

1960

Hogan Dairy Co. v. Creamery Package Manufacturing Co. : Brief of Defendant and Respondent

Utah Supreme Court

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Moreton, Christensen & Christensen; Attorneys for Defendant and Respondent;

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Case No. 9241

IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

HOGAN DAIRY COMPANY,
a corporation,

JUL 15 1960

Plaintiff and Appellant,

Clerk, Supreme Court, Utah

—vs.—

CREAMERY PACKAGE MANUFACTURING COMPANY, a corporation,

UNIVERSITY OF UTAH

JUL 10 1967

Defendant and Respondent.

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BRIEF OF DEFENDANT AND RESPONDENT

**MORETON, CHRISTENSEN
& CHRISTENSEN**

*Attorneys for Defendant and
Respondent*

1205 Continental Bank Building
Salt Lake City, Utah

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BRIEF OF DEFENDANT AND RESPONDENT

STATEMENT OF FACTS

If the jury believed the testimony offered on behalf of the defendant, the jury would have to return a verdict in favor of the defendant Creamery Package Manufacturing Company, as it did. The jury having found in the defendant's favor, defendant is entitled to have the evidence and reasonable inferences therefrom, viewed in a light most favorable to it. In view of deficiencies in appellant's statement of facts, it becomes necessary for us to restate the facts, and to set before the court the evi-

dence which apparently was accepted by the jury in arriving at its verdict. It may be noted here, that if the jury believed any one of the four witnesses called by the defendant, such would be sufficient to support the verdict and judgment in defendant's favor.

Blaine Anderson, defendant's sales representative, testified as follows: (Tr. 314 to 345)

He first learned about the equipment known as Vac Heat #330 in March of 1958, at a lecture given by Horace L. Mitten, Jr., at a short dairy course at Logan, Utah. Max Hogan, the technical man for the plaintiff Hogan Dairy attended the same lecture.

Thereafter, Anderson called upon the Hogans at West Jordan to see if they were interested in purchasing this piece of equipment. Later, in about April, Mr. Anderson was invited to attend a directors meeting of the Hogan Dairy at West Jordan. At the same meeting a representative of a competitive company met with the board, and explained his equipment. Following that, Anderson was invited to explain defendant's Vac Heat Unit. He spent about 30 or 40 minutes in the directors' meeting. After he finished discussing with the directors the qualities of the Vac Heat equipment, he showed them a piece of literature explaining the 330 Vac Heat equipment, as well as other equipment. (Ex. P-1). At the conclusion of his presentation, he was asked if it was possible for the Hogan Dairy to rent or lease this piece of equipment from Creamery Package, and the answer was

no, that the only way plaintiff could get one from the defendant was to buy it, either on a deferred payment plan, or a cash sale. Then Mr. Anderson volunteered to them, that there were companies who made a business of buying equipment and renting or leasing it to people who wanted to use it, and gave them the names of two or three companies that he knew about, and then he left the meeting without any understanding or agreement or commitments by either party. At that time the directors of Hogan Dairy had not made up their minds as to which type of equipment they should acquire, or from whom.

A few days thereafter, Max Hogan called Anderson and told him the Hogan Dairy had decided to obtain the 330 unit, and said if Mr. Anderson had any blanks by which they could make an application with some company who would purchase the equipment and lease it to them, he would appreciate it. Thereafter, Mr. Anderson gave to the Hogans some application forms to be filled out by them, to acquire the use of Vac Heat on a rental basis. Mr. Anderson gave them blank forms from the National Equipment Rental Company of New York, which application was filled out by the Hogans and transmitted to the National Rental Equipment Company.

The next thing Mr. Anderson learned, was by a copy of a letter addressed to the Hogan Dairy, Inc., from the National Equipment Rental Ltd., dated April 29, 1958, (Ex. 5-D), stating that as soon as the lease agreement, (Ex. 4-D), was entered into between the National Rental

and the Hogans, and the initial check paid to the rental company, it would purchase from the Creamery Package Company the equipment in question, and have it shipped directly to the Hogan Dairy at West Jordan, with the request to extend to the Hogan Dairy as the user, all guaranties and warranties and services that would normally accompany it.

