1958

Arthur O. Naujoks and Gertraude Naujoks v. Emil Suhrmann et al : Brief of Respondents

Utah Supreme Court

IN THE SUPREME COURT
of the
STATE OF UTAH

ARTHUR O. NAUJOKS and GERTRAUDE NAUJOKS,
Plaintiffs and Respondents,

vs.

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

Case No. 8775

BRIEF OF RESPONDENTS

(Numbers in parenthesis refer to pages of the record. The Appellants will be referred to as the Defendants.)

STATEMENT OF FACTS

In making the Statement of Facts defendants do not recognize the rule that in view of the verdict and judgment for plaintiffs the evidence must be viewed most favorably for plaintiffs. They leave out much of the evidence that is important.

For example, they failed to disclose to the Court the fact that the partners of the Jordan Meat & Livestock Company are the sole owners of the stock of the Valley Sausage Company. These two concerns are really one. The Jordan Meat buys the meat products and sells these meat products to retail outlets. Valley Sausage Company was formed to carry on the sausage business of the Jordan Meat. The raw materials necessary for making sausage are "sold" by Jordan Meat to Valley Sausage and then Valley Sausage "sells" the product to Jordan Meat, which in turn sells to the retail outlets.

In another instance the defendants show the conflict in testimony relating to whether or not Hoffman assisted and instructed the Suhrmanns in the smoking of mettwurst. The jury found against defendants (Interrogatory 4, R. 176) and this Court should, under the law, consider the conflict in favor of plaintiffs here. This would mean that for purposes of appeal it is an established fact that Hoffman did assist and instruct the Suhrmanns in the smoking of the mettwurst.

Under the facts as found by the jury, Emil Suhrmann purchased mettwurst in an unprocessed state (that is, not treated for the purpose of killing trichina) from the Jordan Meat & Livestock Company, which company had in turn obtained it from the Valley Sausage Company, the manufacturer which in turn had obtained it from Jordan Meat. Alfred Hoffman advised and assisted Emil Suhrmann in smoking the mettwurst and in doing

so he was acting as the agent of the Jordan Meat and the Valley Sausage Company. At the time the Jordan Meat sold the raw mettwurst sausage to Suhrmann, it actually knew and as a reasonably prudent person should have known, that Suhrmann intended to sell the mettwurst to the public without processing it so as to kill trichina. At the time Valley Sausage Company manufactured and delivered the raw mettwurst to Jordan Meat it actually knew as a reasonably prudent person should have known, that the mettwurst would be sold and delivered by Jordan Meat to Suhrmann and Suhrmann would sell it to the public without processing it to kill trichina. The plaintiffs ate mettwurst infested with trichina purchased from Suhrmann which, in turn, had been manufactured by Valley Sausage and sold to Suhrmann by Jordan Meat. As a result of eating this mettwurst plaintiffs contracted trichinosis.

The foregoing statement of facts is taken directly from the special verdict returned by the jury (175-178). The foregoing are the ultimate facts established under the evidence and found by the jury and upon which plaintiff is entitled to recover in this cause. The detailed testimony introduced supports all of these findings. We will refer to the details of the testimony as it becomes applicable in answering the arguments of defendants.

STATEMENT OF POINTS

POINT I.

THE EVIDENCE SUPPORTS THE JURY'S ANSWERS TO QUESTIONS 5 AND 6 OF THE SPECIAL VERDICT.

POINT II.

A SPECIAL VERDICT WAS SUBMITTED TO THE JURY AND THERE WAS NO NEED TO GIVE THE REQUESTED INSTRUCTIONS OF EITHER PLAINTIFFS OR DEFENDANTS.

POINT III.

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANTS' MOTION FOR A DIRECTED VERDICT.

POINT IV.

THE DENIAL OF DEFENDANTS' MOTION TO DISMISS THE CROSS-COMPLAINT OF SUHRMANN AND SUBMITTING THE ISSUES THEREIN TO THE JURY IN NO WAY AFFECTS THE JUDGMENT OF PLAINTIFFS AGAINST DEFENDANTS.

ARGUMENT

POINT I.

THE EVIDENCE SUPPORTS THE JURY'S ANSWERS TO QUESTIONS 5 AND 6 OF THE SPECIAL VERDICT.

This point, as argued in defendants' Brief, really contains two distinct and separate propositions. In order to treat the matter in an orderly fashion we are setting forth these two propositions under this point.

