IN THE SUPREME COURT OF OHIO

MICHAEL BERKHEIMER,	:	
		Case No. 2023-0293
Appellant,	:	
		On Appeal from the Butler County Court of
v.	:	Appeals, Twelfth Appellate District
REKM LLC, d/b/a/ WINGS ON BROOKWOOD, et al.,	:	
	:	
Appellees.		
	:	

MERIT BRIEF OF *AMICUS CURIÆ*, OHIO ASSOCIATION FOR JUSTICE, IN SUPPORT OF APPELLANT, MICHAEL BERKHEIMER

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INTRODUCTION

This case presents this Court with the opportunity to clarify the existing case law, to recognize manufacturing standards and practices of the 21st Century and to allow jurors to determine whether food should be deemed "reasonably fit to eat," holding food manufacturers accountable when such standards and practices are violated and when resultant physical and economic harm to Ohioans and to those consumers eating or purchasing food in this state.

The Twelfth District Court of Appeals relied on a line of cases stemming from a decision issued in 1960 by this Honorable Court. The standards of producing food and the practices for the industries to maximize their economic benefit have developed considerably in the past 63 years. It would be naïve to believe that the food and safety standards developed and used in 1960 bear any resemblance to those used in 2016, the year that Appellant Michael Berkheimer was injured.

Likewise, the test of adulteration versus natural has been subject to scrutiny with many other states' courts applying a single test of whether the food served or sold meets the reasonable expectations of consumers. Whether or not it does is a question for the jury to answer.

The Court is urged to confirm that Ohio follows the reasonable expectations test. The determination of whether food is "reasonably fit to eat" is the province of the fact finder to determine what type of food defect is acceptable.

IDENTIFICATION OF AMICUS CURIÆ

The Ohio Association for Justice ("OAJ") is a statewide association of attorneys whose mission is to preserve the legal rights of all Ohioans by protecting their access to the civil justice system. In this case, OAJ has an interest in protecting consumers from lax business practices and

to ensuring the Seventh Amendment Right to a Jury. The undersigned files this brief in support of Appellant and urges the Court to reverse the decision of the Twelfth District Court of Appeals.

STATEMENT OF FACTS

The amicus curiae adopts and incorporates the statement of facts as presented by Appellant in his merit brief.

ARGUMENT

Proposition of Law No. 1: As a matter of law, whether a consumer should reasonably expect, anticipate, and guard against an injurious substance in food that has specifically been disclaimed by the seller is a jury question.

A. Standard of Review.

"Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. ***A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion that that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." Civ.R. 56(C). This rule "provides that summary judgment may be granted only if (1) no genuine issue of material fact remains to be litigated, (2) it appears from the evidence that reasonable minds can reach but one conclusion and that conclusion is adverse to the nonmoving party, and (3) the moving party is entitled to summary judgment as a matter of law." *Kirshner v. Fannie Mae*, 6th Dist. Lucas No. L-11-1027, 2012-Ohio-286, ¶ 10; *Temple v. Wean, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). "If any doubts exist, the issue must be resolved in favor of the

nonmoving party." *Baker v. Coast to Coast Manpower, LLC*, 3rd Dist. Hancock No. 5-11-36, 2012-Ohio-2840, ¶ 7; *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59, 604 N.E.2d 138 (1992).

"To prevail on a motion for summary judgment, the party moving for summary judgment must be able to point to evidentiary materials that show that there is no genuine issue as to any materials fact, and that the moving party is entitled to judgment as a matter of law." *United States Bank, N.A. v. Greenless*, 9th Dist. Lorain No. 14CA010618, 2015-Ohio-356, ¶ 7; *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264. "The non-moving party's reciprocal burden does not arise until after the moving party has met its initial evidentiary burden. *United States Bank* at ¶ 8. Although the "moving party is not required to produce any affirmative evidence, [that party] must identify those portions of the record which affirmatively support his or her argument." *Baker* at ¶ 8; *Dresher*, 75 Ohio St.3d at 293; Civ.R. 56(E).

