

1958

Harold W. Bodon et al v. Emil Suhrmann et al : Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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DEC 19 1958

IN THE SUPREME COURT

of the

STATE OF UTAH

FILED

AUG 8 1958

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

vs.

EMIL SUHRMANN, dba SUHRMANN'S SOUTH TEMPLE MEAT COMPANY, and ALBERT NOORDA and SAM L. GUSS, dba JORDAN MEAT & LIVESTOCK COMPANY,

Defendants and Respondents.

KURT A. SCHNEIDER,
Plaintiff and Appellant,

vs.

EMIL SUHRMANN, dba SUHRMANN'S SOUTH TEMPLE MEAT COMPANY, and ALBERT NOORDA and SAM L. GUSS, dba JORDAN MEAT & LIVESTOCK COMPANY,

Defendants and Respondents.

Clerk, Supreme Court, Utah

Case No.
8715Case No.
8716

PETITION FOR REHEARING AND BRIEF
IN SUPPORT THEREOF

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PETITION FOR REHEARING
and
BRIEF IN SUPPORT THEREOF

PETITION FOR REHEARING

COMES NOW the Appellants Harold W. Bodon, by his Guardian ad Litem Heinrich Bodon, and Kurt A. Schneider, and respectfully petition this honorable Court

for a rehearing in the above entitled case and to vacate the order of the Court herein affirming the judgments in favor of the defendants Albert Noorda and Sam L. Guss, dba the Jordan Meat & Livestock Company.

This petition is based on the following grounds:

POINT I.

THIS COURT ERRED IN HOLDING THAT THE EVIDENCE DID NOT SUPPORT THE JURY'S FINDING THAT A REASONABLY PRUDENT PERSON IN THE POSITION OF THE DEFENDANTS NOORDA AND GUSS, WOULD HAVE KNOWN THAT SUHRMANN WOULD SELL THE SAUSAGE WITHOUT PROCESSING IT TO KILL TRICHINA.

POINT II.

THIS COURT ERRED IN HOLDING THAT DEFENDANTS, NOORDA AND GUSS, WERE ENTITLED TO ASSUME THAT THE DEFENDANT SUHRMANN WOULD HANDLE THE METTWURST WITH REASONABLE CARE AND PRUDENCE AND WOULD HANDLE IT IN A MANNER NOT DANGEROUS OR IN CARELESS DISREGARD OF THE SAFETY OF OTHERS.

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I hereby certify that I am one of the attorneys for the appellants, petitioners herein, and that in my opinion there is good cause to believe the judgment objected to is erroneous and that the case ought to be re-examined as prayed for in said petition.

Dated August, 1958.

BRIGHAM E. ROBERTS

BRIEF IN SUPPORT OF APPELLANTS'
PETITION FOR REHEARING

POINT I.

THIS COURT ERRED IN HOLDING THAT THE EVIDENCE DID NOT SUPPORT THE JURY'S FINDING THAT A REASONABLY PRUDENT PERSON IN THE POSITION OF THE DEFENDANTS NOORDA AND GUSS, WOULD HAVE KNOWN THAT SUHRMANN WOULD SELL THE SAUSAGE WITHOUT PROCESSING IT TO KILL TRICHINA.

Apparently the Court agreed with our contention that defendant Jordan Meat would be liable if it reasonably should have known that the retailer Suhrmann would sell the mettwurst to consumers without processing it to kill trichina and the consumer would not cook or otherwise prepare the product.

This is not a situation where the usual pork products, such as pork chops and pork roasts, are sold to the public in contemplation that further cooking would be done. This mettwurst was a spread to be used in the same condition as it was purchased.

The Court quotes from testimony of Suhrmann and apparently contends that he therein indicated that he would completely process the mettwurst even to the extent of killing trichina. This quotation is taken out of context and cannot be stretched or tortured into any such meaning. No one could draw an inference, or even a suspicion, that Suhrmann intended to process this mettwurst to kill trichina. The testimony established that all he intended to do, and defendant Jordan Meat should have known this, was to cold smoke the meat for the purpose of flavoring it and none other. Contrary

to the statement in the opinion, the supplier did not process the meat as completely as it could without the use of the ovens. If it was not to be cooked, the only other practical way to kill trichina was to freeze the product and this defendant did not do. This Court goes so far as to concede that in processing the meat Suhrmann did not intend to heat it for the purpose of killing trichina. The Court Stated:

“According to the evidence, the latter (Suhrmann) had indicated that heating spoiled the flavor his customers preferred in the mettwurst. In order to preserve the natural flavors, in the smoking process in his oven, he purposely kept the temperature below 80 degrees.”