Next Mr. Anderson received a purchase order, dated May 8th, (Ex. 10-D), requesting the Creamery Package to ship the unit in question to the Hogans at West Jordan. In the left hand corner at the bottom of this document is printed: "All guaranties, warranties and services normally accompanying this equipment are to be extended directly to the consignee."

Thereafter, the equipment was shipped directly to the Hogans at West Jordan, and in accordance with the provisions of Ex. 5-D and 10-D, Mr. Anderson assisted the Hogans in setting up the equipment in the Hogan Dairy. *He told the Hogans that it would have to be checked over by a factory man before it could be put in operation*, but Mr. Hogan, Sr., replied that it would go into operation the next day, with or without the help of Mr. Anderson. Accordingly, the Hogans did attempt to operate the equipment without its first being tested, and the results were unsatisfactory to them. The second day of the operation, Mr. Haxton, an engineer for the Creamery Package, and Mr. Anderson, went to the Hogan Dairy to see what they could do by way of assisting the Hogans.

They found that one valve had been improperly assembled, and the milk was being held for a longer period than it should have, which would have a tendency to give the milk a cooked taste. This valve was properly assembled and Mr. Haxton suggested to them that they hadn't set up the vacuum pump correctly, and asked them to change that.

There were complaints made to Mr. Anderson after this adjustment had been made, and Mr. Anderson requested the Hogans to furnish him with a sample of the milk that they claimed was spoiled, but with one exception, hereafter noted, he was unable to obtain such samples. He then became a customer of the Hogan Dairy, took milk daily, used it in his home, and found nothing wrong with the milk. The Hogans did, at one time, make available to Mr. Anderson two bottles of allegedly spoiled milk. They were tasted by Mr. Anderson and others. Mr. Anderson, an expert taster of milk, could find nothing wrong with it.

Mr. Haxton, a witness called by defendant after qualifying as a mechanical engineer with extensive experience in dairy machinery and equipment, testified as follows: (Tr. 285-301).

On August 5, 1958, he went to the Hogan Dairy at West Jordan, and found the plant in a cleanup condition, the milk run having been completed. He discussed the problem with Max Hogan. Hogan gave to Haxton a list of symptoms that he thought might be important. One

was that the infuser was discharging milk. Haxton dismantled the infuser, and found that it had been assembled in such a manner that it couldn't possibly have worked correctly. Hogan also complained that the vacuum was also irregular. Mr. Haxton explained to him that the pump was improperly installed, and asked him to change it. He reassembled the infuser and checked it to see that it would work.

Mr. Haxton again went to the Hogan Dairy on the 9th day of August. He didn't see Max Hogan on the second visit, he being away. The vacuum pump *had not* been changed so Haxton and Anderson changed that themselves, and that corrected the vacuum problem. Mr. Haxton and Mr. Kaufman checked over the entire equipment and ran water through it. It appeared to be alright. Mr. Haxton next saw the Hogan Dairy in November of 1958. Max Hogan told Mr. Haxton that he felt that he had been making some progress with the handling of the unit since he returned from camp. He was getting better adjusted to it, but he still felt that there was a slight cooked flavor and he wanted to know if there wasn't anything Haxton could do about that. One valve was repositioned which would reduce the time the milk would be held under the high temperature. The difference in time would be a reduction of about one-eighth. The same result could have been had by reducing the temperature by adjustment of valve #22. It was just a question of time over heat, or heat over time. One can cook by a longer period at low temperature or by a shorter period of high tem-

peratures. One could get the milk through Hogan Dairy without scorching it and without repositioning the valve. The entire Vac-Heat system could have been bypassed, by making a few adjustments requiring about twenty minutes work, and it would then operate the same as before Vac-Heat was installed.

Upon one of his visits to the Hogan Dairy, Mr. Haxton found a very minute air leak in the vacuum chamber. The air leak would have no effect on the product adversely. The only thing that could happen, there might be a small product loss if the bubbles are drawn out through the vacuum pump. That all of the times Mr. Haxton went to the Hogan dairy, he found the bubbles in the vacuum tank were normal.

Horace L. Mitten, Jr., testified as follows: (Tr. 231-255).

