IN THE SUPREME COURT OF OHIO

MICHAEL BERKHEIMER, Appellant, v. REKM LLC dba WINGS ON BROOKWOOD et al., Appellees.	Case No. 2023-293 On Appeal from the Butler County Court of Appeals, Twelfth Appellate District

MOTION FOR RECONSIDERATION OF APPELLANT MICHAEL BERKHEIMER

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Pursuant to Supreme Court Rule of Practice 18.02, Appellant Michael Berkheimer asks the Court to reconsider its four-to-three decision holding that, as a matter of law, no reasonable juror could ever conclude that a consumer might "reasonably expect" bones to be absent from a piece of chicken marketed and sold as "boneless." *Berkheimer v. REKM, L.L.C.*, 2024-Ohio-2787 at ¶ 3. This Court "grant[s] a motion for reconsideration to correct a decision that, upon reflection, [it] deem[s] to have been made in error." *State v. Braden*, 158 Ohio St.3d 462, 2019-Ohio-4204, 145 N.E.3d 235, ¶ 9. Mr. Berkheimer respectfully submits that reconsideration is proper here because, for the reasons stated below, as well as those stated in his merits briefing before this Court, the Court's decision was factually and legally erroneous.

ARGUMENT

I. The Opinion Wrongly Assumes that "Insurer" Status Is the Only Means by Which a Producer of Injurious Food May Be Held Liable.

This Court rejected Mr. Berkheimer's arguments that "the court of appeals did not give due consideration to the fact that the food item was advertised as a 'boneless wing' and that there was no warning given that a bone might be in the boneless wing," because, the Court said, "a supplier of food is not its insurer." *Berkheimer*, 2024-Ohio-2787, ¶ 23. But that reasoning assumes the analysis is binary: Either a party is an "insurer" of food, or it cannot be held liable. That is not the law. In resting this portion of its decision on this false dichotomy, the Court failed to consider other avenues of liability.

As this Court correctly acknowledged, Mr. Berkheimer alleged claims for, inter alia, negligence, misbranded food, and violation of the Ohio Deceptive Trade Practices Act. *Id.* at ¶ 7. None of these claims require a seller to be an "insurer" of its product before it can be held accountable for injury caused by that product. "In order to establish an actionable claim of negligence, a plaintiff must show the existence of a duty, a breach of that duty, and an injury that

was proximately caused by the breach." *Rieger v. Giant Eagle, Inc.*, 157 Ohio St.3d 512, 2019-Ohio-3745, 138 N.E.3d 1121, ¶ 10. "Insurer" status is not required. Likewise, food is "misbranded" pursuant to R.C. 3715.60(A) wherever "[i]ts labeling is misleading in any particular." Again, whether the seller has assumed the role of "insurer" is not relevant.

Finally, the Ohio Deceptive Trade Practices Act provides that a seller *can* be held liable where, as here, it "[r]epresents that goods . . . are of a particular standard, quality, or grade [i.e., boneless]" when, in fact, they are not, regardless of whether the seller is deemed an 'insurer.' R.C. 4165.02(A)(9). The chicken sold here plainly was not "boneless" and therefore was not of the "standard, quality, or grade" "[r]epresent[ed]." *Id.* All of these claims and more were raised in Mr. Berkheimer's complaint. None of them require "insurer" status. By disposing of Mr. Berkheimer's case in its entirety without properly addressing these claims, the Court erred.

II. The Opinion Does Not Properly Address the Liability of the Producer and Distributor of the Chicken at Issue.

The Court's decision is also erroneous because it fails to adequately consider Mr. Berkheimer's claims against the producer and distributor of the chicken at issue, focusing almost exclusively on the liability of the restaurant that ultimately served the "boneless wing." As explained in Mr. Berkheimer's merits brief, however, both the industrial chicken producer (Wayne Farms) and the distributor (Gordon Food Service ("GFS")) who produced and distributed the chicken used to make the boneless wing that injured Mr. Berkheimer sold and marketed the chicken as "boneless . . . breasts." (Merits Br. at 2.)

X-ray machines are ubiquitous at industrial chicken producers like Wayne Farms, where they are used to ensure that the corporation's mass-produced "boneless" chicken is actually boneless, and Wayne Farms admitted in deposition that it used x-ray machines throughout its business, *except* at the two plants that produced the batch of "boneless" chicken from which Mr.