B. Legal Argument

In *Allen v. Grafton*, this Court began with the premise that "the operator of the restaurant impliedly warrants that the food is reasonably fit to eat." 170 Ohio St. 249, 250, 164 N.E.2d 167 (1960); *Yochem v. Gloria, Inc.*, 134 Ohio St. 427, 17 N.E.2d 731 (1938). In *Yochem*, the underlying issue was the service of well water contaminated as a result of proximity to a septic tank. *Id*. at 429. Unlike the circumstances in *Allen*, the water in *Yochem* was weighed by the jury to determine whether it was adulterated. *Id*. at 431. Because the oyster shell swallowed by the diner in *Allen* could have been "readily removed from a fried oyster by anyone who is going eat it and that, if it is so removed, the fried oyster would then admittedly be food that is fit for earing and that is not 'adulterated.'" *Allen* at 252. However, the Court found that if the shell had been shattered into small pieces so no "substantial edible portion *** was free from such pieces,"

the argument that the "oyster would constitute 'adulterated' food or food not reasonably fit for eating might be more persuasive." *Id.* Unfortunately, the Court was guided by a decision from 1936 in which a consumer was injured by a fragment of a chicken bone in a chicken pot pie. In that case, *Mix v. Ingersoll Candy Co.*, a California court held as a matter of law that no one could recover damages under that set of facts. 6 Cal. 2d 674, 59 P.2d 144 (1936).

The *Allen* Court found 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." *Allen* at 258-59. (Emphasis added.) The Court then held that "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 we can say as a matter of law that one who eats oysters can reasonably anticipate and guest against eating such a piece of shell, especially where it is as big a piece as the one described in plaintiff's petition." *Id.* at 259.

From this holding, many Ohio appellate courts have expanded this holding to include the presence of any substance natural to that food. "Following the lead of the Supreme Court of Ohio, 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." *Lewis v. Handel's Homemade Ice Cream & Yogurt*, 11th Dist. Trumbull No. 2002-T-0126, 2003-Ohio-3507, ¶ 9 (June 30, 2003), citing *Mitchell v. T.G.I. Fridays*, 140 Ohio App.3d 459, 2000-Ohio-2591, 748 N.E.2d 89; *Mathews v. Maysville Seafoods Inc.*, 76 Ohio App.3d 624, 602 N.E.2d 764 (1991), *cert. denied*, 63 Ohio St.3d 1450, 589 N.E.2d 393 (1992) ; *Krumm v. ITT Continental Baking Co.*, 5th Dist. Fairfield No. 23-CA-81 (Dec. 9, 1981). In determining that a pistachio shell in the plaintiff's pistachio ice cream was the source of the

harm, the 11th District dismissed the litigation as a matter of law relying on "common sense." *Lewis* at ¶ 10.

The Eighth District followed suit in *Parianos v. Bruegger's Bagel Bakery*, 8th Dist. Cuyahoga No. 84664, 2005-Ohio-113 (Jan. 13, 2005). In *Parianos*, the plaintiff injured her teeth and mouth when she bit on a pig bone in sausage. *Id.* at ¶ 3. The appellate court reached this decision based on *Allen* and *Mix*. Because the bone was from a pig, the plaintiff "should reasonably have anticipated and guarded against the presence of such a bone in her sandwich." *Id.* at ¶ 15. The court went further to hold that "[w]e find 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." (Emphasis added.) *Id*. The court extended the *Allen* holding from the nature of the food – chicken bone in chicken – to the nature of the preparation – sandwiches, pies and stews. See also, *Ruvulo v. Homovich*, 149 Ohio App.3d 701, 2002-Ohio-5852, 778 N.E.2d 661, ¶ 11 (8th Dist.) (judgment as a matter of law for injury claims caused by chicken bone in a chicken gordita sandwich).

The Franklin County Common Pleas considered a claim involving a hard object in a fajita chicken burrito in *Sharp v. Chipotle Mexican Grill of Colo. LLC*, Franklin Cty. C.P. No. 11 CV 10041 (Aug. 15, 2013).