He is highly trained and broadly experienced in the dairy business generally, and in the Vac-Heat process in particular. He traced the processing of the milk from the farm through all the processes at the Hogan Dairy, and explained in detail each function of the various pieces of equipment. He explained that the Vac-Heat unit consisted of pipes and tanks which could not possibly in any way give any contamination to any milk which has flowed through it. Any contamination would have to occur before or after passage through the unit. Contamination could occur in the Vac-Heat unit only through failure to remove the contamination left there by a pre-

ceding flow of contaminated milk. He explained various temperatures required to destroy them; also the chemical reactions which take place in milk and what is called rancidity. The milk could not in any way receive that from going through the Vac-Heat process.

He explained how the operation is controlled, so that the milk will not be enriched or diluted, namely by extracting from the product the same quantity of water as is placed in it by using the steam bath. He explained how the operator could control both the heat and the length of time the product is subjected to the heat treatment, as simply as a housewife controls a good electric range. She may have high temperatures and bake quickly, or low temperatures and bake a long time. In other words, by the control of time and temperature, the operator gets the type of finished product that he desires.

He further testified an increased "shelf life" results from the proper use of Vac-Heat; he explains how milk may spoil after it leaves the dairy, either from having been contaminated after treatment, or not kept at the proper temperatures or exposed to light. He explains how the milk held by some retailers would spoil when not spoiled in other retail establishments.

Dr. Theodore I. Hedrick, an expert eminently qualified by scholastic training and practical experience in the dairy business, testified as follows: (Tr. 353-369)

He is Professor of Dairy and manager of a Michigan State University dairy plant. He directs the operation of the dairy plant, and instructs both under-graduate and graduate level students, including candidates for PhD degrees, and carries on independent research. The dairy he operates produces all types of dairy products. The school dairy is operated the same as a commercial plant, handling about 7,000,000 pounds a year. This dairy has a Vac-Heat unit 330, identical with the one at the Hogan Dairy, which it has had and used since December of 1958. The other dairy equipment was also about the same as that used in the Hogan Dairy.

He traced the milk from the time it entered the plant, through the various steps of the treating process, including the Vac-Heat, and the temperatures that the milk is kept at before and after treatment. He testified that the length of time that milk can be held on shelves and be palatable depends on the temperature at which it is stored. Where the storage is at 50°F. or below, the storage tests indicate the milk will keep at least two weeks and still be of average quality, but will show usually an increase in bacteria and some drop in flavor score.

Many things could cause a variation in the pasteurized milk product. First possibility would be the quality of raw milk, which varies from day to day and season to season. Other factors are the care and handling during the transportation of the milk from the farm to the plant; the care and handling of the milk in the plant prior to

pasteurization; the care with which the milk is processed. In the case of steam infusion, the quality of the steam; the sanitary practices of the dairy, and the time, care and conditions under which the milk is held after pasteurization, and in the processing of it. If it is bottled in paper containers, the type and quality of the wax used could be a factor.

Contamination would be important in influencing the keeping quality. By post contamination is meant that which occurs after the pasteurizing has been completed, and may occur anywhere down stream from the flow diversion valve. There is also the possibility of contamination at the tank form when the milk is picked up in the night, the farmer is in bed and the tank wouldn't be washed until it has had a chance to dry parts of the milk onto the tank; it could form what is known as milk stone, and the milk stone harbors all types of bacteria and would naturally contaminate the milk. One of the important type organisms in milk stone would be thermophilic in nature, and that would survive pasteurization, and likely grow after the milk is in the package and thereby spoil milk in a short time. Each dairy experiences trouble with milk spoiling and they should investigate every possibility immediately, starting with the milk supply. We think Vac-Heat gives us a more uniform product with a better keeping quality and that the customers prefer it. We have, for experimental purposes, omitted Vac-Heat treatment on occasions, and the customers asked why the difference in the milk. Any milk that

is properly pasteurized will have some degree of cooked flavor.

It would have been a simple matter for the Hogans to have completely by-passed the Vac-Heat unit, until they were able to determine the source of the trouble. Air leaks are not uncommon because of the difficulty in getting the fittings so that they fit perfectly every time. An air leak either of pinhole size, or larger, near the top of the vacuum chamber would not affect the flavor of the milk, because the milk must come in contact with air later anyway. On testing treated milk and discovering a scorched or burned flavor, it would be impossible to tell where, through the whole process, too much heat had been applied to the product.