Defendants here contend that there is no evidence to sustain a finding that Hoffman was the agent of the defendants. The next separate and distinct proposition is that there is no evidence to support a finding that defendants knew, or as reasonably prudent persons, should have known, that Suhrmann intended to sell the mettwurst to the public without processing it to kill trichina.

The jury made these findings which are in favor of plaintiff's position. Hence, the evidence must be considered in a light most favorable to plaintiffs in determining whether these findings are supported. All conflicts in testimony must be resolved on appeal in favor of the jury finding and the Court must draw all reasonable inferences from the facts which tend to support these findings. The defendants, in their brief, have totally ignored this very fundamental rule which governs an appeal from a judgment rendered in an action at law.

1. Hoffman an agent of defendants.

As heretofore pointed out, the Jordan Meat & Livestock Company and the Valley Sausage Company are integral parts of one business operation which has for its purpose selling meat and meat products to retail outlets. No money changes hands between these companies, but merely bookkeeping entries. Both companies are owned lock, stock and barrel by the same individuals. (246-249). Alfred Hoffman was normally employed by the Valley Sausage Company as a sausage maker (463, 490). Because of language difficulties, when Suhrmann would call to place orders he was referred to Hoffman. (494). Practically all of the business dealings regarding the sale and purchase of meat between Suhrmann and defendants was conducted through Hoffman (306, 494).

In spite of the denial by Noorda that Hoffman had anything to do with selling (463) he admitted he knew

that Hoffman had a conversation with Suhrmann and Hoffman asked Noorda if "we would take and make the sausage, blood sausage, liverwurst and mettwurst for Suhrmann" (464). Noorda replied that "we would make it for anyone." (464). Thus we have a situation where the first contact in connection with the sale of meat to Suhrmann was had through Hoffman and this was brought to the attention of the defendant Noorda.

This, together with the fact that Noorda knew Hoffman was taking orders for meat products from Suhrmann, establishes that he knew Hoffman was actively engaged in selling and Noorda, by not stopping him, approved of such activity. This attitude on Noorda's part makes common sense. The ultimate object of Valley Sausage and Jordan Meat was to sell their products and anyone in the organization would certainly be expected to assist in achieving that objective just as Hoffman did. The end of April or first part of May, 1955, Suhrmann was informed by Hoffman that defendants were not going to deliver mettwurst any longer (306). Suhrmann then went to the defendants' plant and there saw both Hoffman and Noorda. Hoffman, in the presence of Noorda, stated that he would be unable to deliver mettwurst because all the ovens were used for hot cooking and they had no facility for cold smoking the products (307). Suhrmann testified that at this meeting (307):

> "A. I make then the suggestion to Mr. Hoffman and told him I had an oven which I could

use and maybe we could do the cold smoking in my store.

Q. And then what was said?

A. It seems to me that Mr. Hoffman didn't like the idea.

Q. Well, what did he say?

A. I can't remember the words only that I had the impression he would not accept my proposition.

Q. Was anything else said in the conversation?

A. Well, Mr. Noorda told me "We will do anyway."

Q. And then was anything else said?

A. We agreed finally that the company should bring the raw wurst, ready to be smoked, to my place and we should do the cold smoking."

From this we see that Mr. Hoffman took an active part in the conversation and was not merely a conduit of German. Hoffman even made the arrangements with Suhrmann for giving credit for shrinkage of the mettwurst in processing it (313). Noorda was aware of this arrangement for shrinkage because he testified that that was one of the conditions under which Suhrmann was to smoke the mettwurst (465, 492). Suhrmann had had no experience in smoking mettwurst and he talked with Hoffman about how it should be done (307). Suhrmann testified as follows (308):

"Q. Do you recall whether or not Mr. Noorda was present?

A. It is possible, but I am not quite sure about it.

Q. Do you remember then anyone other than Mr. Hoffman and yourself being present?

A. Mr. Noorda would be the only person being present.

Q. Now tell us what was said?

A. I inquired what is this cold and hot smoking, what it really was, and he instructed me on it and told me how to proceed.

Q. And what did he say?

A. He told me as soon as the wurst is in the oven the temperature must not be above 80 degrees.

Q. Was anything else said about how to do it?

A. When I talked to him he said a few degrees more, maybe five, or even ten would be the limit, and if it would go higher, about 90 that would spoil it and ruin the wurst."