> Most [cases] involving injuries sustained from hard objects in food are brought under R.C. Chapter 3715. R.C. 3715.52 prohibits the "manufacture, sale, or delivery, holding or offering for sale of any food … that is adulterated…" R.C. 3715.59 further provides that food is "adulterated" when "[i]t bears or contains any poisonous or deleterious substance that may render it injurious to health; but in case the substance is not an added substance, the food shall not be considered adulterated if the quantity of the substance in the food does not ordinarily render it injurious to health" or "[i]t bears or contains any added poisonous or added deleterious substance that is unsafe." R.C. 3715.59(A); R.C. 3715.59(B). In short, these statutes generally provide that the presence of harmful substances in food manufactured and sold is prohibited in Ohio and the sale of food that violates

> these statutes can be the basis for liability on the part of the establishment that sold it.

Id. at *5-6. "In the decades since *Allen*, numerous Ohio courts of appeal have applied *Allen* to various fact patterns, consistently holding that a consumer should reasonably expect and guard against the presence of natural substances in prepared food." *Id.* at *6. The *Sharp* court declined to allow a product liability claim based on substances discovered in food. "Based on *Allen* and its subsequent application in courts of appeal across Ohio, the law dictates that the presence of a chicken bone in a chicken burrito should be reasonably anticipated and guarded against by the consumer." (Emphasis sic.) *Id.* at *10.

Of notable exception to the decisions of the Fifth, Seventh, Eighth, Eleventh, and Twelfth Districts is the *Thompson v. Lawson Milk Co.* decision from the Tenth District. 48 Ohio App.2d 143, 356 N.E.2d 309 (1976). In *Thompson*, the injured party purchased haBerheimer m sliced by the store. She then made a ham sandwich, bit into a hard substance contained in the meat, and ultimately lost part of a tooth. *Id.* at 144. The appellate court held that "it is a jury question whether a consumer should expect material to be included in a chopped ham, hard enough to break a tooth and be on guard against such a result. The jury, of course, may ultimately decide the issue for defendants. It is not, however, strictly an issue of law in this case." *Id.* at 147.

The Ohio courts of appeals have attempted to follow the holding of the *Allen* Court during the past several decades with increasing blindness to the industry standards and processes of the food industry. If only the boneless chicken market were considered, it is apparent that no reasonable person could anticipate or guard against bones better than Appellant in the case at bar. Appellant ordered boneless chicken wings. He cut the chicken into pieces with a fork and knife. No chicken bone was discernible to him. Rather than foisting the blame for the injury on Appellant, the alternative problem contemplated by the *Allen* Court should be considered:

> A different problem would be presented if the shell had been shattered into smaller pieces which could not be readily removed from the oyster so as to leave any substantial edible portion that was free from such pieces. In the latter instance, a contention, that the oyster would constitute "adulterated" food or food not reasonably fit for eating, might be more persuasive.

Allen, 170 Ohio St. at 252.

In this case, OAJ recommends that the Court reevaluate the holding from *Allen* in light of the facts of this Appellant and in view of modern production of chicken, including boneless, or deboned, chicken. Furthermore, the unambiguous statements by sellers that the chicken was "boneless" weigh heavily in a consumer's reasonable expectation of whether the consumer must guard against the potentially injurious substance.

It cannot be that we rely on the manner in which chicken pot pies were created in 1936 to determine whether food is reasonably fit for eating. Such a question speaks to the heart of what summary judgment actually means: that there are *no* set of facts on which the plaintiff could recover. However, this case is replete with such facts most appropriate to be submitted to a jury. Accordingly, all such doubts must be resolved in favor of the non-movant to summary judgment and the matter be permitted to proceed to a jury trial.

Proposition of Law No. 2: This Court should bring Ohio in line with the rest of the country.

In the event that the Court not find that Ohio already adopted the reasonable expectation test, OAJ urges the Court to do so with this case, and make a clear declaration to courts below that reasonable expectation is the controlling test in Ohio. The two tests for determining whether food is reasonably fit to eat are the "foreign versus natural" test and the "reasonable expectations" test.

As early as 1967, Florida courts determined that the "foreign-natural" test was unworkable due to myriad factual scenarios.

