1959

Arthur O. Naujoks and Gertraude Naujoks v. Emil Suhrmann et al : Appellants' Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

Hurd, Bayle & Hurd; Robert Gordon; Wallace R. Laughnor;

IN THE SUPREME COURT
of the
STATE OF UTAH

UNIVERSITY UTAH

AUG 6 1959

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ARTHUR O. NAUJOKS, and
GERTRAUDE NAUJOKS, his wife,
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.

Case No. 8775

APPELLANTS' PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

HURD, BAYLE & HURD
ROBERT GORDON and
WALLACE R. LAUCHNOR
Attorneys for Appellants
Albert Noorda and Sam L. Guss
and Valley Sausage Company

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PETITION FOR REHEARING

The appellants, Albert Noorda and Sam L. Guss, d/b/a Jordan Meat & Livestock Company, and Valley Sausage Company, a Utah corporation, petition the Court for a rehearing

and reargument of the above entitled case for the reason and upon the grounds:

POINT I.

THE COURT HAS MISCONSTRUED THE RECORD IN THIS CASE AND DRAWN INFERENCES THEREFROM WHICH ARE NOT JUSTIFIED BY THE EVIDENCE, AND THE DECISION SHOULD THEREFORE BE RECALLED AND THE CASE REHEARD.

POINT II.

THE DECISION OF THE COURT IS IN CONFLICT WITH THE COURT'S PREVIOUS DECISION RENDERED ON IDENTICAL FACTS AND THE DECISION SHOULD THEREFORE BE RECALLED AND THE CASE REHEARD.

WHEREFORE, petitioners pray that the judgment and opinion of the Court be recalled and a reargument be permitted of the entire case.

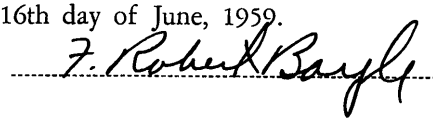
A brief in support of this petition is filed herewith.

HURD, BAYLE & HURD
ROBERT GORDON and
WALLACE R. LAUCHNOR
By F. Robert Bayle
F. Robert Bayle
Attorneys for Appellants

F. Robert Bayle hereby certifies that he is one of the attorneys for appellants and petitioners herein, and that in his opinion there is good cause to believe that the judgment and

decision of the Court is erroneous and that the case should be reheard and reargued as prayed for in said petition.

Dated this 16th day of June, 1959.



BRIEF IN SUPPORT OF PETITION FOR REHEARING

POINT I.

THE COURT HAS MISCONSTRUED THE RECORD IN THIS CASE AND DRAWN INFERENCES THEREFROM WHICH ARE NOT JUSTIFIED BY THE EVIDENCE, AND THE DECISION SHOULD THEREFORE BE RECALLED AND THE CASE REHEARD.

There is no need for a complete restatement of the facts of the case at this time inasmuch as the facts were fully outlined and discussed in the original briefs and in oral argument. The Court's decision, however, shows that the facts have been misconstrued, and that the Court has drawn inferences from the evidence which are not justified by the record. We shall discuss only such of the facts as will present our position in this regard.

The Court's opinion summarizes the evidence from the appellants' contention, and then goes on to state that while this view of the evidence is reasonable, the jury was not obligated to accept it because of other facts from which the jury could have found that Hoffman's authority went beyond that claimed by appellants.

The principal factual situation which the Court points out

in support of this statement may be summarized by stating that Suhrmann dealt with Hoffman in most of the dealings he had with Jordan Meat & Livestock Company. Unquestionably that is the fact, but the appellants submit that no inference can be drawn from such fact, except the reason given by Suhrmann himself.

Suhrmann's testimony is that he contacted Hoffman because of the language difficulty in speaking with Noorda. At the time Suhrmann was advised that no further deliveries of fully processed mettwurst would be made, both Noorda and Hoffman were present. Hoffman was acting merely as an interpreter (Tr. 102-127). It was Noorda who made the final decision that the deliveries of raw and uncooked mettwurst would be made to Suhrmann (Tr. 103-127). Thus the record clearly indicates that Suhrmann was in fact dealing with Noorda —that he knew Noorda was the man in authority, and that Hoffman was contacted only as a matter of convenience because of the language difficulty. This is emphasized and reemphasized by Suhrmann:

> "I had to do with Mr. Hoffman in all these cases because I had just recently come to Salt Lake and hardly knew any English and Mr. Hoffman knew German so I had to do business with him." (Tr. 111).
>
> "Let me say this here, *in every instance* when I told you or the other gentlemen I talked with Mr. Noorda, it was always over Mr. Hoffman, I told it to Mr. Hoffman and Mr. Hoffman told him the answers, and in this way I want it to be understood." (Tr. 136) (Italics added.)

In other words, if Suhrmann was to do business with

Jordan Meat at all of necessity he must contact Hoffman as the only person in the establishment with whom he could talk.

We respectfully submit that under these circumstances no inference may be drawn that because of the exclusive contact between Suhrmann and Hoffman any greater authority was conferred upon Hoffman as the defendants' agent.

The court's opinion goes on to say that when some of the mettwurst shrank in processing, Suhrmann contacted Hoffman and the latter gave him a credit with the suppliers. We respectfully submit that the Court misconstrued the record in this regard.

