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Edith Raggenbuck et al v. Emil Suhrmann et al : Brief of Appellants

Utah Supreme Court

Hurd, Bayle & Hurd; Grant MacFarlane; Wallace R. Lauchnor; Attorneys for Appellants;

In the Supreme Court
of the State of Utah

EDITH RAGGENBUCK, et al.,
Plaintiffs and Respondents,

vs.

EMIL SUHRMANN, d/b/a SUHRMANN'S SOUTH TEMPLE MEAT COMPANY, and ALBERT NOORDA and SAM L. GUSS, d/b/a JORDAN MEAT & LIVESTOCK COMPANY, and VALLEY SAUSAGE COMPANY, a Utah corporation,
Defendants and Appellants.

No. 8753

BRIEF OF APPELLANTS

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STATEMENT OF CASE

This is an intermediate appeal taken from that certain order entered in the District Court of Salt Lake County, Utah, on the 10th day of September, 1957, whereby eleven suits filed by the plaintiffs against the above-named defendants were ordered consolidated for trial as to liability only.

Each of the eleven suits claim damages suffered by the plaintiffs in allegedly contracting trichinosis due to eating a sausage product known as metwurst which was manufactured, insofar as mixing the raw ingredients were concerned, by defendant Valley Sausage Company. The unfinished product, then in a raw, unsmoked and inedible state, was sold to defendants and distributors, Jordan Meat and Livestock Company, who in turn sold the product to the defendant Emil Suhrmann. This metwurst was then processed in defendant Suhrmann's smoke oven and thereafter sold by Suhrmann to the plaintiffs as retail purchasers. The complaint filed in each of the suits is based on negligence of each of the defendants and on breach of an implied warranty. The answers filed in the cases by each of the defendants raise issues as to liability, if any, and there will be sharp conflict in the evidence on these issues in any trial of these cases as set forth in the pre-trial order dated September 12, 1957 (R. 19-25).

A motion to amend the pre-trial order was filed by defendants Valley Sausage Company and Jordan Meat & Livestock Company in the lower court on September 27, 1957, and after hearing arguments thereon, the court again denied the defendants a right to a trial of the issues of liability and damages before a single jury (R. 28-32). This intermediate appeal then was taken (R. 37-43), and thereafter granted by this Honorable Court (R. 36).

STATEMENT OF POINTS

POINT I

THE PRE-TRIAL ORDER OF THE DISTRICT COURT

CONSOLIDATING THE CASES AS TO LIABILITY ONLY, THEREBY LEAVING THE ISSUE OF DAMAGES TO BE THEREAFTER TRIED SEPARATELY BY A DIFFERENT JURY IN EACH CASE IS ERRONEOUS, CONTRARY TO THE LAW, AND IN VIOLATION OF THE CONSTITUTION OF THE STATE OF UTAH.

POINT II

THE PRE-TRIAL ORDER OF THE DISTRICT COURT CONSOLIDATING THE CASES AS TO LIABILITY ONLY IS PREJUDICIAL TO THE DEFENDANTS AND WOULD RESULT IN MANIFEST INJUSTICE TO THE DEFENDANTS.

ARGUMENT

POINT I

THE PRE-TRIAL ORDER OF THE DISTRICT COURT CONSOLIDATING THE CASES AS TO LIABILITY ONLY, THEREBY LEAVING THE ISSUE OF DAMAGES TO BE THEREAFTER TRIED SEPARATELY BY A DIFFERENT JURY IN EACH CASE IS ERRONEOUS, CONTRARY TO THE LAW, AND IN VIOLATION OF THE CONSTITUTION OF THE STATE OF UTAH.

It is the contention of the defendants, and each of them, that they are entitled to a trial of all of the issues involved in each of these cases, both as to liability and damages, by a jury consisting of eight (8) jurors.

The Constitution of the State of Utah, under Article I, Section 7, provides as follows:

> "No person shall be deprived of life, liberty or property, without due process of law."

and Section 10 of Article I further provides:

> "In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of 8 jurors. In courts of inferior jurisdiction the jury shall consist of 4 jurors. In criminal cases the verdict shall be unanimous. In civil cases, three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded."

