

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PAUL M. MARIN, Individually and as next friend of  
MATTHEW P. MARIN, a minor,

UNPUBLISHED  
March 3, 2000

Plaintiff-Appellant,

v

No. 212208  
Court of Claims  
LC No. 97-716661-CM

MICHIGAN STATE UNIVERSITY,

Defendant-Appellee.

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Before: Murphy, P.J., and Hood and Neff, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant summary disposition pursuant to MCR 2.116(C)(10) on plaintiff's claims for negligence and breach of implied warranty. We reverse.

Plaintiff and his son Matthew attended the Green and White football game at defendant's Spartan Stadium on April 20, 1996, during which they purchased hot dogs and sodas. Approximately forty-eight hours later, they each became sick as a result of infection from the bacteria *Yersinia Enterocolitica*. Plaintiff alleged that the hot dogs had been improperly handled or cooked and were the source of the contamination. It was defendant's practice to invite local charitable organizations to operate the concession stands at the stadium as fundraisers for the charities. The concession stand where plaintiff purchased the hot dogs was operated by a volunteer group of students and parents from the graduating class of a local high school.

The trial court granted defendant summary disposition pursuant to MCR 2.116(C)(10), finding that plaintiff had not shown a genuine issue of fact as to whether the hot dogs purchased from defendant were the cause of the bacterial infection. The trial court denied defendant's motion for summary disposition pursuant to MCR 2.116(C)(7), on the basis of governmental immunity, finding that defendant had not submitted sufficient information for the court to determine whether the concession operation was a proprietary function.

Plaintiff argues that the trial court erred in granting summary disposition because there was a genuine issue of fact regarding causation. This Court reviews a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In ruling on a motion for summary disposition brought under MCR 2.116(C)(10), the trial court must consider the pleadings, affidavits, depositions, and other documentary evidence submitted by the parties in a light most favorable to the party opposing the motion. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

A party opposing a motion for summary disposition must present more than conjecture and speculation to meet its burden of providing evidentiary proof establishing a genuine issue of material fact. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 192-193; 540 NW2d 297 (1995). “A conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference.” *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). Where the proffered evidentiary proofs fail to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999); *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456, n2; 597 NW2d 28 (1999).

Plaintiff alleged two claims against defendant, breach of implied warranty and negligence. To establish a prima facie case of breach of implied warranty, a plaintiff must show that goods were defective when they left the possession of the manufacturer or seller and that the defect caused the plaintiff's injuries. *Jodway v Kennametal, Inc*, 207 Mich App 622, 629; 525 NW2d 883 (1994); *Guaranteed Construction Co v Gold Bond Products*, 153 Mich App 385, 392; 395 NW2d 332 (1986). To establish a prima facie case of negligence, a plaintiff must demonstrate that the defendant's breach of its duty was the proximate cause of the plaintiff's injuries. *Richardson v Michigan Humane Society*, 221 Mich App 526, 528; 561 NW2d 873 (1997).

Defendant argues that plaintiff failed to establish evidence of causation. Defendant submitted documentary evidence to rebut plaintiff's theory that the hot dogs served at Spartan Stadium were the source of the *Yersinia* and to show that plaintiff could not rule out other possible sources of food contamination. Defendant provided the affidavit of a food safety specialist, who stated that *Yersinia* has an incubation period of a few hours to seven days before the onset of illness, and it was “virtually impossible to determine if a particular food is safe or unsafe without laboratory work.”

Defendant provided the answers to discovery requests, in which plaintiff could not recall what food or drink he or Matthew consumed prior to April 19, 1996. Despite plaintiff's contention that the hot dogs were the only food consumed by both plaintiff and Matthew not also consumed by other family members during the incubation period, plaintiff could not specifically account for what Matthew's mother ate or drank for dinner on April 19 or for breakfast on April 20, or what Matthew's mother or sister ate for breakfast or lunch on April 21. Further, both plaintiff and Matthew drank milk, a product linked with other outbreaks of *Yersinia*, from a breakfast buffet on April 20 and April 21. Defendant provided a report by plaintiff's medical expert, which indicated that, although the hot dogs “represent a very real possibility” as the source of the bacteria, Matthew and plaintiff should look at “other foods that could have been involved as they probably did share a number of meals.” Moreover, defendant

submitted evidence that 1906 hot dogs were served at the football game, 286 at the concession booth in question, and yet no other cases of *Yersinia* linked to food served at Spartan Stadium were reported to state public health officials, although such reporting is required.

Nonetheless, there was no evidence linking the *Yersinia* bacteria to the other suggested sources, and plaintiff provided evidence supporting his theory that the hot dogs were the source of the *Yersinia* bacteria, thereby establishing a genuine issue of material fact as to causation. This Court is liberal in finding a genuine issue of material fact. *Marlo Beauty Supply, Inc v Farmers Ins Group*, 227 Mich App 309, 320; 575 NW2d 324 (1998). An opposing party need not rebut every possible theory which the evidence could support. *Libralter, supra* at 487-488. If there is evidence pointing to one theory of causation, supported by a logical sequence of cause and effect, it is immaterial that another plausible theory exists. *Id.* at 488.

Plaintiff provided the affidavit of his medical expert which opined that there was a common source of the *Yersinia* bacteria in plaintiff and Matthew, and given the severity of Matthew's symptoms, his illness occurred forty-eight to seventy-two hours after ingestion of contaminated food. The affidavit stated that "a hot dog is an ideal vehicle for contamination by the *Yersinia* bacteria." The expert concluded that there was "a reasonable probability that the [*Yersinia*] bacteria may be attributed to the ingestion of the hot dog."

Plaintiff presented evidence that defendant's handling of the hot dogs sold on April 20, 1996, and the vendor's cooking of those hot dogs, may not have met defendant's own standards for preventing food-borne illness. Defendant's responses to interrogatories indicated that hot dogs received for upcoming events are refrigerated; if the hot dogs are not used for upcoming events, they are frozen. Frozen hot dogs are thawed in coolers and are not refrozen. However, the refrigeration logs maintained by defendant, dated March 1996 and April 1996, showed that throughout the refrigeration period the temperature of the hot dogs sold by defendant ranged, at various points, from twenty-six to forty-one degrees.

Further, plaintiff provided defendant's food service sanitation requirements and its Concession Stand Operating Guidebook, which details instructions for handling and cooking hot dogs, including that hot dogs be cooked in an electric steam kettle to a specified internal temperature, checked by a thermometer on the wall next to the cooker. Plaintiff provided his affidavit stating that when he purchased the hot dogs from defendant, the vendor removed the hot dog from a grill device, not an electric steam kettle, and that plaintiff did not see any thermometers present in the vendor's stand, contrary to the food safety instructions published in defendant's Guidebook.

Plaintiff's evidence established a genuine issue of material fact regarding the cause of the *Yersinia* contamination. Plaintiff presented more than mere conjecture that the hot dogs sold by defendant were the proximate cause of the illness suffered by plaintiff and his son Matthew.

Reversed.

/s/ William B. Murphy

/s/ Harold Hood

/s/ Janet T .Neff