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SUPREME COURT OF VIRGINIA

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IN THE
Supreme Court of Virginia
AT RICHMOND

730363

LYNCHBURG COCA-COLA BOTTLING CO., INC.,

Appellant

v.

WILLIAM HENRY REYNOLDS,

Appellee

APPENDIX

Volume 1 - pages 1-52

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IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

RECORD NO. 730363

LYNCHBURG COCA-COLA BOTTLING CO., INC.,
Appellant

v.

WILLIAM HENRY REYNOLDS,
Appellee

APPENDIX
Volume 1 - pages 1-52

Upon the petition of Lynchburg Coca-Cola Bottling Co., Inc., a writ of error and supersedeas is awarded it to a judgment rendered by the Circuit Court of the City of Lynchburg, formerly the Corporation Court of the City of Lynchburg, on the 9th day of February, 1973, in a certain motion for judgment then therein depending, wherein William Henry Reynolds was plaintiff and the petitioner was defendant; upon the petitioner, or some one for it, entering into bond with sufficient security before the

clerk of the said court below in the penalty of \$3,750,
with condition as the law directs.

MOTION FOR JUDGMENT FILED
BY PLAINTIFF ON APRIL 6, 1972

1. I, William Henry Reynolds, plaintiff, by my attorney, hereby move the Corporation Court for the City of Lynchburg, Virginia, for a judgment against you, Lynchburg Coca-Cola Bottling Co., Inc., defendant, for the sum of \$50,000.00, with interest at the rate of 6% per annum from April 26, 1970, until paid, for this, to-wit:

2. That heretofore, to-wit, on and prior to and ever since the 26th day of April, 1970, in the City of Lynchburg, Virginia, the defendant, Lynchburg Coca-Cola Bottling Co., Inc., was and is now, engaged in the manufacture, bottling and distribution of a certain soft drink, or beverage for human consumption, commonly known as Coca-Cola, bottled in glass bottles.

3. That on the 26th day of April, 1970, the plaintiff purchased a bottle of Coca-Cola, in the City of Lynchburg, Virginia; that said Coca-Cola without the knowledge of the plaintiff, contained some foreign substances. It became and was the duty of you, the said defendant, Lynchburg Coca-Cola Bottling Co., Inc., to use due and proper care in the manufacture and bottling of said drink and to have the same free from foreign substances, and you, the said defendant negligently failed to use due and proper care and knew, or by the exercise of reasonable

care could have known that said drink sold to me contained some foreign substances, and in drinking the said Coca-Cola, believing the same fit for human consumption, I did swallow portions of the Coca-Cola containing the foreign substances, whereby and by reason whereof, I became very sick and sore and suffered great pain and mental anguish and still suffer, have been extremely nervous and upset, and was unable to attend my usual and regular work for some time.

4. A trial by jury is demanded.

* * * * *

JUDGMENT ORDER ENTERED AND
FILED ON FEBRUARY 9, 1973

This day came again the parties, by their attorneys, and the Court having taken under advisement the motion of the defendant to set aside the verdict and enter judgment for the defendant, or in the alternative to grant a new trial, took time to consider thereof, and counsel for both parties having heretofore filed briefs in this matter and the Court having considered same and having filed a written opinion, dated January 19, 1973, with the Clerk of this Court, and having sent a copy of said opinion to counsel of record for the plaintiff and defendant, and now being advised of its judgment, the Court doth overrule the motion of the defendant to set aside the verdict of the jury heretofore rendered in this action on October 26,

1972, in favor of the plaintiff, and it is, therefore, considered by the Court that the plaintiff recover of the defendant the sum of Three Thousand Dollars (\$3,000.00) with interest from October 26, 1972, until paid, and his cost by him in this behalf expended, and the defendant, by its attorney, duly objects and excepts to the foregoing action of the Court for reasons heretofore stated.

The defendant having indicated an intention to apply to the Supreme Court of Virginia for a writ of error and supersedeas, the Court doth, pursuant to Rule 5:9 of the Rules of Court, direct that the transcript in the above action tried on the 26th day of October, 1972, which was taken and transcribed by Brenda E. Tharpe, court reporter, shall become and be a part of the record in this action upon entry of this order and upon the filing of the said transcript in the office of the Clerk of this Court.

At the instance of the defendant, who having indicated its intention to apply to the Supreme Court of Virginia for a writ of error and supersedeas as aforesaid, the Court doth order that execution of the foregoing judgment be suspended for four (4) months from this day and thereafter until the petition for appeal is acted upon, upon condition that said defendant or someone for it give a proper suspending bond in the penalty of \$500.00, conditioned according to law, with surety approved by the Clerk of this Court.

* * * * *

COPY

JUDGE'S CHAMBERS

O. RAYMOND CUNDIFF
JUDGE

CORPORATION COURT
FOR THE
CITY OF LYNCHBURG

GEO. W. MARTIN
CLERK

LYNCHBURG, VA.
January 19, 1973

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Lynchburg, Virginia 24560

In re: WILLIAM HENRY REYNOLDS, Plaintiff,
v.
LYNCHBURG COCA-COLA BOTTLING CO., INC., Defendant.

Gentlemen:

The Court has before it a motion to set the jury's verdict of \$3000 aside in the above captioned case. The Court will not restate the facts in the case as same were not in dispute.

The first ground the defendant is seeking to set the verdict aside is because it is excessive. The law is well settled that under § 8-224 of the Code of Virginia, the Court has the power to set a verdict aside and award a new trial if in the Court's opinion the verdict awarded is either small or excessive. Our Court of Appeals has construed this statute many times and set down some definite guidelines by which the Court should consider in determining whether or not the verdict should be set aside. The defendant cites the case of National Cab v. Thompson, 208 Va. 731 (1968), in which a \$10,000 verdict was set aside by the Supreme Court in which case the Court stated as follows:

"We are not unmindful of the weight which attaches to a verdict of a jury approved by the trial judge, but here we find the conclusion inevitable that the award of \$10,000 bears no reasonable relation to the damages sustained by Mrs. Thompson, and therefore is not supported by, and is contrary to, the evidence. Although the

record contains no evidence that the jury was actuated by passion, corruption or prejudice, the verdict is so excessive as to shock the conscience of the court. It creates the impression that the jury misconceived or misunderstood the facts or the law, and is not the product of a fair and impartial decision."

The defendant further cites the case of Smithey v. Sinclair Refining Company, 203 Va. 142, in which the Court reduced a verdict from \$15,000 to \$5000, citing the injury required only \$59.00 medical treatment and one week lost from work. It is noted that \$5000 was allowed to stand as compensation for this injury. There the Court again stated as follows:

"But if it appears that the verdict is so excessive as to shock the conscience of the Court and to create the impression that the jury has been influenced by passion, corruption or prejudice, or has misconceived or misunderstood the facts or the law, or if the award is so out of proportion to the injuries suffered to suggest that it is not the product of a fair and impartial decision, then it becomes the plain duty of the judge, acting within his legal authority, to correct the injustice. ..."

It is noted in the Smithey, supra, case on p. 145, the Court stated as follows:

"In this Commonwealth we have, by decisions so numerous and so familiar that they require no citation, sought to uphold the sanctity of the jury verdict. It is our duty to sustain a verdict that has been fairly rendered.