The opinion herein convinces us that we have not made clear to the Court the position we take in this case. It is stated in the opinion:

“The only fact of significance the plaintiff is able to point to inculpatng the supplier is that they knew the unfinished mettwurst delivered to Suhrmann might contain trichina.”

Noorda admitted that he knew this. We disagree with the statement that this knowledge is the only significant fact to which plaintiff is able to point inculpatng defendant Jordan Meat. Defendant Jordan Meat also should have known that this mettwurst was to be sold by Suhrmann to the public without processing to kill trichina. If this is so Jordan Meat is liable. The following facts are also significant:

1. Suhrmann was going to smoke not cook the mettwurst. (276)

2. Suhrmann told Noorda he was going to smoke it. (276)
3. Cooking meat and smoking meat are two different processes (291)
4. Meat must be more than smoked to raise temperature enough to kill trichina therein. (291)
5. Noorda knew this latter fact. (291)
6. Must be heating to kill trichina. (292)
7. Noorda knew Suhrmann wanted the mettwurst smoked colder.
 - (a) Noorda had even refused to cool down his ovens to accomodate Suhrmann. (60)
 - (b) Suhrmann told Noorda he (Noorda) was cooking the mettwurst too much. (295)
8. Noorda did nothing to eliminate trichina. (53)
9. Noorda did not warn Suhrmann that it might be present. (291)
10. Suhrmann returned to Jordan Meat mettwurst which it sold to its customers. (286, 287)
 - (a) Defendant Jordan Meat should have known from examination that it had not been cooked.

From the above we have proof positive that Suhrmann was going to smoke, not cook, the mettwurst. Noorda understood the difference between smoking and cooking or heating. He was told that Suhrmann wanted it smoked colder. Noorda was told defendant was cook-

ing the mettwurst too much and defendant refused to cool down its ovens to accommodate Suhrmann.

A jury could reach a supportable conclusion from this that a reasonably prudent person in the position of defendant Jordan Meat would have known that Suhrmann intended to sell the mettwurst to the public *without processing it to kill trichina*

Just any processing would not be sufficient to “insulate” defendant from liability. It would have to be processing which would kill trichina in the pork products sold. This type of processing was not contemplated by Suhrmann and defendant Jordan Meat, as a reasonably prudent person, would have known it was not contemplated based on the foregoing facts.

This Court in the opinion states the rule as follows:

“That rule, sound where applicable, may only be invoked where the supplier knows, or *reasonably should know*, that the retailer is to sell the product to consumers without further processing.”

To this should be added the words “to kill trichina” because processing other than to kill trichina would not be sufficient to protect the public. We submit that the evidence above set forth invokes this rule. The jury having found these facts, judgment should be for the plaintiffs.

The opinion states:

“Looking at it from the point of view of the supplier, it is difficult to see how they could reasonably be expected to disregard the directions of their customer.”

There certainly would have been no disregard of directives if defendant had eliminated the trichina before delivery to Suhrmann. Defendant knew that the mettwurst was to be sold to the public and if defendant reasonably should have known that processing to kill trichina was not contemplated by Suhrmann the liability should attach. In such a situation defendant may have eliminated liability on its part either by warning defendant Suhrmann of the necessity to eliminate trichina before selling or by securing his agreement to so process it or by eliminating trichina itself by freezing or by refusing to sell to Suhrmann.

The opinion further states:

“In the absence of knowledge of danger to the public, they had no duty to police or supervise Suhrmann in the operation of his business, and likely could not have continued to do business with him had they done so.”

First, there was danger to the public in selling pork not processed to kill trichina when consumers could not be expected to further cook the product. This was not a situation where pork chops or a pork roast was sold. Mettwurst was to be eaten by the consumer as sold.

It may well be defendant had no duty to supervise Suhrmann's business but that is not the duty plaintiff relies upon. Defendant had a duty not to put in the channels of commerce pork products unprocessed to kill trichina, when it should have known that persons handling the product thereafter would not process the product

to kill trichina. Defendant violated that duty and plaintiff as a member of the buying public was injured. This spells liability.

We submit the record refutes the following statement made by the Court:

“Excluding the knowledge of Hoffman, who, because of the jury’s finding above referred to, must be regarded as the agent of Suhrmann and not of the supplier, the latter could have nothing more than suspicion that Suhrmann would sell the mettwurst to the public without correctly processing it.”

A reasonably prudent person would have more than mere suspicion that Suhrmann did not intend to kill trichina. He was going to smoke it—not cook it—he complained it had been cooked too much—he was going to cold smoke it. This knowledge was brought home to Noorda, the admitted agent of defendant. We submit these facts would lead one to have more than a suspicion that Suhrmann would not correctly process the mettwurst to kill trichina. Indeed common sense would lead one to believe that Suhrmann would only smoke the mettwurst for flavor and would not process it to kill trichina.

