IN THE SUPREME COURT OF OHIO

MICHAEL BERKHEIMER,	:	
	:	**Supreme Court Case No.: 2023-0293**
Plaintiff-Appellee,	:	
	:	
v.	:	
	:	
REKM, LLC, et al.,	:	
	:	
Defendants-Appellants.	:	

MEMORANDUM IN OPPOSITION TO JURISDICTION OF PLAINTIFF-APPELLANT MICHAEL BERKHEIMER

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II. Introduction

A. Procedural Posture

Appellant Michael Berkheimer ("Appellant") filed his Complaint on or about March 1, 2017. (T.d. 4.) Appellant identified four Appellees in his Complaint and asserted multiple counts against each. (T.d. 4.) Originally, the Trial Court granted Appellee's Motion for Judgment on the Pleadings dismissing Appellant's Complaint in it's entirely. (T.d. 69.) The Appellate District reversed that decision on July 8, 2019 indicating that judgment was premature in absence of discovery. *Berkheimer v. REKM, LLC*, 12th Dist. Butler No. CA 2017-12-165, 2018 WL 3342686, 2018-Ohio-2668. That matter was appealed by the Appellees to the Supreme Court requesting jurisdiction and this matter was not accepted by the Supreme Court. Supreme Court Case No. 2018-1199.

After this matter was remanded to the Trial Court, some discovery was completed and Appellees moved for summary judgment in April 2021 requesting dismissal of all of Appellant's claims against it inasmuch as there is no dispute of fact that Appellant's claims fail as a matter of law. (T.d. 117, 130.) The Trial Court granted summary judgment on all counts on February 14, 2022. (T.d. 172.) Appellant filed a second appeal to the 12th District requesting a reversal of the Trial Court's decision. However, the Court of appeals upheld the decision of the Trial Court. Berkheimer v. REKM, LLC, 12 Dist. Butler No. CA2022-03-026, 2023-Ohio-116. Now, the Appellant has filed an appeal to the Supreme Court of Ohio requesting that this Court intervenes and accepts this matter for review. This matter does not involve a substantial constitutional question, nor one of public and great general interest and this Court should deny the Appellant's Motion for Jurisdiction.

B. Facts

This matter arises out of an April 1, 2016, incident involving the consumption of chicken. (T.d. 133) at 102. On that date, Appellant visited Appellee's restaurant, Wings on Brookwood, with about seven friends. (T.d. 133) at 102-106. Appellant visited this restaurant regularly or maybe once a week. (T.d. 133) at 105.

On the day of the subject incident, after drinks, Appellant and his friends were seated at a booth to order food. (T.d. 133) at 109-110. Appellant reviewed the menu to see if there was something different as sometimes specials were added. (T.d. 133) at 110. If there were no specials, Appellant usually ordered the boneless parmesan wings. (T.d. 133) at 110. Prior to the incident, Appellant had never seen a bone-in wing in his boneless wing order. (T.d. 133) at 187.

On the day of the incident, Appellant and maybe two of his friends ordered the boneless wings. (T.d. 133) at 110-112. Appellant did not ask about packaging or labeling of the chicken from Wayne Farms or Gordon Foods and did not know how the chicken was prepared. (T.d. 133) at 117-118. The boneless wings were allegedly procured to Appellee by Co-Appellee Gordon Food Service ("GFS"). (T.d. 4 at ¶ 29). GFS allegedly obtained the Boneless Skinless Chicken Tenderloins clipped from Co-Appellee Wayne Farms. (T.d. 4 at ¶ 31).

At his deposition, Appellant admitted that he did not know exactly who the chicken supplier was. (T.d. 133) at 115. Appellant did not see any of the packaging or labeling that came on the chicken. (T.d. 133) at 115. He specifically did not know how the wing was handled from the time it was removed from the packaging to the time it was placed in front of him to eat. (T.d. 133) at 188.

After ordering, Appellant was initially given the wrong order or boneless wings with a different sauce than the parmesan garlic sauce he had ordered. (T.d. 133) at 112. Appellant thus indicated to the employee that he had ordered the boneless wings with the parmesan garlic sauce. (T.d. 133) at 112. As such, the waitress apologized and took the incorrect wings back. (T.d. 133) at 112. No one else was provided with the incorrect order. (T.d. 133) at 112-113.