In personal injury cases, where the action merely sounds in damages and where there is no rule for measuring such damages, the amount to be awarded is left largely to the discretion of the jury. The verdict of the jury, arrived at upon competent evidence and controlled by proper instructions, in

an impartially conducted trial, has always been held to be inviolate against disturbance by the courts. Farish & Co. v. Reigle, 11 Gratt. (52 Va.) 697, 722; Ward v. White, 86 Va. 212, 220 763, 98 S.E. 866, 870; Dinwiddie v. Hamilton, 201 Va. 348, 352, 353, 111 S.E.2d 275, 277, 278.

It is not our intention to depart from these salutary rules. But this is not to say that the verdict of a jury is not subject to the control of the courts. A healthy administration of justice requires that, in a proper case, the courts must take action to correct what plainly appears to be an unfair verdict. This authority is an ancient and accepted part of the common law. As related to the problem before us, it has been recognized by the legislature in its enactment of Code § 8-244, relating specifically to the power of the court to award a new trial where the damages awarded by a jury are either too small or excessive, and Code § 8-350, supra, relating to the procedure to be followed in protesting and seeking an appeal from a court's action in ordering a remittitur.

In a case where the verdict of a jury is attacked on the ground that it is excessive, the rules controlling the actions of the court in relation thereto are clear and well defined. If the verdict merely appears to be large and more than the trial judge would have awarded had he been a member of the jury, it ought not to be disturbed, for to do so the judge must then do what he may not legally do, that is, substitute his judgment for that of the jury. Aronovitch v. Ayres, 169 Va. 308, 328, 193 S.E. 524, 531; Simmons v. Boyd, 199 Va. 806, 811, 812, 102 S.E. 2d 292, 296.

But if it appears that the verdict is so excessive as to shock the conscience of the court and to create the impression that the jury has been influenced by passion, corruption or prejudice, or has misconceived

or misunderstood the facts or the law, or if the award is so out of proportion to the injuries suffered to suggest that it is not the product of fair and impartial decision, then it becomes the plain duty of the judge, acting within his legal authority, to correct the injustice. Chesapeake & O. Ry. Co. v. Arrington, 126 Va. 194, 217, 101 S.E. 415, 423, cert. denied 255 U.S. 573, 41 S. Ct. 376, 65 L. ed. 792; C. D. Kenny Co. v. Solomon, 158 Va. 25, 30, 31, 163 S.E. 97, 98, 99."

It would be impossible to attempt to discuss each case in which this question has been decided by a Supreme Court, however, all follow the same legal principles as set forth in the above cited cases. In the case before the Court the plaintiff spent less than \$1.00 in medicine and did not miss any time from work. He testified that he became actually nauseated in finding the foreign matter in the bottle requiring him assistance to return to the police headquarters. He was a patrolman. He was nauseated and sick for two days and unable to eat; that he has been unable to drink any colored soft drinks since that time. There is no evidence in the case that the jury was influenced by passion, corruption or prejudice, or misconceived or misunderstood the facts of the law. While the Court may be of the opinion that had it been sitting as a member of the jury it would not have rendered as large a verdict the Court cannot substitute its judgment for that of the jury. Where a verdict is supported by evidence and reached in a fair and impartial manner it should not be disturbed or set aside by the Court unless it is so excessive as to shock the conscience of the Court. The Court is of the opinion that the verdict in the case before the Court does not meet this test and the jury having determined the quantum of damages, this verdict should not be disturbed on the ground of excessiveness.

The next question raised by the defendant is that Instruction No. 3 on behalf of the plaintiff should not have been given. Instruction No. 3 granted at the request of the plaintiff is as follows:

"The Court instructs the jury that it is the duty of a manufacturer to exercise a high degree of care in the preparation, bottling and inspection of its product, and the presence of foreign substance in a sealed beverage container, 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 a high degree of care in the preparation, inspection and bottling of its product. The issue as to whether the defendant did exercise such a high degree of care as to overcome such prima facie presumption 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 you shall find your verdict in favor of the plaintiff against the defendant."

The defendant contends the case of Newport News Coca-Cola v. Babb, 190 Va. 360 (1950) was not considered in granting this instruction. It is noted in the Babb case the continuity of possession between the bottler and the consumer was broken. In the case before the Court there was no intervening third party that handled the bottle after delivery to the plaintiff by the seller. It is noted in the Babb case the Court stated as follows:

"As we pointed out in the Land Case, the inference of negligence on the part of the defendant bottling company from the presence of the obnoxious substance in the bottle should have been predicated upon a finding that the bottle was not tampered with after it left the custody of the defendant bottling company, and that the obnoxious substance was in the bottle at the time the defendant parted with possession of it.

'As given, the instruction deprived the defendant of the defense that the mouse may have gotten into the bottle either while it was in the possession of the local grocer or while it was in the custody of the plaintiff herself.

'Moreover, the instruction was defective in that it failed to tell the jury that the inference of negligence on the part of the defendant bottling company from the presence of the obnoxious substance

in the bottle might be rebutted by evidence that the defendant had exercised a high degree of care in the cleaning and filling of its bottles."

See also, Coca-Cola Bottling Works v. Sullivan (1942), 178 Tenn. 405, 158 S.W. (2d) 721, 171 ALR 1200; and an annotation, "Presumption of Negligence from foreign substance in food." 171 ALR 1209-1216."

In the case before the Court Instruction No. 3 did contain the clause "not tampered with after it leaves the manufacturer". It is further noted in the Babb case the instruction was criticized for failing to tell the jury that the inference of negligence might be rebutted by evidence that the defendant exercised high degree of care. It is further noted that Instruction 3 does contain language to this effect.

The defendant further raises the question that the Court was not instructed that the presence of the foreign substance was in the bottle when it left the possession of the defendant. The Court granted Instruction "A" as offered by the defendant as follows:

"The Court instructs the jury that this is a negligence action and in order to recover the plaintiff must prove by a preponderance of the evidence negligence on the part of the defendant which proximately caused his alleged injuries.

Before you may infer negligence on the part of the defendant from the presence of a foreign substance in the bottle, the plaintiff must first prove by a preponderance of the evidence that such foreign substance was in the bottle when it left the possession of the defendant.

If the plaintiff fails to prove by a preponderance of the evidence that the foreign substance was in the bottle when it left the possession of the manufacturer, or, if it appears equally as probable that it was not in the bottle when the bottle left the possession of the defendant as that it was, then you should return your verdict for the defendant."

Upon the reading of Instruction "A", the jury there was told that the plaintiff must first prove by a preponderance of the evidence that the substance was in the bottle when it left the possession of the defendant.

Instruction No. 3 as given by the Court is a copy of the instruction as taken from Virginia Jury Instructions by Doubles, Emrock and Merhige, Section 39.02. Upon reading all the instructions offered by the defendant and the plaintiff, the Court is of the opinion that the jury was fairly and correctly instructed on all questions of law.