On May 19, 1955, the first mettwurst was delivered to Suhrmann under this new arrangement (311, Exhibit P-1).

Hoffman himself delivered the Mettwurst to Suhrmann on May 19th. Suhrmann testified (318, 319):

"Q. Now on this first occasion again, that Mr. Hoffman came, on the 19th of May, you say he came in the afternoon as I understood you?

A. Yes.

Q. And who started the fire, who started the smoldering of the sawdust?

A. I think it was Mr. Hoffman.

Q. Did Mr. Hoffman come back that night, did he leave and then come back to check up on this smoking?

A. At this first time he came back before I closed my shop and again told us to be very careful and have it cold smoke. And he told me to touch the wurst, the wurst must be cool.

Q. Did he tell you anything to do in the event it was not.

A. Only he told me to spray water on the sawdust."

Mrs. Suhrmann confirmed this testimony (354, 355).

Hoffman's assistance in this smoking was in line with the understanding that Suhrmann had with Noorda and which understanding is reflected by the following testimony elicited by defendants' counsel from Suhrmann on cross examination (331):

"Q. Now, I want to know what was said about the arrangements made in connection with this smoking by you and what Mr. Noorda said about it.

A. The agreement was this: That the meat company would deliver the sausage made except the process of smoking, deliver it in my business and I would smoke it for them and the company had to pay.

THE REPORTER: I can't hear you.

A. The agreement was this, the company would deliver in my business a quantity of mett-

wurst ready made up to the process of smoking and I should do the smoking in my oven for and on behalf of the company and I would accept the price that the company make to me."

In further confirmation of the fact that this work of Hoffman's was in line with the agreement between Noorda and Suhrmann was the testimony that some of the mettwurst smoked by Suhrmann was to be returned to the Jordan Meat. Suhrmann testified (315,316):

"Q. I want you to direct your attention to a conversation that you had about smoking more mettwurst than you would use, did you have only one such conversation?

A. No, It happened several times.

Q. When was the first time as nearly as you can put it?

A. He has no recollection — ask my wife.

Q. Was it before or after, or on the 19th of May?

A. After May 19th.

Q. Can you remember where the first conversation took place?

A. I can't remember it, but my wife surely will remember.

Q. Do you remember the conversation you had?

A. Yes sir.

Q. Will you tell what was said?

MR. BAYLE: Just a moment, we would like to know the time of this conversation. He says he doesn't know but his wife knows about it, and I

assume his wife is the one that talked to the party we are now speaking of.

THE COURT: I think he said he then pursued it and he said it was after May 19th, that is the closest he could put it. I don't know whether you have asked whether anyone else was present, Mr. Roberts, I think he is entitled to have that.

Q. (By Mr. Roberts). Was anybody else present besides you and Mr. Suhrmann?

A. Several times Mr. Noorda was present when I talked to Mr. Hoffman.

Q. Was Mr. Noorda at one or more of these conversations that was had about smoking more mettwurst in your oven than you would use?

A. Except that this was a conversation over the phone, he was present.

Q. Were each of these conversations on this subject about the same?

A. Everytime that he was expected to smoke more than he really needed for himself, they advised him beforehand and asked for permission.

Q. By "they" who do you mean?

A. The firm, Jordan Meat and Livestock Company.

Q. Who was there, what individual, would you talk to all individuals?

A. To Mr. Hoffman.

Q. Now, will you tell us what was said?

A. Naturally after more than two years I cannot recollect every word which was spoken, but the essence is this: The gentlemen would tell me we have so and so, so much additional wurst to smoke and we will bring it over to your establishment and you will be kind enough to smoke it, call us by phone and we will pick it up, and each one, or two of these people would come to the factory and you can bring it back to us."

And, as a matter of fact, mettwurst was returned on a number of occasions to defendants and invoices were made out showing credit for these returns (318). Also, invoices were introduced showing the sale of this mettwurst by Jordan Meat to customers Brinksma and Lingman (Exhibits P-15 and P-19). We submit that the foregoing testimony supports the finding that Hoffman was acting as the agent of defendants in assisting and advising Suhrmann in the smoking of the mettwurst sausage. Suhrmann did not know how to smoke mettwurst. In order to sell this meat product it was essential that he be instructed in the details of this work. In furtherance of that objective Hoffman showed him how to perform this process. Noorda denied that Hoffman had anything to do with the selling end of the business. The evidence, however, is to the contrary. It establishes without question that Hoffman was engaged in taking orders from Suhrmann and making deliveries of mettwurst to Suhrmann. He participated in the discussions concerning mettwurst delivered to Suhrmann on and after May 19th and his activities in overseeing the smok-

ing was in line with the understanding between Suhrmann and Noorda.