Cleaning and sanitizing the equipment after use is a very important function, in any dairy plant. If this is done improperly, contamination will occur, particularly in the stream from the pasteurization, and this will affect the keeping quality of the milk. Dr. Hendrick explains all the various tests that the dairy should do daily to determine whether there is any part of their equipment contaminated.

In summary, the evidence on behalf of the defendant tends to establish:

1. That the Vac-Heat unit, when properly installed and utilized, not only does not impair the taste quality of the milk, but actually enhances and preserves it.

2. That there was no defect in the Vac-Heat unit leased by plaintiff.

3. That if there was any defect in the quality or taste of plaintiff's milk, such did not result from the Vac-Heat unit.

4. If there was any defective operation of the Vac-Heat unit, such resulted from plaintiff's improper assembling of the equipment, and refusal to permit it to be checked and tested by defendant's factory representatives before being put into service.

5. Any impairment to the quality or taste of plaintiff's milk, resulting from use of the Vac-Heat unit, could easily have been averted, by by-passing the system until the problem was discovered and corrected.

POINT I.

THE COURTS SHOULD HAVE GRANTED DEFENDANT'S MOTION FOR A DIRECTED VERDICT.

At the conclusion of plaintiff's case, defendant moved for a directed verdict. (Tr. 230). On the facts as they appeared in the record at that time, this motion should have been granted.

Blaine Anderson, on behalf of defendant, attempted to sell a Vac-Heat to the Hogan Dairy. It declined to buy it. However, plaintiff elicited the aid of Anderson, as its agent, to put it in contact with an equipment rental

agency, who would purchase the Vac-Heat equipment and lease or rent it to the Hogan Dairy. There was no relation of vendor and purchaser existing between Creamery Package and Hogan Dairy. There was no relation of bailor and bailee between the same parties. The evidence shows that the Hogan Dairy entered into its rental contract with National Rental Equipment, Ltd., and all of its rights, duties and liabilities were fixed in that written contract, to which Creamery Package was not a party. (Ex. 10-D). The only obligation that the Creamery Package was to perform, was to extend to Hogan Dairy, as consignee, its normal warranties and services. The equipment was sold to National Rental. Hogan Dairy had possession of it by virtue of the lease agreement, (Ex. 4-D), and Creamery Package had neither right nor duty to do more than was required of it under its agreement with National Rental Equipment, Ltd. At the close of plaintiff's case, there was no evidence offered or received to prove, or tending to prove what the obligations of the Creamery Package were, under the term normal services and warranties. Absent any showing as to what the warranty was, there was of course no showing of breach, and therefore the court should have granted defendant's motion.

POINT II.

ANSWERING APPELLANT'S POINT I.

The court's instruction #13, defining plaintiff's duty to mitigate its damages, was correct, if the case should be submitted to the jury at all.

In 15 Am. Jur. page 420, Damages, Sec. 27, it is said:

“One who is injured by the wrongful or negligent acts of another, whether as the result of a tort or of a breach of contract, is bound to exercise reasonable care and diligence to avoid loss or to minimize or lessen the resulting damage, and to the extent that his damages are the result of his active and unreasonable enhancement thereof or are due to his failure to exercise such care and diligence, he cannot recover, or as the rule is sometimes stated, he is bound to protect himself if he can do so with reasonable exertion or at trifling expense, and can recover from the delinquent party only such damages as he could not, with reasonable effort, have avoided. It is also an elementary principle that a party claiming damages must not be in fault in contributing to them by his own want of proper care; and such care must extend to the protection from the further loss after the act complained of. If he fails to use such diligence, his negligence is regarded as contributing to his injury, and, furthermore, such damages as could have been avoided are not regarded as the natural and probable result of the defendant’s acts.”

Moreover, the giving of Instruction 13, cannot be complained of by the appellant, for the reason that the jury found no cause of action. Therefore, even if the instruction were erroneous, it would not be prejudicial to plaintiff.

As is illustrated in the case of *Colemere v. Higgins, Admrs.*, (Utah), 351 P. 2d 903 quoting from page 903:

“Further, the instruction on this point would

only have significance if the jury had found in favor of plaintiffs on their complaint, and were considering the question of damages. Inasmuch, as the jury found against the plaintiff on their complaint, we find no error in the court's refusal to give such instruction."

