

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JAMES F. FOOTE,

Plaintiff,

v.

JOHN POLK, et al.,

Defendants.

OPINION & ORDER

Case No. 16-cv-641-wmc

The court allowed plaintiff James F. Foote to proceed in this lawsuit against defendants John Polk and Polk Meat Products on state law claims arising out of his biting into a sausage containing a piece of metal. On January 9, 2019, the court issued an opinion and order granting defendants' motion for summary judgment with respect to plaintiff's common law negligence and strict liability claims, and directed plaintiff to show cause as to why summary judgment should not be granted in defendants' favor on his implied warranty of merchantability claim. (Dkt. #66.) Rather than submitting evidence in support of that claim as directed, Foote responded to the court's order with a motion for reconsideration pursuant to Federal Rule of Civil Procedure 59(e). (Dkt. #67.) Since Foote has not responded to the court's order with respect to the implied warranty of merchantability claim, the court enters judgment in defendants' favor on that claim, and for the reasons that follow, the court is denying Foote's motion. Accordingly, the court will enter judgment on the implied warranty of merchantability claim in defendants' favor and close this case.

OPINION

Under Rule 59(e), a court has the opportunity to consider newly discovered material evidence or intervening changes in the controlling law or to correct its own manifest errors of law or fact to avoid unnecessary appellate procedures. *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996); see *Harrington v. City of Chi.*, 433 F.3d 542, 546 (7th Cir. 2006). A “manifest error” occurs when the district court commits a “wholesale disregard, misapplication, or failure to recognize controlling precedent.” *Burritt v. Ditlefsen*, 807 F.3d 239, 253 (7th Cir. 2015) (internal quotations and citations omitted). Rule 59(e) “does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment.” *Moro*, 91 F.3d at 876. Rule 59(e) relief is only available if the movant clearly establishes one of the foregoing grounds for relief. *Harrington*, 433 F.3d at 546 (citing *Romo v. Gulf Stream Coach, Inc.*, 250 F.3d 1119, 1122 n. 3 (7th Cir. 2001)).

Plaintiff has not pointed to any newly discovery evidence or error in law or fact warranting relief. First, plaintiff complains that the court should not have invoked the principle of *res ipsa loquitur* with respect to his negligence and strict liability claims, arguing that he intended that the court deem defendants’ failure to provide evidence about the sensitivity of its metal detectors sufficient to permit a reasonable finding of negligence. Yet defendants did not have the burden to come forward with evidence about the sensitivity level of their metal detectors; plaintiff did, and plaintiff certainly could have gathered evidence related to the efficacy of the metal detectors, but he did not. As such, the court

is not persuaded that plaintiff submitted any evidence of defendants' negligence, and certainly not new evidence warranting relief under Rule 59(e). Furthermore, with respect to his strict liability claim, no evidence of record supported a reasonable finding that the metal was in the sausage when it left defendants' control, and defendants submitted undisputed evidence that prison staff handled the sausages before they reached plaintiff's food tray. (Op. & Order (dkt. #66) at 6-7.)

Plaintiff also argues, along the same line of thought, that the court failed to draw all reasonable inferences in his favor. He claims that it was undisputed that the metal was imbedded inside the sausage, which permits a reasonable inference that it left the manufacturer in that condition. Yet the court accepted that the metal may have been in the sausage when plaintiff received it, but further noted that there were too many intervening steps in which the sausage meat was handled by prison staff between the time it left defendants' control and when plaintiff received it to permit a reasonable finding that the piece of metal was in the sausage when it left defendants' control. While the court construed the evidence of record in plaintiff's favor, plaintiff's role as the non-moving party did not free him from his burden of coming forward with evidence that would permit a reasonable fact-finder to find in his favor on his claims. Accordingly, plaintiff has not identified any manifest error of law or fact, nor has he come forward with newly discovered evidence, and the court is denying his motion.

ORDER

IT IS ORDERED that:

1. Defendants are entitled to judgment in their favor as to plaintiff James Foote's implied warranty of merchantability claim.
2. Plaintiff's motion for reconsideration pursuant to Federal Rule of Civil Procedure 59(e) (dkt. #67) is DENIED.
3. The clerk of court is directed to enter judgment accordingly and close this case.

Entered this 16th day of September, 2019.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge