

1958

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

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Bodon v. Suhrmann*, No. 8715 (Utah Supreme Court, 1958).
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In the Supreme Court of the State of Utah

UNIVERSITY UTAH

HAROLD W. BODON, by his Guardian
ad litem, HEINRICH BODON,
Plaintiff and Appellant,
vs.

MAY 3 1958

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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

EMIL SUHRMANN, d/b/a SUHR-
MANN'S SOUTH TEMPLE MEAT
COMPANY,
Cross Appellant.

FILED
4-1958

Clerk, Supreme Court, Utah

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

EMIL SUHRMANN, d/b/a SUHR-
MANN'S SOUTH TEMPLE MEAT
COMPANY,
Cross Appellant.

BRIEF OF CROSS APPELLANT

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COMPANY,
Cross Appellant.

BRIEF OF CROSS APPELLANT

(Numbers in parantheses refer to pages of the record. The parties will be referred to here as they appeared in the trial court, except that Emil Suhrmann will bereferred to as Cross Appellant also.)

PRELIMINARY STATEMENT

The defendant and respondent Emil Suhrman dba South Temple Meat Company has filed a cross appeal against the defendant and respondent Albert Noorda and Sam L. Guss dba Jordan Meat and Livestock Company in each case.

The cross appeal is based on the theory of an implied warranty made by Jordan Meat and Livestock Company to Emil Suhrmann that the mettwurst sold to him was wholesome and fit for human consumption and that the breach of that warranty proximately resulted in injury to Emil Suhrmann.

Cross appellant claims—*First*, damages to his person by contracting trichinosis from eating mettwurst purchased from Jordan Meat and Livestock Company. *Second* for loss of business due to defendant Jordan Meat and Livestock selling cross appellant for resale mettwurst infested with trichinae, and *Third*, for a judgment over against defendant Jordan Meat and Livestock Company to reimburse cross appellant for the judgment granted against him to the plaintiffs.

STATEMENT OF THE CASE

The cross appellant made a proffer of proof to the court in the absence of the jury relative to the damage he had sustained by contracting trichinosis from eating mettwurst pur-

chased from the defendant Jordan Meat which was infested with trichinae (111). The court sustained an objection to this evidence (111).

Cross appellant made a proffer of proof to show that he lost business in the amount of \$2500.00 in the four months immediately subsequent to the discovery that the defendant Jordan Meat had sold to the cross appellant for resale mettwurst which contained live trichinae (112). The court sustained an objection to the proffer on the grounds that it was not "a recoverable element of damages of a retail merchant from a middleman" (112).

The Court refused to give the jury cross appellant's proposed instruction #2, which set out the elements of implied warranty and instructed the jury that if they found a verdict against the defendant Suhrmann on this theory they should award Suhrmann a judgment in a like amount against defendant Jordan Meat Company.

Emil Suhrmann opened the South Temple Meat Company in April 1954. This was the first time he had ever been in the meat business (87). He did not know that mettwurst contained trichinae (102). Hoffman, an employee of Valley Sausage, demonstrated to Suhrmann how to operate his smoke over (93). He told Suhrmann mettwurst should never get warm (94). That it should be cold smoked and should never be over 80° F (95). Hoffman never told Suhrmann to get the temperature up to 137° F. in order to destroy any trichinae (96). He did not inform Suhrmann about freezing the pork (334), nor did he tell Suhrmann that the mettwurst had to reach a heat of 137° to kill trichinae (336). Huffman further

testified that smoking is to give the mettwurst flavor only (65). Hoffman knew Suhrmann had no understanding of the meats (327).

Noorda knew Suhrmann was going to sell the mettwurst he purchased from Jordan Meat to the public (290). Noorda did not know Suhrmann's experience in smoking meats (290).