Suhrmann's testimony is to the effect that there is some loss from shrinkage in smoking the mettwurst; that he paid the same price for the mettwurst unsmoked as he had formerly paid for the finished product, and that he discussed with Mr. Noorda the fact that he should be allowed credit for such shrinkage (Tr. 127-128). We respectfully submit that Suhrmann may well have said at other places in the record that he discussed with Mr. Hoffman the matter of a credit for shrinkage, but keeping in mind the testimony quoted above at Transcript page 136, it is clear that such discussion was with Hoffman as an interpreter, and not with Hoffman as an individual.

The appellants desire to further point out with respect to the testimony of Suhrmann, that it was all of a self serving nature. The Court must remember that Suhrmann was also a defendant in this case. His testimony must be so viewed, and when so viewed, it is apparent that everything this witness

had to say was a self serving effort to shift the blame from himself to the defendants Noorda and Guss. All of his statements relative to assistance by Hoffman were emphatically denied by Mr. Hoffman.

It should also be pointed out that at a subsequent trial of other cases involving seventeen plaintiffs and arising out of the same factual situation, the testimony of the witness Suhrmann was entirely discredited. His story under oath at this later trial is that he personally did not talk with Hoffman at the time the first mettwurst was delivered to Suhrmann's place of business to be smoked. Suhrmann said that he was not even in the store when Hoffman came, but that Hoffman instructed Mrs. Suhrmann in the smoking process. A comparison of these statements with the testimony in the present trial, when Suhrman testified in detail as to how Hoffman placed the mettwurst in the smoke oven and lit the fire, (Tr. 109, 110, 123, 146 and 147) leads to the inevitable conclusion that Suhrmann was not telling the truth, and that his testimony can be given no weight in any respect or degree whatsoever.

As this Court has held in the case of Tebbs vs. Peterson, 122 Utah 214, 247 P. 2d 897, a party may not recite upon oath one statement of facts in one judicial proceeding and then, to meet the exigencies of the occasion in the trial of a different suit, recite under oath an entirely different story. Under such a situation, the material variances by Suhrmann, as aforementioned, in effect permit him as a party vitally interested in the results of the litigation, to make a mockery of justice.

See also: Gohlinghorst vs. Ruess, 146 Neb. 470, 20 N.W.

2d 381; Peterson vs. Omaha & C. B. St. R. Co., 134 Neb. 322, 278 N.W. 561; Gormley vs. Peoples Cab, Inc., 142 Neb. 346, 6 N.W. 2d 78.

In the event appellants' petition for rehearing is granted, a transcript of Suhrmann's testimony in the last trial will be made available to this Court. Because of the marked variance in Suhrmann's testimony, his credibility was effectively destroyed in this last trial, resulting in a favorable verdict for these appellants.

The appellants respectfully submit that it is clear from the foregoing summary that there was no competent substantial evidence to support the finding by the jury that Hoffman was acting as the agent of the defendants in assisting Suhrmann in processing the mettwurst, and in view of Suhrmann's unreliability, the verdict of the jury based solely upon his testimony should not be permitted to stand as a judgment against these appellants. The dictates of justice demand otherwise.

POINT II.

THE DECISION OF THE COURT IS IN CONFLICT WITH THE COURT'S PREVIOUS DECISION RENDERED ON IDENTICAL FACTS AND THE DECISION SHOULD THEREFORE BE RECALLED AND THE CASE REHEARD.

As is conceded in the Court's opinion in this case, the factual situation is the same as that involved in Schneider vs. Suhrmann, 8 Utah 2d 35, 327 P. 2d 822. Unless some of the witnesses varied their testimony, this must be the situation, since both cases involved the same transactions. In the Schneider

case, this Court affirmed the finding by the jury that Hoffman was not acting as the agent of the defendants in assisting Suhrmann, and likewise affirmed the action of the trial court in dismissing the complaint as to the appellants Noorda and Guss.

The Court's opinion fails to point out a material difference between the facts in the instant case and those considered in the Schneider case, and yet the decision arrives at an opposite result. In the final paragraph of the opinion, an effort is made to justify the result by imputing Hoffman's knowledge to the defendants. Such a position might be sound, if it were justified by the record. However, nowhere in the transcript of the evidence is there anything from which a reasonable inference might be drawn that Hoffman knew that Suhrmann would process the mettwurst insufficiently. As this court pointed out in the opinion in the Schneider case, Suhrmann told Noorda, speaking through Hoffman as an interpreter:

> "Let me have it, prepare it as far as you are able and then deliver it to me, and I will finish it. I have an oven to smoke it, and I will take care of the rest. What you don't—what you cannot do I will complete in my own business."

Under such circumstances the defendants had, we respectfully submit, no further duty toward the public. This court so stated in the Schneider case:

> "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."

The same factual situation exists here as was involved in the Schneider case, and it is inconceivable that from such a situation the court in one case can come to the conclusion that Hoffman was not an agent of these appellants and such finding is supported by the evidence, and in the next case the Court can conclude that Hoffman was an agent of these appellants, and that such conclusion is supported by the evidence. The same evidence cannot in justice or common sense support two opposite conclusions. This is particularly true in light of Suhrmann materially changing his testimony while under oath during the last trial.

CONCLUSION

The appellants respectfully submit that on the basis of the foregoing argument and in view of the marked variance in defendant Suhrmann's testimony, and the conflict between this decision and the Court's previous opinion, a rehearing and reargument should be granted. Upon such a review of the entire matter, it is our sincere conviction that the Court will feel compelled to find that the trial court was in error in refusing the appellants' motion for a directed verdict of no cause of action.

Respectfully submitted,

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