Berkheimer's meal was made. (*Id.* at 2 & fn. 3.) Along similar lines, Mr. Berkheimer's merits brief explained that GFS had received no fewer than seven complaints over just three months' time regarding bones found in "boneless . . . breasts" of chicken from these two Wayne Farms plants but did nothing.[1] (*Id.* at 4.) Yet the Court's opinion ignores these undisputed facts and does not address these or any other issues specific to the liability of Wayne Farms and GFS, instead focusing almost exclusively on how the "boneless . . . breasts" were prepared at REKM's restaurant to make "boneless wings."

III. The Court's Analysis of the Size of the Bone at Issue Is Factually and Legally Erroneous.

The Court also justified its decision in part on its pronouncement that "the bone ingested by Berkheimer was so large relative to the size of the food item he was eating that, as a matter of law, he reasonably could have guarded against it." *Berkheimer*, 2024-Ohio-2787, ¶ 22. In support of this conclusion, the Court's opinion points out that the bone "was approximately 1 3/8 inches long." *Id.* But the opinion fails to consider the fact that the bone was also very thin. *See, e.g.*, *Berkheimer v. REKM, LLC*, 2023-Ohio-116, 206 N.E.3d 90, ¶ 6 (12th Dist.) (noting the thinness of the bone). *See generally* Wartman, *'I'll Never Be the Same.' Man at Center of Viral Boneless Wing Lawsuit Speaks Out*, Cincinnati Enquirer (Aug. 3, 2024), https://perma.cc/7G5T-GZ63 (showing photograph of bone). Entirely obscured within a single bite of the "boneless wing," Mr. Berkheimer unknowingly swallowed the thin bone which, once ingested, tore through his esophagus, causing catastrophic infection and permanent damage.

The Court's decision to consider the length of the bone at issue and ignore its width explains, in part, its factually erroneous conclusion that Mr. Berkheimer "reasonably could have guarded against" ingesting the bone. *Berkheimer*, 2024-Ohio-2787, ¶ 22. But in ignoring width,

[1] Moreover, all of this chicken bore the very same product code. (Merits Br. at 4.)

the Court committed not only factual error but legal error as well, running afoul of its own precedent in *Allen v. Grafton*, 170 Ohio St. 249, 164 N.E.2d 167 (1960). There, this Court considered *both* the length and width of the injury-causing fragment at issue and did not confine its analysis to a single, misleading dimension. *Id.* at 259 ("piece of shell" at issue as "'approximately 3 x 2 centimeters'").

IV. There Is No Basis in Law or Fact for the Court's Conclusion that a "Boneless Wing" Is a "Cooking Style."

Finally, the Court should reconsider its decision because its conclusion that "boneless wing" is a "cooking style," *Berkheimer*, 2024-Ohio-2787, ¶ 23, is erroneous as a matter of law and fact. This conclusion is central to the majority's reasoning, but it is made without citation to a single authority. Indeed, it appears that no other court has ever reached such a conclusion. And the notion that "boneless wing" describes a "cooking style" rather than the content of the food at issue is wholly novel not just in law but in the full breadth of human experience. It is doubtful that any individual has ever ordered that food of any type be cooked "boneless wing style." Grilling, frying, baking, searing, and roasting are "cooking styles." "Boneless winging" is not.

Along these same lines, the Court errs in its application of the "chicken finger" analogy selected by the majority. The Court points out that "a person eating 'chicken fingers' would know that he had not been served [actual] fingers," and asserts that this fact supports the conclusion that a person ordering "boneless wings" would know not to expect that the boneless wings will be *either* wings *or* free of bones. *Id.* But in reality, the analogy to "chicken fingers" cuts directly *against* the Court's conclusion. The two terms—chicken finger and boneless wing—are both composed of a noun identifying an anatomical part (finger and wing, respectively) preceded by an adjective (chicken and boneless, respectively). In both cases, it is common knowledge that (1) the noun is a figurative descriptor of the familiar item the product seeks—by its shape or otherwise—

to mimic, while (2) the ordinary meanings of the two adjectives apply. In other words, while the Court is correct that a consumer ordering a chicken finger would understand that she was not ordering a literal finger, she nevertheless certainly would expect that her order *would* be made of chicken, not pork or beef. Likewise, a consumer who orders a boneless wing understands that he is not ordering a literal wing, but he nevertheless expects that his order will not contain bones.

CONCLUSION

For all of these reasons and those stated in his merits brief and reply in support of the same, Appellant Michael Berkheimer asks the Court to reconsider its erroneous decision concluding that no juror could possibly conclude that a consumer might "reasonably expect" bones to be absent from "boneless wings."

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on August 5, 2024, a copy of the foregoing Motion for Reconsideration of Appellant Michael Berkheimer has been served upon opposing counsel via email at the following addresses:

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