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Harold W. Bodon et al v. Emil Suhrmann et al : Brief of Respondents

Utah Supreme Court

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MAY 3 1958

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In the Supreme Court of the State of Utah

HAROLD W. BODON, by his Guardian
ad Litem, HEINRICH BODON,

Plaintiff and Appellant,

vs.

EMIL SUHRMANN, d/b/a SUHR-
MANN'S SOUTH TEMPLE MEAT
COMPANY, and ALBERT NOORDA
and SAM L. GUSS, d/b/a JORDAN
MEAT & LIVESTOCK COMPANY,

Defendants and Respondents.

Case No.
8715

KURT A. SCHNEIDER,

Plaintiff and Appellant,

vs.

EMIL SUHRMANN, d/b/a SUHR-
MANN'S SOUTH TEMPLE MEAT
COMPANY, and ALBERT NOORDA
and SAM L. GUSS, d/b/a JORDAN
MEAT & LIVESTOCK COMPANY,

Defendants and Respondents.

Case No.
8716

BRIEF OF RESPONDENTS
ALBERT NOORDA AND SAM L. GUSS

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BRIEF OF RESPONDENTS
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STATEMENT OF FACTS

The respondents, Albert Noorda and Sam L. Guss, cannot agree entirely with the statement of facts contained in the brief of appellants and consequently feel compelled to bring certain matters to the attention of this Honorable Court in the following statement.

The Valley Sausage Company is a Utah corporation, manufacturing pork products into various types of sausage (Tr. 234, 235, 251 & 252). This corporation was not a party to the instant suits (Tr. 34 & 35). The defendants and respondents, Albert Noorda and Sam L. Guss, along with a son of Mr. Guss, do business as a partnership under the firm name of Jordan Meat & Livestock Company (Tr. 34). This partnership, hereinafter referred to as Jordan Meat, is a wholesale distributor for the meat products manufactured by Valley Sausage Company (Tr. 23, 24 & 242). The partnership does no manufacturing (Tr. 243).

Prior to May, 1955, Jordan Meat was selling processed pork products to defendant Suhrmann, a retail meat dealer doing business as South Temple Meat Company (Tr. 87). The usual practice was for Suhrmann to place his order through a Mr. Block, one of the salesmen for Jordan Meat but if Block could not understand Suhrmann because of the German language barrier, then in such instances, Alfred Hoffman was called to the telephone to act as an interpreter (Tr. 34, 264 & 265). Hoffman was a sausage maker employed by Valley Sausage Company; there was no telephone in the sausage kitchen where Hoffman worked and it was therefore necessary

for those at the sales office of Jordan Meat to summon him when needed as an interpreter (Tr. 29, 32, 34, 304 & 305).

In May, 1955, defendant Suhrmann was informed by Jordan Meat that Valley Sausage Company could not furnish any more of the product known as mettwurst and a conversation took place at the Valley Sausage plant between defendant Noorda and Suhrmann wherein Noorda told Suhrmann, through Albert Hoffman acting as an interpreter, that they could no longer sell the finished product of mettwurst to Suhrmann because their ovens could not be cooled down during the week for the processing of it. Prior to this time, all of the mettwurst sold to Suhrmann had been fully processed in the large smoke ovens of Valley Sausage Company and heated to 137 or 140 degrees Fahrenheit to insure the elimination of any trichina in the pork used in making the product (Tr. 243, 244, 245, 256, 257, 287 & 288). Defendant Suhrmann also told Noorda that they were smoking the mettwurst too much and that his customers didn't like it that way (Tr. 245); also that he had a smoke oven at his place of business and proposed that he buy the mettwurst in a raw and unprocessed state and represented that he knew how to process the product to completion for retail sale to his customers (Tr. 246, 247 & 248). From that time, all mettwurst sold to defendant Suhrmann by Jordan Meat was in a raw and unprocessed condition and was further processed by Suhrmann at his own place of business (Tr. 64, 210, 211, 248, 249, 252, 253, 294 & 295). Noorda had no knowledge of what equipment Suhrmann had at his place of business nor had he or defendant Guss told Suhrmann about the further processing of the raw

mettwurst which had been sold to Suhrmann after May, 1955 (Tr. 33, 255 & 256).

