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Artful Pleading and Circumstantial Evidence in Food Manufacturing Defect Cases: Is It Too Easy to Get to a Jury

Carl Crosby Lehmann

ARTFUL PLEADING AND CIRCUMSTANTIAL EVIDENCE IN FOOD MANUFACTURING DEFECT CASES: IS IT TOO EASY TO GET TO A JURY?

CARL CROSBY LEHMANN*

I. INTRODUCTION

This article examines cases where plaintiffs claim to have been injured by ingesting a foreign[1] contaminant placed in a food product before the product left the hands of the defendant-manufacturer.[2] Although these cases are numerous and span decades, they often consist of very similar assertions by both parties.[3] Because of a lack of direct evidence on either side, plaintiffs usually trace the chain of custody from the point of purchasing the product to the time of ingestion in an effort to raise an inference that the alleged defect existed in the product when it was packaged at the defendant's factory. Defendants routinely counter with evidence of their manufacturing process, attempting to establish the impossibility of the defect either finding its way into the product, or occurring in the manner that the plaintiff asserts.[4]

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* The author is an associate with Gray, Plant, Mooty, Mooty & Bennett, P.A. of Minneapolis, Minnesota. Mr. Crosby Lehmann practices in the areas of products liability and employment defense litigation.

1. "Foreign" means both in the sense that the defect is unnatural to the food product itself as well as to the manufacturing process. The cases examined here are distinguishable from cases where, for example, a consumer is injured by swallowing a bone, or injured by a machine part that has fallen into a product during the manufacturing process. *See, e.g.*, Kneibel v. RRM Enterprises, 506 N.W.2d 664 (Minn. Ct. App. 1993).

2. This article does not address claims that a defendant is liable for the defective design of its packaging or any other theories where the manufacturer may be found liable for intentional tampering by third persons.

3. *Compare* Richenbacher v. California Packing Corp., 145 N.E. 281 (Mass. 1924) *and* Campbell Soup Co. v. Gates, 889 S.W.2d 750 (Ark. 1994). Although seventy years separate these two cases, the plaintiffs' circumstantial evidence attempting to prove that the defendants' product left the factory with the defect is essentially the same, as is the defendants' use of evidence of its manufacturing process and techniques. *Id.*

4. Some defendants have not denied that a contaminant could have found its way into the product, but have offered evidence of their manufacturing process to prove that the plaintiff's claims are impossible for some other reason. *See* Williams v. General Baking Co., 98 A.2d 779, 780 (Del. Super. Ct. 1953); Schneider v. Proctor & Gamble Mfg. Co., 411 So. 2d 669, 671 (La. Ct. App. 1982); Givens v. Baton Rouge Coca-Cola Bottling Co., 182 So. 2d 532 (La. Ct. App. 1966) (affirming judgment against plaintiff who allegedly consumed a live insect in soft drink manufactured by defendant, finding that evidence of defendant's manufacturing process established that it was impossible for a worm to have been introduced into the bottle and not only remain undeteriorated, but remain alive); Gustafson v. Gate City Co-op Creamery, 126 N.W.2d 121, 123 (S.D. 1964) (noting defendant's evidence of its butter mixing process offered to prove that it was inconceivable for glass to have shown up—a very great majority of it—on only the thin slice consumed by the plaintiff); Gates v. Standard Brands, Inc., 719 P.2d 130, 136 (Wash. St. App. 1986) (recognizing that defendant's evidence tended to prove that although a snake vertebra could have arrived with the peanuts and made its way into a Baby Ruth candy bar, it could not have been spongy or rank after going through

This article explores how courts have dealt with evidence proffered by defendants of their manufacturing methods. This article supports the view that not only is this evidence relevant and admissible, but, when comprehensive and unrefuted, it should erase any inference to be drawn from the plaintiff's circumstantial evidence; thereby requiring a plaintiff-consumer to present additional evidence in order to raise a question of fact as to when the defect became present in the defendant's product. Once a manufacturer presents evidence of its production procedures and demonstrates the high improbability that the defect existed before the product left the custody and control of the defendant, the plaintiff's circumstantial evidence loses its probative force in establishing any presumption of when the defect first appeared in the product. In order to restore a fact question, the plaintiff should be required to refute the defendant's evidence.

Such a rule best balances the interests of both parties. Manufacturers are assured that plaintiffs are not provided easy access to a jury through artful pleading and the expense of defending meritless, and sometimes fraudulent,[5] claims is reduced. Plaintiffs can rebut the evidence of the defendant's manufacturing techniques without too great of a burden with evidence that there still existed an opportunity for the contaminant to have been introduced into the product.[6] Under this approach, the plaintiff is not required to *prove* that the defendant's manufacturing process is fallible. Instead, plaintiffs must merely present evidence re-establishing a factual dispute as to whether or not the contaminant could have been introduced into the product while in the custody of the manufacturer.

Part II examines the burdens of establishing a prima facie case against manufacturers for injuries caused by defects in food or beverage products. Part III explores the confusion still existing over whether a defendant's evidence of its manufacturing techniques is even *admissible*

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the production procedures).

5. *See, e.g.*, Bolton v. Kroger Grocery & Baking Co., 123 F.2d 526, 527 (7th Cir. 1941) (affirming jury verdict for the plaintiff for injuries allegedly caused by swallowing glass embedded in the defendant's product). Despite defendant's proof that it was physically impossible for glass located in a person's stomach and intestines to work their way outward through the walls of her organs, muscles, and tissues to the skin of her abdomen, the court held the jury verdict was not manifestly contrary to the evidence since the jury could have found that the plaintiff's story was not entirely false. *Id.* at 527-28. "The extent of the rejection of plaintiff's testimony was a matter solely for the jury's determination." *Id.* at 528.

6. As argued below, plaintiff can still rely upon circumstantial evidence to raise a jury question. *See infra* note 9 and accompanying text. Plaintiffs may simply be required to introduce evidence of available opportunities for the defect to have become introduced into the product while the product was still under the control of the defendant. Where the manufacturing procedures are complex and do not provide any apparent opportunities, plaintiffs could hire an expert to observe the process and testify as to different means by which the defect could have been introduced while in the defendant's control.

in these cases. Parts IV and V study the conflicting views of the impact a defendant's proof of its manufacturing techniques has on a plaintiff's evidence that she purchased a product in a sealed container and that at no time after the container was opened did she or anyone else tamper with the product. Some jurisdictions hold that these allegations establish a factual issue of whether the defect existed at the time the product left the defendant's control (Part IV). Other jurisdictions hold that a defendant's evidence of its manufacturing process may erase any inferences to be drawn from a plaintiff's circumstantial evidence, requiring the plaintiff to produce additional proof in order to establish a question of fact as to whether the product contained the defect at the time it left the defendant's control (Part V). In Part VI, it is argued that the rule of those jurisdictions requiring a plaintiff to rebut a defendant's evidence of its manufacturing process best balances the interests of both parties.

II. GENERAL BURDENS OF PROOF IN ESTABLISHING A PRIMA FACIE CASE AGAINST A MANUFACTURER FOR INJURIES CAUSED BY A FOREIGN OBJECT IN A FOOD OR BEVERAGE.

To establish a manufacturer's liability for damages which result from the consumption of a contaminated food or beverage, a plaintiff must prove that the defendant's product contained a deleterious substance, that the substance was consumed, and that as a result of the consumption, the plaintiff sustained an injury.[7] Whether an action is brought in strict product liability, breach of warranty, misrepresentation, or negligence, it is a consumer's burden to show that the complained defect existed in the product at the time it left the custody and control of the manufacturer or entity in the line of distribution being sued.[8] A lack of direct evidence does not preclude recovery. A plaintiff may rely upon circumstantial evidence to raise an inference that a contaminant was introduced into the product while under the defendant's control.[9]

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7. LeBlanc v. Louisiana Coca-Cola Bottling Co., 60 So. 2d 873, 874 (La. 1952).