Eventually, Appellant received his correct order served with celery and ranch dressing in a wooden basket. (T.d. 133) at 113-114. When he received his order, Appellant thought that he had received a different batch of wings as his friend Rob indicated that "these wings look bigger than normal." (T.d. 133) at 119.

Appellant then proceeded to eat the first wing by cutting it into thirds. (T.d. 133) at 119. According to Appellant, it was "pretty good." (T.d. 133) at 119. He then ate the second wing and again cut it into thirds. (T.d. 133) at 119. He did not notice anything when cutting the wing. (T.d. 133) at 185. Appellant is sure that he was eating boneless wings, as he can visibly tell the difference between boneless wings and bone-in wings. (T.d. 133) at 186.

It was the third bite of the second wing that started to allegedly cause issues. (T.d. 133) at 185. As Appellant was sitting there, he "felt like something went down, a piece of meat went down the wrong wind pipe," and he tried to swallow. (T.d. 133) at 122. Appellant then put a napkin up to his mouth, because he had a 'weird feeling.' (T.d. 133) at 122. Appellant's friend Joel asked him "why are you crying?" (T.d. 133) at 122. He responded that it felt "like something went down the wrong pipe." (T.d. 133) at 122.

Appellant's condition subsequently allegedly did not improve, so he got up to go into the restroom. (T.d. 133) at 122. Essentially, Appellant tried to clear his throat for twenty minutes

with no relief. (T.d. 133) at 123. Appellant then decided to pay his bill and go home, as he was not feeling well. (T.d. 133) at 125.

After several days, on April 4, 2016, Appellant reported to the emergency room due to a high fever. (T.d. 133) at 141- 143. Appellant asserts that upon being examined, physicians discovered a chicken bone lodged in Appellant's throat. (T.d. 4 at ¶ 24). Appellant alleges that the bone was surgically removed and that his esophagus was torn resulting in an infection. (T.d. 133) at 151-52, 165. The alleged chicken bone that was discovered was five centimeters long or just under two inches. (T.d. 133) at 157.

III. Law and Argument

A. Response to Proposition of Law #1:

The Appellant has not presented a substantial constitutional question in this matter, nor has presented a matter of public or great general interest as to why consumer expectation is a jury question.

Ohio law is clear and unambiguous that since bones are natural to chicken, a person is responsible for guarding against any injury resulting from its consumption.

> "[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 v. Grafton (1960), 170 Ohio St. 249, 164 N.E.2d 167.

In *Allen v. Grafton* (1960), 170 Ohio St. 249, the Supreme Court of Ohio held that a piece of oyster shell approximately three by two centimeters in size, which was present in a fried

oyster, was insufficient to justify the legal conclusion that an entire serving of six fried oysters was "adulterated" or that it was not "reasonably fit for" eating. Moreover, the possible presence of a piece of oyster shell in or attached to an oyster is so well known to anyone who eats oysters that court could say as a matter of law that one who eats oysters can reasonably anticipate and guard against eating such a piece of shell, especially where it is a big piece.

In upholding summary judgment granted to the Defendant, the Supreme Court held that "the fact, that something that is served with food and that will cause harm if eaten is natural to that food and so not a foreign substance, will usually be an important factor in determining whether a consumer can reasonably anticipate and guard against it." *Id* at 258-59. The Court clearly held that it is proper for a Court to rule in favor of a party on a motion for summary judgment after implementing the "foreign-natural" test and the "reasonable expectation" test.

The 12th District Court of Appeals has summarized the "foreign-natural" test and "reasonable expectations" test in a 1991 decision. *Mathews v. Maysville Seafoods, Inc.*, 76 Ohio App.3d 624 (12th Dist. 1991). A fish fillet from Long John Silver contained a bone that the plaintiff swallowed, requiring surgery. *Mathews* at 625. The Appellate Court held that "the 'foreign-natural' test provides: [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 out to anticipate and be on his guard against the presence of such bones." *Id.* at 625. The "reasonable expectation" test holds that the consumer should be expected to reasonably find in his or her food, and not what might be natural ingredients of the food prior to preparation. *Id.*

Ohio Courts have consistently used the thought process from *Allen* and *Mathews* to hold and uphold Summary Judgment in similar cases. In *Parianos v. Bruegger's Bagel Bakery*, No. 84664, 2005 WL 78114 (Ohio Ct. App. Jan. 13, 2005), a restaurant-customer unsuccessfully

sued the restaurant for injuries suffered while eating a sausage, egg, and cheese bagel sandwich. The Appellant in *Parianos* bit down on what was later identified as a pig bone located in the sausage, injuring her mouth. Despite her assertion that it would be more difficult to identify and guard against a bone in a "conglomerate" sandwich, the Court citing the language from *Allen, Supra,* and held that that a pig bone is still natural to its type, and thus the Appellant could not recover under Ohio law.