Defendant Suhrmann testified that Alfred Hoffman had instructed him in the method of curing raw mettwurst or had assisted him in so doing. This was emphatically denied by Hoffman (Tr. 282, 283 & 297).

Noorda contradicted the testimony of defendant Suhrmann and his wife that any mettwurst smoked and processed by Suhrmann was returned to Jordan Meat for re-sale (Tr. 249 & 250). The same price was charged Suhrmann for the raw mettwurst as had been charged for the processed product except that Suhrmann received a credit in poundage amounting roughly to 5% on account of the shrinkage resulting from the heat created in processing the raw mettwurst (Tr. 248, 249, 250, 254 & 255).

Inspectors from the Salt Lake City Board of Health were present at the plant of Valley Sausage Company during all business hours (Tr. 29, 30, 212, 213). The pork trimmings which were used by Valley Sausage Company in the manufacturing of its products were purchased from a Federal inspected plant in the midwest and appeared wholesome and fresh (Tr. 201, 202 & 203).

There is no practical method of inspecting hogs for the presence of the trichina organism (Tr. 12, 13, 214, 215) and no law or regulation requires that unfinished pork products be inspected for the presence of the organism in any slaughter house or meat processing plant (Tr. 12, 13 & 14); nor is there any law or regulation requiring that pork products sold by the

manufacturer or wholesaler in a raw condition, not ready for human consumption without further processing, smoking or cooking, be subjected to freezing or heating (Tr. 13, 14 & 21).

The samples of mettwurst taken by the inspectors from the Jordan Meat were negative insofar as the trichina organism was concerned (Tr. 220). All mettwurst which was sold as a finished product by Jordan Meat had been heated to at least the required temperature of 137° Fahrenheit in the Valley Sausage Company plant for the purpose of eliminating trichina (Tr. 37 & 38).

At the conclusion of the evidence, the trial court submitted the case to the jury by way of a special verdict (R. 46, 47 & 48), and thereafter a judgment was entered in favor of both plaintiffs and against defendant Suhrmann, and in favor of the defendants Noorda and Guss d/b/a Jordan Meat, and against the two plaintiffs, no cause of action (R. 107, 108 & 109). The trial court also granted the Motion of defendants Noorda and Guss to dismiss the Cross-Complaint of defendant Suhrmann (R. 116 and 117). Motions for a new trial filed by plaintiffs and defendant Suhrmann were denied by the trial court and these appeals were taken (R. 119 in Schneider case and R. 22 in Bodon case).

STATEMENT OF POINTS

POINT I

THE TRIAL COURT DID NOT ERR IN ENTERING
A JUDGMENT IN FAVOR OF DEFENDANTS NOORDA

AND GUSS AND AGAINST THE PLAINTIFFS FOR THE REASON THAT THERE WAS NO SUBSTANTIAL COMPETENT EVIDENCE FOR THE JURY TO FIND DEFENDANTS NOORDA AND GUSS GUILTY OF ANY NEGLIGENCE WHICH PROXIMATELY CAUSED PLAINTIFFS TO CONTRACT TRICHINOSIS.

POINT II

THE TRIAL COURT DID NOT ERR IN DENYING PLAINTIFFS' MOTION FOR A NEW TRIAL ON THE ISSUE OF INADEQUACY OF DAMAGES.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN ENTERING A JUDGMENT IN FAVOR OF DEFENDANTS NOORDA AND GUSS AND AGAINST THE PLAINTIFFS FOR THE REASON THAT THERE WAS NO SUBSTANTIAL COMPETENT EVIDENCE FOR THE JURY TO FIND DEFENDANTS NOORDA AND GUSS GUILTY OF ANY NEGLIGENCE WHICH PROXIMATELY CAUSED PLAINTIFFS TO CONTRACT TRICHINOSIS.

