left side of the store?

A. Right side.

Q. Right?

A. Yes, sir, facing the front of the store.

Q. All right. And you did not see what happened?

A. No, sir.

Q. And of your own knowledge, do you know what happened?

A. No, sir.

Q. Had you at any time, from the delivery on, as Mr. Conant has testified, on June 2, up until the time that this incident happened, had occasion to clean up the bottle display, or anything like that?

A. No more than we — if I would get through my meat counter and somebody set an empty bottle down, I would always keep those cleaned up, or help the others.

Q. If you saw that somebody had mixed drinks, changed Pepsi-Colas and taken two Pepsi-Colas out of a Pepsi-Cola carton and put two Truades in, would you rearrange that?

page 62] A. I never done any of that.

Q. You never did any of that?

A. No, sir.

Q. If you saw anything in the store like, say, a box of shredded wheat that was hanging over a shelf, would you push it back?

A. I expect I would.

Q. Would you do the same thing for a Pepsi-Cola or Coca-Cola carton, if you saw it?

A. If I saw them.

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LOUISE CARDWELL,

was sworn, and testified in behalf of the plaintiff, as follows:

DIRECT EXAMINATION

By Mr. Wilson:

Q. Will you state your name, residence, and occupation, as of June 7, 1962?

Louise Cardwell

A. Louise Cardwell; thirty-nine; Burkeville, Virginia.

Q. Where were you employed on June 7, 1962?

page 63] A. I was working part-time, at Burkeville Market.

Q. Were you working in the market on that particular date?

A. Yes, sir, I was.

Q. Between 3:00 and 3:30 in the afternoon, when Mrs. Yeatts was injured, do you know what position in the store you were in?

A. Yes, sir, I do.

Q. Tell the jury, please.

A. I was cleaning the counter where the ketchup was on, to the right as you come in the store from the back of the store — I mean, to the right.

Q. Would you mind going in from the front of the store?

A. All right. I was on the left aisle, coming from the front of the store, cleaning the counter and waxing it and putting things back.

Q. Was Mrs. Yeatts on the right or left aisle as you came in from the front of the store?

A. Well, when I went to it, she was in the right.

Q. When did you first discover that she had suffered an injury?

A. Well, I heard the breakage, and I heard her scream, and I went around the counter to see what had hap-

page 64] pened.

Q. When you went around the counter, what did you see?

A. I saw her standing, and two men were busy wrapping her leg.

Q. The two men you refer to are Mr. Cardwell and Mr. Collins?

A. Mr. Conant was there, and Mr. Collins.

Q. Mr. Conant and Mr. Collins?

A. Yes, sir.

Q. They had gotten there before you did?

A. Yes, sir.

Q. Did you see the wound in Mrs. Yeatts' leg?

A. Not at that time.

Q. Did you know what had happened?

A. No, sir, I did not.

Q. What did you do?

A. Well, I didn't do anything at that time, until Mr. Conant told my husband to take — if he and I would take her to the doctor, and we left with her to go to the doctor.

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Q. Now, you said that you did not see the wound at the time in the store. Did you subsequently see it?

A. I saw it at the doctor's office.

Q. Would you explain to the jury the nature of that wound?

A. Well, it was cut, as my husband said, with a lapped-over incision.

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page 66] CROSS-EXAMINATION

By Mr. Bowles:

Q. Mrs. Cardwell, you did not see Mrs. Yeatts get cut, did you?

A. No, sir, I did not.

Q. And of your own knowledge, you don't know what happened?

A. No, sir, I do not.

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REDIRECT EXAMINATION

By Mr. Wilson:

Q. Mrs. Cardwell, as an employee of Burkeville Market, did you at any time between June 2, and June 7 of 1962, touch the Pepsi-Colas?

A. No, sir, I did not, because I was employed to help straighten the counters. I was cleaning the counters and waxing them and putting — dusting the products on them.

