The Supreme Court of Ohio

CASE ANNOUNCEMENTS

December 9, 2024

[Cite as *12/09/2024 Case Announcements #2*, 2024-Ohio-5741.]

## RECONSIDERATION OF PRIOR DECISIONS

**2023-0293. Berkheimer v. REKM, L.L.C.**
Butler App. No. CA2022-03-026, 2023-Ohio-116. Reported at 2024-Ohio-2787. On motion for reconsideration. Motion denied.
Fischer, J., concurs, with an opinion.
Donnelly, J., dissents, with an opinion.
Stewart, J., dissents, with an opinion.
Brunner, J., dissents.

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**FISCHER, J., concurring.**

**{¶ 1}** I fully join the decision denying appellant Michael Berkheimer's motion for reconsideration in this case. I write to provide insight into my reasoning for doing so.

**I. Reconsideration is unwarranted in this case**

**{¶ 2}** It is the rare exception, rather than the rule, for this court to grant motions for reconsideration. "This court has the authority to grant motions for reconsideration filed under S.Ct.Prac.R. 18.02 in order to 'correct decisions which, upon reflection, are deemed to have been made in error.'" *State ex rel. Ohio Presbyterian Retirement Servs., Inc. v. Indus. Comm.*, 2017-Ohio-7577, ¶ 2, quoting *State ex rel. Huebner v. W. Jefferson Village Council*, 75 Ohio St.3d 381, 383 (1995). S.Ct.Prac.R. 18.02(B) specifies unambiguously that motions for reconsideration "shall not constitute a reargument of the case."

**{¶ 3}** I wish to emphasize that motions for reconsideration are not, and should never be, used to reargue a case. For this reason, even when I disagree with the majority opinion in a case,

I will vote to deny a motion for reconsideration that merely reargues a case and fails to meet the standard set forth in S.Ct.Prac.R. 18.02. *See, e.g.*, *State v. Barnes*, 2022-Ohio-4785, ¶ 1 (Fischer, J., concurring) (agreeing that a motion for reconsideration should be denied despite a belief that the majority opinion was wrongly decided).

**{¶ 4}** The motion for reconsideration in this case alleges four bases for reconsideration. None of these arguments warrants granting reconsideration. For decades, Ohio has applied the blended test first set forth in *Allen v. Grafton,* 170 Ohio St. 249 (1960), and we applied that test when we reaffirmed the Twelfth District Court of Appeals' judgment in this case. 2024-Ohio-2787, ¶ 13. This test has been applied by Ohio courts numerous times in the intervening decades. *See Thompson v. Lawson Milk Co.*, 48 Ohio App.2d 143, 145 (10th Dist. 1976); *Schoonover v. Red Lobster Inns of Am., Inc.*, 1980 WL 353017, *1-2 (1st Dist. Oct. 15, 1980); *Krumm v. ITT Continental Baking Co.*, 1981 WL 6575, *1 (5th Dist. Dec. 9, 1981); *Mathews v. Marysville Seafoods, Inc.*, 76 Ohio App.3d 624, 626 (12th Dist. 1991); *Fugo v. Bilmar Foods, Inc.*, 1992 WL 173336, *2 (5th Dist. June 29, 1992); *Patton v. Flying J, Inc.*, 1997 WL 327158, *1 (6th Dist. June 6, 1997); *Soles v. Cheryl & Co. Gourmet Foods & Gifts*, 1999 Ohio App. LEXIS 5529, *5 (3d Dist. Nov. 23, 1999); *Ruvolo v. Homovich*, 2002-Ohio-5852, ¶ 8 (8th Dist.); *Lewis v. Handel's Homemade Ice Cream & Yogurt*, 2003-Ohio-3507, ¶ 7-8 (11th Dist.); *Parianos v. Bruegger's Bagel Bakery*, 2005-Ohio-113, ¶ 14. The majority opinion contains an analysis of each of the points raised in the motion for reconsideration. Because the motion for reconsideration fails to identify any points of law not already considered in the majority opinion, the motion must be denied as a matter of law.

