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IN THE SUPREME COURT OF THE STATE OF IDAHO

MELINDA DEITER and JOSEPH DEITER,
individually, and as parents and natural
guardians of MELINDA ROBERTS and
GIDEON DEITER, minors,

Plaintiffs/Appellants,

v.

DONALD COONS, SHARON COONS, and
PENNY COONS d/b/a DON'S MEATS,
PATTY A. ANDERSON,

Defendants/Respondents.

Case Number: 42634-2014 District Court Number: CV 2012-210

APPELLANTS' REPLY BRIEF

On Appeal from the District Court of the Third Judicial District
of the State of Idaho, in and for the County of Gem,
the Honorable Juneal Kerrick, District Judge, Presiding

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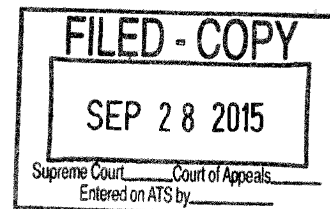

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INTRODUCTION

Respondents both failed to address the central issue in this case: the Federal Meat Inspection Act ("FMIA") establishes the standard of care for meat sales and production in Idaho. Patty Anderson and Don's Meats prepared and sold adulterated meat in violation of the Federal Meat Inspection Act, breaching their duty of care, and severely sickening the Plaintiffs.

ARGUMENT

I. APPELLANTS' NEGLIGENCE CLAIMS WERE PLED APPROPRIATELY.

Respondent Don's Meats repeatedly suggests Appellants' failure to plead negligence per se separately is somehow dispositive. This issue was appropriately handled at the trial level. This appeal relates to Appellants' negligence cause of action.[1]

Idaho law is crystal clear: negligence per se is not a distinct cause of action from negligence. There is no requirement to distinctly plead negligence per se, and Defendants have cited no authority purporting to require as much. "Negligence per se is simply one manner of proving a common law negligence claim." *Steed v. Grand Teton Council of the Boy Scouts of Am., Inc.,* 144 Idaho 848, 853, 172 P.3d 1123, 1128 (2007), (citing *Ahles v. Tabor*, 136 Idaho 393, 34 P.3d 1076 (2001)). In Idaho, "a party is not required to specifically plead negligence per se in their complaint when alleging a cause of action for ordinary negligence." *Obendorf v. Terra Hug Spray Co.,* 145 Idaho 892, 898-99, 188 P.3d 834, 840-41 (2008).

[1] Respondent Don's Meats incorrectly suggests "the Deiters are not appealing the grant of summary judgment on the following claims: (1) negligence..." (Respondents Don's Meats Opening Brief at 11).

Moreover, "in Idaho, it is well established that statutes and administrative regulations may define the applicable standard of care owed, and that violations of such statutes and regulations may constitute negligence *per se.*" *Sanchez* v. *Galey,* 112 Idaho 609, 617, 733 P.2d 1234, 1242 (1986). The trial court specifically addressed the applicability of the Federal Meat Inspection Act (FMIA) as determinative of the standard of care owed under Appellants' negligence claim. Though the lower court incorrectly failed to apply the FMIA's requirements as the standard of care, it properly declined to require a separate pleading for negligence per se.

II. PATTY ANDERSON CONTRACTED TO SELL MEAT, NOT A LIVE STEER, SUBJECTING HER TO THE FMIA'S REQUIREMENTS.

The core of Respondent Patty Anderson's argument on appeal is that, because the steer was alive at the time the contract was signed, none of the provisions of the Federal Meat Inspection Act apply to her actions. Specifically, she argues "the subject live steer was sold to the Deiters and Kirks at the time the contracts were signed by the parties and the deposit monies were provided to Patty Anderson." Her analysis reflects a fundamental misunderstanding of contract law.

The contract between Patty Anderson and Joseph Deiter, drafted by Ms. Anderson, reads as follows:

> This is a contract iniated [*sic*] on Aug. 14, 2010
>
> Between Patty A. Anderson and Joseph and Melinda Deiter of 1935 N Daulby St. Meridian, ID.
>
> A deposit of $100.00 (check #1178) has been received by Patty A. Anderson for ½ of a beef in (carcass weight). Once the beef has been killed and delivered to Don's Meat in Emmett, ID. the carcass weight will be known and Sharon Coons (owner of Don's Meat) will tell us that weight is. At that time Joseph and Melinda Deiter will pay me (Patty Anderson) the amount of $2.25 lb for ½ the beef. When

> the meat has been cut + wrapped by Don's Meat Joseph and Melinda Deiter will pay Sharon Coons .45 ¢ lb for that service and will pick up their half of the beef.