Noorda testified that mettwurst could be uncooked pork (54), that he knew that the only way to eliminate trichinae was heating to 137°F for freezing. He did not say anything to Suhrmann about trichinosis (290) (296), nor did he tell Suhrmann how to eliminate trichinosis (291). Noorda did not tell Suhrmann what temperature the mettwurst was to be smoked at (291). Noorda said, "You have to do more than smoke to get 137° F" (296). He knew that if mettwurst was frozen the trichinae would be killed (296). Noorda stated that if you had smoked mettwurst he would not expect a customer to cook it or do anything else with it (61).

STATEMENT OF POINTS RELIED UPON

1. THE COURT IMPROPERLY REFUSED TO ALLOW CROSS APPELLANT TO INTRODUCE EVIDENCE RELATING TO HIS CROSS COMPLAINT AGAINST RESPONDENT ALBERT NOORDA AND SAM L. GUSS, DBA JORDAN MEAT AND LIVESTOCK COMPANY AND PARTICULARLY THE DAMAGE HE SUSTAINED FROM CONTRACTING TRICHINOSIS FROM EATING METTWURST, PROCESSED BY THE RESPONDENT.

2. THE COURT IMPROPERLY REFUSED TO ALLOW CROSS APPELLANT TO INTRODUCE EVIDENCE FOR HIS LOSS OF BUSINESS DUE TO RESPONDENT SELLING TO CROSS APPELLANT FOR RESALE, METTWURST, INFESTED WITH TRICHINAE.

3. THE COURT IMPROPERLY REFUSED TO SUBMIT TO THE JURY THE ISSUE OF REIMBURSEMENT OF EMIL SUHRMANN BY ALBERT NOORDA AND SAM L. GUSS IN CASE JUDGMENT WAS RENDERED AGAINST EMIL SUHRMANN AS SET OUT IN RESPONDENT JURY INSTRUCTION #2.

4. THE COURT IMPROPERLY REFUSED TO SUBMIT THE ISSUE IMPLIED WARRANTY OF ALBERT NOORDA, ETC., TO CROSS APPELLANT SET OUT IN THE CROSS COMPLAINT TO THE JURY.

5. THE CROSS APPELLANT'S MOTION FOR A NEW TRIAL SHOULD HAVE BEEN GRANTED.

Cross appellant will discuss all five points under the implied warranty theory.

The question presented by the points relied upon is whether a retail meat dealer when sued by a customer for a breach of implied warranty of wholesomeness of a food product for human consumption has a right to sue the wholesaler from whom he purchased the food product, on the grounds that the wholesaler warranted to the retailer that the article was fit for human consumption and was primarily liable for the injury resulting.

POINT I

IS DEFENDANT JORDAN MEAT LIABLE TO SUHRMANN FOR DAMAGES TO HIS PERSON FROM CONTRACTING TRICHINOSIS FROM EATING METTWURST PURCHASED FROM JORDAN MEAT AND WHICH CONTAINED LIVE TRICHINAE?

Emil Suhrmann has been purchasing mettwurst from the Jordan Meat from September 1954 to the early part of May 1955. In the early part of May he was informed by Hoffman, an employee of Valley Sausage Company, that because of the crowded condition of the smoke ovens at Valley Sausage, the ovens could not be cooled down for the smoking of mettwurst. A conversation was had at the plant of Jordan Meat between Suhrmann, Noorda and Hoffman relative to the supplying of mettwurst to Suhrmann for resale. The conditions of the crowding of the ovens and the fact that Valley Sausage did not want to cool them down to smoke mettwurst was explained to Suhrmann. Suhrmann informed them he had a smoke oven at his place of business and Jordan Meat or Valley could smoke the mettwurst there. Jordan Meat claims they agreed to prepare the mettwurst ready for smoking and Suhrmann was to do the smoking. Suhrmann testified that Jordan was to do the smoking in his oven.

Noorda did not know what experience Suhrmann had in smoking meats. He did not tell Suhrmann that the meat in the mettwurst he was selling him had not been frozen to kill trichinae, or that because of this fact the product should be brought up to a temperature of 137°F in the smoke oven in order to kill trichinae.