In the Court's Instruction #16, the jury were clearly told that if they found in favor of the plaintiff, that plaintiff would be entitled to recover as damages, all those that might fairly and reasonably be considered naturally and probably resulting from the breach of contract, including injury to business reputation; loss of business standing; loss of customers or business; loss of employees; profits which would have been realized had the contract been performed.

"Time and place to win factual feature of a law suit is in trial tribunal and not in appellate court." *Conley v. Amalgamated Sugar Co., (Id.)*, 263 P. 2d 705.

The court's instructions must be considered together, as one connected whole. Instruction #13 must be construed in light of Instructions #5, #9 and #10, which read as follows:

INSTRUCTION NO. 5

"You are instructed that while plaintiff seeks to recover from defendant for breach of contract, you should not preclude from your considerations plaintiff's theory that in the performance of said

contract defendant was negligent in that the unit was installed in such a manner that it did not perform the functions properly in processing of the milk which it was intended to perform. You are instructed that if you are satisfied by proof from the preponderance of the evidence that the defendant was negligent, then defendant is liable to plaintiff for the damages, if any, which are the natural, probable proximate result of such negligence.”

INSTRUCTION NO. 9

“If you find from a perponderance of the evidence that the Vac-Heat unit as designed by defendant did not process milk properly because of fault in the design or plan of said machine, then you are instructed that defendant has breached its contract.”

INSTRUCTION NO. 10

“You are instructed that if you find from a preponderance of the evidence that defendant agreed with plaintiff to get said unit operating properly and if you further find that the defendant did not do so, then defendant is liable to plaintiff for the natural and probable results thereof, if any.”

In *Joseph v. W. H. Groves Latter Day Saints Hospital*, 348 P. 2d, 935, 938, this court said:

“What the parties are entitled to and the law seeks to afford is an opportunity for one claiming a grievance which would justify legal redress to present it to a court or jury, and to have a fair

trial. When this is done and the verdict and judgment are entered, all presumptions are in favor of their validity. The burden is upon the appellant not only to show that there was error but that it was prejudicial to the extent that there is reasonable likelihood that in its absence there would have been a different result.”

In *Steel v. Wilkinson*, (Utah), 349 P. 2d 1117, this court said at Syllabus 1:

“All conflicts in evidence and all reasonable and legitimate inferences must be resolved in favor of the defendant on appeal from judgment in favor of defendants.”

Little v. Johnson, (N.M.), 242 P. 2d, page 1000, quoting from the opinion at page 1000:

“When a judgment is attacked as being unsupported, the powers of the appellate courts end with the determination whether there is substantial evidence to support it, contradicted or uncontradicted. In reviewing the evidence on appeal, all conflicts must be resolved in favor of the successful party and all reasonable inferences indulged in to support the judgment, and all evidence and inferences to the contrary will be disregarded.”

POINT III.

ANSWERING APPELLANT'S POINT II.

Appellant's requested Instruction #1, starts out by saying, “You are instructed that the evidence is uncon-

tradicted, that plaintiff and defendant agreed as follows, etc.” Each and every one of the propositions set out in appellant’s requested Instruction #1 is in dispute, as shown by the transcript of testimony. Therefore, there could be no error in rejecting that request.

POINT IV.

ANSWERING APPELLANT’S POINT III.

The proposition presented in appellant’s requested Instruction #3, is completely covered in the court’s instructions #5 and #9, set out in respondent’s answer to Point III.

Furthermore, there is no evidence that the Vac-Heat equipment as designed, would not properly process milk. The evidence is all to the contrary that it would and did process milk properly when operated as it was designed to be operated.

POINT V.

ANSWERING APPELLANT’S POINT IV.

Plaintiff’s requested Instruction #5 was properly refused, as there is no evidence in the record that would support such a proposition to be presented to the jury. All the evidence shows that there is bacteria in the milk as it is gathered from the farm. Dr. Hedrick and Mr. Mitten both testified that there was no evidence to prove,

or no facts scientifically known, that would cause milk treated by high temperatures to deteriorate more rapidly than milk untreated by high temperatures in any given locality more than another locality, or at all. They each testified that some people had theorized to that effect, but there was no evidence to support such theory, and therefore requested Instruction #5 was properly rejected.