8. Tardella v. RJR Nabisco, Inc., 576 N.Y.S.2d 965, 966 (N.Y. App. Div. 1991).

9. It is difficult to articulate exactly what evidence is sufficient in order to draw a reasonable inference on any issue. This type of ruling will depend entirely upon the nature of the evidence offered in the case at hand and it is difficult for such a ruling to serve as a precedent. See 9 WIGMORE, EVIDENCE § 2494, at 383 (Chadbourn rev. 1981). In a leading scholarly piece on the subject, Professor Fleming James wrote:

> The question of sufficiency of circumstantial evidence to prove a fact is more complex and subtle. It turns on the concept of legitimacy of the desired inference. If A is shown, then the trier may infer B from A if, but only if, the inference is a rational one. The test of rationality is usually expressed in terms of probabilities. Where from the proven facts the nonexistence of fact to be inferred appears to be just as probable as its existence (or more probable than its existence), then the conclusion that it exists is a matter of speculation, surmise, and conjecture, and a jury will not be allowed to draw it. This test suggests mathematical precision, but the suggestion is spurious. For one thing, we lack

In order for a question of fact to exist over when a defect became introduced into a product, it must appear by a clear preponderance of the evidence that there has been no such divided or intervening control of the product as to afford a reasonable opportunity for it or its contents to have been tampered with by another after leaving the possession or control of the defendant or its agents.[10] The injured consumer may be required to introduce evidence tending to show the unlikelihood of an intermediary as the source of the defective condition.[11] Where there is any intervention of an intermediary source which produces or could produce the injury complained of,[12] or where the position of the contaminant itself suggests tampering by some third party,[13] a plaintiff is unable to rely exclusively upon the condition of the packaging as evidence to prove this element of her case. In cases involving sealed containers of food and drink however, where the possession of the sealed container has passed from the manufacturer into the hands of an intermediary, the ability of a plaintiff to establish a prima facie case solely with evidence that she examined the package before purchase has been justified on the grounds that it is very unlikely the sealed container could be broken after leaving the control of the manufacturer without this fact being observed by the consumer.[14]

Thus, when a plaintiff introduces evidence that (1) she purchased a food product and observed it to be in a sealed container; (2) that no one

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> the quantitative data about most matters which would be needed to make meaningful statements in terms of probabilities. Of course some broad generalizations would command general assent. These are the judgments of "common sense," but even they are fallible. How often the science of the morrow makes today's common sense look foolish!

Fleming James, Jr., *Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict*, 47 VA. L. REV. 218, 221-22 (1961).

10. McKittrick v. Dugan Bros. of New Jersey, 197 A. 905 (N.J. 1938).

11. *Id.* at 907.

12. Miller v. Gerber Prod. Co., 62 S.E.2d 174, 176 (Ga. 1950) (affirming judgment entered for the defendant in a negligence action where plaintiff allegedly found glass in baby food fed to her child). The court held that plaintiff had not raised an issue of fact for the jury that the glass was in the product when it left Gerber's factory. *Id.* at 176. The plaintiff introduced no evidence of whether the baby had eaten any other food at the time, or what the baby had been doing just prior to being fed. *Id. See also* Love v. New Amsterdam Casualty Co., 175 So. 2d 398, 400 (La. Ct. App. 1965) (noting that plaintiff had not proven that the ice cream had not been handled by persons other than the manufacturer and that the record indicated evidence to the contrary).

13. De Luccio v. Wagner Baking Corp., 115 N.Y.S.2d 728, 729 (N.Y. App. Term 1952); Miller v. National Bread Co., 286 N.Y.S. 908, 909 (N.Y. App. Div. 1936); Ternay v. Ward Baking Co., 167 N.Y.S. 562, 563 (N.Y. App. Term 1917).

14. *See* Gross v. Loft, Inc., 185 A. 80, 80-81 (Conn. 1936) (holding that the trial court was justified in inferring defendant's negligence where the defendant offered no evidence as to the process, care, or supervision used in the manufacture and handling of its products). *Accord* Williams v. General Baking Co., 98 A.2d 779, 780 (Del. Super. Ct. 1953); Campbell Soup Co. v. Dusek, 135 So. 2d 414, 414 (Miss. 1961); Ford v. Roddy Mfg. Co., 448 S.W.2d 433, 436 (Tenn. Ct. App. 1969); Athens Canning Co. v. Ballard, 365 S.W.2d 369, 371 (Tex. 1963); Holley v. Purity Baking Co., 37 S.E.2d 729, 732 (W. Va. 1946).

had an opportunity to tamper with the product from the time the packaging was open to the time the plaintiff consumed the product; and (3) that the plaintiff did not tamper with the product herself, the plaintiff establishes a question of fact as to whether the defect was in the product when it left the control of the manufacturer.[15] The remaining issue is what impact should evidence of the defendant's manufacturing process, tending to exonerate the defendant, have on a consumer's prima facie case? Where evidence exists rebutting the defendant's claim of its quality controls, or where the defendant's evidence of its manufacturing process fails to exclude the possibility that the defect complained of entered the goods during production, the inferences created by the plaintiff's circumstantial evidence remain intact as to the question of when the defect in the product first existed.[16] Where there is no evidence rebutting the defendant's testimony however, should the issue of whether or not a defect was present in a product while in the defendant's possession be given to a jury? Before examining the two schools of thought on this issue, Part III addresses the confusion persisting over whether or not the defendant's evidence of its quality assurances is even admissible.

III. ADMISSIBILITY OF EVIDENCE OF MANUFACTURING PROCESS AND QUALITY CONTROL PROCEDURES

Before the development of other tort theories, consumers injured by adulterated foods sued manufacturers in negligence. A defendant's evidence of its quality assurances was usually offered to prove due care in the manufacture of the product. Some jurisdictions held that the mere presence of impurities in food alone was insufficient evidence of negligence, and they allowed a defendant to introduce proof of its manufacturing techniques as evidence of lack of fault.[17]

Generally, evidence of the processes and procedures utilized by a manufacturer of packaged foods is not sufficient to rebut a presumption

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15. Curtiss Candy Co. v. Johnson, 141 So. 762, 764 (Miss. 1932) (holding plaintiff's circumstantial evidence was sufficient to raise an inference that glass was in a Baby Ruth candy bar at the time it was manufactured by the defendant). The absence of direct evidence does not bar recovery. *Id.* at 764. Had any persons other than the manufacturer placed the glass in the bar, of necessity they would have had to have melted it, placed glass in it, remolded, recovered it with chocolate, and repackaged it in its wrapper. *Id.* Although this scenario was arguably possible, it is "wild conjecture," and did not prevent the jury from finding that the candy was in its original state when it left the factory. *Id. See also* Oklahoma Coca-Cola Bottling Co. v. Dillard, 253 P.2d 847, 850 (Okla. 1953) (holding presence of dead roach in sealed container makes out prima facie case of negligence against manufacturer).

16. *See, e.g.*, Tyrrell v. Lay, 91 N.Y.S.2d 680 (N.Y. City Ct. 1949) (finding proof of manufacturer's precautions failed to rebut inference of negligence).