The language used in our Utah State Constitution is clear in not granting the power to determine the mode of jury trial to the legislature or the courts but specifically enumerates the number of jurors to constitute *a jury* and the number required to render *a verdict*. This is clearly indicative that such matters were not subject to change, alteration or judicial modification without an amendment to our Constitution. It is to be anticipated that counsel for plaintiffs will argue that in some instances, the Federal Courts have permitted separate trials of the issues of damages and liability and therefore contend that there is no violation of any constitutional right. However, it is respectfully submitted that Amendment VII to the Constitution of the United States provides that the right of trial by jury shall be preserved but does not designate the number of jurors to constitute a valid jury nor does it restrict the right of Congress or the United States Supreme Court to promulgate rules pertaining to this right of trial by jury, except as to its substantive provision. Thus a comparison of the language used

by the framers of the two constitutions leaves a clearly defined conclusion that Congress and the Federal Courts have much broader powers in promulgating procedural rules with respect to the mode of jury trial than do the State legislature and the judiciary of Utah.

We now proceed to a consideration of Title 78-21-1, Utah Code Annotated, 1953, which provides as follows:

> "In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract or as damages for breach of contract, or for injuries, an issue of fact may be tried by a jury, unless a jury trial is waived or a reference is ordered."

and Title 78-21-2 then follows:

> "*All questions of fact,* (Italics ours) where the trial is by jury, other than those mentioned in the next section, *are to be decided by the jury* (italics ours) and all evidence thereon is to be addressed to them, except when otherwise provided."

It is to be observed that the legislature has clearly and concisely stated in the foregoing statute that *all questions of fact* are to be decided by *the jury* which simply means that all issues of fact should be tried before one jury and after due deliberation, a verdict rendered thereon. Certainly the language of this statute is not open to a variable interpretation. The statute does not say that the trial shall be of all issues of fact by juries, but specifically states, *the jury.*

Interpretation of the article "the" has been considered by the courts in many instances. In the case of *Rocci vs. Massachusetts Accident Company,* 222 Mass. 336, at page 344, 110

NE 972, the court in considering the question of what the word "the" meant in an insurance policy on a house said:

> "Within *the* (italics ours) house naturally means one house."

And in the case of *Howell vs. State,* 164 Ga. 204, page 210, 138 SE 206, the court stated:

> "It is true that the word 'the' is the definite article and is the word generally used before nouns with particularizing effect, and as opposed to the indefinite articles 'a' or 'an', and to the generalizing effect of the latter articles. The former particularizes the subject spoken of. It is a demonstrative word used especially before a noun to particularize its meaning."

Thus the language used in the Utah statute (Title 78-21-2) does not sanction the trial of some of the issues triable by jury before one jury, while the remaining issues are withheld from its consideration and thereafter submitted for trial by another jury. The parties may waive this right but in absence of a consent and waiver, the right to a trial of all of the issues of fact, both as to liability and damages, by one jury is substantive and must remain inviolate.

This right is preserved by the provisions of Rule 38 (a) of the Utah Rules of Civil Procedure which provides as follows:

> "Right Preserved. The right of trial by jury *as declared by the Constitution or as given by statute shall be preserved to the parties.*" (Italics ours.)

This procedural rule thus dictates that the right of trial by jury and the method prescribed by the Constitution of Utah and by our State statutes should be preserved inviolate and not in any manner altered by the Rules of Civil Procedure.

Rule 42 (b) of the Utah Rules of Civil Procedure provides for separate trials in certain situations as follows:

> "Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counter-claim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues."

Applying the language of this rule to our instant cases, we respectfully submit that the order of consolidation for trial of the cases as to liability only would certainly not result in any convenience to the trial court or to the parties involved, but to the contrary, would result in great inconvenience to all concerned. In the event liability was determined adversely to the defendants, it would then become necessary to summon an additional jury or juries for consideration of damages and this would obviously be prejudicial to the defendants, and each of them, particularly where there will exist a sharp conflict in the evidence as to liability, if any, of each of the defendants.

It goes without saying that piecemeal trials are objectionable and in instances where the issues of liability are so inseparably interwoven with the issues of damages that they cannot be judiciously and properly tried separately without prejudice to one or some of the parties, then the trial court certainly abuses its discretion in ordering separate trials of the issues of liability and damages. Such procedure will irreparably prejudice the rights of the parties and in effect denies to them the right to a fair trial by a jury as known at the common law and under the American system of jurisprudence.