The next ground for setting aside the verdict is that the plaintiff's evidence should have been stricken or that the Court should have granted defendant's Instructions C and C-1. These instructions are to the effect that if the plaintiff received no physical injury recovery cannot be allowed. The defendant recites several out of state cases and apparently no Virginia case has applied this principle to a foreign substance case. The evidence in the present case is that the plaintiff drank the coca-cola and immediately became sick and that he looked in the bottle and then saw the foreign substance; that he was physically unable to continue his duties as a police officer that evening. This is more than psychological or emotional. He had to spend a small sum to purchase medicine for relief. The Court is of the opinion that defendant's Instructions C and C-1 were not supported by the evidence and were properly refused.

The Court is of the opinion that the motion to set aside the verdict should be overruled and the jury's verdict in the amount of \$3000 be entered as the judgment of this Court.

Please prepare an appropriate order in accordance with my decision.

Yours very truly,



O. Raymond Cundiff, Judge
Corporation Court for the
City of Lynchburg.

ORC/MCC

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR
FILED BY THE DEFENDANT ON FEBRUARY 26, 1973

Notice is hereby given, pursuant to Rule 5:6 of the Rules of the Supreme Court of Virginia that Lynchburg Coca-Cola Bottling Co., Inc., the defendant in the above action, hereby appeals to the Supreme Court of Virginia from the final judgment entered in this action on the 9th day of February, 1973.

Pursuant to the aforesaid rule, the defendant assigns error as follows:

- (1) The verdict is excessive.
- (2) The Court erred in giving Instruction 3 on behalf of the plaintiff.
- (3) The Court erred in not striking the plaintiff's evidence.
- (4) The Court erred in refusing Instruction C and C-1 offered by the defendant.
- (5) The Court erred in not sustaining the defendant's motion to set aside the jury verdict and enter final judgment for the defendant, or, in the alternative, to give the defendant a new trial.

The transcript of the evidence has heretofore been filed with the Clerk of the Corporation Court for the City of Lynchburg, Virginia, on February 13, 1973.

* * * * *

TRANSCRIPT OF EVIDENCE FILED FEBRUARY 13, 1973

THOMAS LEWIS DONALD, a witness of the Plaintiff,
testifies as follows:

DIRECT EXAMINATION

BY MR. WHITEHEAD:

Q. Would you please state your name?

A. Thomas Lewis Donald.

Q. Mr. Donald, where do you live?

1 A. I live at 1805 Georgia Avenue.

2 Q. And that is here in Lynchburg?

3 A. Yes, sir, it is.

4 Q. Now, what is your age, please, sir.

5 A. I am twenty-nine (29) years of age.

6 Q. Now, where are you employed?

7 A. I am employed at Lynchburg Foundry, Lower Basin.

8 Q. Now, on Sunday morning, the early part of the morning
9 of April 26, 1970, where were you employed at that particular
10 time?

11 A. Texas Tavern.

12 Q. Where is the Texas Tavern?

13 A. 611 Main Street.

14 Q. That's Lynchburg?

15 A. Yes, sir.

16 Q. And in your job there in the Texas Tavern you did
17 what?

18 A. Grill man and counter man to take care of the first
19 three stools, plus the outside window.

20 Q. Would you explain to us briefly about the Texas
21 Tavern---The customers, when they go there, they get the food
22 at what point?

23 A. If the place is too crowded to sit down, they go to
24 the window. We have a window with, I reckon, about two feet

1 wide and a foot long where I open.

2 Q. And does that window extend out where? To get to
3 that window, where are you standing?

4 A. Standing on the sidewalk.

5 Q. That's on Main Street?

6 A. On Main Street.

7 Q. Now, on the early morning of Sunday, April 26, 1970,
8 before that time did you know him or know him to see him, the
9 Plaintiff in this case, William Henry Reynolds, the gentleman
10 sitting behind me?

11 A. I didn't know personally.

12 Q. Did you know him to see him?

13 A. To see him, yes, sir, I did.

14 Q. On that particular morning and at that time you were
15 working there then?

16 A. Yes, sir, I was.

17 Q. And tell us, please, sir, in your own words what
18 happened that morning with reference to Mr. Reynolds.

19 A. I was working the grill and he come to the window.
20 I opened the window and he told me he wanted a Coca Cola. I
21 got the Coca Cola out of the box. It was half full and the
22 drinks are laying flat down.

23 Q. What was half full?

24 A. The box, the drink box. It was near closing time and

1 we pack the boxes each Saturday night. And he asked for a Coca
2 Cola. I got him one and opened it and set it up on the window
3 and he reached and grabbed it and he took a swallow of it and
4 I seen him spit up on the sidewalk and he showed me what was in
5 it.

6 Q. Did he pay you?

7 A. He paid me twenty-one cents (21) for the drink.

8 Q. I see. Now, let me ask you this: This Coca Cola that
9 you got out of the drink box and sold him, where was that Coca
10 Cola purchased from?

11 A. From Lynchburg Coca Cola Company.

12 Q. And was this Coca Cola standing up in the box or lay-
13 ing down or how?

14 A. It was laying down. We don't stand no drinks up in
15 the box at all.

16 Q. All right, sir, now when you took it out, was the cap
17 on it?

18 A. Yes, sir, it was.

19 Q. What did you do to get the cap off of it?

20 A. I had to open it up. I had an opener over top the
21 drink box where I opened it.

22 Q. In doing so, was the cap on it tight?

23 A. Yes, sir, sure was.

24 Q. Then after you handed the bottle up in the window to

1 him, then he gave you the money?

2 A. Yes, sir.

3 Q. And then you saw him take it away?

4 A. Yes, sir.

5 Q. And after you saw him spit there whatever he did, did
6 he show you the bottle again?

7 A. Yes, sir. I offered to give him another one and he
8 said he would rather keep it. And that's about all he said. ✓

9 Q. Now, let me ask you this: Did he show you the bottle
10 and did you look at the bottle when he showed it to you?

11 A. Yes, sir.

12 Q. Did you see anything inside the bottle?

13 A. It looked like a piece of meat with some hair on it.
14 It was all foamy around it. To me that's the way it looked
15 like.

16 Q. Let me ask you this: Is the bottle that you sold him
17 there?

18 A. Same size bottle, yes, sir.

19 Q. Does that look like the bottle? Does that look like
20 the same amount that he had drank out of it when he handed it
21 to you?

22 A. Something similar to that. It was hot that night and
23 he took a big swallow out of it I imagine.

24 Q. Where was the foreign substance that you saw there in

1 the bottle?

2 A. It was at the top, near the top.

3 Q. At the top?

4 A. Yes, sir.

5 Q. Then did you give him the top or who put the top back
6 on the bottle?

7 A. I give him a top and he put it on himself, yes, sir.
8 And he left.

9 Q. Was he on duty then on the police force?

10 A. Yes, sir.

11 Q. Was he in his uniform?

12 A. Yes, sir, he was.

13 Q. Now, had the cap on that bottle been taken off at any
14 time there while you were there before you took it off at this
15 time?

16 A. No, sir, it hadn't.

17 MR. WHITEHEAD: All right, sir.

18

19 CROSS-EXAMINATION

20 BY MR. THOMPSON:

21 Q. You said the cap hadn't been taken off while you were
22 there?

23 A. No, sir, it hadn't.

24 Q. Of course, you can't say what transpired while you

1 were not there, can you?

2 A. I would say if the cap had been taken off it would
3 have leaked out in the box because the drinks were laying flat
4 down. When I opened it, the pressure was still on.