17. Nichols v. Continental Baking Co., 34 F.2d 141 (3rd Cir. 1929); Swenson v. Purity Baking Co., 236 N.W. 310 (Minn. 1931).

or inference of negligence to be drawn from a particular incident.[18] Evidence suggesting that defendants employ modern machinery and take great precautions in their manufacturing is insufficient to rebut the inference of negligence drawn from the plaintiffs' evidence that there was a defect in the product that caused them injury.[19] As a result, even in negligence actions, rarely will a defendant's evidence of its quality assurance devices be proper when offered to prove the manufacturer's lack of fault for the defective condition of its product.[20]

With the advent of breach of warranty and strict liability actions (where a manufacturer is liable whenever a defect causes injury regardless of the care taken to prevent it), the offer of evidence by a defendant of its manufacturing processes raises further objection and confusion. The Kansas Supreme Court has twice taken the position that evidence of a manufacturer's precautions against contamination are inadmissible in implied warranty cases where negligence is not an issue and therefore due care is irrelevant.[21]

In both *Cernes v. Pittsburg Coca-Cola Bottling Co.*,[22] and *Simmons v. Wichita Coca-Cola Bottling Co.*,[23] the defendants appealed judgments entered against them on the grounds that it was error for the trial court to strike from their answer and exclude from evidence matters relating to the manufacturing and bottling processes employed at their plants.[24] In

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18. 36A C.J.S. *Food* § 70(2) (1961).

19. *See* Ballard & Ballard Co. v. Jones, 21 So. 2d 327, 329-30 (Ala. 1945); Bagre v. Daggett Chocolate Co., 13 A.2d 757, 759 (Conn. 1940); Collins Baking Co. v. Savage, 150 So. 336, 337 (Ala. 1933); Kroger Grocery & Baking Co. v. Schneider, 60 S.W.2d 594, 595 (Ky. 1933); Gilbert v. John Gendusa Bakery, Inc., 144 So. 2d 760, 763 (La. Ct. App. 1962); Richenbacher v. California Packing Corp., 145 N.E. 281, 282 (Mass. 1924); Minutilla v. Providence Ice Cream Co., 144 A. 884, 887 (R.I. 1929); Norfolk Coca-Cola Bottling Works, Inc. v. Krausse, 173 S.E. 497, 500 (Va. 1934).

20. *See, e.g., Richenbacher*, 145 N.E. at 282 (holding that

> [t]he fact that the glass got into the can during the preparation of the spinach and before the can was sealed, notwithstanding the great care which was customarily used in canning spinach, was a circumstance which warranted an inference that some person whose duty it was to see that the system was observed was negligent in the examination of the contents of the can before it was sealed, if not negligent in preventing the presence of glass at a place where it could be put or might fall into the can).

21. *See* Cernes v. Pittsburg Coca Cola Bottling Co., 332 P.2d 258 (Kan. 1958); Simmons v. Wichita Coca-Cola Bottling Co., 309 P.2d 633 (Kan. 1957).

22. 332 P.2d 258 (Kan. 1958).

23. 309 P.2d 633 (Kan. 1957).

24. Cernes v. Pittsburg Coca Cola Bottling Co., 332 P.2d 258, 260 (Kan. 1958); Simmons v. Wichita Coca-Cola Bottling Co., 309 P.2d 633, 634 (Kan. 1957). In *Simmons*, the defense offered the testimony of a chemist at the conclusion of plaintiff's evidence to describe the bottling process at the defendant's plant. 309 P.2d at 634. The witness described an experiment that was conducted where books of matches (the object discovered in Ms. Simmons' bottle) were placed in four separate bottles which were then subjected to the washing process used at the defendant's plant. *Id.* The bottles were then filled and capped in the usual process, and taken to the witness' laboratory for analysis. *Id.* At this point, and before the results of the test were revealed, the plaintiff's objection was sustained on the grounds that this evidence was not relevant to the theory of the lawsuit, in that it was an action based upon implied warranty and not upon negligence of the defendant in bottling the beverage. *Id.*

each case, the plaintiffs presented evidence that they purchased a bottle of soda from a vending machine, opened the bottle soon after, drank portions of it and became ill as a result of an impurity they discovered in the defendant's product.[25] Although *when* the contaminant was added to the bottle was precisely the issue the defendants were attempting to address with the evidence of their manufacturing processes, the Kansas Supreme Court held that the circumstantial evidence provided by the plaintiffs established that there was no question of the soft drinks being contaminated at the time they were sold to the plaintiffs.[26] As such, although the defendants' evidence was relevant in proving due care in the manufacturing of their products, the evidence was held improper under the plaintiffs' theories where manufacturers are liable whenever a foreign substance enters their product during manufacture and subsequently injures a consumer.[27]

The Kansas Supreme Court's reasoning has been relied upon numerous times by plaintiffs suing in warranty and strict liability theories and seeking to exclude a defendant's proffered evidence of its quality control devices.[28] Adopting the reasoning of the Kansas Court, the Washington Supreme Court has held that evidence of a defendant's manufacturing processes, although relevant where due care is at issue, is inadmissible under breach of warranty claims.[29] This appears to continue to be controlling law in Washington.[30]

Plaintiffs have objected to the admission of a defendant's manufacturing process evidence on other grounds as well. In *Trahan v. Gerber Food Products, Inc.*,[31] the plaintiff appealed a verdict in the defendant's favor in a case where the consumer claimed to have been injured by glass particles found in pureed food manufactured by the defendant.[32]

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25. *Cernes*, 332 P.2d at 260; *Simmons*, 309 P.2d at 634.

26. *Cernes*, 332 P.2d at 262; *Simmons*, 309 P.2d at 635.

27. *Cernes*, 332 P.2d at 262; *Simmons*, 309 P.2d at 635.

28. Brown v. General Foods Corp., 573 P.2d 930 (Ariz. Ct. App. 1978); Hazelton v. Safeway Stores Inc., 745 P.2d 309 (Kan. Ct. App. 1987); Trahan v. Gerber Food Products, Inc., 520 So.2d 956 (La. Ct. App. 1987); Barefield v. La Salle Coca-Cola Bottling Co., 120 N.W.2d 786 (Mich. 1963); Johnesee v. Stop & Shop Cos., Inc., 416 A.2d 956, 960 (N.J. Super. Ct. App. Div. 1980); Pulley v. Pacific Coca-Cola Bottling Co., 415 P.2d 636 (Wash. 1966).

29. *Pulley*, 415 P.2d at 639-40 (recognizing that the proffered evidence was germane to impeaching the credibility of the plaintiff's claims by demonstrating the improbability of a foreign object escaping the methods and techniques used, but holding such evidence was circumstantial and did not fulfill the manufacturer's burden of showing who contaminated the particular food product and, as such, it was inadmissible).

30. Gates v. Standard Brands Inc., 719 P.2d 130, 136-37 (Wash. Ct. App. 1986) (holding evidence that snake vertebra could not have been in the condition described by the plaintiff, since peanuts used by the defendant are thoroughly cooked, was admissible despite *Pulley* since the evidence was not offered to demonstrate that the Baby Ruth did not contain the snake vertebra at the time it left the seller).

31. 520 So. 2d 956 (La. Ct. App. 1987).