**{¶ 5}** I note that this case has received a full and fair hearing throughout each level of our court system. Eleven jurists (four judges and seven justices) have examined this case. Eight of the 11 (one trial judge, three appellate judges, and four justices) have all reached the same conclusion: the defendants in this case are entitled to summary judgment.

**{¶ 6}** Jurists often reach different conclusions, hence the existence of dissenting opinions. Eight out of the 11 jurists who have closely examined this case have reached the same conclusion, which shows that there was a legitimate legal basis for this court's reasoning and judgment in this case. And although I disagree with the conclusion of those who dissented in this case, I still respect their legal viewpoint, which they arrived at in good faith after engaging in a legal analysis.

## II. It is paramount that this court strictly apply the Supreme Court Rules of Practice and the Ohio Code of Judicial Conduct

**{¶ 7}** Certain behind-the-scenes developments that have occurred in this case, which are related to the manner in which motions for reconsideration are handled within this court, have compelled me to once again voice my concerns about this court's reconsideration process. For example, I have previously expressed my concern with this court's deciding a motion for reconsideration *before* the response time established by our rules has run. *See State v. Haynes*, 2022-Ohio-4776, ¶ 17 (Fischer, J., dissenting).

**{¶ 8}** In this case, the delay in our issuing a decision on this motion, coupled with early public pronouncements by members of this court related to this case, both in the media and on the judicial record prior to our decision on this motion, could generate an appearance of impropriety. Specifically, S.Ct.Prac.R. 18.02(A) places a time limit on filing a motion for reconsideration. There is a limited time for a party opposing a motion for reconsideration to respond, too. S.Ct.Prac.R. 18.03(A). These time limitations are important because justices and judicial candidates must not comment on "pending" or "impending" cases. Jud.Cond.R. 2.10. This ethical prohibition on judicial commentary in turn protects the rule of law so that case law is not manipulated into the political discussion during an election season. The speedy filing schedule also promotes discussion among justices soon after a case is released and ensures a timely decision if there is nothing new to consider, thus helping to expedite public discussion of matters in an election season. Hence, the timing rules protect both the ethical duties of a justice and focuses discussion of a case in the public sector when there is nothing new to consider, as in the case at bar.

**{¶ 9}** As noted above, the motion for reconsideration did not cover any subject matter not previously considered by this court, nor did the motion raise any complex legal arguments. Given the straightforward nature of this motion, we could have made our decision promptly after its filing in August rather than leaving it to linger into the heart of election season. Thus, I felt the need to write this concurrence to point out these problems to the bench, bar, and public.

## III. We are a court of law, not a court of public opinion

**{¶ 10}** Given the concerns noted above, I wish to emphasize that decisions on motions for reconsideration like this one are not, and should never be, based on newspaper articles and writings by nonlawyers who have not reviewed the entire judicial case file and applicable case

law. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978) ("it is assumed that judges will ignore the public clamor or media reports and editorials in reaching their decisions and by tradition will not respond to public commentary"); *State v. Hairston*, 2008-Ohio-2338, ¶ 25 ("courts must be faithful to the law [and] must not be swayed by public clamor, media attention, fear of criticism, or partisan interest").

**{¶ 11}** Furthermore, in his motion for reconsideration, Berkheimer has cited a news article written after our merits decision was announced. This citation appears to function as an attempt to supplement the record to incorporate a photograph of the bone in question in this case. A citation for such purposes may be improper, but more significantly, I wish to emphasize that such citations to post-decision news articles do not serve as a basis for reconsideration.