(R. p. 61).

This is a bilateral contract. "A bilateral contract consists of mutual promises, made in exchange for each other by each of the two contracting parties... In a bilateral contract both parties are promisors and both parties are promisees; and the legal effect of such a contract is that there are mutual rights and mutual duties." *Gen. Motors Acceptance Corp. v. Turner Ins. Agency, Inc.*, 96 Idaho 691, 695, 535 P.2d 664, 668 (1975), *citing* 1 Corbin on Contracts 24, s 21 (rev. ed. 1963).

Patty Anderson's promise or obligation under the Deiter contract was not to transfer a live steer to Joseph and Melinda Deiter. Instead, she obligated herself to have the animal "killed and delivered to Don's Meat," who would be paid separately for their cut and wrap service. Though the Deiters had given Ms. Anderson a $100.00 deposit, the contract was not yet performed by Ms. Anderson at the time Joseph Deiter signed on the line. The remainder was not due upon delivery of a living, breathing steer; the $2.25 per pound in carcass weight was due upon the Deiters' receipt of meat under the contract.[2] Patty Anderson paid the kill fee out of her own pocket. Joseph Deiter purchased *meat* from Patty Anderson, not a *live animal.*

---

[2] Though not entitled to any level of judicial deference, even by Patty Anderson's source's own admission, if a person is "selling the animal when live; by the letter of the law, you should charge by the live weight." (Respondent Patty Anderson's Brief at 13, *citing* Gwin, Lauren and Jim Postlewait, Frequently asked questions about using custom-exempt slaughter and processing facilities in Oregon for beef, pork, lamb and goat, Oregon State University Extension Service (2009): beefcattle.ans.oregonstate.edu/html/publications/documents/BEEF006-FAQ_001.pdf). No affidavit or opinion is offered to authenticate such an article. It is not permissible to shirk the boundaries of the FMIA because an unverified individual in Oregon thinks it is "not practical" to weigh the animal before selling it.

To analogize, consider a situation where a buyer enters into a contract with a builder for a house, and offers a deposit as an assurance that the buyer will pay the full amount. Simply because the contract is entered into while the house is not yet built does not mean the buyer purchased timber and other raw materials rather than a completed home.

Similarly, the contract between the Kirks reads:

> This contract commencing on 8-17-10 between Patty A. Anderson and Carolyn Kirk is for the purchase of ½ of a angus beef.
>
> Received check # 2549 in the amount of $100.00 as deposit on beef.
>
> I agree to pay the kill fee to the mobile butcher. He will take the beef to Don's Meat in Emmett, ID. Don's Meat will determine the carcass weight. Don's Meat will notify both Carolyn and me of the carcass weight. When this is determined Carolyn Kirk agrees to mail me Patty Anderson the balance at $2.25 lb (carcass) weight). Don's Meat will notify Carolyn Kirk when the meat is ready to be picked up. Carolyn Kirk will pay Don's Meat .45 ¢ lb. for cutting and wrapping the beef.
>
> ...
>
> Thank you. I'm sure you will enjoy your meat. Keep our phone number and contact us when you want more beef.

(R. p. 63).

The record contains no evidence of any cooperation between the Deiters and the Kirks regarding what to do with their live steer—even merely discussing logistics about how to slaughter and butcher it. There is no evidence because the contracts were for sales of meat, not a live animal.

Patty Anderson insists that she "hired Janak, Inc., to slaughter the animal on behalf of the Deiters and Kirks, and to deliver the carcass to Don's Meats for the Deiters and the Kirks," (Brief of Respondent Patty Anderson at 17), and that she "told Janak, Inc. of the prior sale of the live

steer to the Deiters and Kirks. (Id. at 8). This is contrary to Donald Janak's own affidavit, which states Janak, Inc. "had no knowledge as to whether Anderson had sold the beef to anyone" and "had no way of knowing that the beef it was asked to slaughter was for anyone other than Patty Anderson." (R. p. 94). As such, when Janak delivered the carcass to Don's Meats at the behest of Ms. Anderson, he tagged it with her name as the owner. (R. p. 94).