32. Trahan v. Gerber Food Prods., Inc., 520 So. 2d 956, 957-58 (La. Ct. App. 1987).

One of the plaintiff's assigned errors on appeal was the admission of the defendant's testimony of its production methods.[33] The plaintiff argued that the defendant's purpose in introducing this evidence was to argue tampering, an affirmative defense, and because Gerber failed to plead this in its answer, it should have been precluded from presenting such evidence at trial.[34] The court rejected this contention, and held that the defendant was merely rebutting the allegation of negligent manufacturing.[35] The defendant had always denied that the product had been produced with any glass in it, and this evidence was introduced in furtherance of this contention.[36] As such, the court concluded that the plaintiff could not reasonably have been surprised by this evidence.[37]

The bulk of jurisdictions that have addressed the question of admissibility recognize that, although inappropriate where offered to prove lack of fault, evidence of a manufacturer's procedures of production and packaging is admissible when proffered to refute the inference that the defect existed in the product at the time it left the control of the defendant.[38] In *Brown v. General Foods Corp.*,[39] the plaintiff appealed a verdict against him.[40] The plaintiff had sued a manufacturer of cereal for injuries sustained when he ingested a moldy banana peel which he alleged had been at the bottom of a cereal box.[41] One of the grounds for appeal addressed by the Arizona Court of Appeals was whether the trial court committed error in admitting, over plaintiff's objection, evidence relating to the manufacturer's quality control procedures.[42] The plaintiff argued that such evidence was relevant only to establish improbability, and not impossibility of the event, and as such, is only relevant when a defendant faces a claim that it breached some duty of due care.[43] The plaintiff asserted that this evidence is not relevant, but rather highly prejudicial, when the matter before the court involves implied warranty and strict liability claims.[44]

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33. *Id.* at 959.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Trahan*, 520 So. 2d at 959.
38. Brown v. General Foods Corp., 573 P.2d 930, 934 (Ariz. Ct. App. 1978); Hazelton v. Safeway Stores, Inc., 745 P.2d 309, 312-13 (Kan. Ct. App. 1987); Barefield v. La Salle Coca-Cola Bottling Co., 120 N.W.2d 786, 789 (Mich. 1963); Johnesee v. Stop & Shop Cos., Inc., 416 A.2d 956, 960 (N.J. Super. Ct. App. Div. 1980); Simon v. Graham Bakery, 111 A.2d 884, 886 (N.J. 1955); Miller v. National Bread Co., 286 N.Y.S. 908, 909 (N.Y. App. Div. 1936).
39. 573 P.2d 930 (Ariz. Ct. App. 1978).
40. Brown v. General Foods Corp., 573 P.2d 930, 932 (Ariz. Ct. App. 1978).
41. *Id.*
42. *Id.* at 931.
43. *Id.* at 933.
44. *Id.*

In rejecting the plaintiff's argument, the court stated that the questioned testimony constituted circumstantial evidence relevant to an important issue in the case.[45] To the extent that a plaintiff may rely upon circumstantial evidence to raise an inference of the existence of defect, likewise, circumstantial evidence is admissible on the manufacturer's behalf if the evidence makes it appear more probable than not that the product in question did not contain the defect when it left the manufacturer's hands.[46] The court noted that "a manufacturer will rarely have available anything other than circumstantial evidence to disprove a plaintiff's claim relating to the discovery and existence of an alleged defect in a product."[47] Therefore, the evidence is admissible if relevant and if it tends to show the improbability of the defect as alleged by the plaintiff.[48]

In *Johnesee v. Stop & Shop Cos.*,[49] a consumer sued a soup manufacturer alleging that a can of soup caused the consumer's hepatitis.[50] The Superior Court of New Jersey, Appellate Division, reversed a verdict against the defendant and remanded the case for a new trial.[51] The trial court had refused to admit the testimony of the defendant's quality-assurance manager as to the manufacturer's precautions against contamination.[52] The evidence was held inadmissible even though it was not introduced for the purpose of demonstrating due care, but rather to disprove the plaintiff's assertions that the contamination existed at the time the soup was manufactured by the defendant.[53]

In reversing the decision, the *Johnesee* court stated: "In a foreign substance case, where it is possible for the substance to enter the food after leaving the manufacturer's hands, evidence that the substance was not present when the food was under defendant's control would be relevant to disprove that necessary element of a products liability claim."[54] Even where the evidence does not conclusively exclude the possibility of contamination, the court found that the evidence would still be relevant and admissible.[55] The court further stated that:

> [P]roof that the soup was made under the most hygienic conditions does not tend to exculpate the maker, since a single

45. *Brown*, 573 P.2d at 933.
46. *Id.* (citations omitted).
47. *Id.* at 934.
48. *Id.*
49. 416 A.2d 956 (N.J. Super. Ct. App. Div. 1980).
50. Johnesee v. Stop & Shop Cos., Inc., 416 A.2d 956, 958 (N.J. Super. Ct. App. Div. 1980).
51. *Id.* at 961.
52. *Id.* at 959.
53. *Id.*
54. *Id.* at 960.
55. *See Johnesee*, 416 A.2d at 960.

> can might become contaminated in spite of all reasonable precautions.
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> Nevertheless, a certain improbability as to the truth of plaintiff's version exists which defendants should not be foreclosed from establishing. The issue is one of credibility. A manufacturer rarely has available anything more than circumstantial evidence to disprove a plaintiff's claim relating to the discovery and existence of an alleged defect in a product. Evidence . . . [of the defendant's manufacturing processes] should be admissible, not to show lack of fault or the presence of due care on the manufacturer's part, but rather as relevant evidence tending to show the improbability of the defect as claimed by plaintiffs.[56]

The Kansas Court of Appeals has shifted away from the Kansas Supreme Court's prior holdings. In *Hazelton v. Safeway Stores, Inc.*,[57] a strict liability claim was brought against a store chain for injuries the plaintiff sustained when he swallowed a needle discovered in bread baked by the defendant.[58] The plaintiff's evidence suggesting needles were in the bread at the time it left the defendant's control consisted of the plaintiff's assertions that he observed the packaging to be untampered; that the crust of the bread also appeared undisturbed; and when he bit into the bread a needle was inside the product.[59] The defendant sought to introduce evidence of its testing for metal contamination of its products before distribution.[60] As the defense explained, this was proffered not to establish due care, but to prove that it was impossible for the product to have been manufactured with a needle embedded therein.[61] The trial court followed the rule established by the Kansas Supreme Court in *Cernes v. Pittsburg Coca-Cola Bottling Co.*,[62] and *Simmons v. Wichita Coca-Cola Bottling Co.*,[63] and refused to admit the evidence.[64]

In reversing the trial court, the Kansas Court of Appeals distinguished its holding here from the decisions in *Cernes* and *Simmons* on

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56. *Id.*
57. 745 P.2d 309 (Kan. Ct. App. 1987).
58. Hazelton v. Safeway Stores, Inc., 745 P.2d 309, 310 (Kan. Ct. App. 1987).
59. *Id.*
60. *Id.* at 312.
61. *Id.*
62. 332 P.2d 258 (Kan. 1958). *See also supra* notes 21-27 (discussing Kansas Supreme Court position that evidence of manufacturer's due care is irrelevant where negligence is not an issue).
63. 309 P.2d 633 (Kan. 1957). *See also supra* notes 21-27 (discussing Kansas Supreme Court position that evidence of manufacturer's due care is irrelevant where negligence is not an issue).
64. *Hazelton*, 745 P.2d at 313.

tenuous grounds.[65] It held that the prior decisions were "cola cases" where "there was direct evidence that the contaminant was in the bottle."[66]

> When, as here, that evidence is circumstantial only, we can rely upon . . . the principle that, if a plaintiff's circumstantial evidence sufficiently negates other possible causes so that his claim has "an inference of probability as distinguished from mere possibility," the plaintiff has a prima facie case in a strict liability suit. . . .
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> . . . "Likewise, circumstantial evidence is admissible on a defendant manufacturer's behalf if the admission of such evidence makes it appear more probable than it would otherwise appear without such evidence that the product in question did not contain the claimed defect when it left the defendant's control."[67]

The rule of the Kansas Court of Appeals in *Hazelton*, that the circumstantial evidence of a defendant's testing procedures are admissible when a plaintiff's case is supported solely by circumstantial evidence, although consistent with other jurisdictions that have addressed this question, is not consistent with the Kansas Supreme Court's previous resolution of the issue.[68] None of the plaintiffs in these Kansas cases presented any direct evidence that the defect was in the product before it left the defendant's hands.[69] To distinguish *Hazelton* on these grounds is specious. Although its supreme court has yet to address this conflict, it appears that the *Cernes* and *Simmons* decisions have become as unpopular in Kansas as they are in most other jurisdictions.

