[Cite as *Parianos v. Bruegger's Bagel Bakery*, 2005-Ohio-113.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84664

KOSTIA PARIANOS, ET AL.	:	
	:	A C C E L E R A T E D
Plaintiffs-Appellants	:	
	:	JOURNAL ENTRY
	:	
vs.	:	and
	:	
	:	OPINION
	:	
BRUEGGER'S BAGEL BAKERY, ET AL.	:	
	:	
	:	
Defendants-Appellees	:	

DATE OF ANNOUNCEMENT OF DECISION:	January 13, 2005
CHARACTER OF PROCEEDING:	Civil appeal from Common Pleas Court Case No. CV-503509
JUDGMENT:	AFFIRMED
DATE OF JOURNALIZATION:	_____

APPEARANCES:

For Plaintiffs-Appellants: (Kostia and Peter Parianos)	HAROLD L. LEVEY 526 Superior Avenue Cleveland, Ohio 44114
For Defendants-Appellees: (Bruegger's Bagel Bakery)	JAMES E. BURNS PAMELA N. HULTIN McCarthy, Lebit, Crystal & Liffman Co. 101 West Prospect Avenue Cleveland, Ohio 44115-1088

COLLEEN CONWAY COONEY, J.:

{¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1.

{¶ 2} Plaintiffs-appellants, Kostia and Peter Parianos (the "Parianoses"), appeal the trial court's decision granting summary judgment in favor of defendants-appellees, Bruegger's Bagel Bakery ("Bruegger's") and Hormel Foods (collectively referred to as "appellees"). Finding no merit to the appeal, we affirm.

{¶ 3} In August 2002, Kostia Parianos purchased a sausage, egg, and cheese bagel sandwich from Bruegger's. While eating the sandwich, she bit into a "bone-like substance," which allegedly caused injury to her teeth and mouth.

{¶ 4} In the complaint, Kostia Parianos alleged that the appellees impliedly warranted that the sandwich was wholesome and fit for consumption and that they were negligent in the preparation of the sandwich and its contents. Peter Parianos also set forth a claim for loss of consortium. The trial court granted summary judgment for the appellees. The Parianoses appeal, raising one assignment of error.

{¶ 5} Appellate review of summary judgment is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241; *Zemcik v. La Pine Truck Sales & Equipment* (1998), 124 Ohio App.3d 581, 585, 706 N.E.2d 860. The Ohio Supreme Court set forth the appropriate test in *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389, 696 N.E.2d 201, as follows:

"Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679, 1995-Ohio-286, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264."

{¶ 6} Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E); *Mootispaw v. Eckstein,* 76 Ohio St.3d 383, 385, 1996-Ohio-389, 667 N.E.2d 1197. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 1992-Ohio-95, 604 N.E.2d 138.

{¶ 7} The Parianoses claim that summary judgment was improperly granted because the affidavit attached to the appellees' motion was

inadmissible. They argue that the affidavit contained no averment that the object examined was the same as that provided by the Parianoses which was found in the sandwich. We disagree.

{¶ 8} A Civ.R. 56 affidavit is a "written declaration under oath, made without notice to the adverse party." R.C. 2319.02; *Murin v. Jeep Eagle Corp* (June 16, 2000), Lucas App. No. L-99-1346. Here, the affidavit of Bruce Fanta ("Fanta") was properly signed, sworn, and notarized. Fanta stated the following in his affidavit:

> **"In August 2002, I examined a piece of white material sent to Hormel Foods by the insurance company of Bruegger's Bagels in Ohio. I received the object from Hormel's Consumer Response Department. According to the information given to me, the material was found by a Bruegger's customer named Parianos who claimed to have found the material in a sausage patty."**

{¶ 9} Fanta's affidavit, to be admissible, does not need to contain a specific averment that the object examined was the same as that discovered in the sandwich by the Parianoses. The affidavit is based upon his personal knowledge and it sets forth facts sufficient to sustain the appellees' burden under Civ.R. 56. Further, contrary to the Parianoses' assertion, a clear reading of the affidavit indicates that the substance examined by Fanta was the same material they surrendered to Bruegger's. Moreover, if the Parianoses believed that the object submitted for testing was not the object they surrendered to Bruegger's, the Parianoses bore the burden to refute Fanta's assertion. Civ.R. 56(E); *Mootispaw*, supra.