Finally, after the animal had been slaughtered and butchered, Anderson kept a whole box of meat for herself—further evidence that she sold meat, not a live animal. (Aug. R. Aff. of Stanley J. Tharp, April 22, 2013, Exh. D).

As a matter of law, Patty Anderson's contractual obligation to provide "half a beef," measured in carcass weight, killed and delivered to a meat processor constitutes a sale of meat, not of an animal. Because Patty Anderson sold meat, her sale triggered the FMIA's provisions. Appellants' expert Kevin Elfering's report offers unrefuted information about just how the meat likely became adulterated before it was transferred to Don's Meats by Janak, Inc. (Aug. R. Aff. of Kevin Elfering). This adulteration occurred long before Patty Anderson had completed her contractual duty to have the steer killed and delivered to Don's Meats. Only *after* the carcass was tainted with fecal matter and *E. coli* O157:H7 could Patty Anderson collect her $2.25 per pound based on the adulterated carcass's weight.

III. <u>DON'S MEATS EXCEEDED THE SCOPE OF THE FMIA'S CUSTOM EXEMPTION</u>

Don's Meats argues it did not violate the Federal Meat Inspection Act because it is entirely "exempt" from regulatory compliance. Don's Meats also takes issue with Appellants' citation of

21 U.S.C. § 661, claiming the provision was not raised below. Don's Meats violations of the FMIA were thoroughly briefed below. Don's Meat acted outside any custom exemption authorized by the FMIA. By violating the FMIA, Don's Meats breached its duty to Appellants.

A. The Deiters do not raise the FMIA's application to Idaho for the first time on appeal.

Don's Meats argues that the Deiters rely on 21 U.S.C. § 661 for the first time on appeal. (Respondent Don's Meats Opening Brief at 12, 19). Section 661 outlines mandatory state implementation of the FMIA or equal standards. The Deiters cited the entire Federal Meat Inspection Act, 21 U.S.C. §§ 601-695, in response to Don's Meat's Motion for Summary Judgment. Don's Meats did not contend the FMIA did not apply in Idaho at the district court, leaving no reason to expound upon the implications of Section 661.

In contrast to Don's Meats, Patty Anderson contemporaneously argued her conduct was not under the purview of the FMIA because it was not "in commerce." Before the trial court, Appellants cited specifically to 21 U.S.C. § 661 in their motion for reconsideration of the grant of summary judgment to Patty Anderson. (R. p. 577). Arguments made in a motion for reconsideration are considered "within the scope of the issues raised by the pleadings" for purposes of an appeal. *Nelson v. Big Lost River Irrigation Dist.,* 148 Idaho 157, 160, 219 P.3d 804, 807 (2009).

Though Don's Meats did not raise an interstate commerce issue, it was the basis for the District Court's ruling (R. p. 603-605), and becomes necessary to address on appeal, both specifically and as more generally as the means by which the FMIA applies to states. The larger

issue of Respondents' negligent conduct in the sale and preparation of meat is hardly a new issue, and was extensively discussed at oral argument and in the pleadings.

B. The FMIA's non-exempt provisions applied to Don's Meats actions.

Despite the inescapable conclusion that the federal regulatory framework applies even to purely intrastate transactions in Idaho, Don's Meats also insists it was "exempt" from compliance with the FMIA. (Respondent Don's Meats Opening Brief at 24). The custom exemption is a narrowly-carved relief from inspection allowing processors to slaughter and/or prepare meat for those who raise the animal.[3]

First and foremost, the FMIA's custom exemption does not relieve compliance with *any* adulteration or misbranding provisions:

> **(d) Adulteration and misbranding provisions applicable to inspection-free articles**
> The adulteration and misbranding provisions of this subchapter, other than the requirement of the inspection legend, shall apply to articles which are exempted from inspection or not required to be inspected under this section.

21 U.S.C. § 623(d). Don's Meats receipt, further preparation, and sale of the meat in question—which, according to Appellants' experts was already adulterated—violates adulteration and

[3] Respondent Don's Meats cites to the same Oregon State University Service on Custom-Exempt Slaughter Anderson does. Regardless, Don's Meats violated the very article it cited, by giving meat back to Patty Anderson from the slaughtered animal they claimed was clearly owned by the Respondents and the Kirks.

misbranding provisions from which Don's Meats cannot claim exemption. *See* 21 U.S.C. § 61 0 (a, c-d).[4] It is unlawful to:

> sell, transport, offer for sale or transportation, or receive for transportation, in commerce, (1) any such articles which (A) are capable of use as human food and (B) are adulterated or misbranded at the time of such sale, transportation, offer for sale or transportation, or receipt for transportation; or (2) any articles required to be inspected under this subchapter unless they have been so inspected and passed...