In *Schneider v. Suhrmann,* (not yet reported) the evidence on this question was substantially the same and this Court stated that evidence on this question was completing this holding in effect that this evidence would support a finding of Hoffman's agency.

2. Defendants knew, or should have known, Suhrmann would not process mettwurst to kill trichina.

The supported finding that Hoffman was the agent of defendants in assisting and advising Suhrmann in smoking the mettwurst establishes the defendants' knowledge that Suhrmann did not intend to process the mettwurst for the purpose of killing trichina. It is established that there are three methods of killing trichina. One is by freezing, another by heating to a temperature of 137° F., and the third, a salt curing method (503). The latter two methods were not even considered by defendants or Hoffman and Hoffman participated in the cold smoking of this mettwurst and by that he meant a temperature in the vicinity of 80° F. (537-538). He told Suhrmann that the temperature could be a little more than 80°, but that if it would go higher, to say 90, it would spoil and ruin the mettwurst (308). This type of smoking would not raise the temperature high enough to kill trichina. This being the only processing Suhrmann was to do, the defendants, through their agent Hoffman, knew that Suhrmann would not process the mettwurst to kill trichina.

Even without this agency of Hoffman the evidence would establish that defendants knew, or should have known, that Suhrmann would not process the mettwurst to kill trichina. According to Noorda, one of the reasons the defendants discontinued smoking mettwurst for Suhrmann was that they did not desire to cool their ovens down to the point necessary to kill trichina.

POINT II.

A SPECIAL VERDICT WAS SUBMITTED TO THE JURY AND THERE WAS NO NEED TO GIVE THE REQUESTED INSTRUCTIONS OF EITHER PLAINTIFFS OR DEFENDANTS.

If the court below had submitted the case to the jury on a general verdict, then it would have been necessary to give the instructions requested by the parties. However, the court concluded to submit the matter on a special verdict wherein the jury resolved the issues of fact. After the jury had returned its verdict making these findings, the court then applied the law to the facts so found and rendered a judgment. in favor of plaintiffs and against the defendants.

The jury found that plaintiffs contracted trichinosis from eating trichina infested mettwurst bought from the defendant Suhrmann, who in turn purchased it from the other defendants who in turn had manufactured the mettwurst. The jury further found that the defendants through their agent Hoffman assisted Suhrmann in the smoking of the mettwurst. The jury also found that the defendants knew that Suhrmann did not intend to

do anything to the mettwurst which would kill trichina. With these facts before it, the court of necessity returned a verdict in favor of the plaintiffs.

Defendants refer to seven requested instructions which they claim were error not to give. Defendants do not discuss these instructions separately and it should be obvious that any discussion on their part could only lead to the result that the court properly rejected these instructions in view of the fact that it submitted the case on a special verdict.

Defendants' Requested Instruction No. 9 states that if the plaintiffs' contracted trichinosis due to circumstances beyond the control of the defendants or as a result of the negligent acts of others, such as Suhrmann, then the verdict must be against plaintiffs.

This instruction is erroneous in two particulars. First, there is no evidence to support any finding that there were circumstances beyond the control of the defendant Valley Sausage, and second, the negligence of Suhrmann would not be the sole cause of the damage to plaintiffs and could not be an intervening cause, because, as found by the jury, the defendants knew that he was going to smoke the mettwurst without doing anything that would kill trichina. The jury found that plaintiffs' trichinosis was not due to circumstances beyond defendants' control.

By requested instruction No. 2, defendants sought to have the court advise the jury of the statutes of the

State of Utah and then to instruct the jury that if it found plaintiffs purchased the sausage from defendant Suhrmann and did not expressly or by implication make known to the defendant Valley Sausage that the mettwurst was to be eaten in a raw, uncooked or unprocessed condition, they should find in favor of the defendant Valley Sausage. Everyone knew that mettwurst would not be cooked by the consumer. It is a product which is ready for consumption upon sale. The jury found that Valley Sausage knew that Suhrmann would not process the mettwurst to kill trichina. Hence, defendant Valley Sausage knew that nothing would be done to kill trichina and therefore, so far as this mettwurst was concerned, it was ready for human consumption. Nothing was to be done to eliminate trichina. Under the findings of the jury defendant Valley Sausage warranted that the mettwurst was fit for consumption because it was then, except for smoking, in condition to be eaten. This requested instruction is clearly inapplicable here.