5 Q. When you opened it, did you see anything in there?

6 A. No, I didn't look at the drink. I was fixing a
7 couple hamburgers. I opened the drink and set it up in the
8 window. He took a swallow and I seen him spit up on the side-
9 walk.

10 Q. Did it foam any when you opened it up?

11 A. When I opened it, it had pressure. The opener is on
12 top of the box under the counter. I push^{ed} down on it and it
13 had just as much pressure as the rest of them had.

14 Q. It didn't foam excessively when you opened it?

15 A. Yes.

16 Q. It looked like a normal drink?

17 A. Yes, sir. When he showed me the drink after he had
18 done threw up, it was some kind of foam around whatever it was
19 in the drink.

20 Q. When you opened it up and handed to him, it looked
21 like any other drink to you.

22 A. Yes, sir.

23 Q. Then he took it and took a drink of it and spit it
24 out, is that right?

1 A. Yes, sir, he did.

2 Q. How far did he get away from the Texas Tavern? Did
3 he take a drink right at the door or window where you hand
4 your stuff out?

5 A. Yes, sir, he took a drink right over at the window
6 then he put the drink back up in the window and showed me what
7 was in it.

8 Q. Was he still at that window when he did this?

9 A. He had stepped back from the window?

10 Q. Had he paid you at that time?

11 A. Yes, sir, he had.

12 Q. Do you all ever have people to come in with hot drinks
13 and ask you to swap them for cold drinks?

14 A. I never had the occassion.

15 Q. You never have?

16 A. No, sir, not myself.

17 Q. I believe you say that you offered him another Coca
18 Cola?

19 A. Yes, sir.

20 Q. What did he say?

21 A. He said he would rather keep that one.

22 Q. Rather keep that one. Did he give you any reason why
23 he would rather keep that one?

24 A. I didn't ask him.

1 Q. Did you give him a cap to go on it?

2 A. He asked for a cap and I give him one.

3 Q. Then what happened?

4 A. He left. He was on duty and they have to be at a
5 certain call box at a certain time of night, I think, to call
6 in.

7 Q. Did he appear to be all right?

8 A. Well, I didn't look at his face that good. I seen
9 him bend over and I seen him spit up or either he threw up
10 one. He looked kind of---

11 Q. What was this, after he left?

12 A. After I served the drink to him, he took a drink at
13 the window. He went over like this, like he was throwing up
14 or spitting up and he set the drink in the window like that
15 and said, "Look what's in it" and I offered him another one.

16 Q. Then I understand after you offered him another one,
17 he said no and he walked on off. Did he appear to be all right
18 at that time?

19 A. Like I say, I am not no doctor. I don't know really.

20 Q. O. K., when you say--When you first saw him spit up,
21 you don't know whether he was throwing up or whether he was
22 spitting up the Coca Cola?

23 A. He took a swallow of the Coca Cola and he threw up.
24 He showed me whatever was in the drink and it was still in there.

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THE WITNESS STANDS ASIDE.

WILLIAM HENRY REYNOLDS, the Plaintiff, testifies as follows:

DIRECT EXAMINATION

BY MR. WHITEHEAD:

Q. You are William Henry Reynolds?

A. Yes, sir.

Q. And where do you live, Mr. Reynolds?

A. 1115 Derring Street.

Q. What is your age, please.

A. Twenty-four (24).

Q. Are you now a member of the Lynchburg Police Force?

A. Yes.

Q. On Sunday, April 26, 1970 in the early morning of that day, were you on duty?

A. Yes, sir.

Q. How long have you been on the Lynchburg Police Force?

A. December will be three years.

Q. You went on there in December of 1969, is that correct?

A. Yes, sir.

Q. And have you been on there constantly since that time?

1 A. Yes, sir.

2 Q. Now, on the date of April 26, what shift were you on
3 at that time?

4 A. Midnight shift.

5 Q. You go to work at what time?

6 A. We have to be there at 11:00.

7 Q. Eleven o'clock. That would be 11:00 p.m.?

8 A. Yes, sir.

9 Q. So you reported for duty at 11:00 p.m. on Saturday?

10 A. Yes, sir.

11 Q. Then where did they have you working or stationed at
12 that time? What territory were you covering?

13 A. From 8th and Main, Church and Commerce, all the way
14 up to 5th.

15 Q. Now, on this occasion while you were on duty there
16 that morning on the 26th of April, 1970, please tell us in
17 your own words what, if anything, you did with reference to
18 going to the Texas Tavern and what took place there.

19 A. I was walking on Main Street east. I walked to the
20 Texas Tavern, which is on Main, and walked to the window. A
21 gentleman was in there and I asked him for a Coke.

22 Q. Is that the gentleman who just testified?

23 A. Yes, Mr. Donald.

24 Q. Were you in the building or outside?

1 A. No, I was standing on the sidewalk.

2 Q. At that window he has referred to?

3 A. Yes. He got a soda and opened it and I put a quarter
4 in the window. It is the normal practice when I walk down
5 there, they had a cup they would keep change in and I would
6 just throw a quarter up in the window and get whatever was
7 ordered and in this particular case it was a soda. I would
8 keep going. I had bought several sodas there before. This
9 particular morning he opened the Coke and set it in the window
10 and I put the quarter in the window and took the Coke and
11 started to walk off and drinking it at the same time. " I
12 turned it up to my mouth and I felt something funny in my
13 mouth and I was still swallowing at the same time. I took the
14 Coke down and looked at it and saw, I guess, about that much
15 foam or mold or mildew or whatever it was, fungus or whatever
16 it was, inside the bottle and at this time I started to feeling
17 sick at the stomach." It had a right bad taste to it and I
18 vomited on the sidewalk. I then stepped back around to the
19 window and showed it to the man. I said, "Look what's in the
20 soda", and he said the only thing he could do was give me
21 another soda for it; that he is not responsible for anything
22 in it. I told him then I didn't want another soda and just
23 give me a top for this one I bought and I was going to take it
24 with me. He gave me a top and I continued to feel^{sick} at the

1 stomach.

2 Q. Let me ask you this: Is this the Coca Cola here?

3 A. Yes, sir.

4 MR. WHITEHEAD: We want to introduce this as
5 Plaintiff's "Exhibit No. A", if Your Honor pleases.

6 THE COURT: Any objections, Mr. Thompson?

7 MR. THOMPSON: No, sir.

8 THE COURT: All right, it will be received as
9 Plaintiff's "Exhibit No. 1".

10 WITNESS:

11 A. I started walking east on Main. I was still feeling
12 rather sick at the stomach. I walked rather slow and I walked
13 down to Sixth and Main then up Sixth Street where I again
14 became sick at the stomach where I vomited. I continued on
15 up to Church Street, Sixth and Church and started west on
16 Church where a bus driver came down and asked me if I was all
17 right. I told him I felt kind of sick and he said, "Well, I
18 will take you down to the Police Station". And I then got on
19 the bus and went down to the Police Station. Once I got to
20 the Police Station I explained to my supervisor what had
21 happened, Lieutenant Robinson, and he stated if you don't--

22 THE COURT: Don't tell what he stated. You can
23 tell what you did.

24 WITNESS:

1 A. I sat down on the bench in the hallway sort of like.

2 BY MR. WHITEHEAD:

3 Q. How did you feel then?

4 A. I still felt sick at the stomach. I didn't feel like
5 working any.

6 Q. Let me ask you this: You say this is the bottle that
7 you purchased. Is that the same amount that you drank out of
8 the bottle?