A similar result can be found in *Ruvolo v. Homovich*, 2002-Ohio-5852, 149 Ohio App. 3d 701, in which an Appellant unsuccessfully sued a Taco Bell for injuries resulting from his consumption of two chicken gordita sandwiches. Similar to the instant case, the Appellant's throat became infected due to a scrape in his throat from a bone fragment present in the sandwich. The *Ruvolo* Appellant alleged that Taco Bell and its food distributors were liable because of their failure to properly inspect the chicken. The Court rejected Appellant's claims, stating: "We find that the chicken in the gordita sandwich consumed by [Appellant] was concealed in manner similar to chicken that is contained in a pot pie or a traditional sandwich. Accordingly, he should reasonably have anticipated the natural occurrence of bone fragments in his chicken meat." *Id.* at ¶ 11, 703–04. Again, the Court cited to *Allen* in support of its conclusion. As the Court in *Ruvolo* recognized as black letter law in Ohio, ". . . food preparers are not liable for the presence of bones in a chicken breast because it is a natural occurrence." *Id.* at ¶ 15.

Mitchell v. T.G.I. Friday's, 140 Ohio App.3d 459, 2000-Ohio-2591 (7th Dist.), involved a piece of clam shell in a fried clam. The appeals court followed *Allen* and *Mathews* and held that it was unnecessary to decide whether the foreign-natural or reasonable- expectation test applied because the plaintiff could not prevail under either theory because the facts of the case were

"virtually indistinguishable from *Allen*." *Id.* at 466.

In *Schoonover v. Red Lobster Inns of America, Inc.*, 1st Dist. Hamilton No. C- 790547, 1980 WL 353017, the court followed *Allen* and affirmed summary judgment for the defendant in a case where the plaintiff ingested bones while eating filet of sole at Red Lobster. The Court held that "the possible presence of fish bones in a service of filet of sole (notwithstanding the fact that 'filet' generally connotes a portion of fish from which most of the bones have been removed) might reasonably be anticipated and guarded against by anyone who eats such a dish." *Id.* at *2.

In *Lewis v. Handel's Homemade Ice Cream & Yogurt*, 11th Dist. Trumbull No.2002-T-0126, 2003-Ohio-3507, the court followed *Allen* and affirmed summary judgment for the defendant in a case where the plaintiff alleged injury from biting into a pistachio shell in pistachio nut ice cream. The Appellate decision held that "[f]ollowing the lead of the Supreme Court of Ohio [in *Allen*], various courts in Ohio have determined, as a matter of law, that a consumer should have reasonably anticipated the existence of a substance natural to the ingredients of that food prior to its preparation." *Id.* at ¶ 9.

In *Soles v. Cheryl & Co. Gourmet Foods & Gifts*, 3d Dist. Union No. 14-99-36, 1999-Ohio-932, the court followed *Allen*, *Mathews*, and *Patton* and held that common sense dictates that the presence of a pecan shell in a pecan cookie is a natural occurrence that the plaintiff reasonably should have anticipated and guarded against.

The Appellant's brief cites the same two decisions that have been previously cited in an attempt to overturn Summary Judgment. *Thompson v. Lawson Milk Co.*, 48 Ohio App.2d 143 (10th Dist. 1976), involved cartilage in ham. The holding in *Thompson* is not relevant as it was based on a dispute over the nature of the foreign object in that case, whereas the Appellant has clearly alleged that a chicken bone caused his injuries. Interestingly, the Court specifically recognized that there is no liability in Ohio for chicken bones found in chicken products. *Thompson*, 48 Ohio App.2d at 145 ("In short, bones or such substances could reasonably be

anticipated by consumers in particular kinds of foods. Thus, consumers should be on guard against such substances.") The Court ruled that the failure to pass the "foreign-natural" test removed the possibility to prevail on Summary Judgment.