Defendants' requested instruction No. 13 was properly refused for the reason that it is a mandatory "no cause of action" instruction and only considers the plaintiffs' right to recover on the grounds of negligence. It is not necessary to establish negligence in a warranty case. The jury found the mettwurst was infested with trichina. This would constitute a violation of Section 40-20-5, Utah Code Annotated, 1953, and would be negligence per se. *Skerl v. Willow Creek Coal Company,* 92 Utah 474, 69 P. 2d 502; *Wilcox v. Wunderlich*, 73 Utah

1, 272 P. 207. Hence, this instruction was inapplicable. See *Troieto v. G. H. Hammond Co.,* 110 F. 2d 135; *Leonardi v. Habermann Provision Co.,* 143 Ohio St. 623, 56 N.E. 2d 232; *Kelley v. John R. Daily Co.,* 56 Mont. 63, 181 Pac. 326.

The need to give defendants' requested instruction ‡14 was eliminated by the finding of the jury that the defendant assisted in smoking the mettwurst through their agent Hoffman and by the finding that defendants knew there would be no further processing by Suhrmann to kill trichina.

Defendants' requested instruction ‡20 was covered by the finding that the defendants knew Suhrmann would not process to kill trichina. Everyone admitted that the mettwurst would be eaten by the consumer without cooking it. This is not like the sale of pork chops or a pork roast. In that situation, a person would expect the meat would be properly cooked. Here, the mettwurst was a spread which was not to be cooked or further processed by the consumer.

Defendant's requested instructions ‡22 and ‡25 are not applicable. They ignore the situation present in the case at bar. Defendants prepared the mettwurst knowing no further steps would be taken to eliminate trichina. It was only to be smoked and so far as the trichina was concerned it was in exactly the same condition as it would be when sold to the consumer. The facts found by the jury rendered these two instructions inapplicable.

None of plaintiff's requested instructions on the

so-called theory of the case was given to the jury. The reason is obvious. The court submitted the facts to the jury and the court applied the law. The authorities submitted by the defendants are not in point.

Defendants' authorities are not helpful.

In *Chili v. Cudahy Brothers Co.,* 267 Mich. 690, 255 N.W. 414, plaintiff sought to recover both on negligence and breach of warranty. He was not permitted to recover on either. He did not prove negligence and the court held there was no implied warranty that pork is fit for human consumption in a raw state. The plaintiff purchased 30 pounds of fresh pork butts at defendant's retail store. Great stress was laid on the fact that defendant did not know that the pork was to be used in making raw sausage. It is uncontradicted in the case at bar that the mettwurst would be eaten by the consumer without cooking it. Defendants knew that no steps had been taken to eliminate trichina and they knew that nothing further would be done after the product left their hands to eliminate trichina. Their agent assisted in the smoking. This case widely differs from the Chili case where the pork sold was such that it would be cooked before eating, while here it would be eaten in the condition it was in when delivered by the retailer. Defendants knew what this condition would be.

Defendants refer to the case of *Dressler v. Merkel, Inc.,* 284 N.Y. Supp. 697 (affirmed on appeal, 4 N.E. 2d 744) as being directly in point. Here again defendants

are stretching things considerably. In that case the defendant was a wholesale dealer in pork products. It sold pork shoulders and back fat to one Ehring who operated a butcher shop. He in turn made this into mettwurst, which was smoked but not cooked. There was no finding in that case or any suggestion that defendant knew what was to be done with the pork products it sold to the retailer. In the case at bar, we have the situation where defendants made the mettwurst up to the point of smoking. Everything was done by them except that process in getting this product ready for human consumption. Defendants participated and supervised this last step through their agent Hoffman. Smoking only changes the flavor and these defendants knew that so far as elimination of trichina was concerned the mettwurst was ready for human consumption.