POINT VI.

ANSWERING APPELLANT'S POINT V.

Appellant claims error in admitting exhibits 11D and 12D. These exhibits were properly admitted to show what the duties of the defendant were. These exhibits were necessary to show defendant's contractual obligations. The Hogans claim they had no knowledge of the contents of the two exhibits 11D and 12D. These are the only agreements to which defendant was a party. They define and limit defendant's contractual obligations to plaintiff. If the Hogans did not know what they meant, it was their duty to find out, and the defendant necessarily had to introduce these exhibits in order to prove and establish what business it had in and around the Hogan Dairy, pertaining to this equipment after Creamery Package had sold the equipment to the National Rental Equipment Company.

POINT VII.

ANSWERING APPELLANT'S POINTS VI AND VII.

Appellant claims that the evidence is uncontradicted. However, it is a fact that the testimony is in conflict on

practically every point. Respondent's evidence shows that the equipment did operate properly; that it did not damage the milk; that the milk was not damaged, and if the milk was damaged it was the fault of the operator not the equipment; and if the milk was contaminated, it would be because of coming in contact with bacteria after it had been pasteurized. The jury's verdict determined the contested issues of fact in defendant's favor. If the plaintiff and appellant was entitled to have the case submitted to a jury, it was submitted fairly and properly and plaintiff simply failed to carry its burden of persuasion.

Further answering appellant's points:

1. Putrid or rancid milk could only come from contaminated or chemical reaction, and the Vac-Heat did not add anything to the milk. It flows through stainless steel tubing and tanks, hence, contamination must come from some other source unless the operator of the Vac-Heat fails to clean it after each use, and thereby permits the Vac-Heat unit to become contaminated.

2. Scorching or cooked flavors are in all milk that is pasteurized or treated with high temperature. The cooked flavor will be in the degree that the operator of the equipment desires to have it, as it is clearly within his power to control both the temperature and the length of time the product is exposed to the heat, just as simply as an electric stove may be run at such high temperature that it burns the food, or at so low a temperature for such a long period of time that the food is burned.

There is no evidence in the record, that shows that any particular sample of milk that was claimed to be spoiled had been kept at a proper temperature after it had been treated at the Hogan Dairy, and the evidence shows that any milk permitted to get above 50° temperature after it has been treated, will spoil in a short time. Therefore, there is no evidence that any of the complaints resulted from faulty treatment of the milk at the Hogan Dairy. The relation of vendor and purchaser did not exist between the Hogan Dairy and the Creamery Package. The relationship of bailor and bailee did not exist between the Hogan Dairy and the Creamery Package. Therefore, the ordinary rules applicable to the relations above mentioned, do not apply. We have the simple proposition that the Creamery Package agreed with the National Rental Equipment when it sold the equipment to the National, that it would ship that equipment directly to the Hogan Dairy, and would give such services and warranties as normally accompanied the equipment.

Appellant claims it could not quit using the Vac-Heat after it found it to be unsatisfactory, because it had advertised extensively and changed the label on its milk containers, all to commence about August 1, 1958. The Hogan Dairy made its own bed. It refused to wait until a factory man could check the equipment and give it a trial run to make sure everything was properly adjusted. If the Hogans had waited, they would not have run two days with the valve improperly assembled; they, would not have operated with the vacuum pump pumping up hill instead of down.

Max Hogan was a college graduate in dairy sciences. He had made a complete investigation of the Vac-Heat method and was the man who was to run it, yet, after two days of unsatisfactory operation, he left the plant for an extended period. All of these problems, created by their own neglect of duty, the Hogans seek to lay at the doorstep of defendant.

CONCLUSION

Plaintiff failed to prove a prima facie case. A verdict should have been directed in defendant's favor. If plaintiff was entitled to go to the jury, it is bound by the jury's findings against it. There was no error in the trial court prejudicial to plaintiff. The judgment below should be affirmed.

MORETON, CHRISTENSEN
& CHRISTENSEN
*Attorneys for Defendant and
Respondent*
1205 Continental Bank Building
Salt Lake City, Utah