21 U.S.C. § 610(b). Don's Meats argues it did nothing "in commerce," and therefore did not violate any provisions in its processing and packaging of the meat. But "commerce" here—by virtue of the Wholesome Meat Act's application of the Federal Meat Inspection Act to states like Idaho—refers also to wholly intrastate conduct.

Don's Meat was also operating outside the FMIA's custom exemption by releasing meat from a private owner to the general public without the requisite inspections. Don's Meats persists that it "did not prepare any such articles for commerce," nor did it "sell, transport or offer for sale or transportation in commerce any such articles (*i.e.*, meat)." (Respondent Don's Meats Opening Brief at 21). Don's Meats cannot plausibly argue that it did not prepare meat for commerce, especially after charging Joseph and Melinda Deiter a fee for its processing of Patty Anderson's carcass.

Don's Meats attempt to mold their conduct into FMIA-compliance is irreconcilable with the belated assertion that Patty Anderson was "clearly" not the owner of the carcass delivered to

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[4] To the extent Don's Meats may attempt to disagree with Appellants' experts, they have failed to produce expert testimony refuting those reports. Under the summary judgment standard, these facts must be taken in the light most favorable to the Deiters as non-movants.

Don's Meats. (Respondent Don's Meats Opening Brief at 22). Don Janak tagged the carcass with Patty Anderson's name. (R. p. 94). Don's Meats retained and delivered 1 box of meat to Patty Anderson from the carcass both Respondents argue belonged to the Kirks and Deiters. (Aug. R. Aff. of Stanley J. Tharp, April 22, 2013, Exh. D).

Don's Meats suggests that the third of three custom exemptions applies here. In their words "the person who raised the steer may deliver the carcass to the custom preparer for preparation of the meat for use exclusively by the owner." (Respondent Don's Meats Opening Brief at 22). This, they suggest, is what happened here: "Anderson's granddaughter, who raised the steer, had it slaughtered by Defendant Don Janak and Delivered to Don's Meats, which prepared the meat for the exclusive use of the owners of the steer, the Deiters and the Kirks." (Respondent Don's Meats Opening Brief at 22). Even assuming those facts were true, that is *not* what the third clause of the custom exemption reads.

Instead, the Act's provisions (except those relating to adulteration and misbranding) shall not apply to: "**the custom preparation by any** person, **firm** or corporation **of carcasses**, parts thereof, meat or meat food products, **derived from the slaughter by any person of cattle, sheep, swine, or goats of his own raising... delivered by the owner thereof for such custom preparation**..." 21 U.S.C. § 623(a). In order for Don's Meats' actions to be custom exempt under this clause, the slaughterer must be the person who raised the animal in question. Danielle Bryant did not slaughter the steer.

Don's Meats accepted a mobile slaughtered carcass from Don Janak it knew belonged to Patty Anderson and processed the meat, releasing it to the Deiters, Kirks, and Anderson, effectively exiling itself from the custom exemption's safe harbor. There are simply too many links in the chain. Despite Don's Meats attempt to fashion facts in its favor by arguing the Deiters owned the live steer, they cannot meet the summary judgment burden.

IV. APPELLANTS NEGLIGENCE PER SE CLAIM ARE NOT AN ATTEMPTED PRIVATE ACTION UNDER THE FMIA

Respondents both contend Appellants claim a private right of action under the FMIA. They have never, and do not now. Instead of bringing a novel claim purporting to be a private cause of action under the FMIA, Appellants instead argue that the FMIA sets the appropriate standard of care for their state law negligence claims against Patty Anderson and Don's Meats.

Respondents apparently argue that, because the FMIA does not create its own statutory cause of action, Appellants cannot recover for violations of the FMIA on a negligence per se theory properly supported by proximate causation and damages. Both cases cited by Don's Meats, *Pacific Trading Co. v. Wilson & Co.*, 547 F.2d 367 (7th Cir. 1976), and *Mario's Butcher Shop and Food Center, Inc. v. Armour and Co.,* 574 F.Supp. 653 (N.D. Ill. 1983), were suits plaintiffs attempted to bring under the FMIA *itself*, without alleging or arguing negligence per se, and do not apply here. Breach of a duty of care by violating federal regulations can result in actionable negligence per se in Idaho. *See Sanchez* v. *Galey,* 112 Idaho 609 (1986). Respondents simply to do not seek any specific relief provided by the FMIA. This is a negligence claim for which the FMIA should replace the standard of care and breach elements.