> The reasoning applied in this test is fallacious because it assumes that all substances which are natural to the food in one stage or another of preparation are, in fact, anticipated by the average consumer in the final product served. It does not logically follow that every product which contains some chicken must as a matter of law be expected to contain occasionally or frequently chicken bones or chicken-bone slivers because chicken bones are natural to chicken meat and both have a common origin. Categorizing a substance as foreign or natural may have some importance in determining the degree of negligence of the processor of food, but it is not determinative of what is unfit or harmful in fact for human consumption. *** Naturalness of the substance to any ingredients in the food served is important only in determining whether the consumer may reasonably expect to fund such substance in the particular type of dish or style of food served.

Zabner v. Howard Johnson's, Inc., 201 So.2d 824, 826 (1967).

In *Williams v. Braum Ice Cream Stores, Inc.*, 1974 OK Civ. App. 63, 534 P.2d 700, ¶ 3 (1974), the plaintiff broke a tooth on a cherry pit in her ice cream. "The 'reasonable expectation' test as applied to an action for breach of implied warranty is keyed to what is 'reasonably' fit." *Id.* at ¶ 9. "We hold that the better legal theory to be applied in such cases is the 'reasonable expectation' theory, rather than the 'naturalness' theory. *** What should be reasonably expected by the consumer is a jury questions, and the question of whether plaintiff acted in a reasonable manner in eating the ice cream is also a fact question to be decided by the jury." *Id*. at ¶ 12. See also, *Newton v. Std. Candy Co*., U.S. Dist. Ct. No. 8:06CV242, 2008 U.S. Dist. LEXIS 21886, *13 (D. Neb., March 19, 2008) (lawsuit involving injuries due to an underdeveloped peanut in Goo-Goo Cluster left "significant factual disputes that must be decided by the jury.").

In *Jeffries v. Clark's Rest. Enters.*, 20 Wn. App. 428, 580 P.2d 1103, 1104 (1978), the plaintiff was injured by swallowing a piece of crab shell when eating a crab melt sandwich in a restaurant.

> Considering the evidence most favorably to Jeffries, the jury could find that: Clark's sold to Jeffries a "crab melt" open sandwich, which consisted of a toasted English muffin topped with shredded crab meat, melted cheese, and chopped

> parsley. The sandwich contained a piece of craw shell, 1 inch in diameter, which Jeffries did not see and swallowed. The crab shell lodged in her esophagus and had to be surgically removed, causing the damages of which she now complains. Under these facts, there is a jury question as to whether Jeffries should have reasonably expected to find a 1-inch piece of crab shell in the sandwich as served. In so holding, we adopt the "reasonable expectation" test, and reject the "foreign versus natural substance" test.

Id. (internal citations omitted).

> The reality is that today's marketplace is one of consumerism. In this day and age, the foreign-natural test is an outdated relic. Many products are purchased in a form that has already been processed in some way. The test's weakness stems from the fact that it focuses on the product in its natural or preprocessed form, not on the form purchased by the consumer, the form which results in injury.

Clime v. Dewey Beach Enters., 831 F.Supp. 341, 348 (D. Del. 1993). Additionally, the "reasonable expectation" test is consistent with Restatement (Second) of Torts § 402(A) (1965):

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
> (2) The rule states in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

The first Ohio court this rationale with respect to food or drink was the Eighth Appellate District in 1928. In *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 481, the court held that the "Baking Company, when it delivered the cake in question to the groceryman, to say the least, impliedly represented to the public, who is the ultimate consumer, that this cake is free from injuries substances and fit for consumption as food." "Whatever implied warranty arises in favor of the groceryman, who established, the contractual relationship with the Baking Company, is for the benefit of this third party, namely, the ultimate consumer." *Id*. at 482. Accord, *Kniess v. Armour & Co.*, 134 Ohio St. 432, 438, 17 N.E.2d 734 (1938) ("The consumer of unwholesome food has a

right of action, not only against the retailer who sold it to him, *** but may also sue the wholesaler *** even though there is no contractual obligation between the producer and the injured party."). Internal citations omitted.

CONCLUSION

For the reasons stated herein, the Ohio Association for Justice respectfully requests that this Honorable Court reverse the decision of the Seventh District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Amicus Curiæ, The Ohio Association for Justice in Support of Appellant, Michael Berkheimer was served by electronic mail pursuant to Civ.R. 5(B)(2)(f) on this 21st day of August 2023 to the following:

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