Hoffman, who took all of Suhrmann's orders for meat, knew that Suhrmann had no knowledge of smoking meats. He knew that freezing would destroy trichinae. During his employment in New York City the pork used to make mettwurst had first been frozen to kill trichinae. He did not inform Suhrmann that freezing was necessary to kill trichinae or that the meat had to be brought to a temperature of 137°F to kill trichinae.

Noorda and Hoffman knew that smoking was only to give flavor.

Emil Suhrmann ate mettwurst purchased from Jordan Meat and from no other source and contracted trichinosis. He maintains that Jordan Meat impliedly warranted that the mettwurst was fit for human consumption and that this warranty went to the ultimate consumer and that he was the ultimate consumer.

In the case of *Challis vs. Hartliff et al*, 133 Kan. 211, 299 P 586, the plaintiff purchased flour from a retail dealer, who purchased it from a broker, who in turn purchased it from a miller, all of them being defendants, that the flour contained a poisonous substance; and that the plaintiff used the flour and suffered injuries.

The court in that case said: "The implied warranty of each of the defendants was separate and distinct from that of the other defendants. It was a series of warranties by each seller to the immediate purchaser and such as would accumulate and assemble for the protection and benefit of the ultimate purchaser and consumer, but without any indication of unity

or interest. The milling company could not know of the arrangements between the broker and the local merchant, nor of that between the local merchant and the plaintiff, nor did it know who these successive purchasers were. The fact that the implied warranty, as alleged, is the same as to each of the three defendants does not make them united in interest any more than if each had made and given a separate express warranty. They are each liable to the plaintiff through the succession of sales and purchases.

In *Parks vs. Pie Co.*, 93 Kan. 334, 144 P 202, the plaintiff recovered a judgment for damages for death of her husband which was caused by ptomaine poisoning from eating a pie manufactured by the defendant pie company and sold by it to a retail grocer, also a defendant, who in turn sold it to the deceased. After reviewing the evidence, it was said, "The degree of care required of a manufacturer or dealer in human food for immediate consumption is much greater by reason of the fearful consequences which may result from what would be slight negligence in manufacturing or selling food from animals. . . . A manufacturer or dealer who puts human food upon the market for sale or for immediate consumption does so upon an implied representation that it is wholesome for human consumption. Practically he must know it is fit or take the consequences if it proves destructive, citing *Tomlinson vs. Armour & Company*, 75 NJ Law, 748 70A 314.

It is clear that the modern trend is to hold the producers, wholesaler and retailer of food for human consumption impliedly warrants that the food is wholesome and fit for human consumption. That the warranty is in favor of the ultimate

consumer, who in this case was Emil Suhrmann. The better reasoned cases also hold that the retailer is entitled to a judgment over against the wholesaler in the event the consumer obtains a judgment against him for breach of warranty.

Swengel vs. F. & E. Wholesale Grocers Company, a Kansas case reported at 77 Pac. 2nd 930. This was an action to recover for damages alleged to have been sustained from consumption of canned sauerkraut juice. The plaintiff alleged that the defendant Wholesale Grocery Company had sold certain Libby's juice put up in cans to Mabel McCully, who conducted a retail grocery store in Wichita, Kansas, representing that the juice was fit for use and immediate human consumption; that the plaintiff purchased five cans of said juice and partook of the contents of one can; that the juice was not fit for human consumption or immediate use and contained harmful ingredients. That the plaintiff as a result of using said juice, suffered illness and injuries for which she sought damages. The gist of the answer was that the defendant did not at any time engage in packing or canning kraut juice nor did it pack the kraut juice alleged to have caused injury to plaintiff and if it did sell the kraut juice to the retail grocer it had no opportunity of inspecting or opening the can of kraut juice to ascertain the condition of the contents. There is no contention but what the plaintiff became seriously ill for some days after drinking a portion of said juice.