9 A. Except for maybe it might have evaporated, that's
10 about it.

11 Q. It looks like the same amount?

12 A. Yes, sir.

13 Q. Now, then when you took the bottle after you said you
14 had taken the drink and so forth and took the bottle up, could
15 you see anything in there?

16 A. It was a bunch of foam at that time. It looked like
17 a big wad of something may have been in it. I don't know what
18 it was and it was a lot of foam and green looking stuff around
19 in it.

20 Q. Is this the same stuff that was in there when you
21 saw it then?

22 A. Yes, it appears to be the same except the foam and
23 stuff is more or less settled.

24 Q. You mean up on top after you finished it was foam

1 then?

2 A. It was some foam in the top and some in the soda.

3 MR. WHITEHEAD: Now, may I let the jury see this?

4 THE COURT: Yes, sir.

5 BY MR. WHITEHEAD:

6 Q. Now, let me ask you this: After you left the Police
7 Headquarters you got off duty around 7:30 or something like
8 that. Where did you go? ✓

9 A. I proceeded home. I stopped at a store on the way
10 to get something for my stomach because it felt jittery or
11 jumpy. ✓

12 Q. Then what did you do?

13 A. I bought a small bottle of Pepto Bismol and I went
14 home. When I walked in the house, I was offered some food and
15 I didn't feel like eating anything. I took some of this Pepto
16 Bismol and layed down.

17 Q. How did you feel during the day?

18 A. I just felt sick at the stomach like if I ate anything
19 else it would come back up.

20 Q. Now, then that night at eleven o'clock, that would
21 have been on the 26th, did you go on your duty that night? ✓

22 A. Yes, sir, I did.

23 Q. How did you feel when you went there?

24 A. I still felt sick at the stomach, kind of nauseated.

1 Q. Now, have you put anything in that bottle in any way
2 whatsoever since the time that you had it down there on Main
3 Street that night, except for putting the cap on it?

4 A. No, sir.

5 Q. All right, sir. Now, can you explain to us just
6 briefly, please, sir, what taste did you have when you drank
7 this drink?

8 A. I can't explain the taste really. It was just a nasty
9 taste, something you wouldn't expect if you bought a soda to
10 drink. You wouldn't expect anything to be in it to taste as
11 nasty as it did and to feel as funny in your mouth.

12 Q. When you started to drinking it, did you notice it?

13 A. No, I didn't pay any attention to it. I never checked
14 a soda until after I drank this one as far as seeing anything
15 was in it or whether it was safe to drink.

16 Q. When you started to drink this soda, did you notice
17 something bad about the taste right away?

18 A. When it was in my mouth, I noticed it was something
19 in my mouth that had a bad taste and I was swallowing and I
20 took the bottle down at the same time.

21 Q. Then after you had done that, you say you went on to
22 work. Then how did you get along after that?

23 A. Well, I couldn't eat. I didn't feel like I could
24 eat anything.

1 Q. How long was that for?

2 A. Probably for the next day, next couple of days. I am
3 not sure how long it was. ✓

4 Q. Now, then as far as being able to eat and so forth,
5 you have gotten over that. You are not having any trouble about
6 that now, are you?

7 A. No, sir.

8 Q. Are you having any trouble at all with reference to
9 this condition that you had when you took that drink with
10 reference to drinking any drinks now?

11 A. Well, other than not drinking Colas or dark colored
12 sodas. I drink a ginger ale or Seven Up, something of this
13 nature, but I won't drink another Coca Cola or another soda
14 that would be hard to see whether anything was in it. ✓

15 Q. Did you drink Coca Colas from time to time before this?

16 A. I used to drink them all the time.

17 Q. And you bought a bottle of Pepto Bismol. That costs
18 how much? ✓

19 A. Fifty-nine (59) cents, I believe.

20 MR. WHITEHEAD: All right, sir.

21 CROSS-EXAMINATION

22 BY MR. THOMPSON:

23 Q. Mr. Reynolds, you took a drink of this drink there, I
24 believe, at the Texas Tavern and then you spit it out, spit it

1 out on the street?

2 A. No, I had swallowed it and it came back up.

3 Q. Came back---So then you vomited on the street there?

4 A. Yes.

5 Q. Then you went back on to the Texas Tavern and asked
6 the man for a cap?

7 A. Well, I showed him the soda and he said---I said,
8 "Look what's in the soda", and he explained to me that he wasn't
9 responsible for what was in the soda, all he did was sell them
10 and he said he could give me another soda for it and I told
11 him I didn't want another one, I wanted this one and to give
12 me a top for it and I was going to take it with me.

13 Q. What were you going to do with it.?

14 A. I didn't know. I was more or less mad with him and
15 at the Texas Tavern for purchasing it there, really.

16 Q. All right, sir, so then you felt sick, you say, and
17 you went on up Church Street and went down to the Police
18 Station?

19 A. Right.

20 Q. What time did you make the purchase?

21 A. I really don't know. I guess around 3:00 or 3:30.

22 Q. You stayed at the Police Station until your shift
23 ends which is about 7:30?

24 A. Usually, it's anywhere between 7:15 and 7:20.

1 Q. Did you drive home then?

2 A. Yes, I did.

3 Q. When you got home, you called Mr. Whitehead?

4 A. I called Mr. Whitehead. I didn't call him right away,
5 I am sure.

6 Q. You called him sometime that day?

7 A. I believe it was that evening that I called him.

8 Q. And Mr. Whitehead told you to come on down there and
9 bring the bottle?

10 A. He told me come in and talk to him.

11 Q. Does that bottle look the same way it did on the day
12 this happened?

13 A. No, it doesn't. The day it happened when I turned it
14 up, I guess the stuff was coming in my mouth and length-wise
15 in the bottle. I guess it had spreaded, I don't know. Some
16 of it got in my mouth. When I brought the bottle down, every-
17 thing that was in that which wasn't supposed to be there had
18 settled back in at the top. There was some foam. You can see
19 where it is dried up around the bottle. The rest of it has
20 settled to the bottom of the bottle.

21 Q. Any change in the coloration?

22 A. I can't tell its change in the coloration. It looks
23 like a regular Coke to me.

24 Q. You got a bottle of Pepto Bismol and took it that day?

1 A. I took some of it.

2 Q. Did you go and buy this?

3 A. I bought it on the way home.

4 Q. When did you go down and see Mr. Whitehead, do you
5 know?

6 A. I am not sure when I went. It may have been the next
7 day, may have been a couple of days later. I am not sure.

8 Q. You say you couldn't eat for a day or two?

9 A. Right.

10 Q. You didn't lose any weight over this, did you?

11 A. I can't say whether I lost weight.

12 Q. After that time you felt all right?

13 A. Except for drinking Cokes, I won't drink them.

14 Q. Do you drink Sprite?

15 A. No, I don't like Sprite.

16 Q. Drink Fresca?

17 A. No.

18 Q. What do you drink?

19 A. Seven Up or maybe ginger ale.

20 Q. You didn't go to any doctor or anything, did you?

21 A. No, I didn't.

22 Q. You went on back to work the next night on your usual
23 shift?

24 A. Yes, sir, against my feelings.

1 Q. On April 26th you went back at what time, 11:30?

2 A. Eleven o'clock.

3 Q. So you didn't lose any time from work on account of
4 this?

5 A. No.

6 Q. Have you worked regularly ever since?

7 A. Yes.

8 Q. And after a couple of days, you had completely
9 recovered from whatever effect this had on you except for the
10 fact you don't like dark colored drinks?