In support thereof, defendants cite the case of *Yazzo M.V.R. vs. Scott,* 110 Miss. 443, 67 So. 491, wherein the court said:

> "An examination of the English decisions will disclose that those courts, have generally, though not always, declined to limit the issues when awarding a new trial. The ground upon which the decision seems to proceed is that the verdict of a jury is indivisible, and the judgment rendered thereon is an entirety, must in all cases be dealt with as such."

Also, in the case of *Donnaton vs. Union Hardware and Metal Company,* 175 P 26, 38 Cal. App. 8, wherein the court, discussing the question of limiting a new trial to the issue of damages only, said:

> "It would work a grave injustice upon the defendant to force it to a new trial of the issue as to damages only, with the issue as to liability, upon which no verdict other than in name had been rendered, forever closed against any inquiry. An examination of all the evidence relating to the injury and its cause and the conduct of the plaintiff, as well as the defendant's agents, might show that it is so interwoven with that relating to damages that to fairly ascertain what is just compensation the plaintiff should receive, if he is entitled to recover at all, can best be determined by trying the whole case before one judge and one jury instead of splitting it up between different judges and different juries."

This proposition of submitting only a part of the facts triable by a jury, to a jury without consent of the parties, was considered in the case of *Slocum vs. New York Life Insurance Company,* 228 U.S. 364, wherein the Supreme Court of the United States speaking through Mr. Justice Van Devanter, and quoting from the case of *Barney vs. Schmeider,* 9 U.S. 248, said:

"As the defendant in this case did not waive his right to have the facts tried by a jury, it was the duty of the court to submit such facts to the jury that was sworn to try them. It is needless to say that this was not done. The statement is clear that the case was decided upon the testimony taken at a former trial, and not read before this jury, because the court had heard it in the first case, and did not deem it necessary to be heard by the jury in this case.

"It is possible to have a jury trial in which the plaintiff, having failed to offer any evidence at all, or any competent evidence, the jury finds for the defendant for that very reason. And in such case it is strictly correct, if the plaintiff does not take a non-suit, for the court to instruct the jury to find for the defendant. But we have never before heard of a case in which the jury were permitted, much less instructed, to find a verdict for the plaintiff on evidence of which they knew nothing except what is detailed to them in the charge of the court. It is obvious that if such a verdict can be supported here, when the very act of the court in doing this is excepted to and relied on as error, *the trial by jury may be preserved in name, but will be destroyed in its essential value, and become nothing but the machinery through which the court exercises the functions of a jury without its responsibility.*" (Italics ours.)

Mr. Justice Van Devanter then citing the case of *Hodges vs. Easton,* 106 U.S. 408, and others, at pages 387 and 388 of the opinion, concludes:

"They show that it is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, no matter what the state of the evidence; . . . in other words the constitutional guaranty operates to require that the issues be settled by the verdict of a jury, unless the right thereto be waived."

The argument may be suggested that because of the numerous parties involved in the consolidation of the cases, that such procedure would necessarily impose a substantial burden upon the jury in determining the issues of damages, in the event the jury found adversely to the defendants, or either of them, on liability. This argument is of little merit because many cases submitted for a jury trial may only have one party plaintiff and one party defendant but the case may involve many witnesses, have numerous exhibits introduced into evidence, and be extremely complicated in nature and troublesome to the jury in arriving at a determination of the issues. Certainly this situation would not justify the impaneling of several juries to try the issues of liability and then have another jury impaneled to determine the issue of damages. It is conceded that in certain given situations the Federal Courts have submitted the determination of the issue of liability to one jury, but it should be noted that in those situations where this procedure has been followed, the facts clearly indicated that the issue of damages was ordinarily one of property damage in which the amount could easily be ascertained and without prejudice to the fundamental rights of the parties. There are also some cases where separate issues have been tried by separate juries but in those situations, the issues were on questions collateral to the main issue of liability. No prejudice of basic rights result where that is done.

It is basic that the verdict of a jury is indivisible and that the award of damages is more often than not tempered by the sound discretion of the jury after hearing all of the facts regarding liability. This is the fundamental strength of reason in

the right to a jury trial and the vitality of our American system of jurisprudence.

POINT II

THE PRE-TRIAL ORDER OF THE DISTRICT COURT CONSOLIDATING THE CASES AS TO LIABILITY ONLY IS PREJUDICIAL TO THE DEFENDANTS AND WOULD RESULT IN MANIFEST INJUSTICE TO THE DEFENDANTS.

