STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH W. BRAMBLE,

Plaintiff-Appellant,

v

HORMEL FOODS CORPORATION,

Defendant-Appellee.

UNPUBLISHED
January 28, 2000

No. 216526
Calhoun Circuit Court
LC No. 98-000532-NO

Before: Markey, P. J., and Murphy and R. B. Burns*, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order granting summary disposition to defendant pursuant to MCR 2.116(C)(10). This case arises out of a dental injury which occurred when plaintiff bit into a sandwich and fractured his tooth on a "hard object." Plaintiff's claim against defendant requested monetary damages under the theories of negligence, implied warranty of merchantability and implied warranty of fitness for a particular purpose, as well as under the Michigan Consumer Protection Act. We reverse and remand.

We review a trial court's grant of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Terry v Detroit*, 226 Mich App 418, 423; 573 NW2d 348 (1997). MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue of material fact. *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 633; 601 NW2d 160 (1999); *Morris v Allstate Ins Co*, 230 Mich App 361, 364; 584 NW2d 340 (1998), citing *Henderson v State Farm Fire & Casualty Co*, 225 Mich App 703, 708-709; 572 NW2d 216 (1997), rev'd on other grounds 460 Mich 348 (1999).

Plaintiff first claims that the trial court erred in finding that there was insufficient evidence to raise a genuine issue of material fact concerning whether the object which allegedly caused plaintiff's injury was in defendant's product. In a products liability case, recovery is permitted under either a negligence theory or implied warranty theory. *Manzoni v Detroit Coca-Cola Co*, 363 Mich 235, 240-41; 109

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

NW2d 918 (1961). A plaintiff bringing a products liability action under either theory, however, must show that the defendant supplied a defective product and that the defective product caused the injury. *MASB-SEG Property/Casualty Pool, Inc v Metalux*, 231 Mich App 393, 399; 586 NW2d 549 (1998).

In an implied warranty claim, this Court reversed and remanded a directed verdict for a manufacturer of applesauce based solely on the direct testimony of two children that it tasted and smelled bad. *Martel v Duffy-Mott*, 15 Mich App 67, 71-72; 166 NW2d 541 (1969). The Court noted that it is "the business of juries to determine the credibility of witnesses, to sift out conflicting claims, and to decide the disputed issues." *Id.*, 73. Moreover, an implied warranty claim only requires proof of a "breach of the implied warranty that the food is wholesome and fit for human consumption . . . ." *Manzoni, supra* at 241.

Here, plaintiff contends that there was a hard object in the Spam which broke his tooth. If plaintiff's testimony is believed, plaintiff has a viable implied warranty claim under *Manzoni* and *Martel*. Whether plaintiff should be believed, however, is a factual question which is properly reserved for a jury. Moreover, if there is a disputed issue of material fact, summary disposition is inappropriate.

Negligence includes the following elements: (i) the existence of a duty; (ii) a breach of the standard of care; (iii) causation in fact; (iv) legal or proximate causation; and (v) damages. *Theisen v Knake*, 236 Mich App 249, 257; 599 NW2d 777 (1999). To establish a prima facie case of negligence, a plaintiff must present proof on each of these elements. *May v Parke, Davis & Co*, 142 Mich App 404, 411; 370 NW2d 371 (1985). A plaintiff may establish its case by circumstantial and direct evidence. *Auto Club Ins, supra* at 604. Positive direct evidence resulting from an analysis of allegedly contaminated food is not an absolute condition to establishing a prima facie case of negligence. *Savage v Peterson Distributing Co, Inc*, 379 Mich 197, 200; 150 NW2d 804 (1967).

We find that plaintiff has provided evidence to support each element of a prima facie case of negligence. Assuming the veracity of plaintiff's allegations, the presence of a hard object in defendant's product supports plaintiff's claim that defendant breached its duty to provide a safe, unadulterated product, and raises a genuine issue of material fact. Plaintiff produced evidence that he has "no doubt" that the hard object was in the Spam, and that this conclusion is rationally based on his exclusion of the other two components of his sandwich. Whether there actually was a hard object present in defendant's product, and whether the presence of the hard object breached a duty is for a jury to decide.

Causation issues stand or fall based on the credibility of plaintiff's testimony and supporting affidavit. Defendant contends that the specific element of causation is fatal to plaintiff's claims because plaintiff can merely speculate as to the exact cause of his injury. Nevertheless, this Court has held that a plaintiff need not eliminate all possible causes of an accident. *Auto Club Ins Ass'n, supra* [citing *Holloway v General Motors Corp (On Rehearing)*, 403 Mich 614, 621; 271 NW2d 777 (1978)]. In light of plaintiff's testimony and affidavit indicating that defendant's product caused his injury, evidence was introduced which, if believed, establishes the causal link between defendant's product, its defective nature, and plaintiff's undisputed injuries. On the basis of the evidence on the record,

plaintiff's negligence claim is supported by enough evidence to survive a motion for summary disposition. Therefore, summary disposition was inappropriate and reversal is warranted.

Finally, plaintiff argues that defendant should not be permitted to argue that the object which caused plaintiff's injury was in another food item without filing prior notice as required by MCR 2.112(K). MCR 2.112(K)(1) states that MCR 2.112(K) applies to "actions for personal injury . . . to which MCL 600.2957; MSA 27A.2957 and MCL 600.6304; MSA 27A.6304 apply." The first statute, however, addresses the allocation of fault percentages among the various parties and nonparties. MCL 600.2957; MSA 27A.2957. Similarly, the second statute addresses personal injuries involving the fault of more than one individual, whether party or nonparty. MCL 600.6304; MSA 27A.6304. Here, plaintiff is not contending that multiple parties are at fault, or that the trier of fact would have to assign percentages of fault. Rather, the issue is whether defendant is solely at fault for plaintiff's injuries.

Moreover, MCR 2.112(K)(3)(a) states that "[a] party against whom a claim is asserted may give notice of a claim that a nonparty is wholly or partially at fault." In other words, the rule does not state that a defendant must name nonparties who are wholly or partially at fault. To the extent that MCR 2.122(K)(2) prevents the trier of fact from assessing the fault of a nonparty where notice has not been given, this does not apply to a circumstance where only one individual was at fault. Accordingly, plaintiff's reliance on MCR 2.112(K) is misplaced.

Reversed and remanded. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Robert B. Burns