11 A. Yes, especially the Cokes.

12 Q. Was this mainly a psychological or emotional reaction
13 to this thing that caused you to throw up, you think?

14 A. I guess it was that. I normally wouldn't have a weak
15 stomach. I have been around a lot of things/average/would
16 never see and it never bothered me but, of course, I never had
17 them in my mouth or inside my body. For instance, I had to
18 eat and sleep around a dead man for three days in 107° heat
19 and it didn't bother me. When it entered my body and was
20 unexpected, it had some type of psychological or mental effect.

21 Q. That is what I asked: Do you think it was mainly a
22 psychological or emotional reaction and you think it was?

23 A. Yes.

24 MR. THOMPSON: That's all.

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THE WITNESS STANDS ASIDE.

MR. WHITEHEAD: We rest if Your Honor pleases.

MR. THOMPSON: Your Honor, I have some photographs I would like to have introduced.

THE COURT: Mr. Whitehead, do you have any objections?

MR. WHITEHEAD: No, sir.

THE COURT: I will allow them to be introduced if it shows the manufacture of the drinks. I think they are perfectly admissible.

ROBERT L. BURFORD, a witness for the defense, testifies as follows:

DIRECT EXAMINATION

BY MR. THOMPSON:

Q. Mr. Burford, would you state your name, please, sir.

A. Robert L. Burford.

Q. Your age?

A. Sixty-one (61).

Q. Where do you live?

A. I live at Route 1, Monroe, Virginia.

Q. And what is your occupation?

1 A. I am Production Manager of the Lynchburg Coca Cola
2 Bottling Company.

3 Q. Who is your supervisor down there?

4 A. Mr. George Lupton.

5 Q. I believe that is Mr. Lupton who sits back of the
6 courtroom?

7 A. Yes, sir.

8 Q. Now, Mr. Burford, I am going to ask you to tell the
9 Court and the jury the process of making Coca Colas and first
10 of all I ask you what are the ingredients of a Coca Cola?

11 A. Well, the two main ingredients that we have to deal
12 with is the syrup which we buy from the Coca Cola Company.
13 The ingredients that make the syrup we have nothing to do with.
14 That's made by the Parent Company. We get that in in stainless
15 steel tankers.

16 Q. What else is in it?

17 A. Then we add the water and carbon dioxide and CO₂ gas.
18 Essentially, syrup and water and CO₂ gas are put together at
19 the Coca Cola Plant.

20 Q. Do you do anything to city water before you put it in-
21 to the Coca Colas?

22 A. Yes, we completely retreat it; we rerun it through a
23 cumulation plant and add the same ingredients that the city
24 does, ferro-sulphate and chlorine. Then we pump it from that

1 tank through filters.

2 Q. What is the first substance?

3 A. The first filter is sand and gravel. The water is
4 pumped down through it and then it goes from there into a
5 carbon filter which completely removes all of these ingredients
6 and it removes the lime and the chlorine and leaves the water
7 completely fresh.

8 Q. With these two filters, the sand and gravel and the
9 carbon filter, does it have a filtering effect on water so as
10 to remove impurities?

11 A. Right.

12 Q. Where does the water go next?

13 A. We have what we call a water polisher. It's a canis-
14 ter that has nineteen (19) paper filters in it and this water
15 is pumped through those paper filters and then it goes from
16 there to the carbonators and mixes.

17 Q. What is done to it at the carbonator?

18 A. Well, that is water and the syrup is mixed and the
19 C20 gas is added in this one machine.

20 Q. Then where does it go?

21 A. It goes from there to the filler.

22 Q. Now, at the filler what happens at the filler?

23 A. Well, the empty bottles come into it and they are
24 raised on cylinders. It raises the bottle up to a neo prene

1 seal and the bottle is sealed tight and liquid comes out of the
2 bowl down through a tube into the bottle and is completely
3 sealed there.

4 Q. Tell us about the syrup from the time it is delivered
5 to you. Tell us how it is delivered to you and from the time
6 it is delivered to you until it is mixed with the water at the
7 carbonator.

8 A. The syrup, like I said before, was delivered in these
9 stainless steel tank trucks and is pumped out of there through
10 a stainless steel tube into our bulk tank, we call them. You
11 will see the pictures of them here.

12 Q. Come now here, please, Mr. Burford. This is Defendant's
13 "Exhibit 7".

14 A. This is a picture of the two bulk tanks that the syrup
15 is pumped into. You can see everything is stainless steel and
16 completely sanitary and the syrup is not ever exposed to the
17 elements at all.

18 Q. How does the syrup get out of the stainless steel
19 tank over to the carbonator?

20 A. We have a pump that pumps the syrup from the bottom
21 of the tank again through stainless steel across the room to
22 the carbonator, a machine that blends the water and syrup.

23 Q. Are there any filters between the tank and the carbona-
24 tor?

1 A. Yes, sir, there is a sixty mesh filter on a cylinder
2 mounted on a line and the syrup is forced through it and so
3 there is no possible way any particle could get in.

4 MR. WHITEHEAD: I object to that.

5 THE COURT: I sustain the objection. You just tell
6 what the operation is. What can happen is a matter for
7 the jury to determine.

8 BY MR. THOMPSON:

9 Q. Mr. Burford, going back to your statement. This is a
10 sixty mesh what?

11 A. Sixty mesh to the square inch. In other words, it is
12 very fine.

13 Q. Does the Coca Cola Bottling Company use or recycle its
14 bottles?

15 A. Yes, sir.

16 Q. I ask you whether or not you also use disposable
17 bottles?

18 A. Yes, we do, a few.

19 Q. Has there been any public reaction to whether you
20 use disposable bottles or returnable bottles?

21 A. Yes, there---

22 MR. WHITEHEAD: I object to that. I don't think
23 the public reaction has got anything to do with it.

24 THE COURT: He can tell why he uses certain type

1 bottles.

2 BY MR. THOMPSON:

3 Q. Why do you all use returnable bottles?

4 A. It's more or less the public wants them. They don't
5 want the throw aways along the road.

6 Q. Now, I want to cover how you all handle the bottles
7 that are returned from the trade from the time they come in
8 the plant until the time they are used again and filled with
9 Coca Cola. Would you show us what Defendant's "Exhibit 1"
10 is, please, sir?

11 A. All right. These are the trucks that come in out of
12 the trade in the evening with the empty bottles on them. We
13 unload them and sort them out according to size and kind and
14 then we store them in an empty bottle area.

15 Q. After you store them in an empty bottle area, what
16 do you do with them when you are getting ready to bottle them?

