

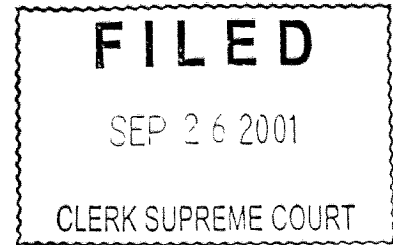
IN THE COURT OF APPEALS OF IOWA

No. 1-512 / 00-0186
Filed September 26, 2001

DONNIE BURGMAIER,
Plaintiff-Appellant,

vs.

KENTUCKY FRIED CHICKEN,
Defendant-Appellee.



Appeal from the Iowa District Court for Polk County, Richard G. Blane, II,
Judge.

Plaintiff appeals from the order in which the trial court granted the defendant's motion for summary judgment on plaintiff's action in which he sought recovery for injuries allegedly sustained when he bit into a chicken breast that contained a bone. **AFFIRMED.**

Donnie Burgmaier, Des Moines, pro se.

Janice M. Thomas of Patterson, Lorentzen, Duffield, Timmons, Irish,
Becker & Ordway, L.L.P., Des Moines, for appellee.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

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PER CURIAM

Donnie Burgmaier appeals from the trial court's order granting Kentucky Fried Chicken's motion for summary judgment on his strict liability and negligence actions for injuries allegedly sustained when he bit into a chicken breast. Burgmaier contends (1) the trial court failed to properly enforce discovery, (2) the court erred in determining no genuine issue of material fact exists, and (3) the court abridged the jury's province when it found he bit into a chicken bone. We affirm.

I. Background Facts and Proceedings. In March of 1999, Donnie Burgmaier and a companion were eating the buffet at a Kentucky Fried Chicken (KFC) restaurant. Burgmaier claims he was biting into the fleshy part of a chicken breast when something lodged into his gum near a tooth, cracking it. He subsequently had his tooth removed.

Burgmaier made a claim with KFC's insurance carrier. In a recorded interview with a claims representative, Burgmaier stated that he bit into the chicken and hit a bone. The insurance carrier denied his claim on the basis it had no liability for the claimed injury.

Burgmaier then filed a pro se petition against KFC, alleging it was negligent and/or strictly liable for the injuries he sustained when he bit into "something" in the chicken breast. He served interrogatories and requests for admissions on the defendant. Defendant objected to much of the discovery and Burgmaier then filed a motion to compel the discovery. The district court denied his motion, finding he failed to comply with the requirement in Iowa Rule of Civil

Procedure 134(3) that he make good faith attempts to resolve the discovery dispute with opposing counsel without intervention of the court. Burgmaier did not file another motion to compel.

Defendant KFC moved for summary judgment. Defendant asserted it was not strictly liable for Burgmaier's injuries under Iowa Code section 613.18 (1999) because it did not manufacture the chicken breast. Defendant also claimed it was not negligent because the bone Burgmaier bit into was not a foreign substance. Burgmaier resisted the motion, claiming there was a dispute as to whether he bit into a bone or a foreign substance. However, Burgmaier did not offer any evidence that he bit into something other than a bone. As a result, the district court concluded Burgmaier bit into a chicken bone. The district court found that defendant was statutorily immune from Burgmaier's strict liability claim because the defendant was merely a retailer of the chicken and not a manufacturer. The court also concluded the defendant was not negligent in serving the chicken because a bone is a natural object found in chicken.

On appeal, Burgmaier claims the court failed to enforce discovery by denying his motion to compel. He believes this adversely impacted his claims. Defendant responds that Burgmaier failed to preserve this issue for appeal. Burgmaier next claims the court erred in determining no genuine issue of material fact exists. He contends that disputing the defendant's version of the facts is enough to put a material fact in issue. Defendant argues Burgmaier provided no evidence as to any material fact in dispute.