**{¶ 12}** No court should ever be influenced *in any way* by media commentary, and such commentary, which is not part of the record, should never be relied on as a basis for granting a motion for reconsideration. Such a basis would be both improper and harmful to this court, and all courts of law for that matter. Such articles directly attack the rule of law and threaten its replacement with the policy preferences of a few. Public policy is the province of the legislative—not the judicial—branch of our government: "'It is a fundamental principle of the separation of powers that "the legislative branch [of government] is the 'ultimate arbiter of public policy.'"'" (Bracketed text added in *Gabbard*.) *State ex rel. Johnson v. Ohio State Senate*, 2022-Ohio-1912, ¶ 10, quoting *Gabbard v. Madison Local School Dist. Bd. of Edn.*, 2021-Ohio-2067, ¶ 39, quoting *Arbino v. Johnson & Johnson*, 2007-Ohio-6948, ¶ 21, quoting *State ex rel. Cincinnati Enquirer Div. of Gannett Satellite Information Network, Inc. v. Dupuis*, 2002-Ohio-7041, ¶ 21.

## IV. Conclusion

**{¶ 13}** The mere suggestion that rulings on motions for reconsideration should be in any way based on newspaper articles is improper. Courts must not be influenced or swayed—in any way—by the press. We are not courts of public opinion. We are courts of law. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 291 (2022), quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 963 (Rehnquist, C.J., concurring in judgment in part and dissenting in part) ("'The Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution.'").

**{¶ 14}** For these reasons, I fully join this court's decision denying the motion for reconsideration. The Ohio Supreme Court is a court of law, not of temporal public opinion.

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**DONNELLY, J., dissenting.**

**{¶ 15}** Months ago, this court received unprecedented media attention after it issued an opinion in what should have been a simple negligence case. That opinion, *Berkheimer v. REKM, L.L.C.*, 2024-Ohio-2787, prevented appellant, Michael Berkheimer, from exercising his constitutional right to a jury trial, *see* Ohio Const., art. I, § 5, by disingenuously defining the word "boneless" to mean "you should expect bones," *Berkheimer* at ¶ 38 (Donnelly, J., dissenting). The majority's opinion has been rightly subjected to ridicule.[1] If there was an Olympics for sophistry, the majority's opinion would certainly have taken the gold. The majority blatantly orchestrated the desired result by usurping the jury's traditional role as the determiner of fact. This is exactly the type of activism self-described conservative justices purport to disdain.

**{¶ 16}** Without a doubt, this case carries profound implications for all Ohioans. Among the biggest problems with this decision is that it causes people to lose faith and confidence in the impartiality of the justice system. The Ohio Capital Journal's headline to its article about this

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1. Derision has been the predominant response. A random sampling of comments to any article describing the decision is heavily slanted against the majority opinion. *See, e.g.*, X (July 26, 2024), https://x.com/JenXperience /status/1817018407348277476 (accessed Sept. 23, 2024) [https://perma.cc/PJP2-AA25]. Even neutral observers have mocked the majority's opinion. The Associated Press's article about the case, which has been viewed millions of times on X, was published under the label "ODDITIES." *See* Rubinkam, AP News, *Chicken wings advertised as 'boneless' can have bones, Ohio Supreme Court decides* (July 25, 2024), https://apnews.com/article/boneless-chicken-wings-lawsuit-ohio-supreme-court-231002ea50d8157aeadf093223d539f8 (accessed Sept. 23, 2024). A legal blog that presented an otherwise impartial account of this case concluded by stating, "[R]emember that chickens don't have fingers," Weiss, Holland & Knight, *Court Decision Concerning "Boneless Chicken Wings" Ignites Political Firestorm in Ohio* (Aug. 9, 2024), https://www.hklaw.com/en/insights/publications/2024/08/court-decision-concerning-boneless-chicken-wings-ignites (accessed Sept. 23, 2024) [https://perma.cc/C33B-J4JD]. And, of course, comedians have had a field day. For example, Lewis Black commented that saying boneless wings can have bones is evidence that "we have lost all sense of reality." Black, YouTube, *Boneless Chicken Wings! (Lewis Black's Rantcast)* (Aug. 9, 2024), https://www.youtube.com/watch?v=sD9Be4hCZlM (accessed Sept. 23, 2024) [https://perma.cc/YY6X-U852]. And Stephen Colbert, when discussing the majority's ruling that boneless wings can have bones, asked, "'[W]hat is the point of anything?'" Bischoff, Cincinnati.com, *'Hot legal garbage': Stephen Colbert trashes Ohio Supreme Court boneless wings decision* (Aug. 15, 2024), https://www.cincinnati.com/story/news/2024/08/15/stephen-colbert-late-show-ohio-supreme-court-boneless-wings-decision/74812370007/ (accessed Sept. 23, 2024) [https://perma.cc/2HCK-YG5J]. The headline for Above the Law's blog post discussing this case was subtly snarky: "'Boneless' Wings Can Have Bones, Declare Committed Textualists." Patrice, Above the Law, *'Boneless' Wings Can Have Bones, Declare Committed Textualists* (July 26, 2024), https://abovethelaw.com/2024/07/boneless-wings-bones-ohio-supreme-court/ (accessed Sept. 23, 2024) [https://perma.cc/WGG4-U7KW]. This is just a sampling; more comments and mockery are available through simple internet searches.

