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THIS WEEK'S DECISIONS - SUPERIOR COURT

Products liability

Causation - Food poisoning

Where a pro se plaintiff brought suit claiming to have suffered food poisoning after eating lunch at the defendant's establishment, the defendant is entitled to summary judgment on the plaintiff's claims for negligence and breach of warranty because the plaintiff failed to present sufficient evidence of causation.

"[Plaintiff Gerson] Gallardo arrived at the Wendy's store located at 303 Central Street, in Natick, Massachusetts sometime between 12:00 p.m. and 1:00 p.m., on September 11, 2013 (the 'date of the incident'), in order to purchase lunch. According to Gallardo, he ordered a grilled chicken sandwich, french-fries, and a drink. According to logs maintained by Wendy's, however, none of the three chicken sandwiches prepared between the hours of 11:07 a.m. and 12:15 p.m., match Gallardo's order. ... Regardless of exactly what he ordered, at some point between 12:00 p.m. and 1:00 p.m., Gallardo consumed the food he purchased. He does not contend the food smelled or tasted peculiar or, that it appeared to have been cooked improperly.

"On the date of the incident, the Wendy's store began experiencing electrical problems around the time of Gallardo's visit. According to Wendy's, the electrical problems did not occur until after 12:15 p.m. and, the problems did not affect the operation of the grill or the frontend cash registers. ... Wendy's states receipts were issued for all purchases made during this time period, but that, due to the electrical problems, the store shut down completely between 12:15 p.m. and 1:45 p.m.

"Gallardo disputes Wendy's assertions, but he cites to no record evidence to sup-

port his contentions. He claims the store was already experiencing electrical issues when he arrived, which was before 12:15 p.m. He claims the frontend cash register was not working when he placed his order. According to Gallardo, the cashier was writing orders down on a piece of paper and calculating the money owed by looking at the menu board. He states the cashier never gave him a receipt.

"Gallardo alleges that, on the date of the incident, approximately three hours after eating at Wendy's, he became ill

"Although not binding on this court, *Denaro v. 99 Restaurant, Inc.*, 2002 Mass. App. Div. 195, 2002 WL 31546120 (Mass. App. Div., Sept. 18, 2002) (Coven, J.), is instructive. In that case, the plaintiff-patron brought claims for negligence and breach of warranty against the defendant-restaurant, alleging he had contracted salmonella poisoning from food the restaurant served him. The court entered summary judgment in favor of the restaurant, concluding there was not sufficient evidence of causation.

"According to the court, in a food poisoning case, in the absence of direct evidence, causation can be established through circumstantial evidence sufficient to permit a trier-of-fact to infer food a restaurant served was contaminated. ... 'Expert opinion as to causation, proof that other patrons had contracted salmonella poisoning at the defendant's restaurant, or evidence that the food had an abnormal or unwholesome appearance, taste or odor would have been probative: ... But, the plaintiff offered no such evidence and, the court concluded the plaintiff's confirmed case of salmonella poisoning, the absence

of any other food consumed within twelve hours, and the onset of symptoms immediately after the meal alone were 'insufficient as a matter of law to raise even a reasonable inference in his favor on the question of causation: ... The current case warrants the same outcome.

"Here, there is no direct evidence the food Gallardo purchased from, and consumed at, the Wendy's store contained *CJ Bacteria* and, Gallardo has failed to offer sufficient circumstantial evidence to permit a trier-of-fact to reasonably infer that the food was contaminated. There is no record evidence indicating there was anything abnormal about the taste, smell, or appearance of the food Gallardo consumed. There is no record evidence establishing that other people who ate at the Wendy's store around the same time as Gallardo became infected with *CJ Bacteria*. In fact, when the [Natick Board of Health (BOH)] inspected the Wendy's store in response to Gallardo's complaint, it found no health code violations. Finally, Gallardo offered no expert report or affidavit to support his assertion that the food he ate at the Wendy's store was the cause of his infection and/or illness

"... Here, even assuming a case such as this, which involves an allegation of food poisoning, can be brought under a failure to warn theory, Gallardo's claim fails, because, as explained above, he has not provided sufficient evidence of causation."

Gallardo v. Wendy's Old Fashioned Hamburgers of New York, Inc. (Lawyers Weekly No. 12-113-17) (8 pages) (Inge, J.) (Middlesex Superior Court) Gerson Gallardo, pro se; David S. Katz for the defendant (Civil Action No. MIDCV2014-08276) (Aug. 22, 2017).