The Kansas court held that the preponderance at least of modern authority is to the effect that upon the sale of food to be immediately put to domestic uses there is as between the dealer and the consumer an implied warranty that such

food is wholesome and fit to be eaten. The court discussed the exception to the general rule arising in the case of canned goods where the dealer did not make or pack them, has no greater knowledge of the wholesomeness of the contents than the purchaser. The Kansas court discussed the lines of cases to the effect that there is distinction between a sale of provisions open to inspection, and provisions packed in cans or sealed packages.

Holding: "It is also well known that many articles of food are sold by brand or name as the result of extensive advertising in which purity, wholesomeness, price, etc., are stressed in varying degrees, and that insofar as manufacturers, packers, and jobbers are concerned, the purpose is to challenge attention to the brand or name and to create a demand therefor. Insofar as the local dealer is concerned, he stocks and sells these advertised goods because of that demand. * * * We think that a merchant, in displaying articles of food for sale, impliedly warrants that each day and all of the articles are fit, whether of well known or little known brands, or whether packaged or not, and that the fact the purchaser chooses one or the other should not relieve the dealer. And if the dealer is liable, under the circumstances instant in this case, so are the intermediate handlers.

POINT II

THE COURT IMPROPERLY SUSTAINED AN OBJECTION TO CROSS APPELLANT INTRODUCING EVIDENCE FOR LOSS OF BUSINESS DUE TO DEFENDANT

JORDAN MEAT SELLING CROSS APPELLANT FOR RE-SALE, METTWURST INFESTED WITH TRICHINAE.

Vaccarezza et al vs. Sanguinetti, California case reported in 163 Pac. 2nd 470, is an action for injuries to plaintiff's children caused by eating infected salami sold by the retailer. The retailer filed a cross complaint against the defendant manufacturer. The court found a judgment for plaintiffs against the defendant retailer and manufacturer and on the cross complaint of the retailer entered judgment against the manufacturer for the amount the plaintiffs might collect from the retailer. The action was based upon breach of the implied warranty of fitness for the purpose for which purchased. The court held that the warranty applied applied to the sale of foodstuffs for human consumption, and runs with the goods to the ultimate consumer. The only damage suffered by the retailer in the sale of such infected meat was the judgment against him in favor of the consumer. It follows logically that if he had sustained damage for loss of business he would also have been awarded such damage.

In the case of McSpedon vs. Kunz, a New York case reported at 2 NE 2nd Page 513, the meat packer held liable for breach of implied warranty for injury sustained by housewife who developed trichinosis after eating porkchops which she believed were well done but which were infected with trichinae, where packer knew method of discovering and eradicating trichinae, notwithstanding that trichinae would have been destroyed by heat if chops had been cooked to 137°F. The plaintiff brought action against Kunz, a butcher; Rubin Brothers, the middle man; and Armour & Company,

the slaughterer and packer. Judgment was given against Kunz for a small amount, with recovery over against Rubin Bros., and recovery over by them against Armour & Company.

The court cited with approval the case of Rinaldi vs. Mohican Co., reported at 121 NE 471, that on every sale of food by a dealer for immediate human consumption, there is an implied warranty of wholesomeness to the same effect in the case of Kurth vs. Krumme, 143 Ohio 638 56 NE 2nd 277.

POINT III

IS THE DEFENDANT JORDAN MEAT LIABLE TO SUHRMANN FOR A JUDGMENT OVER IN THE SAME AMOUNT AS THE JUDGMENT WHICH THE PLAINTIFF WAS AWARDED AGAINST THE DEFENDANT SUHRMANN ON THE THEORY THAT SUHRMANN MADE THE SAME WARRANTY TO THE CONSUMER AS THE WHOLESALER MADE TO SUHRMANN, NAMELY THAT THE METTWURST WAS WHOLESOME AND FIT FOR HUMAN CONSUMPTION.