case read “Ohio Supreme Court majority ruling that boneless wings can have bones is an embarrassment.” Johanek, Ohio Capital Journal, *Ohio Supreme Court majority ruling that boneless wings can have bones is an embarrassment* (July 30, 2024), https://ohiocapitaljournal.com/2024/07/30/ohio-supreme-court-majority-ruling-that-boneless-wings-can-have-bones-is-an-embarassment/ (accessed Sept. 23, 2024) [https://perma.cc/E5LD-62TG]. Fox 5 New York quoted a defense attorney as saying, “‘In New York, I’d like to think that there aren’t a lot of judges that would be so boneheaded.’” Williams, Fox 5 New York, *Ohio Supreme Court rules ‘boneless’ chicken wings can have bones* (Aug. 4, 2024), https://www.fox5ny.com/news/ohio-supreme-court-rules-boneless-chicken-wings-can-have-bones (accessed Sept. 23, 2024) [https://perma.cc/B8EL-P36E]. At least one member of the General Assembly wants to enact legislation that requires this court to issue decisions that pass a “‘common sense test,’” calling this case “‘one of the most obvious cases of legislating from the bench possible,’” and adding that “‘common sense and logic must not matter to the Republican Supreme Court majority. All that seems to matter to them is shielding billion-dollar corporations from lawsuits when their negligence hurts people.’” Ingles, Statehouse News Bureau, *After boneless wings case, Ohio lawmaker drafts bill on “common sense” standards for court cases* (Aug. 2, 2024), https://www.statenews.org/government-politics/2024-08-02/after-boneless-wings-case-ohio-lawmaker-drafts-bill-on-common-sense-standards-for-court-cases (accessed Sept. 23, 2024) [https://perma.cc/GV3E-43RH]. Case Western Reserve University law professor Jonathan Entin, in discussing this case, stated, “‘You don’t have to get into all of the technical details of legal doctrine to be able to say this is a decision that shows that a majority of the current court are not sympathetic to ordinary people who get hurt through, basically, no fault of their own.’” Trau, Ohio Capital Journal, *Lawmaker takes action after Ohio Supreme Court rules ‘boneless’ chicken wings can have bones* (July 29, 2024), https://ohiocapitaljournal.com/2024/07/29/lawmaker-takes-action-after-ohio-supreme-court-rules-boneless-chicken-wings-can-have-bones/ (accessed Sept. 23, 2024) [https://perma.cc/5FTK-GY3V].

**{¶ 17}** Here are the technical details, which frankly aren’t that complicated: The trial court dismissed the case on summary judgment. The court of appeals affirmed, and a majority of this court affirmed the court of appeals. We review decisions granting summary judgment de novo. *Caldwell v. Whirlpool Corp.*, 2024-Ohio-1625, ¶ 12. Summary judgment can be rendered only when “reasonable minds can come to but one conclusion and 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). When confronted with three justices who disagreed and given the obligation to construe the evidence most strongly in Berkheimer's favor, one might be tempted to conclude that reasonable minds cannot come to but one conclusion in this case. That reasonable minds can differ about the conclusion of this case is bolstered by the abundance of commentators and commentary agreeing with the conclusion reached by the dissenting justices. To be sure, our jurisprudence is not dictated by the commentariat, but given the overwhelming response to the absurdity of the majority opinion, one would think that the members of the majority could have reexamined their thinking and concluded that maybe it's possible, even if just barely, for reasonable minds to disagree. *See, e.g.*, Cleveland.com, *The Ohio Supreme Court's verdict that 'boneless' doesn't always mean boneless: Editorial Board Roundtable* (Aug. 8, 2024), available at https://www.cleveland.com /opinion/2024/08/the-ohio-supreme-courts-verdict-that-boneless-doesnt-always-mean-boneless-editorial-board-roundtable.html (accessed Sept. 23, 2024). The members of the majority could have granted reconsideration.[2] But they have (apparently) concluded that anyone who disagrees with them isn't reasonable, which is a necessary implication to the myriad minds that disagree with the majority's opinion and a neat way to get around the whole "but one conclusion" speed bump. They are the majority; therefore, anyone who disagrees is not reasonable.

**{¶ 18}** Just as a hypothetical, it isn't hard to imagine how much damage a result-oriented jurist can cause when he or she is untethered from the ordinary definition of words. If any conclusion contrary to his or hers is by definition "unreasonable," then in what way might a result-oriented jurist contort words like "right to make," "reproductive decisions," "including," "abortion," or "fertility treatment" as found in Article I, Section 22 of the Ohio Constitution? Frankly, a result-oriented jurist might not even grant the word "and" contained in Article I,

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2. This court grants reconsideration regularly, if not often, including in some momentous constitutional cases. *See DeRolph v. State*, 2002-Ohio-6750, ¶ 4. One of the justices who changed his vote in that case was the late Chief Justice Thomas J. Moyer, who often asked the following question of counsel who appeared before him: What law would you have us write? Under the majority's opinion in this case, that question has a simple answer: producers and purveyors of meat whose "boneless" products contain bones are immune from liability for any damage caused by the bones, no matter how careless or reckless they might have been in removing the bones. That is a horrible message for this court to send. But it is a gift to law professors, who now have a perfect example of a court's exceeding its authority by ignoring a patent legal standard in order to restrict the constitutional right to a jury trial. Why are the members of the majority so afraid of this case going to trial that they would continue to uphold such a ridiculous and ridiculed opinion?

Section 22 its ordinary meaning if "or" or "but" suits that particular jurist better. As for "[t]he state shall not," *id.*, well, it's pretty easy to imagine such a jurist ignoring the word "not."

**{¶ 19}** Perhaps the most damning indictment of the majority's approach and the distrust its approach engendered throughout Ohio, the United States, and even the world, is summed up in one layman's discussion of the case. The author made the following commentary about the justices in the majority: "[I]t's not a sign of corruption, as many blithely assume. It's *smirking*. It's judges as maliciously compliant genies serving the lamp, enjoying their clever but inaccurate pedantry, indifferent to public trust in the law." (Emphasis in original.) Beschizza, *Ohio Supreme Court rules that "boneless" chicken can contain bones* (July 26, 2024), https://boingboing.net /2024/07/26/ohio-supreme-court-rules-that-boneless-chicken-can-contain-bones.html (accessed Sept. 23, 2024). In short, if the public cannot trust the judiciary to be faithful in small things—like whether "boneless" can reasonably be understood as not including bones—how can the judiciary be trusted with greater things?