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page 67] RECROSS-EXAMINATION

By Mr. Bowles:

Q. Do you buy Pepsi-Colas?

A. Occasionally.

Q. During that period of time, did you buy any Pepsi-Colas?

A. At this time, I couldn't say. I don't remember.

Q. If you had bought any Pepsi-Colas, would you have gotten them at the Burkeville Market?

A. Very definitely so.

Q. And you would have taken them off that display?

A. Yes, sir.

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JAMES G. COLLINS

was sworn, and testified in behalf of the plaintiff, as follows:

DIRECT EXAMINATION

By Mr. Wilson:

Q. Please state your name, age, residence, please, sir.

A. James G. Collins; I live at Burkeville, Virginia; I am fifty-four years old.

page 68] Q. Talk a little louder, so the jurors over there can hear you.

Mr. Collins, on June 7, 1962, where were you employed?

A. Burkeville Market.

Q. Were you in the market on that afternoon between 3:00 and 3:30, when Mrs. Yeatts was injured?

A. I was.

Q. Where were you at the time she received her injury?

A. I was standing directly behind Mr. Conant. He was operating the register, and I was bagging groceries in a bag.

Q. Mr. Conant has testified that that was near the front of the store?

A. Front of the store.

Q. Where was Mrs. Yeatts when she was injured?

A. She was back between the Pepsi-Cola display stand and the meat counter.

Q. Is that the type of rack that the Pepsi-Colas were stored in, in the Burkeville Market?

A. Yes, sir.

Q. Do you recall at the time whether or not the rack was empty, half-full, or full, or what the nature of it

page 69] was in that respect?

A. I don't remember.

Q. Did you see Mrs. Yeatts when she came into the store?

A. I really couldn't say whether I saw her when she come in the store. I don't remember.

Q. When did you first discover that she had been injured?

A. When I heard the glass breakage, and I heard her scream.

Q. What did you do?

A. We went running back there.

Q. What did you do when you got back there?

A. I run back to the rack, and got two men's pocket handkerchiefs and made a compress, put it over the wound on the leg, and wrapped an apron around it.

Q. What was the type of wound?

A. I couldn't very well tell. She was bleeding and blood coming out. I couldn't very well tell.

The Court: Is he the man with the life-saving crew?

The Witness: I was; yes, sir.

By Mr. Wilson:

Q. Mr. Collins, did you, as an employee of

page 70] Burkeville Market, touch or disturb those Pepsi-Colas in any way, after they had been racked up?

A. Not to my knowledge, no.

Mr. Wilson: He's with you.

CROSS-EXAMINATION

By Mr. Bowles:

Q. Mr. Collins, in response to one of Mr. Wilson's questions, he asked you where Mrs. Yeatts was standing when she was

James G. Collins

injured. Did you see her get injured?

A. No, sir, I didn't see her get injured.

Q. Do you know where she was standing when she got injured?

A. No, sir, I don't.

Q. What you mean is you know where she was standing when you went over there?

A. When I got to her, yes, sir.

Q. That was after she was injured?

A. Yes, sir.

Q. You didn't see this happen?

A. No, sir.

Q. Of your own knowledge, do you know how it happened?

A. No, sir, I do not.

page 71] Q. What were your duties in the Burkeville Market?

A. Well, it was straightening up stock, sometimes I operated the cash register; sometimes I was packing groceries in the boxes, taking them out and putting them in customer's cars.

Q. Did you ever straighten the soft drink display?

A. No, sir.

Q. Did you ever move empty bottles away from it?

A. Yes, sir, I have picked empty bottles out of the floor.

Q. If you had seen that the soft drink display was disarranged, would you have put it back?

A. No, sir.

Q. Is that part of your duties?

A. We didn't bother them, no, sir.

Q. If you had seen a sack of potatoes getting ready to fall off the shelf, would you have pushed that back?

A. More than likely.

Q. But you wouldn't push the Pepsis, if you saw that sticking out?

A. We more or less left it up to the routemen. We wouldn't fool with those.

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Mr. Wilson: At this time, Your Honor, I would like to read the depositions of Drs. Adams and Jackson, respectively, to the jury.

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Mr. Wilson: I think we will have to rest.
Mr. Bowles: Defendant has a motion.
The Court: You all take a walk.

(The jury retired from the courtroom.)