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65. *Id.*

66. *Id.*

67. *Id.* at 313 (citations omitted).

68. *Compare id. with* Cernes v. Pittsburg Coca Cola Bottling Co., 332 P.2d 258, 260 (Kan. 1958) *and* Simmons v. Wichita Coca-Cola Bottling Co., 309 P.2d 633, 634 (Kan. 1957).

69. In *Simmons*, the plaintiff's testimony was that after drinking about one-third of the soda, her sister called to her attention that there was some foreign object in the bottle which was later determined to be a book of matches. 309 P.2d at 634. In *Cernes*, the plaintiff was handed an open bottle of Coca Cola about which he noticed nothing unusual until the third swallow when he began to swallow the foreign substance that made him sick. 332 P.2d at 260. These cases cannot be said to represent instances where the plaintiffs presented direct evidence that the adulteration discovered was in the product at the time it left the manufacturer's hands.

IV. JURISDICTIONS HOLDING A PLAINTIFF'S CIRCUMSTANTIAL EVIDENCE MAY CREATE AN IRREBUTTABLE INFERENCE OF PRESENCE OF DEFECT BEFORE THE PRODUCT LEFT THE CONTROL OF ITS MANUFACTURER

Some jurisdictions hold that when a plaintiff asserts she purchased a food product that appeared to be undisturbed in its normal packaging, and that she did not tamper with the product herself, nor was there any opportunity for anyone else to adulterate the product from the time it was taken out of its sealed container to the time it was consumed, she has established a jury question as to the issue of presence of a defect at the time the product left the manufacturer's control. These jurisdictions reason that because upon a motion for summary judgment all inferences should be given to the non moving party, any evidence of a manufacturer's quality controls, and the improbability of such an occurrence, merely raises a fact question for a jury to determine. The remainder of this section surveys cases from various jurisdictions subscribing to this position.

In *Ford v. Roddy Manufacturing Co.*,[70] the plaintiff sued a soda bottler when he suffered injuries from drinking Coca-Cola containing an insect.[71] A jury returned a verdict for the plaintiff and the defendant appealed, contending that a directed verdict should have been granted.[72] The plaintiff's evidence consisted of his testimony that he purchased a soda from a vending machine, that it appeared normal, and that nothing unusual was observed when he opened the bottle.[73] The plaintiff also presented testimony that before the soda was added to the pop machine, it was kept under lock, and the two individuals who had access to the beverages testified that they had never tampered with any bottles.[74] Upon opening the soda, the plaintiff immediately drank about one-third of the contents when he noticed the bug and became sick.[75]

The defendant's evidence included proof of its bottling process and sanitary conditions at its bottling facility.[76] The bottler established that from the time bottles are picked up from its customers to the time they are filled with the soda and capped, they go through an elaborate washing, rinsing, and inspection process.[77] Although this evidence remained

70. 448 S.W.2d 433 (Tenn.Ct.App. 1969).
71. Ford v. Roddy Mfg. Co., 448 S.W.2d 433, 434 (Tenn. Ct. App. 1969).
72. *Id.*
73. *Id.* at 435.
74. *Id.*
75. *Id.*
76. *Ford*, 448 S.W.2d at 438.
77. *Id.* Defendant's proof established that empty bottles are picked up by the defendant from its

uncontested, the trial court held that proof of the defendant's bottling process presented a question upon which reasonable minds could disagree, and that the evidence of the manufacturing process did not warrant a directed verdict in favor of the defendant.[78]

The Tennessee Court of Appeals affirmed.[79] Focusing entirely upon the inferences to be drawn from the plaintiff's evidence, the court stated:

> The question before the Court is whether there was 'reasonable opportunity' for someone to have tampered with the bottle of Coca Cola or its contents after it had left the possession and control of the defendant bottler. If there was such reasonable opportunity for the bottle to have been tampered with the case should not have gone to the jury.[80]

The requirement is satisfied if the plaintiff's evidence sufficiently eliminates the probability of anything being done to the bottles or their contents after they left control of the bottler.[81] Even though the plaintiff's evidence did not wholly exclude the possibility that someone tampered with the beverage after it left the defendant's control while it was being stored, the court held the issue of when the insect came to be in the bottle was one for a jury.[82]

In *Haynes v. Coca Cola Bottling Co.*,[83] a plaintiff became ill after drinking a can of soft drink purportedly containing paper and fungus.[84] The plaintiff sued under theories of negligence and breach of warranty, and a jury returned a verdict in her favor.[85] The defendant appealed on the grounds that the plaintiff's evidence was insufficient to raise a jury

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customers, washed and refilled. *Id.* The washing process consists of pre-rinses, washing and rinsing of the empty bottles. *Id.* The bottles come out of the washer on a conveyor line where they are both visually inspected under bright lights by the defendant's employees and also subjected to an electronic eye inspection. *Id.* The water used to make the soda is treated at the defendant's plant to remove foreign substances and purify the water. *Id.* The water is cooled, carbonated, and passed on to the filler to be injected into bottles through a fine screen. *Id.* The syrup is added next where it passes directly from the drum received by the bottler through a strainer into each bottle. *Id.* The bottles then travel on a conveyor belt a distance of six inches to the capper. *Id.* The bottle then passes through an electronic inspection. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 436.

81. *Ford*, 448 S.W.2d at 436.

82. *Id.* at 438-39. The court did recognize that instances may arise where a directed verdict would be proper, as where the explanatory evidence submitted by the defendant is so strong that reasonable minds could draw but one conclusion therefrom. *Id.* at 439. However, given the facts of this case and the result reached by the court, it is difficult to imagine a case where the court would adopt this view.

83. 350 N.E.2d 20 (Ill. App. Ct. 1976).

84. Haynes v. Coca-Cola Bottling Co., 350 N.E.2d 20, 22 (Ill. App. Ct. 1976).

85. *Id.*

question as to the issue of whether the defect existed in the soda at the time it left the defendant's control.[86]

The plaintiff's evidence consisted entirely of her testimony that she purchased the can of soda from a factory dispensing machine at her job.[87] The can was not leaking or damaged.[88] She opened the can, heard a fizzing sound, and immediately began drinking from it.[89] The plaintiff drank the contents of the can, even though the taste was somewhat unappealing.[90] After consuming all of the beverage, she discovered a solid matter at the bottom of the can and immediately became ill.[91]

The defendant presented testimony of its plant manager whose duty it was to supervise the canning operations.[92] He described the procedures in processing cans of Coca Cola.[93] He also described quality control examinations performed every thirty seconds on random cans.[94] The purpose of this testimony was to establish the impossibility of paper and fungus having entered a can of soda before a can is sealed at the plant.[95] The defendant argued that contamination could not have occurred at its plant prior to sealing because its precautionary practices and packaging devices would detect any product not fully filled with liquid.[96] Given that fungus could not have grown without air in a sealed can, the jury could only speculate about how and where the contaminants were added.[97]

On appeal, the Illinois Court of Appeals held that the defendant's evidence ignored the presence of paper in the can as well as the plaintiff's evidence that the can fizzed when opened.[98] The court recognized that the plaintiff must prove that the defect existed in the product at the