**{¶ 20}** The only legal issue before us is whether the majority misapplied the standard for upholding a court of appeals' judgment granting summary judgment. The standard, as noted above, is that summary judgment will not be granted or affirmed on appeal unless reasonable minds can come to but one conclusion. In this court's previous opinion in this case, we were unable to reach a unanimous conclusion—as the opinion concurring in the judgment denying the motion for reconsideration admits, *see* concurring opinion, ¶ 5—and it would be wrong to accord no significance to our disagreement in light of the summary-judgment standard. Four members of this court believe that it is *not* possible to find negligence in this case. That is a perfectly reasonable legal position. Three members of this court believe that it *is* possible to find negligence in the underlying case, an equally reasonable legal position. The black-letter law of summary judgment, which is contained in the Ohio Rules of Civil Procedure, is the *only* law before us. The four members of the court who are voting to deny reconsideration are doing so without addressing my basic argument. They should show their work: Why do they believe summary judgment is appropriate even though it is clear that reasonable minds cannot come to but one conclusion? We will never know. They have four votes. This is not a positive harbinger for Ohioans.

**{¶ 21}** By denying reconsideration, the members of the majority have once again elevated the interests of the defendant corporations above a grievously injured plaintiff's constitutional right to a jury trial, denying Berkheimer the mere opportunity to try his case to a jury. (For the record, I have never stated that there was negligence in this case, only that a jury, not judges or justices, should determine whether there was negligence.) The members of the majority have granted virtual immunity to entities involved in the meat industry for any bone-related injury that might be caused by their "boneless" products. The three defendants—and other similarly situated entities—now have less incentive than ever to carefully produce, process, procure, or prepare meat products before advertising them as boneless. I (and most of the people who have read about this case) dissent.

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**STEWART, J., dissenting.**

**{¶ 22}** A jury should be deciding this case, not four justices of this court. Because the original majority wrongly concluded otherwise—and its decision is based on two obvious errors—I dissent from the decision to deny appellant Michael Berkheimer's motion for reconsideration.

**Obvious Errors in the Original Majority Opinion**

**{¶ 23}** The procedural posture of this case is important. It came to us following the grant of summary judgment in favor of appellees, REKM, L.L.C., Gordon Food Service, Inc., and Wayne Farms, L.L.C., on Berkheimer's claims of negligence, breach of warranty, adulterated food, misbranded food, and violations of the Ohio Deceptive Trade Practices Act, R.C. 4165.01 et seq. This court reviews the grant of summary judgment de novo, and our review is governed by the summary-judgment standard set forth in Civ.R. 56. *Comer v. Risko*, 2005-Ohio-4559, ¶ 8. Summary judgment is appropriately granted when

> "(1) [n]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party."

(Bracketed text in original.) *M.H. v. Cuyahoga Falls*, 2012-Ohio-5336, ¶ 12, quoting *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327 (1977), citing Civ.R. 56(C).

**{¶ 24}** In this case, the majority opinion concluded that there was no genuine issue of material fact as to whether Berkheimer should have reasonably anticipated that a bone would be found in one or more of the food items he ordered that were advertised to him as "boneless wings" and whether he could have guarded against injury. 2024-Ohio-2787, ¶ 23, 25. The court found that because bones are natural to chicken, Berkheimer should have expected the presence of bones in his boneless wings and that because the bone was approximately 1⅜ inches long, Berkheimer could have guarded against being injured by it. *Id.* at ¶ 22, 23. The majority opinion reached these conclusions even though the purchased food items were specifically marketed, advertised, and sold as being boneless,[3] *see id.* at ¶ 23, and despite the fact that the bone remained hidden to Berkheimer even after he had taken precautionary measures to avoid injury by cutting up the food prior to consumption, *see id.* at ¶ 22. At a minimum, these two facts make the question of what Berkheimer reasonably should have anticipated and guarded against a question for a jury. After all, the summary-judgment standard requires this court to construe all evidence in the light most favorable to Berkheimer. But instead of correctly applying this standard and sending this case back to the trial court for further proceedings, the four justices in the majority went out of their way to ensure Berkheimer's case met a dead end. And the way they went about this was absolutely absurd.