In the brief filed by the plaintiffs, they persist in making the statement that the processing of the raw mettwurst was to be done by defendant Suhrmann under the supervision of Jordan Meat. We readily admit that Suhrmann so testified but it must be remembered that he has no defense to these

actions and consequently has used every means at his disposal to try and shift the burden of liability to defendants Noorda and Guss. Suhrmann's contentions in this respect were persistently denied by Noorda (Tr. 33, 254, 255, 256), and the employee of Valley Sausage Company, Alfred Hoffman (Tr. 282, 283). In addition to this, the jury by their findings in questions No. 3 and No. 4 of the Special Verdict answered to the effect that if Hoffman did assist defendant Suhrmann in the processing of the mettwurst sausage that he was not then an agent of Noorda or Guss (R. 47). We respectfully submit that such a finding by the jury is conclusive and binding on the parties, and thus must be taken as a fact that neither Noorda, Guss nor the Jordan Meat had anything to do with the further processing of the mettwurst.

Plaintiffs also contend that because the jury found in answer to question No. 5 (b) that a reasonably prudent person in the position of Noorda and Guss would have known that Suhrmann intended to sell the mettwurst without processing it to kill trichina, the trial court erred in entering a judgment in favor of the said defendants, Noorda and Guss, and against the plaintiffs. We respectfully submit that a close scrutiny of the evidence fails to disclose any fact from which the jury could reasonably have reached such a conclusion. Suhrmann repeatedly testified that he talked only with Hoffman when dealing with Jordan Meat (Tr. 62, 87, 96, 113 & 119), and in view of the jury's finding in response to question No. 4, mentioned above, any knowledge acquired by Hoffman relative to the skill, knowledge or intentions of the defendant Suhrmann regarding the further processing of the mettwurst certainly

could not be considered as imputed to defendants Noorda and Guss. Mrs. Suhrmann testified that she dealt only with Hoffman in making purchases of mettwurst from Jordan Meat (Tr. 143). Her dealings with Noorda were only in connection with returns and receiving credits for shrinkage (Tr. 145, 146 & 147). Noorda testified as to his conversation with Suhrmann relative to selling him raw and unprocessed mettwurst but he was dealing with a man in the meat business and there is nothing in the transcript of this conversation that would give Noorda cause to doubt Suhrmann's ability or intention to further process the mettwurst in accordance with the standards prescribed for the elimination of trichina (Tr. 244, 245 & 246). Suhrmann said he had a smoke oven at his place of business (Tr. 248). There was no duty placed upon Noorda to determine if defendant Suhrmann was competent to conduct his own meat business and as the raw mettwurst had no appearance of being ready to eat, or in an edible state when sold to Suhrmann, there accordingly was no basis for a finding of negligence on the part of either of the defendants Noorda or Guss. This was the conclusion reached by the trial court and one of the reasons for the lower court entering judgment upon motion in favor of these defendants and against the plaintiffs.

This Honorable Court has often considered the question of review of a jury's determination on appeal, and in *Seybold vs. Union Pacific Ry. Company*, 121 Utah 61, 239 P. 2d 174, speaking through Mr. Justice Crockett, said:

"We have no disagreement with the time-honored rule that if there is substantial evidence to support the conclusion of the trier of the fact it will not be disturbed on review. But that means more than a mere

scintilla of evidence. See Wigmore 3rd Ed. Sec. 2494 . . . If there is any substantial competent evidence upon which a jury acting fairly and reasonably could make the finding it should stand. But if the finding is so plainly unreasonable as to convince the court that no jury acting fairly and reasonably could make the finding, it cannot be said to be supported by substantial evidence. See also 20 Am. Jur. 1033."

Defendants Noorda and Guss respectfully submit that aside from the evidence of such knowledge as Hoffman may have had there is no "substantial competent evidence" to support the answer of the jury to question No. 5 (b) of the Special Verdict as required by the law and as expressed by this Court's decisions.

We now proceed to a consideration of the rules of law applicable to the sale of pork and pork products. Plaintiffs and appellants cite a number of cases contending for the proposition that where negligence is established there need be no privity of contract as a basis for recovery by injured persons. These defendants have no quarrel with this general principle of law. However, this legal concept is only applicable to finished products which are made or manufactured and sold at that time in a condition for use or consumption by the ultimate consumer, without further processing. Plaintiffs have never contended that the mettwurst delivered to Suhrmann in a raw or uncooked state was then ready for consumption. It was obvious from the appearance of the unprocessed mettwurst introduced at the trial for illustrative purposes that it resembled raw sausage, certainly not ready for eating. Suhrmann undertook to further process the product to make it fit and ready for

eating by his customers. Had this been done properly and in accordance with known practices and acceptable standards of the packing industry, the resultant product would have been completely safe and edible (Tr. 13, 37, 245, 292 & 293).