The Court: All right.
Mr. Bowles: If Your Honor please, the defendant moves the Court to strike the plaintiff's evidence and enter up summary judgment for the defendant. It is our position, in support of the motion, that the plaintiff has not borne the burden of proof, she has not met the burden of proof that is encumbent upon her in negligence cases. I am going to point out to the Court that this is not a suit in warranty, this is a suit in pure, simple negligence.

(Arguments omitted.)

The Court: I will overrule you at this time.

(Further argument omitted.)

The Court: That is for the jury to determine, Mr. Bowles.
Mr. Bowles: Note our exception to the Court's ruling.

page 89] (The jury returned to the courtroom.)

Mr. Bowles: Judge, I am not going to put on any evidence. The defendant rests.
The Court: All right, sir.

Mr. Bowles: I renew the same motions.

The Court: Yes, sir; and I overrule you.

Mr. Bowles: Exception.

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The defendant objects and excepts to the giving by the trial judge of any instructions, for the reason set forth in the motion to strike the plaintiff's evidence, and the motion renewed after the close of all of the evidence; and. on the further ground that the evidence predominates in showing that judgment should be entered for the defendant on the motions, on the basis that the plaintiff has failed to meet the burden of proof in showing any negligence on the part of the defendant, much less that any such negligence was a proximate cause of her injury; that the testimony as brought out, shows that the plaintiff, and all of her witnesses, do not know how or why the accident or incident occurred, and only know that a piece of glass was in the plaintiff's leg. The plaintiff has offered no testimony to show how the piece of glass came to be in her leg, but, on the contrary, she and her witnesses have taken the position that they do not know; and consequently, under the rule in *Murphy* v. *Saunders,* 202 Va. 913, and *Robey* v. *Richmond Coca-Cola Bottling Works,* 192 Va. 192, the Court should

page 91] have sustained the defendant's motion. Thereupon, the defendant offered instructions with the understanding that it was not waiving its objection to the giving of any instructions by the Court.

Now the defendant objects and excepts to the giving by the Court of INSTRUCTION NO. 2 on behalf of the plaintiff, on the grounds that there is no evidence that there was an explosion of a bottle; that there was no evidence that it had or had not been tampered with, after leaving the possession of the manufacturer; and that the giving of an instruction telling the jury that the mere happening of an accident set up a *prima facie* case of negligence as against the de-

fendant, was highly prejudicial and improper in that the defendant is only required to exercise ordinary care in the manufacture and delivery and stacking of its product; that the instruction as given is confusing; and that there is no evidence of failure to exercise any degree of care. There is no question of whether the defendant did exercise ordinary care or not, in that the plaintiff has not taken the position that we failed to exercise ordinary care, and that the plaintiff has failed to introduce any evidence that would even tend to go to the question of whether ordinary care was exercised or not. The instruction, as given, puts the question to the jury on the basis of a guessing game, page 92] and allows the jury to indulge in speculation and guessing.

The defendant objects and excepts to the giving of INSTRUCTION NO. 5 by the trial Court on the basis that there is no evidence of any negligence whatsoever on the part of the defendant that has been proven, or even adduced by this plaintiff, other than the fact that she was cut by a piece of glass that had on it a Pepsi-Cola cap, and that she has not brought forth any witness who testified as to how or why the occurrence happened; and all of the witnesses that she has brought forth, including herself, testified that they did not know. And, on the further ground, that the plaintiff is guilty of contributory negligence, as a matter of law, on the theory that she was the last person to be in proximity to the display rack, prior to being cut; and that her own evidence shows that as she approached the rack, there were no drinks on the floor, but that the evidence shows that after she left the rack, there were drinks broken and in a carton on the floor.

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page 94]

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The Court: Lady and gentlemen of the jury, is your verdict unanimous?

Foreman Jenkins: Yes, sir.

The Court: "We, the jury, find for the plaintiff and assess

the damages at $2,000.00. A. T. Jenkins, Foreman."

Lady and gentlemen, you are excused. I thank you for your time in deliberation.

(The jurors, having been excused, retired from the courtroom.)

Mr. Bowles: Your Honor, the defendant wants to make a motion.

page 95] The Court: Do you want to make your motion, or reserve it, until you get it typed up?