The defendants are not opposed to a trial of these eleven cases either upon an individual basis, or by groups of a given number of plaintiffs, or all of them consolidated, so long as in any method of procedure, the *same jury* considers the issues of liability and thereafter assess the damages, if need be, as to one or more of the defendants. As has been previously said, to do otherwise and as ordered by the trial court at pretrial, would result in manifest injustice to the defendants and be prejudicial to their right to an impartial trial by jury. The consolidation for trial of all of the cases before one court and jury, trying all the issues involved, both as to liability and damages, would not create an extraordinary burden upon the court or the jury, but to the contrary, would logically expedite a judicial determination of all the issues. As was said by the court in the case of *United States ex rel Rodriquez vs. Weekly Publications, Incorporated,* 9 Fed. Rules Decisions, page 179, 13 Fed. Rules Service at page 769:

> "In support of his motion, the plaintiff asserts that whereas the issues of liability are simple and can be quickly disposed of by a jury, the issues of damages

> are exceedingly complicated and will undoubtedly require the services of a master. In substance, however, the plaintiff wants two jury trials, one to consider the question of liability and the other to ascertain the damages . . . The gravamen of this action is fraud. An indispensible element of a cause of action for fraud is damages. In other words, fraud in the abstract does not give rise to a claim. It is only fraud causilly connected to damage which is the basis of an action. In the instant case, the segregation of the issues of liability and damages and their trial to two separate juries would mean that the first jury would be confronted with the question of fraud in the abstract without the necessary connection to specific damages and the second jury would be confronted with the issues of damages without having before it the links which unite them to the fraud. That this is the danger to which such a severance would expose this litigation is made clear by the very suggestion of the plaintiff's counsel . . . This is not a separate defense, such as the statute of frauds or release, or the statute of limitations, which may be separately adjudicated without in any way interfering with the trial of the remaining issues . . . In a cause of action for fraud, tried to a jury, this severability does not appear to be feasible."

The above court then denied plaintiffs motion for separate trials of the issues of fraud and damages because of the obvious prejudicial effect to the defendant. This same problem was considered in the case of *Eichinger vs. Firemans Fund Insurance Company,* 20 Fed. Rules Decisions, page 204, 23 Fed. Rules Service, at page 526, wherein the court said:

> "As a preliminary reflection, it may well be recognized that within the thought of the rules as a whole, and as a procedural charter, there is an impalpable suggestion that, in default of controlling considerations

to the contrary, a single submission of all of the issues in a civil action should be favored rather than their resolution in piecemeal trials . . . It is also asserted, not wholly without force, that the issues as against the separate groups of defendants are of such character that they may not be presented to a single jury with a degree of clarity adequate to their intelligent comprehension and answer. That the case does confront the trial judge with a task of sobering magnitude and delicacy, the court unhesitatingly grants. It also imposes a heavy burden of discrimination in advocacy upon the attorneys by whom it will be tried. But the court is convinced that neither the duty of the trial judge nor that of counsel is necessarily, or reasonably, beyond intelligible performance in the exercise of the care requisite for it. Impossibility of such performance certainly would require that there be separate trials. Difficulty of execution, however austere, if short of practical impossibility, should not. Both judge and counsel may prefer becomingly to avoid the performance of notably difficult assignments. Neither should evade them by cowardly flight."

It is thus to be observed that courts are reluctant in permitting cases to be tried in piecemeal fashion, and rightly so, for the obvious reason that prejudice will result in most instances and the parties involved in the litigation be unlawfully deprived of their basic rights to a determination of the issues by a jury of their own peers. This doesn't mean a consideration by one or more juries; the right simply means that a person should have the fundamental assurance that a jury who is to hold him liable and thereafter assess damages, if need be, shall only do so after a careful consideration of all of the facts both as to those of liability and damages. To do otherwise, would be to invade our American jury system and effectively destroy

its fundamental concepts which have endured over the centuries.

CONCLUSION

In conclusion and by way of summary, it is the contention of the appellants that the trial court abused its discretion in making and entering its order consolidating all of these cases for trial as to liability only. We respectfully reiterate that such procedure is erroneous and unconstitutional, prejudicial to the fundamental rights of each of the appellants herein, and would result in manifest injustice.

Respectfully submitted,

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