17 A. Well, we use these same trucks and take them out of
18 the storage area and bring them down to the uncaser down to
19 an inspection station there. I think we have a picture there.

20 Q. We don't have a picture of the inspection station.
21 Do you have a decaser?

22 A. Yes, sir.

23 Q. What happens at the decaser?

24 A. We have two men on that line. They load the line.

1 It's a machine that takes the empty bottles out of the cartons
2 and out of the shelf and carries them up on the table. These
3 two men load that line and then they check all of these bottles
4 as they come down the line for any that may be broken or have
5 paper wedged in them or any foreign particles.

6 Q. Where do they go from the decaser?

7 A. Go into the washer.

8 Q. I show you what is the Defendant's "Exhibit 2".

9 What does that show?

10 A. That is the sorting area. After they are unloaded off
11 of the trucks we have a crew of men there to separate the kind
12 and size and, say, we have Coke and Sprite and Tab all mixed up
13 in the same shelf and separate them out.

14 Q. Now, you say it goes from the decaser to the washer.
15 What is Defendant's "Exhibit 3"?

16 A. That is the entrance to the washer. They go through
17 the decaser and are now on this scramble table that feeds them
18 into the front end of this washer.

19 Q. Now, describe the washer to us. How many tanks are
20 in there and what are in these tanks and what happens in the
21 washer?

22 A. Well, in this machine there are four (4) compartments.
23 In the first compartment we have a mild solution of costic
24 2.5%. In number three we increase it to 3.5 and then in number

1 four tank we drop it back to 2.5.

2 Q. Why is it 3.5 in number two tank?

3 A. That's the strongest solution. The State requires
4 three percent and we run a little bit higher.

5 Q. And number three tank is 2.5 percent?

6 A. Yes and number four tank is fresh water rinse.

7 Q. Now, then do you have any brushes or anything in the
8 washer?

9 A. Yes, sir, after these bottles come out of the rinse
10 tank, they go through a jet spray. These bottles are upside
11 down. This spray is spraying up into them. Then as they move
12 forward they go over a series of brushes, two rows of brushes
13 that this brush goes up into the bottle spinning at tremendous
14 speed with a jet spray going through that.

15 Q. Would you compare the size, the diameter of the brush
16 with the diameter of the bottles.

17 A. It's probably a quarter of an inch larger than the
18 bottle so it will spread out and get the entire area.

19 Q. You talk about costic. What is costic?

20 A. It's costic soda. It's a cleansing agent. It will
21 clean most anything.

22 Q. What effect does it have on organic matter?

23 A. I guess it causes deterioration.

24 Q. I don't want you to guess, now. You are supposed to

1 know.

2 A. That's what it's for. It causes deterioration or
3 breakdown.

4 Q. I show you Defendant's "Exhibit No. 4" and ask you
5 what is that.

6 A. This is the discharge end of the washer. The bottles
7 have gone through this costic and rinse and brushing and this
8 is the discharge end. We have two men inspecting that with
9 fluorescent lights up underneath this that shine down into the
10 bottle and on the bottles.

11 Q. What are they looking for?

12 A. They look for any bottle that may have been broken in
13 the machine or chipped or any bottles that the machine did not
14 clean. Those two men take it out and discard it. They are
15 broken up.

16 Q. Now, do you have any electronic devices or anything?

17 A. Yes, sir, after this inspection of these two men, we
18 have what we call the super eye. This is an electronic device.
19 The bottles go through it. It has a light that shines down
20 through it. Actually, what it does it takes a picture down
21 through the bottle and if it is any foreign particle in that
22 bottle, it has a rejection hammer and it will take it out on
23 a side table.

24 Q. Then after the bottles pass this electronic eye, where

1 do they go?

2 A. Into the filler.

3 Q. I show Defendant's "Exhibit No. 5", what is that?

4 A. That is the filler. The bottles are filled in here.

5 You see the empties coming in here and the full ones going out.

6 Q. After they go in the filler where do they go?

7 A. After they are filled and crowned, they go down a
8 conveyor line into a case packer that puts them back into the
9 carton and into the sheaves.

10 Q. I show you Defendant's "Exhibit 6". What is that?

11 A. This is the empty storeroom where the empties have
12 been sorted. We store them there in different sizes and
13 kinds so we can pick them up and carry them right to the
14 washer.

15 Q. Now, after the bottles are filled and packed and are
16 stacked there in the warehouse, then what happens to them?

17 A. Full bottles you mean?

18 Q. Yes.

19 A. They are taken out of storage and loaded onto the
20 trucks in the evenings after they come back with the empties
21 and loaded for the next days route.

22 Q. And, Mr. Burford, after your Coca Colas are taken
23 away from the plant and delivered to the various retailers
24 such as the Texas Tavern, the Kroger Store and Kings Store

1 and so forth does Coca Cola Company have any more control over
2 those Coca Colas after they are delivered to the merchants?

3 A. No, I would say not. They are sold to the merchants.

4 MR. THOMPSON: Your witness.

5 MR. WHITEHEAD: No questions.

6

7 THE WITNESS STANDS ASIDE.

8

9 MR. THOMPSON: The Defendant rests, Judge.

10

11 (Whereupon, the Court and Counsel retired to Chambers
12 where the following proceedings were had:)

13

14 MR. THOMPSON: Judge, I would move the Court not
15 to permit that bottle of Coca Cola to go to the juryroom.
16 The officer testified that the appearance is not the same
17 as it was on the day he purchased it, and it is no question.
18 I mean the jury has all seen it.

19

20 THE COURT: I have already admitted it in evidence
21 and they are entitled to take evidence to the juryroom.

22

23 MR. THOMPSON: I am asking you not to send in there
24 because I think it is prejudicial. He says it's actually
settled in the bottom.

25

THE COURT: He said he can't tell exactly but it
is the same color.

1 MR. THOMPSON: I looked at the thing and I think
2 it would be prejudicial.

3 THE COURT: Something prejudicial is not a basis
4 for not being admitted. I am going to overrule the
5 motion.

6 MR. THOMPSON: We accept.

7 THE COURT: We will now consider the instructions.
8 First we will consider the ones offered by the Plaintiff.

9 Mr. Thompson, do you have any objection to 1-A as
10 rewritten?

11 MR. THOMPSON: Judge, I have no objection to it.
12 My only objection is the Plaintiff should not get any
13 instructions because the evidence should be stricken and
14 I move to strike the evidence for the Plaintiff. The
15 Defendant by Counsel moves the Court to strike the
16 Plaintiff's evidence on the ground that the Plaintiff
17 stated himself that his sickness and so forth was mainly
18 emotional and psychological. We believe under the case
19 law of Virginia under the authority cited with our copy
20 of Instruction C that there can be no recovery for that
21 type of injury and there is no evidence here there was
22 anything in the Coca Cola to make anybody sick except
23 the emotional and psychological reaction to it.

24 THE COURT: The Court is going to overrule the

1 motion. The Court thinks the evidence in the case is
2 sufficient to submit the question to the jury. So it is
3 going to overrule your motion to strike the evidence.