Mr. Bowles: What is the general practice of the Court?

The Court: Well, the general practice is that if you intend seriously to go up on the situation, and argue it, you go ahead and get it typed up, and then we will argue it later on.

Mr. Bowles: The Court understands that the motion is to set the jury's verdict aside, on the grounds set out previously on the motion to strike the plaintiff's evidence?

The Court: I will give you a few days to do that, and then, if you all want to argue it with me and set a date, then I will do that. You all can get together in the meantime, and I would suggest that you let me know.

Mr. Bowles: Right. Then I understand that we are to submit written — does the Court desire written —

The Court: What they generally do, if you all want to write it, it will be all right; or, if you all want to come and argue it, it will be all right. Either way you want to do it.

Mr. Bowles: I assume that the Court will not enter judgment on the jury verdict, until after the motion

page 96] has been argued?

The Court: No, but I am not going to wait five years for this to be done. When are you planning on getting that transcribed?

Mr. Bowles: That is largely up to Mr. Lee.

The Court: Are you planning on getting it transcribed?

Mr. Bowles: Yes, sir.

The Court: If you all come to some agreement or something, in the meantime, then you can let me know.

Mr. Bowles: Yes, sir.

The Court: All right. I will take it under advisement.

Dr. Gustavus Vasa Jackson, Jr.

★ ★ ★ ★ ★

Dep.
page 3] DR. GUSTAVUS VASA JACKSON, JR., a witness of lawful age, first being duly sworn, deposes and states as follows:

DIRECT EXAMINATION

By Mr. Wilson:

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Dep.
page 5]

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Again, this is a 3 centimeter ragged laceration of the medial aspect of the right foreleg with penetration of at least 5 centimeters deep into the leg. The angle of the penetration was superiorly down into the leg — from up to down, in other words.

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Dep.
page 11]

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CROSS EXAMINATION

By Mr. Bowles:

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Dep.
page 15]

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Q. So when you talk about a 3 centimeter wound, it is a little over an inch.

A. A little over an inch. That's right.

Q. You were talking, I believe, about the angle of wound.

A. Yes.

Q. You said it was a superior angle.

A. Yes.

Q. Meaning that the object had come downward from above —

A. From above; yes.

Q. — into the leg.

A. Yes.

Q. And not up from below.

A. It did not appear that way on exploring the *would*: no. It came from above.

Q. Could you, from what you observed, make any estimate as to what height above? I mean, would the source of the object that projected itself into the patient's leg, would it have to have been a good bit higher than where the wound was, or —

Dep. page 16] A. Well, of course this would be relative as to how close she was standing to the stack there. But, I would say probably she was within arm length of the stack when she reached over for the bottle of Pepsi there. That is just a rough estimate. I would say the bottle exploding would have had to occurred at least approximately a foot above the incisional area. Yes. A foot above, from the point of penetration.

★ ★ ★ ★ ★

Dep. page 3] DR. RAYMOND A. ADAMS,

called as a witness in behalf of the plaintiff, first being duly sworn, deposes and states as follows:

★ ★ ★ ★ ★

Dep. page 9]

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Dr. Raymond A. Adams

CROSS EXAMINATION

By Mr. Bowles:

★ ★ ★ ★ ★

Dep.
page 10]

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Q. Where is that scar?
A. It's on the medial aspect of her leg.
Q. You mean by that on the shin bone of your leg?
A. The medial aspect of her leg; the shin bone is in front.
Q. You will have to excuse my ignorance, but if you will just tell me in old common, every-day language where the scar is, it would help?
Dep. page 11] A. It's on the inner aspect of her lower leg.
Q. Can you locate it as between the ankle or the knee? Is it closer to the ankle?
A. Closer to the ankle.
Q. About how far from the ankle?
A. A few inches; I didn't localize it precisely as to centimeters or inches.
Q. But it is on the inner part of the right leg?
A. That's right.
Q. Several inches above the ankle?
A. That's right, several inches above the ankle.
Q. How large a scar is this?
A. Well, I didn't measure the size of the scar and record it, but it was a small scar.

★ ★ ★ ★ ★

A Copy—Teste:

H. G. TURNER, Clerk.

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