We submit that the testimony in this case not only supports but requires a finding that the defendant Jordan Meat knew, or should have known, that Suhrmann was not going to kill, or attempt to kill, any trichina in the mettwurst. He was going to cold smoke it and defendant knew it. It took absolutely no step to eliminate this organism. Jordan Meat put the mettwurst in the channels of commerce where it would ultimately reach

the buying public through a retailer it should have known would not process it to kill trichina.

We submit that the judgment in favor of the defendant Jordan Meat should be reversed.

POINT II.

THIS COURT ERRED IN HOLDING THAT DEFENDANTS, NOORDA AND GUSS, WERE ENTITLED TO ASSUME THAT THE DEFENDANT SUHRMANN WOULD HANDLE THE METTWURST WITH REASONABLE CARE AND PRUDENCE AND WOULD HANDLE IT IN A MANNER NOT DANGEROUS OR IN CARELESS DISREGARD OF THE SAFETY OF OTHERS.

We are at a loss to understand the following statement of the Court:

“Under the circumstances here described, the supplier was entitled to assume that reasonable care and prudence would be exercised in regard to the product and was not obliged to anticipate that it would be handled by the retailer in a manner which was dangerous or in careless disregard of the safety of others.”

Here the supplier was unwilling to reduce the temperature in its ovens in order to process the mettwurst as Suhrmann wanted it. Defendant Jordan Meat knew that Suhrmann wanted the mettwurst cold smoked. The defendant Jordan Meat, through its agent Noorda, admitted that cooking meat and smoking meat were two different processes and that a person would have to more than smoke meat to raise the temperature to sufficiently kill trichina (291). All Suhrmann intended to do was to smoke it (276). Having this testimony in mind and

that set forth in the preceeding point, it would be an extremely stupid person who would assume that Suhrmann would handle it in such a manner as to eliminate trichina. Failure to do this to a pork product which was not to be cooked by the consumer is certainly dangerous and in careless disregard of the safety of others.

We submit defendant Jordan Meat should have known that no steps would be taken to kill trichina and that being so, there could be no reasonable basis upon which they could assume that Suhrmann would properly process the mettwurst to kill trichina. In any event sale of adulterated food constituted a violation of the statute and under our law was negligence per se regardless of defendant's assumptions or knowledge.

CONCLUSION

We submit that serious and grievous error has been committed when this Court holds the finding made by the jury is not supported by the evidence. We only need look to the testimony of Noorda and Suhrmann to see that the only reasonable conclusion that could be reached is that Suhrmann was going to smoke, not cook, the meat and was going to cold smoke it at that. That would be the extent of the processing he was to accomplish. Noorda either knew or should have known this fact. That evidence supports the finding of the jury. If he should have known that no precautions would be taken to protect the public after the mettwurst left his place of business, then it was negligence upon his part to permit it to be placed on the market for sale when he should

have known that no precautions would be taken to eliminate the trichina.

We submit that appellants should be given a rehearing in these cases or new trial on the question of the liability of Jordan Meat.

Respectfully submitted,
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During oral argument, the Court asked respondents' counsel his position with respect to appellant's contention that appellants were entitled to judgment because of the jury's answer 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 as to kill trichina. His only reply was that the evidence did not sustain this finding. We desire to point out the specific evidence which supports this finding.

Noorda testified that Suhrmann told him that he would smoke the mettwurst in his oven (276). Noorda admitted that cooking meat and smoking meat are two different processes and that a person would have to do more than smoke meat in order to raise the temperature sufficiently to kill trichina (291). In other words, there must be both smoking and heating to kill trichina (292) and all Suhrmann proposed to do was to smoke it (276).

Suhrmann had no gas in his oven with which to heat meat (149). Hoffman took the orders from Suhrmann (327) and he knew that Suhrmann was not a qualified man in the meat business (327). Noorda did not discuss trichina with Suhrmann (291) although he knew that Suhrmann wanted the mettwurst smoked colder (321) and Noorda stated that he did not want to cool down the ovens (60). Suhrmann told Noorda he (Noorda) was cooking the mettwurst too much (295). Noorda agreed that a customer would not cook mettwurst (61). Noorda knew that pork could contain trichina, but did nothing to eliminate it (53) and in no way warned Suhrmann (291). Also, Noorda admitted receiving back mettwurst to sell to his customers (286, 287) at which time, as an experienced sausage producer, he should have known that the mettwurst had not been cooked.

See 2 Restatement of the Law of Torts,
Section 388 et seq.