V. PROXIMATE CAUSE IS SUPPORTED BY THE EVIDENCE

Don's Meats argues the Deiters have failed to establish proximate causation and summary judgement is appropriate. Summary judgment is appropriate only if the affidavits, depositions, admissions and other evidence in the record demonstrate that there are no genuine issues of material fact, and that the movant is entitled to judgment as a matter of law. I.R.C.P. 56(c); *Loomis v. City of Hailey,* 119 Idaho 434, 436, 807 P.2d 1272, 1274 (1991).

The legal responsibilities of Don's Meats and Patty Anderson are clear under the FMIA. The rules were not followed.[5] Appellants have provided admissible evidence via two septate expert affidavits, linking the meat in question to the illnesses.

Dr. Medus stated:

> In my opinion, the contaminated beef purchased from Patty A. Anderson and Don's Wholesale Meats was the initial source of illness in the household. Since the family consumed the contaminated beef repeatedly over a one week time period, all of the illnesses can be explained by ground beef consumption on multiple days.

(Aug. R. Aff. of Carlota Medus, Ex. B at 3-4).

Dr. Elfering stated:

> In reviewing the microbiological data and the summation of Dr. Carlota Medus, the Deiter family became ill with E-coli O157 :H7 from the consumption of the beef in question, slaughtered by Janak and Hicks, and sold to them by Patty Anderson.

---

[5] Respondent Don's Meats discusses at length its sanitation procedures and notes it has never been issued a USDA citation. (Respondent Don's Meats Opening Brief at 6). This is totally irrelevant to whether the meat purchased by the Deiters was adulterated with *E. coli* O157:H7 and does not excuse Don's Meats instant non-compliance with FMIA regulations.

(Aug R. Aff. of Kevin Elfering, Ex. B at 8 and 9.) Respondents have not rebutted this with a single piece of admissible evidence.

Don's Meats suggests the Deiters "admit the meat was not contaminated with E. coli." (Respondent Don's Meats Opening Brief at 2). That is grossly inaccurate. The presence of Shiga toxin 1 and 2 in the broth obtained from the meat establishes the portion of meat harbored *E. coli* somewhere within the larger sample. Finding Shiga toxin 1 and 2 is like finding a fingerprint—by finding a fingerprint, it follows that a human hand touched the surface. If Shiga toxins are detected, Shiga toxin producing *E. coli* necessarily produced them. Arguing that because no bacterium were isolated, no bacteria were present in the sample is like arguing despite finding a fingerprint, humans had never been there.

The only evidence produced implicates the adulterated, uninspected meat Don's Meats admits to processing and selling caused the severe illnesses of the Deiter family. Accordingly, at a minimum, this question would be appropriate for a fact-finder to determine, and not disposed of on summary judgment.

VI. <u>ATTORNEY'S FEES</u>

This appeal was brought with the sound backing of the law and the record. It is certainly not frivolous or unreasonable. Accordingly, no attorney's fees or costs for the Respondents are appropriate under the law.

CONCLUSION

Ms. Anderson and Don's Meats violated the FMIA in their sale and processing of uninspected, adulterated meat. These violations constitute actionable negligence under Idaho law. The Deiters respectfully request this court reverse the grants of summary judgment to Respondents and remand the case for trial on the merits.

Dated: September 24, 2015

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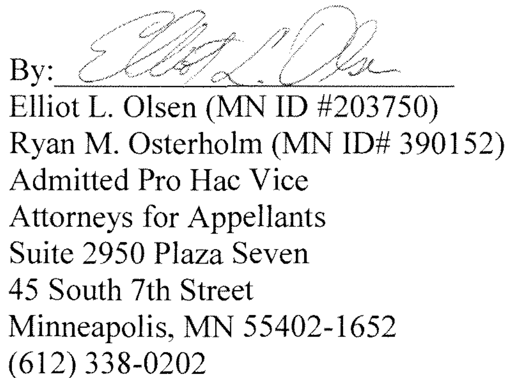

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