In Davis admr. etc., of A. S. Davis deceased vs. J. M. Radford, dba Radford's Drugstore et al., Dr. T. C. Smith Company appt. 233 NC 283, 63 SE 2nd 822, 24 A.L.R. 2nd 906, plaintiff sued defendant Radford, a retail druggist in Ashville, North Carolina, for breach of implied warranty of wholesomeness in the sale to his intestate of an article for human consumption known as "Westal," which it was alleged contained a poisonous ingredient and which caused the injury and death of the intestate. Defendant Radford alleged he had

purchased the patented bottle product known as Westal from T. C. Smith Company, wholesale druggists in Ashville, with implied warranty that it was suitable for human consumption, and that said Smith Company was primarily liable for any damage plaintiff might recover from defendant Radford. The court held that Radford had personally suffered by reason of the breach of Smith's Company warranty, he could have recovered the loss from Smith Company and if he should suffer loss by reason of damages against him by one to whom he sold with the same warranty he could recover the entire amount sustained from Smith Company. In other words, where the distributors or wholesale dealer sells to the retail dealer articles in original packages for human consumption with warranty of wholesomeness and the retail dealer sells under the same warranty to a customer, for the injury resulting, the retail dealer may properly charge the wholesaler with primary liability for the loss sustained.

In the case of Occhipinti vs. Buscemi, 71 NYS 2nd 766, where a retailer was sued on an alleged breach of warranty by a customer for injuries sustained from eating trichinae-infected pork purchased from him, and the retailer impleaded the packing company from which he procured the meat, whereupon the packing company contended that the retailer's cross-complaint should be dismissed because he failed to allege that he had sustained any loss recoverable in an action for breach of implied warranty, the court, rejecting the contention, pointed out that such impleaded defendant had been brought into the action prior to the enactment of §193-a, under §193, Civil Practice Act, which required a defendant in impleading

a third party to establish prima facie, that such party sought to be impleaded "is or will be liable," and that it seemed clear, from the fact that the application for impleader had been granted, that a proper showing had been made. It was argued that before the retailer was entitled to the relief sought he must prove payment of the judgment, but the court said, quoting from the Twelfth Annual Report of the Judicial Council (1946) that while impleader, being a procedural device, could not be utilized to create a substantive right, it could "affect a substantive right by accelerating its accrual," thus in the case of indemnity against loss a defendant could implead his indemnitor, although the presentation of the claim was technically premature, and concluded that it was not necessary for the retailer to prove payment of the judgment before he could proceed on his third-party complaint.

Attention is called to *Weiner vs. Mager & Throne, Inc.* (1938) 167 Misc. 338, 3 NYS 2nd 918, in which a retailer was allowed to recover over a cross complaint from a baker, who had apparently been sued jointly with the retailer for the illness of a consumer allegedly caused by eating bread containing dead worms, wherein the court said, with reference to the statutory authority in the Civil Practice Act on adding a new party defendant who was liable to the original defendant, that it "makes no difference under the statute that the claim upon which the plaintiff is suing is a breach of contract claim, and the claim which defendant desires to assert against the third party is based on tort or vice versa."

A.L.R. 2nd Series Vol. 24-P913 at page 914 contains an annotation of recent cases on this proposition.

POINT IV

THE COURT IMPROPERLY REFUSED TO SUBMIT THE ISSUE IMPLIED WARRANTY OF ALBERT NOORDA, ETC., TO CROSS APPELLANT SET OUT IN THE CROSS COMPLAINT TO THE JURY.

POINT V

THE CROSS APPELLANT'S MOTION FOR A NEW TRIAL SHOULD HAVE BEEN GRANTED.

Argument in support of points 4 and 5 are submitted on the argument presented at points 1, 2, and 3.

CONCLUSION

I respectfully submit that the trial court committed error in refusing to submit to the jury the case of the theory of an implied warranty of quality to the retailer made by the defendant Jordan Meat to the retailer Emil Suhrmann and permitting the jury to pass on the question of the damages sustained by him in contracting trichinosis from eating mettwurst purchased from Jordan Meat Company and for the loss of business sustained from the purchase of the mettwurst from Jordan Meat containing trichinae and for a judgment over in the amount of the judgment obtained against him by the plaintiffs.

I respectfully submit that this court should grant a new

trial so that these matters can be brought to the attention of the jury.

Respectfully submitted,

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