Trichina is a minute parasite or round worm, microscopic in size and invisible to the naked eye (Tr. 5 & 7). It is impossible and accordingly impractical for the packing industry throughout the United States to inspect slaughtered hogs for the presence of trichina (Tr. 12 & 14). Consequently, the meat inspection laws merely require that all pieces of pork or pork products which have a cooked or smoked appearance when placed on the market, must have been treated by heating up to 137° Fahrenheit or frozen in accordance with prescribed methods in order to eliminate the trichina parasite (Tr. 12 & 13). It is thus the conclusion of the meat inspection authorities in the United States that at the present time there is no safe and practical method to insure that raw pork products are free from trichina and health authorities have concluded it best to carry on a public education program during the past thirty years to caution the public to cook all raw pork products (Tr. 13 & 14). Hence when Suhrmann purchased the raw mettwurst from Jordan Meat the product did not have any appearance other than being uncooked and unsmoked and there was accordingly no duty upon Jordan Meat to have done anything to eliminate trichina. The duty was upon Suhrmann and he alone to finish the product by smoking at least to a temperature of 137 degrees. This prescribed temperature is extremely moderate and would have been easily attainable in any smoke oven which Suhrmann testified he used in further

processing the product. Even though Suhrmann failed in his duty to the plaintiffs in that respect, his undertaking to finish the product was conclusive in breaking the chain of causation in any negligence which plaintiffs are attempting to impose upon the defendants Noorda and Guss. Based upon the foregoing analysis, these defendants respectfully submit that the cases cited by plaintiffs at page 8 in their brief all deal with finished products and are not even remotely in point to our instant factual situation.

We believe that since the mettwurst was admittedly to be further processed when it was sold by Jordan Meat, the cases involving the sale of uncooked pork products set forth the rule of law applicable here. In the case of *Cheli vs. Cudaby Bros. Company*, 267 Mich. 690, 255 N W414, the court held that even though the packer makes no inspection for trichina, he is not guilty of negligence and is not liable to the ultimate consumer. On the matter of the implied warranty under the provisions of the Uniform Sales Act, the court there said that the warranty is that the food sold is fit for human consumption in the ordinary manner, that is cooked. Also, in the case of *Dressler vs. Merkel, Inc.*, 284 NY Supp 697, 4 NE 2d 744, the plaintiff, who became ill from eating trichinous mettwurst, failed to recover for negligence against the packer who supplied the pork to the sausage making retailer, the packer being held blameless in not foreseeing that the retailer might use the pork improperly in processing the mettwurst to be eaten by the plaintiff consumer without further cooking. This is a case we believe to be precisely in point with our instant set of facts. In other words, the wholesaler is entitled to

assume that the product which he sells will be put to a normal and reasonable use expected of such a product and he is not liable where it would ordinarily be safe but the injury results because it is mishandled by someone else. See Prosser on Torts, page 499, citing *Cheli vs. Cudahy Bros. Company*, supra; *Vaccarino vs. Cozzubo*, 181 Md. 614, 31 Atl. 2d 316; *Silverman vs. Swift Co.*, 141 Conn. 450, 107 Atl. 2d 277; *Eisenbach vs. Gimbel Bros.*, 281 NY 474, 24 NE 2d 131.

Plaintiffs also cite a number of cases in their brief in support of the contention that the sale of trichina infected mettwurst by the defendants Noorda and Guss violated Title 4-20-5, Utah Code Annotated, 1953, dealing with adulterated food, and Title 4-20-8, dealing with food products of a diseased animal. It should be considered that all cases cited by plaintiffs with respect to such are from the State of Ohio, where the courts have adopted a rule of absolute liability, and is the minority view in the United States. Those decisions hold the seller liable upon mere proof that the meat was impure or infected regardless of whether the seller knew, should have known, or had any way of determining that the meat sold was impure or infected. See *Kurth vs. Krumme*, 143 Ohio St. 638, 56 N.E. 2d 127; *Troietto vs. G. H. Hammond Co.*, 110 F. 2d 135, and other cases cited in plaintiff's brief at pages 11 and 12. We respectfully submit that this minority rule places an undue burden on manufacturers and producers of food and food products, is exceedingly harsh and unjust, and if followed with respect to pork products, would create an impossible situation in the meat packing industry. The attention of this Court is respectfully invited to the case of *Feinstein vs. Daniel*