II. Scope of Review. We review rulings on motions for summary judgment for errors at law. *Sain v. Cedar Rapids Cmty. Sch. Dist.*, 626 N.W.2d 115, 121 (Iowa 2001). The record before the district court is reviewed to determine whether a genuine issue of material fact existed and whether the district court correctly applied the law. *Id.*

III. Motion to compel. Burgmaier first claims the court failed to enforce discovery by denying his motion to compel. Defendant argues Burgmaier failed to preserve this issue for review. Iowa Rule of Appellate Procedure 6(a) requires a party to specify the “decree, judgment, order or part thereof appealed from.” Burgmaier did not appeal from the court’s ruling on his motion to compel. However, substantial compliance with rule 6(a) is all that is required so long as the notice does not “confuse, mislead, or prejudice the appellee.” *McBride v. City of Sioux City*, 444 N.W.2d 85, 88 (Iowa 1989). “We prefer to dispose of cases on the merits and not on mere technicalities.” *Id.*

Assuming arguendo that Burgmaier substantially complied with rule 6(a) in order to preserve this issue for appeal, he could not succeed on his claim. Iowa Rule of Civil Procedure 134(e) states:

No motion relating to depositions or discovery shall be filed with the clerk or considered by the court unless the motion alleges that counsel for the moving party has made a good faith but unsuccessful attempt to resolve the issues raised by the motion with opposing counsel without intervention of the court.

Burgmaier’s motion to compel made no such allegation. As a result, the district court properly denied his motion. Furthermore, Burgmaier was instructed by the

court how to cure the deficiencies in his motion. He failed to do so. He cannot blame the court for this failure.

IV. Summary Judgment. In ruling on a motion for summary judgment, the court must view the facts in the light most favorable to the party resisting the motion. *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 717 (Iowa 2001). The court must consider every legitimate inference that can be reasonably deduced from the record in favor of the resisting party. *Id.* at 718.

An inference is legitimate if it is rational, reasonable, and otherwise permissible under the governing substantive law. On the other hand, an inference is not legitimate if it is based upon speculation or conjecture. If reasonable minds may differ on the resolution of an issue, a genuine issue of material fact exists.

Id.

Burgmaier claims that because he made the allegation in his petition that he bit into "something" and defendant denied the allegation, a material issue of fact exists. However, under Iowa Rule of Civil Procedure 237, a party may not rely on the mere allegations or denials in their pleadings. Iowa R. Civ. P. 237(e). Instead, their response must set forth specific facts showing there is a genuine issue for trial. *Id.* Failure to do so may result in summary judgment being entered against them. *Id.* Burgmaier did not offer any evidence with his resistance to defendant's motion for summary judgment that he bit into anything other than a chicken bone. Therefore, the district court properly concluded there was no genuine issue of material fact in dispute.

The district court granted defendant summary judgment on Burgmaier's strict liability claim on the basis that defendant was statutorily immune from such

a claim. Iowa Code section 613.18(1)(a) (1999) provides a defendant who does not manufacture a product, but merely sells it, immunity from a strict liability suit that arises from an alleged defect in the design or manufacture of that product. The district court found that Burgmaier failed to prove KFC was a manufacturer of the chicken breast. In reviewing the record before the district court in the light most favorable to Burgmaier, we find the district court properly granted summary judgment on the strict liability claim because defendant was a mere retailer of the chicken.

The district court also found that defendant was not negligent as a matter of law. In doing so, it cited the case of *Brown v. Nebiker*, 229 Iowa 1224, 1234, 296 N.W. 366, 371 (Iowa 1941), in which the Iowa Supreme Court stated, "One who eats . . . the type of meat that bones are natural to, ought to anticipate and be on his guard against the presence of bones, which he knows will be there." Burgmaier admitted in his recorded interview with the insurance company that he knew there were bones in the chicken breast and that he was eating "bone chicken." Therefore, we affirm the district court's grant of summary judgment on Burgmaier's negligence claim.

AFFIRMED.

Vogel and Vaitheswaran, JJ., concur; Sackett, C.J., specially concurs without opinion.