**{¶ 25}** To begin with, there is no denying that the food items at issue in this case were advertised and sold as boneless and that there was no disclaimer that there could still be bones in the product. This is not, for example, a case in which a bone was found in a chicken pot pie or chicken tetrazzini, two food items that one might *expect* to be free of bones but that are generally not advertised as such. Rather, this is a case in which a bone was found in a food item specifically marketed, advertised, and sold as being "boneless."[4] This fact makes this case

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3. Additionally, according to Berkheimer's counsel, Berkheimer was charged 50 cents more for his order of boneless wings than he would have been charged for an order of regular wings.

4. As the dissenting opinion in the case pointed out:

> "Boneless" means "without a bone." Cambridge English Dictionary, https://dictionary.cambridge.org/us/dictionary/english/boneless#google_vignette (accessed June 6, 2024) [https://perma.cc/9C89-EXWC]. It means "without bones." Collins Dictionary, https://www.collinsdictionary.com/us/dictionary/english/boneless (accessed June 6, 2024) [https://perma.cc/VFT8-RMEY]; YourDictionary, https://www.yourdictionary.com/boneless

different from the cases cited by the majority in its analysis, *see, e.g.*, *Allen v. Grafton*, 170 Ohio St. 249 (1960); *Mix v. Ingersol Candy Co.*, 6 Cal.2d 674 (1936); *Brown v. Nebiker*, 229 Iowa 1223 (1941); *Courter v. Dilbert Bros., Inc.*, 19 Misc.2d 935; *Mathews v. Maysville Seafoods, Inc.*, 76 Ohio App.3d 624. In those cases, the food product at issue may have implied the absence of the injurious item but did not specifically disclaim its presence. The way a product is advertised influences a consumer's reasonable expectations about the product. And in a case like this one—where the product at issue was explicitly advertised as having had removed the otherwise naturally present bones—it is asinine to conclude, as a matter of law, that a reasonable consumer[5] would expect that the product would have bones.

**{¶ 26}** The way this product was advertised was obviously problematic to the majority's analysis. So, to circumvent that problem, justices in the majority created their own definition of "boneless," one that is completely divorced from reality, let alone what any reasonable person would understand the word "boneless" to mean. They created a definition for the word "boneless"—apparently out of thin air, as neither party had suggested the definition and the majority cited no authority for it—saying that in the context of the term "boneless wing," the word "boneless" merely describes the way in which the food was cooked and was never meant to be, nor could it have reasonably been understood to be, a description of the food product itself. *See* 2024-Ohio-2787 at ¶ 23. The absurdity of this newly created definition is not lost on Berkheimer. As he aptly points out in his motion for reconsideration:

> This conclusion [that "boneless wing" denotes a "cooking style"] 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

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> (accessed June 6, 2024) [https://perma.cc/5PTY-9K2G]. And it means "(of meat or fish) without any bones." Oxford Learner's Dictionaries, https://www.oxfordlearnersdictionaries.com /us/definition/english/boneless (accessed June 6, 2024) [https://perma.cc/5JD8-KTDZ].

2024-Ohio-2787 at ¶ 37 (Donnelly, J., dissenting).

5. Apparently the four justices in the majority are so far removed from any commonsense notion of reasonableness that they either forgot or do not care to remember that restaurant diners come from all walks of life. The overwhelming majority of diners are not judges or lawyers. The average diner's reasonable expectations are not formed by legal doctrines such as the foreign-natural test.

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.

**{¶ 27}** The majority's determination that "boneless" represents a cooking style has no basis in law, no basis in fact, and no basis in reality. Yet this erroneous creation is central to the majority's holding that Berkheimer should have anticipated the presence of bones in his food and guarded against injury. This alone is reason enough for this court to grant reconsideration, and Berkheimer's argument against the definition does not, as the concurring opinion states, constitute a reargument of the case, since no one suggested the definition, let alone argued for or against it, prior to the majority's crafting it out of whole cloth.