Reeves et al., (D.C. New York, 1936) 14 Fed. Supp. 167, wherein the court held that since neither the State or Federal Government had prohibited the sale of infected pork and had made no provisions for any system of inspection to determine whether it contained trichina, there was no basis for concluding that the pure food law intended to include hogs infected with trichinae under the classification of "diseased animals" or "unfit for food." Further interpreting the pure food law in the case of *Dressler vs. Merkel, Inc.*, supra, the court likewise held that trichina infected meat is not within the meaning of the term "diseased" and goes on to say that as used in the pure food law the term "diseased" must be limited to instances where animals are known to be diseased, or where the disease could be discovered by inspection, or by methods commonly used in manufacture. See also *Zorger vs. Hillman's*, 287 Ill. App. 357, 4 N.E. 2d 900.

It is thus respectfully submitted that the trial court rightfully rendered a judgment of no cause of action in favor of the defendants Noorda and Guss and against the plaintiffs in the actions tried in the lower court.

POINT II

THE TRIAL COURT DID NOT ERR IN DENYING PLAINTIFFS' MOTION FOR A NEW TRIAL ON THE ISSUE OF INADEQUACY OF DAMAGES.

The assertions made by plaintiffs under Point II of their brief to the effect that the lower court erred in denying their

motion for a new trial on the grounds of inadequacy of damages are without merit. While this proposition does not directly concern defendants Noorda and Guss, since no judgment was rendered against them, we feel compelled to answer plaintiffs' contention in that respect.

Plaintiffs have sought to detail considerable evidence relative to their pain, suffering and alleged disabilities. Schneider claimed he was severely incapacitated but apparently not too ill, as he went swimming at Saratoga on Utah Lake in September, 1955, a month following his illness (Tr. 185 & 186). Except for the month of August and part of September, 1955, Schneider carried on his insurance business and importing business (Tr. 180, 181 & 182). In an effort to prove loss of income, his income tax returns were introduced in evidence but showed a higher income for 1956 than the three preceding years (Tr. 182 & 183). Treatment for Schneider consisted largely of vitamin pills prescribed by a naturopath and masseur treatments (Tr. 176, 177, 178 & 179). His claim that he suffered loss of income from his importing business due to the illness is unsupported by the evidence because he changed his avocation from that to the insurance business due to a fear of war coming to Europe and thereby losing his source of products (Tr. 153).

As to the claims of Bodon, the evidence adduced pertaining to his pain, suffering and disability, was even weaker. He claimed an inability to work as a book binder for about one week (Tr. 191 & 192). Although he testified that he still had weakness in his arms and legs, Bodon played soccer in September, 1955, and throughout 1955 and 1956 (Tr. 193,

194, 196, 197 & 198), to say the least, indulging in a vigorous game.

After listening to the foregoing evidence and observing the apparent well-being of each of the plaintiffs, the jury apparently concluded, as any reasonable person would from a reading of such evidence, that the damages suffered by each of the plaintiffs were negligible. The verdict rendered obviously reflects such a feeling on the part of the jury.

Plaintiffs fail to point out in their brief specifically in what respect the verdict of the jury shows they were acting under the influence of passion or prejudice. They apparently take the position that because the award given was small, it is thereby self evident that such must be the case. However, in fact and in truth, the jury no doubt came to the conclusion that neither Bodon nor Schneider was in ill health at the time of trial, and that any damage previously suffered was minimal and of little or no consequence. As is said by the author in 15 Am. Jur., par. 231, at page 664, on Damages:

“Generally, a verdict will not be disturbed merely on account of the smallness of the damages awarded or because the reviewing court would have awarded more.”

We respectfully submit that the conclusion reached by the jury in our instant cases is amply supported by the evidence and there has been no basis shown by either of the plaintiffs as a ground for disturbing the verdict or granting a new trial.

CONCLUSION

By way of conclusion, we respectfully submit that the

judgment rendered by the trial court is in all respects correct, and should be affirmed, and that the plaintiffs are not entitled to a new trial on any ground.

Respectfully submitted,

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