4 Now, any objection to Instruction 1-A?

5 MR. THOMPSON: We have no objection to Instruction
6 1-A.

7 THE COURT: Any objection to Instruction 3?

8 MR. THOMPSON: Yes, sir.

9 THE COURT: What is the objection?

10 MR. THOMPSON: The Defendant by Counsel excepts
11 to the action of the Court in giving Instruction 3 on
12 the ground that the instruction does not comply with the
13 holding of the Court of Appeals in the case of Pepsi
14 Cola Bottling Company vs. McCulloch, 189 Virginia, Page
15 89 and on the further ground that the jury should never
16 be instructed on the presumption. The purpose of pre-
17 sumptions or inferences arising from a foreign substance
18 in a bottle is merely to get the case to the jury and
19 after the case goes to the jury it's up to the jury to
20 decide, taking into account all of the facts and infer-
21 ences that can be drawn from them, whether or not a case
22 of negligence is on the part of Coca Cola Bottling
23 Company have been made out and to instruct the jury on
24 a presumption confuses them and is likely to mislead

1 them. It is argumentative and we don't think it's a
2 proper statement of law.

3 THE COURT: Mr. Whitehead, you want to reply to
4 that?

5 MR. WHITEHEAD: Yes, sir, in other words as I
6 understand the way the instruction is drawn it's a
7 correct statement of law and the way it should be given
8 so as to explain to the jury what the facts in the
9 situation are and how they have to proceed.

10 THE COURT: What about the objection he has to
11 that case that he cites?

12 MR. WHITEHEAD: That instruction there was
13 different.

14 THE COURT: I am going to give Instruction 3 as
15 offered, Mr. Thompson.

16 MR. THOMPSON: We accept.

17 THE COURT: Do you have objection to Instruction
18 No. 6?

19 MR. THOMPSON: No objection to Instruction No. 6.

20 THE COURT: Mr. Whitehead, do you have any objec-
21 tion to A and B for the Defendant?

22 MR. WHITEHEAD: No, sir, not to A and B.

23 THE COURT: What are you offering in place of C,
24 Mr. Thompson? Are you offering C?

1 MR. THOMPSON: Yes, sir, I am offering C.

2 THE COURT: Do you have any objection to No. C,
3 Mr. Whitehead?

4 MR. WHITEHEAD: Yes, sir, we object, Judge.

5 THE COURT: What is the objection?

6 MR. WHITEHEAD: The objection to that is that it
7 is not based on the evidence. In the evidence here he
8 did suffer physical injury.

9 THE COURT: The Court is going to refuse C because
10 there is other evidence than emotional and psychological
11 injury if you believe what the Plaintiff said. So the
12 Court thinks this instruction is improper under the
13 evidence in this case and is going to refuse it.

14 MR. THOMPSON: All right, sir, I accept.

15 THE COURT: Mr. Whitehead, read C-1. Do you have
16 any objection to C-1, Mr. Whitehead?

17 MR. WHITEHEAD: Yes, sir, same objection.

18 THE COURT: For the same reason, I am going to
19 refuse it.

20 MR. THOMPSON: I accept to the Court's action in
21 refusing C and C-1.

22 THE COURT: Do you have any objection to D, Mr.
23 Whitehead?

24 MR. WHITEHEAD: No, sir, D is all right.

1 (Whereupon, the Court and Counsel returned to the
2 Courtroom and the Court instructed the jury as follows:)

3 Instruction A

4 The Court instructs the jury that this is a
5 negligence action and in order to recover the plaintiff
6 must prove by a preponderance of the evidence negligence
7 on the part of the defendant which proximately caused
8 his alleged injuries.

9 Before you may infer negligence on the part of
10 the defendant from the presence of a foreign substance
11 in the bottle, the plaintiff must first prove/a prepond-
12 erance of the evidence that such foreign substance was in
13 the bottle when it left the possession of the defendant.

14 If the plaintiff fails to prove by a preponderance
15 of the evidence that the foreign substance was in the
16 bottle when it left the possession of the manufacturer,
17 or, if it appears equally as probable that it was not in
18 the bottle when the bottle left the possession of the
19 defendant as that it was, then you should return your
20 verdict for the defendant.

21 Instruction B

22 The Court instructs the jury that the defendant
23 was not an insurer of the absolute purity of its product.
24 Even if you believe from a preponderance of the evidence

1 that the foreign substance was in the bottle when it left
2 the possession of the defendant, yet if you further
3 believe that the defendant exercised a high degree of
4 care in the bottling, preparation, and inspection of
5 its product, then you should return your verdict for the
6 defendant.

7 Instruction D

8 The Court instructs the jury that, if you find
9 for the plaintiff, the burden of proof is on the plain-
10 tiff to prove by a preponderance of the evidence the
11 injuries and damages he sustained as a proximate result
12 of consuming the soft drink.

13 Instruction 1-a

14 The Court instructs the jury that if you find
15 for the plaintiff, William Henry Reynolds, it is your
16 function to determine the amount of damages that should
17 be awarded him, and in determining same, you must be
18 guided solely by the evidence in the case and should
19 fix the amount at such sum as to you seems a fair and
20 just compensation for the injuries and damages proximately
21 caused the plaintiff by the alleged incident, but not in
22 excess of the amount sued for; and in arriving at the
23 amount of damages to be awarded, should you find for the
24 plaintiff, you may take into consideration any of the

1 following items or elements of damage that a preponderance
2 of the evidence may show to have been sustained by the
3 plaintiff as a proximate result of the incident sued
4 for:

- 5 (a) Any sickness, inconvenience and discomfort
6 the plaintiff has already sustained.

7 Instruction 3.

8 The Court instructs the jury that it is the duty
9 of a manufacturer to exercise a high degree of care in
10 the preparation, bottling and inspection of its product,
11 and the presence of foreign substance in a sealed
12 beverage container, not tampered with after it leaves
13 the possession of the manufacturer, is in itself evidence
14 of negligence; and when that is shown by the evidence,
15 a prima facie case of negligence on the part of the
16 manufacturer is made out.

17 But the prima facie presumption above referred
18 to may be rebutted by evidence showing that the defendant
19 exercised a high degree of care in the preparation,
20 inspection and bottling of its product. The issue as
21 to whether the defendant did exercise such a high degree
22 of care as to overcome such prima facie presumption of
23 negligence is for you to decide; and if upon the whole
24 evidence you believe from a preponderance thereof that

1 the defendant was negligent and that any such negligence
2 was a proximate cause of injuries to the plaintiff,
3 then you shall find your verdict in favor of the plaintiff
4 against the defendant.

5 Instruction 6.

6 The Court instructs the jury that it is not
7 necessary that material facts be proven by direct
8 evidence; they may be proven by circumstantial evidence,
9 that is, the jury may draw all reasonable and legitimate
10 inferences and deductions from the evidence adduced
11 before them.

12 (Whereupon, the following instructions were
13 refused by the Court:)

14 Instruction C

15 The Court instructs the jury that if you believe
16 from the evidence that the plaintiff suffered no
17 physical injury, as such, from the contents of the bottle
18 and that his reaction was emotional or psychological
19 then you shall render your verdict for the defendant.

20 Instruction C-1

21 The Court instructs the jury that if you believe
22 from the evidence that the plaintiff suffered no
23 physical injury or sickness from the incident herein
24 sued for, then he cannot recover for the emotional or

psychological reaction thereto.