In *Fugo v. Bilmar Foods, Inc.,* 5th Dist. Stark No. CA-8788m 1992 WL 173336 (June 29, 1992,) a ham bone was found in a piece of chicken which would be a foreign substance. Again, a set of circumstances that could not pass the "foreign-natural" test as a ham bone would not be a natural occurrence in chicken and so summary judgment could not be granted.

One of the claims set forth in the Appellant's Memorandum in Support is that the Courts in Ohio have not addressed when the injurious substance is specifically disclaimed as being absent in the food consumed. In *Patton v. Flying J, Inc.,* 6th Dist. Wood, WD-96-056, 1997 WL 327158, the plaintiff broke his tooth by biting into a chicken bone in a sandwich advertised as a "boneless breast of chicken." *Id*. at *1. Following *Allen* and *Mathews,* the court affirmed summary judgment for the seller, holding that "notwithstanding the fact that appellant asserts the chicken sandwich in this case was advertised as 'boneless,' common sense dictates that the presence of bone fragments in chicken meat is a natural enough occurrence that appellant reasonably should have expected and guarded against it." *Id*. at *2.

The court rejected this argument, again citing the language in *Allen, Supra.* noting as follows:

> This court has reviewed the entire record of proceedings which was before the trial court and, upon consideration thereof and the law, finds that, notwithstanding the fact that appellant asserts the chicken sandwich in this case was advertised as "boneless," common sense dictates that the presence of bone fragments in chicken meat is a natural enough occurrence that appellant reasonably should have expected and guarded against it. There being no other material issues of fact, when construing the evidence that was before the trial court most strongly in favor appellant, reasonable minds can only conclude that appellee is entitled to summary judgment as a matter of law, and appellant's sole assignment of error is not well-taken.

Patton at *2.

The case in *Patton* identifies a fact pattern nearly identical to the facts in this matter.. In *Patton*, the court expressly noted that "notwithstanding the fact that appellant [plaintiff] asserts the chicken sandwich in this case was advertised as "boneless," common sense dictates that the presence of bone fragments in chicken meat is a natural enough occurrence that appellant reasonably should have expected and guarded against it." *Id.*

The Appellant's memorandum addresses that this Court accept jurisdiction to rule consistent with the decision in *Allen*. This is interesting because the holding in *Allen* is consistent with the holding at the Trial Court and the Court of Appeals. The distinctions between the *Allen* case and the case at hand have already been addressed in a variety of Courts of Appeals in Ohio who have all ruled that summary judgment is proper in certain cases involving injuries sustained by consumers when eating food.

B. Response to Proposition of Law #2:

Ohio Law is well-settled as to this matter and there is no Constitutional Issue nor matter of public or great general interest to reverse the law based on decisions from other States.

The second proposition of law contradicts the Appellant's own memorandum that the *Allen* decision is no longer applicable law and that the Supreme Court of Ohio should adopt case law from other States as to the issue of food consumption. The rationale behind this theory is that the decisions made since *Allen* by various Courts of Appeals throughout the State of Ohio are antiquated and wrongly decided. The proposition, if accepted, would have a chilling effect throughout the Judiciary in this State and is judicial activism in a most extreme manner.

The citations to two Common Pleas cases in Ohio and a 1974 Court of Appeals case by Appellant's memorandum are mischaracterized in the brief. The two Common Pleas decisions

appear to have merely done what occurred in this matter which was deny motions for judgment on the pleadings as some discovery needed to take place prior to a dispositive motion being filed. The other matter, which was improperly named in the Appellant's footnote, was about an insertion of a peppercorn into a salami. That matter certainly did not have the similar fact pattern of a bone or a shell occurring naturally to the animal from which it came from as in the other cases cited in this memorandum.

IV. Conclusion

For the reasons set forth in this memorandum in opposition to the Motion for Jurisdiction, this matter is not one containing a Constitutional issue. This matter is not one of public or great interest. This is a matter that has had similar cases decided previously in accordance with well-settled case precedence in Ohio. Therefore, Appellee REKM, LLC requests that this Court declines the Appellant's Motion for Jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served via regular U.S. Mail, postage prepaid, and/or electronic mail, upon:

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