{¶ 10} The Parianoses also claim that the affidavit did not constitute sufficient evidence to establish that the material

analyzed was a pig's bone, a natural substance found in a sausage patty.

{¶ 11} Fanta's affidavit stated that he examined and chemically tested the material. He stated that his visual observations of the material were consistent with that of bone and that the chemical tests confirmed the material was bone. We find that these statements sustain the appellees' burden under Civ.R. 56. Again, if the Parianoses believed that the bone was not natural to a sausage patty, the burden shifted to them to demonstrate that a genuine issue of material fact existed that the material was not a pig's bone. Civ.R. 56(E); *Mootispaw*, supra.

{¶ 12} The Parianoses further allege that the trial court erred in granting summary judgment because a customer could not have reasonably guarded against the presence of a pig's bone in a "melted conglomeration" sandwich. They claim that a "conglomerate" sandwich is exempt from the well-accepted reasoning that a customer has the duty to protect herself from natural substances in food. However, the Parianoses fail to cite any authority in support of this argument.

{¶ 13} Moreover, this court has rejected this argument in *Ruvolo v. Homovich*, 149 Ohio App.3d 701, 2002-Ohio-5852, 778 N.E.2d 661. In that case, this court found that a consumer should reasonably anticipate the natural occurrence of chicken bone fragments when the chicken in a gordita sandwich was "concealed in a manner

similar to chicken that is contained in pot pie or a traditional sandwich." Id. at 703.

{¶ 14} In reaching this conclusion, this court relied on the Ohio Supreme Court's decision of *Allen v. Grafton* (1960), 170 Ohio St. 249, 164 N.E.2d 167, where the court held that:

> **"[B]ones which are natural to the type of meat served cannot legitimately be called a foreign substance, and a consumer who eats meat dishes ought to anticipate and be on his guard against the presence of such bones. * * * Certainly no liability would attach to a restaurant keeper for the serving of T-bone steak, or a beef stew, which contained a bone natural to a type of meat served, or if a fish dish should contain a fish bone, or if a cherry pie should contain a cherry stone * * *." *Allen,* supra at 253-254, quoting, *Mix v. Ingersoll Candy Co.* (1936), 6 Cal.2d 674, 59 P.2d 144 (It is a "matter of common knowledge [that] chicken pies occasionally contain chicken bones.")**[1]

{¶ 15} In the instant case, Kostia Parianos bit into a sausage, egg, and cheese bagel sandwich. The sausage contained a bone which was natural to its type. Thus, she should reasonably have anticipated and guarded against the presence of such a bone in her sandwich. We find that there is no difference between a "melted conglomeration" sandwich, a chicken gordita sandwich, pot pie, beef stew, or a cherry pie, because these foods, by their very nature, obscure the ingredients therein. Therefore, the trial court did not err in granting the appellees' motion for summary judgment.

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[1]While we recognize that the *Mix* holding was modified by *Mexicali Rose v. Superior Court* (1992), 1 Cal.4th 617, 822 P.2d 1292, the Ohio Supreme Court previously adopted such modification by implementing the reasonable anticipation analysis in *Allen*, supra. See *Mexicali*, supra at 625, discussing the holding of *Allen*, supra.

{¶ 16} Accordingly, the sole assignment of error is overruled.[2]

Judgment affirmed.

It is ordered that appellees recover of appellants the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, P.J. and

JAMES J. SWEENEY, J. CONCUR

JUDGE
COLLEEN CONWAY COONEY

[2]Having determined that Kostia Parianos has no cognizable claim against appellees, we find that Peter Parianos' claim for loss of consortium is also barred. See *Bowen v. Kil-Kare, Inc.* (1992), 63 Ohio St.3d 84, 585 N.E.2d 384.

N.B. This entry is an announcement of the court’s decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court’s announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).