In *Eisenbach v. Gimbel Brothers,* 281 N.Y. 474, 24 N.E. 2d 131, plaintiff ate pork tenderloin at defendant's restaurant. The suit was against the defendant restaurant and it impleaded its vendor, a wholesaler. This wholesaler impleaded its vendor, a packer. The verdict was against the defendant and the court instructed that if the verdict was against the defendant restaurant, then the defendant restaurant and its vendor were in turn entitled to judgments in their favor. The jury found that the chef at the restaurant had improperly cooked the pork. The case at bar is entirely different because there was to be no cooking of this mettwurst. There is no question here of improper cooking. The basis of the court's

holding that the defendant restaurant was not entitled to judgment was that such recovery would not be permitted upon the principle that a party cannot recover for a loss that he could have averted by reasonable care. In the case at bar defendants knew that Suhrmann would not cook the mettwurst and hence failure to cook would not be an intervening cause. Also in that case the one defendant was precluded from recovery because of its own contributory negligence and here plaintiffs seek judgment against all defendants and contributory negligence of one defendant will not bar judgment against him or the other defendants so far as plaintiff is concerned.

Defendants say that since an inspection for trichina or a test for their presence is unknown, failure to make the same is not negligence. There never has been any claim by plaintiffs that this was the negligence relied upon. The sale of trichina infested pork constituted a violation of the Utah Statutes and is hence negligence per se without more. Also, a warranty is hereby involved which again necessitates no negligence.

Defendants contend that the warranty to be implied is a warranty that the food will be fit for human consumption when processed or used in the customary and proper manner. We have no quarrel with this rule. In the first place, the mettwurst was to be eaten without further cooking. No one could anticipate that mettwurst would be cooked. The important thing is that defendants when they prepared and sold this mettwurst

knew that it must then be fit for human consumption with the exception of smoking. They warranted that it was in such condition.

Where a special verdict is submitted to a jury, it is not customary for the trial court to instruct the jury as though a general verdict would be returned. It may well be that had a general verdict been submitted, instructions something like those requested by defendants would have to be given, but here the facts were found by the jury and the law was applied by the court thus eliminating the necessity of an explanation to the jury of the law.

We believe the court followed both the language and the spirit of Rule 49, Utah Rules of Civil Procedure in submitting this case to the jury. If counsel had desired any further issues submitted to the jury, it was encumbant upon him to frame such and request it. He made no such request. Rule 49 in such event provides as follows:

> "* * * If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."

POINT III.

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANTS' MOTION FOR A DIRECTED VERDICT.

The basis of defendant's argument under this point is that there was no evidence that any act or omission to act by defendants proximately caused plaintiffs to contract trichinosis. This in turn is based upon the proposition that the negligence of Suhrmann was an intervening act which was the sole cause of plaintiffs' illness.

The findings of the jury completely refute this argument. Defendants placed in the channels of commerce mettwurst containing trichina, knowing that Suhrmann would do nothing to kill same and knowing the consumer would not cook the product. Also their agent participated in and supervised the smoking process performed by Suhrmann. Under this latter situation if Suhrmann was negligent so were defendants through their agent and the act of their agent could not be an intervening cause.

The conduct of Suhrmann in not processing the mettwurst to kill trichina was foreseeable. The jury found that defendants knew Suhrmann would not so process it. Under the law this prevented such conduct from being an intervening cause. In Prosser on Torts (2nd Ed.) 268, the rule is stated as follows:

> "If the intervening cause is one which in ordinary human experience is reasonably to be anticipated, or one which the defendant has reason to anticipate under the particular circumstances, he may be negligent because he has failed to guard against it . . .
>
> Obviously the defendant cannot be relieved from liability by the fact that the risk, or part

> of the risk, to which he has subjected the plaintiff has come to pass. Foreseeable intervening forces are within the scope of the original risk, and hence of the defendant's negligence. The courts are quite generally agreed that such intervening causes will not supercede his responsibility."

The act of defendants in placing the trichina infested mettwurst in channels of commerce did not come to rest until eaten by plaintiffs. The affect of that act was a continuing one. The act of defendants and Suhrmann concurred to cause the illness of plaintiffs.

As stated in *Ehalt v. McCarthy,* 104 Utah 110, 138 P. 2d 639 (1943).

> "The conduct of Babcock and Ehalt — and the latter when he assumed Babcock's position by the understanding between them also assumed his duties if in fact he did not have an independent duty to watch the gauge — in neglecting to attend to the water in the boiler was simply a continuation of the conduct of the predecessor crew. It was an added and continued negligence of the same type and not an independent nor an intervening cause. The whole conduct of predecessor and successor crews was of a piece. An independent intervening agent such as to break the causal connection between right and wrong according to Bohlen on Torts, page 29, must be (1) independent, self created, not itself the product of the wrongful act; (2) it must intervene; (3) "It must divert and not merely hasten natural effect of the wrong."