**{¶ 28}** This court should grant Berkheimer's motion for reconsideration for the additional reason that the majority inappropriately weighed material facts regarding the nature and size of the chicken bone at issue in this case and the level of difficulty in discovering it. The majority opinion takes the position that because the length of the bone was 1⅜ inches long—something it determines to be rather large—Berkheimer should have been able to discover its presence and guard against injury. But this analysis ignores the fact that Berkheimer did take precautions when eating his food by cutting up the boneless wings into smaller bite-sized pieces before consuming them. Despite taking these precautions, Berkheimer still failed to discover the bone. It is difficult to know what else Berkheimer could have done—short of going through some sort of exploratory dissection of his boneless wing in search of an offending item that the menu noted wasn't even present in the first place—to discover the bone and guard against injury. Indeed, the justices in the majority never point to anything else that Berkheimer might have tried to do or should have done to discover the bone hidden within the boneless wing. Instead, they conclude—with no actual analysis—that Berkheimer was the one at fault for his injury. This court should not be drawing such conclusions at the summary-judgment phase when existing facts call into question whether the injurious item actually could have been discovered. Such is the province of a jury, not the State's highest court.

**{¶ 29}** And finally, the concurring opinion discusses how we, as a court, do not make our decisions based on media accounts. But it should be obvious to anyone reading these separate opinions on the motion for reconsideration in this case that the reason the first dissenting opinion

cites the various media sources ridiculing this court is not to sway the four justices in the majority to change their minds but, rather, to point out just how absurd the majority opinion is to conclude that reasonable minds could come to only one conclusion.

**{¶ 30}** This court, like all others, should be independent—not swayed by media commentary or other influences like political-partisan allegiances. However, the way in which justices are now elected to this court critically calls into question the independence of this body. The comment to Jud.Cond.R. 2.4 states: "Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences." In 2021, Republican members of the Ohio General Assembly passed a law to require that political-party affiliation be listed on the ballot for Supreme Court candidates. *See* 2021 S.B. No. 80. This partisan legislation was proposed and enacted after Ohio had voted for the Republican nominee for President in 2016 and 2020. Importantly, this change in the law did away with a previous law that had been on the books for over 100 years and that required nonpartisan general elections for judicial candidates in Ohio.[6] One wonders why the legislature would extend its reach over the independent judiciary in such a way as requiring justices on the State's highest court to declare an affiliation with a political party. Some experts suggest that the reason is simply to put partisan allies on the bench. *See* Milov-Cordoba, State Court Report, *How Years of Legislative Maneuvering Shaped this Year's Judicial Elections* (Oct. 10, 2024), https://statecourtreport.org/our-work/analysis-opinion/how-years-legislative-maneuvering-shaped-years-judicial-elections (accessed Dec. 3, 2024) [https://perma.cc/C99Q-TNV9].[7]

**{¶ 31}** Fair, if biting, media commentary is a far cry from an attack on the rule of law as described by the concurring opinion and is nowhere near as damaging as the politicization of, what should be, an independent judiciary. As Alexander Hamilton said in Federalist No. 78 when speaking on the importance of an independent judiciary to the separation of powers, "as liberty can have nothing to fear from the judiciary alone, [it] would have everything to fear from

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6. The Nonpartisan Judiciary Act of 1911 required nonpartisan ballots for the election of judges in Ohio, S.B. No. 2, 102 Ohio Laws 5, 6, and this requirement remained codified at R.C. 3505.04, *see* Am.Sub.H.B. No. 1062, 138 Ohio Laws, Part II, 4570, 4690-4691, until the enactment of S.B. No. 80 in 2021.

7. State Court Report is an online newsletter "dedicated to covering legal news, trends, and cutting-edge scholarship, offering insights and commentary from a nationwide network of academics, journalists, judges, and practitioners with diverse perspectives and expertise" and "is a project of the Brennan Center for Justice at NYU School of Law, which is a nonpartisan law and policy institute." State Court Report, https://statecourtreport.org/about/state-court-report (accessed Dec. 3, 2024) [https://perma.cc/3ES4-6GP2].

its union with either of the other departments." The Federalist No. 78, at 465 (Clinton Rossiter Ed.1961).

**{¶ 32}** Given the multiple obvious errors present in the majority opinion, I would grant the motion for reconsideration and therefore dissent.

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