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86. *Id.* at 24.
87. *Id.* at 22.
88. *Id.*
89. *Haynes*, 350 N.E.2d at 22.
90. *Id.*
91. *Id.*
92. *Id.* at 23.
93. *Id.* He testified that the water, syrup and carbonated air, which are mixed together in the final product, are routed through stainless steel pipes to the mixing phase, and that after the liquid becomes carbonated, it flows through a similar stainless steel system to the machine which fills the cans. *Id.* The cans which are assembled at the plant are placed single file on a conveyor belt. *Id.* While on the line, the cans are rinsed with high pressure chlorinated water. *Id.* Next, they are immediately filled with the product. *Id.* In less than one-tenth of a second after being filled, they are sealed. *Id.* If the conveyor belt is stopped for any reason, the cans between the filler and the sealer are removed from the line. *Id.* Once the cans have been sealed, they are sent to a warmer which raises the temperature to create greater pressure within the can. *Id.* The cans then travel to a "fill-defects" device which checks the liquid level in the cans. *Id.* If the proper fill is indicated, it lets the cans pass; if the proper level is not signaled, it rejects them. *Id.*
94. *Haynes*, 350 N.E.2d at 23.
95. *Id.* at 23-24.
96. *Id.* at 24.
97. *Id.*
98. *Id.* at 24-25.

time it left the control of the manufacturer.[99] The court stated that "[t]his burden may be fulfilled by proof that there was no reasonable opportunity for tampering with the sealed container or, if there was such reasonable opportunity, by proof that there was actually no tampering or adulteration."[100] Without reconciling the plaintiff's version of the facts with the defendant's proof of its manufacturing procedures, the court held that the plaintiff's circumstantial evidence raised an inference from which a jury could reasonably determine that a defect existed in the product at the time it left the control of Coca-Cola.[101]

In *Curtiss Candy Co. v. Johnson*,[102] the plaintiff sued the manufacturer of Baby Ruth candy bars after he was injured by glass he swallowed when he ate one of the defendant's candy bars.[103] The defendant presented evidence that no articles of glass are permitted in the factory; that in addition to their uniforms, employees are only permitted to carry keys for their lockers while working; and that modern methods are employed in the manufacturing process that would prevent foreign materials like glass from contaminating a candy bar.[104] The court held that the plaintiff's assertions that the wrapper was sealed and the smooth chocolate covering was intact when he proceeded to eat the candy warranted the jury's finding that the candy bar had been produced with the glass imbedded in it.[105]

These cases all hold that a plaintiff's circumstantial evidence, offered to prove that no reasonable alternative source existed for the defect to have been introduced, establishes the requisite inference that the contamination existed at the time the product remained in control of the manufacturer. Evidence by the defendant of its manufacturing

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99. *Haynes*, 350 N.E.2d at 25.

100. *Id.* (citation omitted).

101. *Id.* This case is factually similar to a subsequent Illinois appellate decision where an opposite result was reached. *Compare id. with* Warren v. Coca-Cola Bottling Co., 519 N.E.2d 1197 (Ill. App. Ct. 1988). *See also infra* notes 118-31 and accompanying text (discussing *Warren*). The *Warren* court did not criticize the result in *Haynes*, but distinguished itself on the ground that, in *Warren*, the plaintiff failed to provide sufficient evidence from which one could infer that plaintiff's illness was the result of the contamination found in the defendant's product. *Warren*, 519 N.E.2d at 1202-03. This does not adequately explain how the court's other holding (that the plaintiff was unable to prove existence of defect at the time the product was in the defendant's control) bodes with the *Haynes* decision. *Id.* As a result, the law in Illinois is unclear.

102. 141 So. 762 (Miss. 1932).

103. Curtiss Candy Co. v. Johnson, 141 So. 762, 763 (Miss. 1932).

104. *Id.*

105. *Id.* at 764-765. A similar holding was made in McNicholas v. Continental Baking Co., 112 S.W.2d 849 (Mo. Ct. App. 1938) (holding that despite evidence of methods and precautions taken to prevent glass from entering into bread manufactured by the defendant, the issue of when the defect first existed in the product is a jury question). The court stated that the defendant's evidence, "presented nothing more than a conflict with the evidence presented by plaintiff, and, under the rule heretofore referred to, defendant's evidence, where it is in conflict with plaintiff's evidence, must be disregarded." *Id.* at 855.

techniques may not erase the inference drawn from the plaintiff's evidence. Such evidence proffered by the defendant is only useful for a jury to weigh in determining the credibility of the plaintiff's version of the facts.

V. JURISDICTIONS WHERE EVIDENCE OF MANUFACTURING PROCEDURES MAY REBUT A PLAINTIFF'S CIRCUMSTANTIAL EVIDENCE AS A MATTER OF LAW ELIMINATING ANY INFERENCE THAT A DEFECT WAS CONTAINED IN A PRODUCT AT THE TIME IT WAS IN THE MANUFACTURER'S CONTROL

A growing number of jurisdictions hold that the inference established by a plaintiff's circumstantial evidence, tending to prove that the defective condition complained of was in the defendant's product when it left its manufacturing facilities, may be voided by a defendant's uncontested evidence of its manufacturing and inspection processes. The following is a discussion of the cases adhering to this position.

In *Tardella v. RJR Nabisco, Inc.*,[106] a plaintiff who had sued the manufacturer of Baby Ruth candy bars appealed a summary judgment in the defendant's favor.[107] The plaintiff had purchased a candy bar from a convenience store.[108] Upon opening and eating the candy, the plaintiff's infant daughter was injured when she ingested a 7/8 inch "beading" pin which was embedded in the candy bar.[109]

To supplement its motion for summary judgment, Nabisco provided affidavits from its quality control personnel describing its production procedures.[110] It was shown that the type of pin which injured plaintiff, designed to attach sequins to polystyrene decorations, was never used in and around Nabisco's facility, and that all of the defendant's personnel wore smocks, had their hair covered, and were prohibited from wearing jewelry while working in the plant.[111] The raw materials used in production were carefully tested, filtered, and inspected for foreign matter.[112] When the process was complete, the finished product passed through a metal detector which would have detected and rejected a candy bar

106. 576 N.Y.S.2d 965 (N.Y. App. Div. 1991).
107. Tardella v. RJR Nabisco, Inc., 576 N.Y.S.2d 965, 966 (N.Y. App. Div. 1991).
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Tardella*, 576 N.Y.S.2d at 966. At the introduction of the peanuts, the most opportune time for metallic contaminants to enter into the product, the peanuts pass over a number of magnets and are both visually and electronically inspected. *Id.* at 967.

containing metal one-tenth the size of the pin found in plaintiff's candy bar.[113]

The plaintiff never refuted this evidence nor did she attempt to establish in some other way a time during the manufacture when the contaminant could have been introduced.[114] The burden upon the plaintiff was to exclude alternate causes of the accident, or at least render them "sufficiently 'remote' or 'technical' to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence."[115] In opposition to the defendant's motion for summary judgment, the plaintiff was required to present some evidence of a means by which the defect became introduced into the product.[116] The appellate court affirmed the trial court's ruling that the defendant's evidence satisfied the movant's burden on summary judgment of establishing prima facie that the pin was not in the candy bar when it left the defendant's manufacturing and distribution facilities.[117]

In *Warren v. Coca-Cola Bottling Co.*,[118] the Illinois Appellate Court re-examined a case where a consumer of a soft drink sued the manufacturer of the syrup and the bottler claiming that she became ill from drinking a contaminated can of soft drink.[119] The defendants were granted their motions for summary judgment by the circuit court and the consumer appealed.[120] The court held that in addition to not being able to establish that the bacteria found in the soda can was the *cause* of her illness, the plaintiff's circumstantial evidence was insufficient to raise the requisite inference that the bacteria was present in the soft drink at the time the product left the control of either defendant.[121]

Similar to the plaintiffs' evidence in the cases discussed throughout this paper, Ms. Warren testified that she bought a single, cold, flip-top can of Coca-Cola taken from the cooler of a convenience store.[122] The top of the can appeared to be clean.[123] Before the plaintiff was even finished paying for the soda, she opened the can, observed that it had normal carbonation, and took a "big gulp."[124] She immediately noticed that the cola tasted bad, and within five minutes after tasting the