This Court then quoted Judge Sanborn in *Union Pac. R. Co. v. Callagan,* 56 Fed. 988 as follows:

> "The independent intervening cause that will prevent a recovery on account of the act or omission of a wrongdoer must be a cause which interrupts the natural sequence of events, turns aside their course, prevents the natural and probable result of the original act or omission, and produces a different result, that could not have been reasonably anticipated. The concurrent or succeeding negligence of a fellow servant or a third person which does not break the sequence of events is not such a cause, and constitutes no defense for the original wrongdoer, although, in the absence of the concurrent or succeeding negligence, the accident would not have happened."

Jordan v. Coca Cola Co., 117 Ut. 578, 218 P. 2d 660 (1950) is not remotely analagous to the case at bar. That case involved drinking from a bottle of Coca Cola containing flies and other impurities. Plaintiff obtained the bottle from an automatic dispensing machine. He relied upon the doctrine of res ipsa loquitur which is not involved in the case at bar. The court refused to apply this doctrine because the cap of the bottle could be removed and replaced without detection and it was not shown there had been no opportunity to do so. In fact, the court held, it was shown there were numerous opportunities to tamper with the bottle.

Under the foregoing authorities we submit the conduct of Suhrmann was neither the sole proximate cause of plaintiff's illness nor an intervening cause. Defendants' act was a proximate cause of that illness.

Under the facts of the case plaintiffs were entitled to recover upon the ground defendants violated Sections 4-20-5 and 8, Utah Code Annotated, 1953. *Donaldson v.*

Great Atlantic & Pacific Tea Co., 186 Ga. 870, 199 S.E. 213, 128 A.L.R. 456; annotations 128 A.L.R. 464 and 28 A.L.R. 1384; *Troietto v. G. H. Hammond Co.,* 110 F. 2d 135; *Leonardi v. Habermann Provision Co.,* 143 Ohio St. 623, 56 N.E. 2d 232; *Kelly v. John R. Daily Co.,* 56 Mont. 63, 181 Pac. 326.

Also plaintiffs were entitled to recover on the ground of breach warranty. *Walters v. United Grocery Co.,* 51 Utah 565, 172 Pac. 473; *Decker & Sons v. Capps,* 139 Tex. 609, 164 S.W. 2d 828, 142 A.L.R. 1479; *Weideman v. Keller,* 171 Ill. 93, 49 N.E. 210; *McSpedin v. Kunz,* 271 N.Y. 131, 2 N.E. 2d 513, 105 A.L.R. 1497; *Greco v. Kresge Co.,* 277 N.Y. 26, 12 N.E. 2d 557, 115 A.L.R. 1020; *Charles v. Hartloff,* 136 Kan. 823, 18 P. 2d 199; *Swengil v. F & E Wholesale Grocery,* 147 Kan. 555, 77 P. 2d 930.

POINT IV.

THE DENIAL OF DEFENDANTS' MOTION TO DISMISS THE CROSS-COMPLAINT OF SUHRMANN AND SUBMITTING THE ISSUES THEREIN TO THE JURY IN NO WAY AFFECTS THE JUDGMENT OF PLAINTIFFS AGAINST DEFENDANTS.

The issues of this case were presented to the jury on interrogatories contained in a special verdict. Certain of the interrogatories related to the issues between plaintiffs and defendants, others related to the issues between defendant Jordan Meat, defendant Valley Sausage on one side and defendant Suhrmann on the other.

To have submitted these latter issues could not have been error, prejudicial or otherwise. The defendants do not point out in what particular there was any prejudice to them. No confusion could have resulted because the interrogatories are clear, simple and concise. They separate the issues between the various parties.

Defendants cite the answer to Interrogatory No. 9 as showing confusion. The jury could have found, and did, that while defendant Suhrmann did lose business there was no satisfactory proof as to the amount.

We submit that permitting the jury to answer questions concerning the rights of Suhrmann could not possibly affect the answers made to the interrogatories relating to the rights of plaintiffs.

CONCLUSION

The jury found all issues in favor of plaintiffs. Those findings are supported by the evidence and the findings in turn support the judgment. The verdict accomplishes justice between the parties and the judgment should be affirmed.

Respectfully submitted,

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