113. *Id.* at 967.
114. *Id.*
115. *Id.* (quoting Schneider v. Kings Highway Hosp. Ctr., Inc., 490 N.E.2d 1221, 1221 (N.Y. 1986)).
116. *Id.*
117. *Tardella*, 576 N.Y.S.2d at 967.
118. 519 N.E.2d 1197 (Ill. App. Ct. 1988).
119. Warren v. Coca-Cola Bottling Co., 519 N.E.2d 1197, 1199 (Ill. App. Ct. 1988).
120. *Id.*
121. *Id.* at 1202.
122. *Id.* at 1199.
123. *Id.*
124. *Warren*, 519 N.E.2d at 1199.

drink, she felt nauseated and sick to her stomach.[125] She was taken to the hospital and remained there for six days where she suffered stomach cramps, diarrhea, and bouts of vomiting.[126] Tests of the soda performed after the plaintiff was released from the hospital revealed heightened levels of fecal organisms.[127]

In addition to other grounds advanced in their motion for summary judgment, Coca-Cola argued that there was no evidence to support the contention that any bacteria was in the soft drink when it left the company's control.[128] The court of appeals agreed, holding that the mere fact that an injury occurs in consumption of a product does not raise the presumption, or otherwise create an inference entitling the consumer to recover against a manufacturer under a theory of negligence, breach of warranty, or strict liability.[129]

> Plaintiff presented no evidence in the form of counter-affidavit, or otherwise, to contradict the affidavit of [Coca-Cola's Quality Assurance Vice President], which described the closed system in which the syrup is manufactured by defendant Coca-Cola, from which the court could infer that any bacteria was present in the syrup when it left the control of the company for bottling.[130]

The plaintiff failed to adequately set forth evidentiary facts by which a jury could reasonably infer that the soda was contaminated with bacteria when it left the control of either defendant.[131]

A recent case advancing this position is *Campbell Soup Co. v. Gates*;[132] a case where a plaintiff sued a food manufacturer when she purchased a package of Ramen Noodle Soup infested with beetle larvae.[133] According to the plaintiff, when she purchased the product, the packaging was sealed with no holes in it.[134] Immediately upon returning home, the plaintiff took three noodle packages out of the shopping bag,

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125. *Id.*
126. *Id.*
127. *Id.* at 1200.
128. *Id.* at 1200-01. Coca-Cola supplemented its motion with an affidavit of its Vice President of Quality Assurance for Coca-Cola USA. *Id.* at 1201. The evidence established that the syrup used in the defendant's product is manufactured in a completely closed system in which materials received in sealed containers, are transferred directly to closed tanks for storage until transfer to a mixing vessel. *Id.* The final syrup product is strained through a stainless steel mesh with openings of 0.004 of an inch. *Id.* Tests are conducted on the strained syrup, and the product is then packaged into thoroughly cleaned and inspected containers for shipment to bottlers. *Id.* This evidence remained uncontested by the plaintiff. *Id.* at 1202.
129. *Warren*, 519 N.E.2d at 1202 (citations omitted).
130. *Id.*
131. *Id.*
132. 889 S.W.2d 750 (Ark. 1994).
133. Campbell Soup Co. v. Gates, 889 S.W.2d 750, 751-52 (Ark. 1994).
134. *Id.* at 751.

and poured them in a sauce pan of boiling water.[135] After consuming about half of the bowl, the plaintiff observed tiny worms in the product and became sick.[136]

The defendant's evidence established that none of the other packages from the supermarket where the plaintiff purchased the soup were contaminated, nor had the defendant ever received other reports of infested products.[137] Evidence of Campbell's manufacturing techniques was also presented in an attempt to establish the impossibility of the plaintiff's contentions.[138] A microbiologist, who identified the beetle larvae and who was familiar with the manufacturing process of the soup, testified that during production the noodles are steamed for a half-minute at 212 degrees Fahrenheit, folded into blocks, deep-fried for another half-minute at 330 degrees, cooled for about a minute and a half at 100 degrees, and then immediately packaged.[139] According to the witness, the larvae could not have survived either the steaming or deep-frying process as they could not survive temperatures above 140 degrees.[140]

Campbell moved for a directed verdict on the ground that there was no basis on which the jury could infer any defect in the noodles at the time they left the manufacturer's hands.[141] The court denied the motion and the jury returned a verdict for the plaintiff.[142] On appeal, the Arkansas Supreme Court held that a directed verdict should have been granted.[143] "The evidence presented by Ms. Gates in her effort to assign liability to Campbell Soup Company did not show that the product in question was in a defective condition when it left Campbell's hands; nor was there sufficient evidence to negate the existence of other possible sources of contamination."[144]

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135. *Id.*
136. *Id.*
137. *Id.*
138. *Gates*, 889 S.W.2d at 754.
139. *Id.*
140. *Id.*
141. *Id.* at 752.
142. *Id.*
143. *Gates*, 889 S.W.2d at 754.
144. *Id.* An older decision from Kentucky also seems to follow the reasoning of the decisions discussed in this section. *See* Ewing Von Allmen Dairy Co. v. Miller, 264 S.W.2d 862 (Ky. 1954). In *Miller*, the court reversed a judgment in favor of a plaintiff whose three year old child swallowed a piece of wire allegedly originating from ice cream produced by the defendant. *Id.* at 863. The plaintiff-mother's testimony consisted of evidence that upon arriving home from the store where she had purchased ice cream, she took the carton and without opening it, cut it in half giving each of her children a half carton and spoon. *Id.* When plaintiff heard her child choking, she put her finger in the child's throat and pulled out a very small wire. *Id.*

The court held that the plaintiff failed to establish with "the requisite high degree of proof" that the wire was in the ice cream at the time it left the control of the defendant. *Id.* at 863-64. One of the factors relied upon to make this determination was the defendant's evidence of its manufacturing and

VI. WHY REQUIRING PLAINTIFFS TO REBUT EVIDENCE OF THE DEFENDANT'S MANUFACTURING PROCESSES BEST BALANCES THE INTERESTS OF BOTH PARTIES

Many believe there is a litigation crisis in America which is crippling industry through product liability suits.[145] Such fears have been the impetus for radical "reform" proposals in the current U.S.. Congress.[146] Food and beverage producers face as much pressure as anyone.[147] In addition to being a perennial target for lawsuits, these manufacturers must address countervailing demands from consumers for less packaging, lower costs, and decreased use of chemicals and other artificial methods of preservation.[148]

Regardless of whether one believes the situation is at a crisis level, companies should not be subjected to defending, through trial, unsubstantiated claims simply because a plaintiff's case is artfully pleaded. In these cases, even when manufacturers "win" at trial, they (and ultimately

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packaging systems. *Id.* at 863. Defendant's superintendent of production testified that the product was produced in an enclosed system where no human hand or outside air entered. *Id.* He further testified that the milk (1) enters a filter of 112 discs which spin at great speeds to throw out any foreign substance which might be in the milk; (2) is piped through sterilizing processes and subjected to great amounts of pressure so the nothing but liquid can pass through; (3) flows into the freezers where the "pumps are so precisely set that no foreign substance can go through them," and finally; (4) the ice cream is packed into cartons by machinery. *Id.* In assessing this evidence, the court noted that "here the proof showed there was no opportunity to tamper with this ice cream carton," and that "it was next to impossible for this wire to have gotten in the ice cream in its plant and before delivery to the store." *Id.* at 863, 864.

Despite the court's endorsement of the evidence of the defendant's manufacturing process, another justification for the decision was the fact that the injured girl was only three years old. *Id.* at 864. The plaintiff could not exclude the possibility that the wire came from some other source. *Id.* The court stated: "From all that is shown in the record, she might have gotten the wire off the kitchen table or in the automobile, or numerous other places, and had it in her mouth when she started eating the ice cream." *Id.* Given this factor, it is difficult to predict what impact this decision will have in a case in Kentucky where the plaintiff herself asserts that a contaminant was in the product while she was consuming it and where a defendant's evidence suggests the mismanufacture of the type asserted is unlikely.

145. There exists the perception that because of their wealth, and the ease of suing in strict liability, manufacturers have become lightning rods for lawsuits. The figures of today tend to support this view whether one compares the number of lawsuits, the number and size of damage awards, insurance rates, or even the number of lawyers from those of the 1970s. *See* Harry Bacas, *Liability: Trying Times*, NATION'S BUSINESS, Feb. 1986, at 22-23; George J. Church, *Sorry, Your Policy Is Canceled*, TIME, Mar. 24, 1986, at 16-17.

146. Church, *supra* note 145, at 17.

147. *Signs of Change*, PACKAGING WEEK, Aug. 14, 1991, at 24.

148. *Id.*

consumers) end up paying a large price in defending themselves.[149] Legal gate-keepers, especially summary judgment motions, should serve their purpose of preventing claims from proceeding without sufficient evidence to establish a prima facie case. The rule of those jurisdictions where a plaintiff is denied recovery as a matter of law absent evidence rebutting the defendant's proof of its manufacturing techniques best respects the rights of both litigants.[150] Defendants are relieved of the burden of having to proceed in defending themselves against claims when plaintiffs have no evidence to suggest that a defect complained of was in the product when it left the defendants' control. Plaintiffs may raise a material issue of fact simply by refuting the defendant's evidence of its production procedures.

Those jurisdictions holding that a plaintiff raises a question of fact merely by asserting that prior to purchasing the product she examined it, observed it to be in a sealed container, and that she neither added the defect herself nor did anyone else have any opportunity to do so, are misguided.[151] The focus of these decisions is on whether or not the plaintiff's evidence accounts for other potential causes of the defect from the time the product left the manufacturer's hands to the time the plaintiff purchased and consumed it, thus suggesting that any alternative

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149. *See, e.g.*, Trahan v. Gerber Food Prod. Inc., 520 So. 2d 956 (La. Ct. App. 1987). This case is a good example of both the fraud that may confront food and beverage companies, and the importance of which quality control evidence should play in controlling unmeritorious claims. *See id.* The plaintiff asserted that she had purchased six of defendant's baby food jars and observed that the "safety buttons" on all of them, which pop up after being opened, were down. *Id.* at 958. She further testified that the jar of squash she opened emitted a sharp "pop" as she twisted the cap off, that she inspected the jar's contents by looking for discoloration around the lid, and seeing none, began feeding her son. *Id.* Moments later, she observed blood oozing from his mouth and discovered that the squash contained a protruding piece of glass. *Id.* Analysis of the contents of five of the jars revealed that four of them contained glass fragments. *Id.* The sixth jar remained unopened until trial. *Id.*

In the face of this damning evidence, Gerber demonstrated that during the manufacturing process each jar and lid are individually and identically coded with letters and numbers which identify the type of food, and the date and place of manufacture. *Id.* Thus, a jar and lid of one of Gerber's products should have the same code identifying the same food, manufacturing plant, and date. *Id.* The jar and lid of the squash from which plaintiff claimed to have been feeding her son revealed a jar coded in North Carolina and a lid coded in Arkansas, and although the jar identified the contents as squash, the lid identified the food as carrots. *Id.* The defendant further established that the glass fragments were not of the same type of glass as used in its jars, nor was there any other glass in and around the production area, including windows. *Id.*

Gerber additionally demonstrated that a jar could be heated in a microwave oven with the lid on causing the lid to redepress. *Id.* Evidence of its capping procedures revealed that a seam on every jar makes a corresponding indentation on every lid during the capping phase as the lids are heated to mold their shapes onto the jars. *Id.* In examining the plaintiff's sixth jar that had remained unopened until trial, it was discovered that the seam lines were not aligned, thus indicating that the jar had been previously opened. *Id.*

150. *See supra* part V (discussing cases in which plaintiff's failed in their burden to exclude alternate causes of the defect).

151. *See supra* part IV (discussing cases in which circumstantial evidence may create an irrebuttable inference of presence of defect before leaving control of the manufacturer).

sources are unlikely to have been the cause of the defect and thus the manufacturer must be the culprit. Although excluding other potential causes is certainly an *element* of a plaintiff's prima facie case, the ultimate burden on the plaintiff is to establish a reasonable inference that the defect was in the product when it left the manufacturer's control.

When the defendant establishes that its product could not reasonably have been the source of the defect in the product, then the plaintiff's evidence attempting to rule out alternative sources is ineffective in raising an inference that the defect existed at the time of manufacture. If, for example, a defendant proves that from the time raw materials are added to the time a sealed container of the end product exits, a closed system, free from human hands, sifts the raw materials, produces the product, detects defects, and packages the product,[152] the inference that the product contained the defect before it left the factory is just as unreasonable as the notion that it was added sometime later. Because the defendant's evidence makes *any* inference to be drawn from the plaintiff's testimony unlikely, the focus should shift to whether an opportunity existed for the contamination to have occurred while the product was in the defendant's hands. Accordingly, plaintiffs should be required to rebut the evidence presented by the manufacturer to re-establish a question of fact for a jury.

Requiring consumers in these cases to refute the defendant's evidence does not place an unreasonable requirement upon them. The plaintiff may still, and in most cases undoubtedly will, rely exclusively upon circumstantial evidence. Even though the plaintiff's ultimate burden will be to prove that the defect existed before the manufacturer gave up control of the product, at this stage all that is required of the plaintiff is to raise an inference of this fact. The plaintiff can accomplish this by presenting evidence that merely disputes the defendant's claims that it is impossible for contamination to occur while in the manufacturer's control.

Three types of evidence would sufficiently rebut a defendant's testimony of its production techniques. First, a plaintiff may present some extraneous evidence disclaiming the defendant's assertions. The plaintiff might also present evidence which on its face demonstrates an existing opportunity for the defect which injured plaintiff to have entered the product at the manufacturer's facility. Finally, the plaintiff may provide an expert who has knowledge of the production techniques utilized by the defendant and who can demonstrate a means by which

152. *See* Ewing Von Allmen Dairy Co. v. Miller, 264 S.W.2d 862 (Ky.App. 1954).

the defect potentially became added to the product while under the defendant's control.

Adoption of this rule best harmonizes the interests of both parties by placing the focus back on the plaintiff's burden of proving that the defect existed in the product while under the manufacturer's control. It does not place an unreasonable burden upon plaintiffs in establishing a prima facie case against these manufacturers for injuries caused by tainted products. If anything, such a rule would arguably place an additional incentive upon food and beverage manufacturers to continue to develop and employ even safer and sanitary manufacturing techniques.

VII. CONCLUSION

Even under a theory of strict liability, a manufacturer has never been held to insure consumers of its product against all injuries associated with its use. For this reason, it is the plaintiff's prima facie burden to prove that a contaminant in a food or beverage which caused her injury was in the product at the time it left the custody and control of the defendant-manufacturer. Given that circumstantial evidence can be highly probative and persuasive, a plaintiff should never be prevented from establishing a case based exclusively on such evidence. However, where this evidence fails to establish an element of the plaintiff's case, as in instances where a defendant presents evidence of its manufacturing procedures to prove that such a defect could not have been added to the product during manufacture, the plaintiff should be required to refute such evidence before proceeding with her case.