

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Christine Mitchell,

PLAINTIFF,

v.

Gregory M. Parker, Inc.,

DEFENDANT.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2022-CP-07-00056

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

This matter came before the Court on September 24, 2024, on motion of the Defendant for Summary Judgment filed March 18, 2024, as to all causes of action in the Plaintiff's Complaint. Present at the hearing were Kelly D. Dean for the Defendant, and Eric J. Erickson for the Plaintiff. After considering the arguments by Ms. Dean and Mr. Erickson and the submitted memorandums and supporting exhibits, including Plaintiff's Supplemental Memorandum in Opposition to Summary Judgment filed October 3, 2024, the Court grants the Defendant's Motion for Summary Judgment.

FINDING OF FACTS

This case arises out of the alleged consumption of purportedly adulterated and defective food by the Plaintiff, Christine Mitchell. The Plaintiff alleges that, on or about April 27, 2018, she purchased macaroni salad from a Parker's store located at 3462 Trask Parkway, in Beaufort, South Carolina. (Complaint ¶ 4, 2). After eating the macaroni salad, she then "felt something in her throat," which shortly resolved without medical treatment. (2nd Amd. Complaint, ¶ 5, 6). Then, roughly 47 days later, on June 13, 2018, the Plaintiff sought medical treatment and, subsequently, a surgery was performed that revealed a

toothpick lodged in her intestine. (2nd Amd. Complaint, ¶¶ 7-12). The Plaintiff has alleged that Parker's was negligent in the following particulars:

- a) In failing to maintain the food for sale on the premises in a reasonable safe condition for invitees such as the Plaintiff;
- b) In the lack of reasonable diligence exercised in the preparation and/or maintenance of the food on the premises intended for invitees such as the Plaintiff;
- c) In failing to warn or have a sign of the hidden defects and dangerous conditions within the food items of which the Defendant had knowledge of or should have knowledge of;
- d) In failing to provide adequate lighting to invitees such as the Plaintiff who was unable to see the foreign object in the food;
- e) In failing to maintain and keep the food clear of debris for invitees such as the Plaintiff.

The Plaintiff was deposed on June 9, 2022. The Plaintiff testified that she ordered mac and cheese, which she calls "macaroni and cheese salad," a drink, gizzards, and two pieces of chicken. Mitchell Dep. 40:15-42:3. She then ate the food in the car. Mitchell Dep. 42:14-17. The Plaintiff testified that she took a bite of the macaroni and cheese salad and felt something stuck in her throat. Mitchell Dep. 42:14-25. She did not see anything in her food. Mitchell Dep. 43:3-5. As she began to chew her food, she did not feel anything unusual in her mouth and she did not spit the food out. Mitchell Dep. 43:6-44:10. Though she had bottom teeth, the Plaintiff did not have any top teeth and her plan to consume the gizzards was to "gum" them. Mitchell Dep. 48:5-49:13. When she swallowed, she felt like something stuck in her throat, but she was able to swallow it. Mitchell Dep. 49:10-15. It did not scratch her throat. Mitchell Dep. 49:14-16. She then continued home, felt fine, and did not seek any medical treatment until over a month later, on June 13, 2018. Mitchell Dep. 49:17-50:2. The Plaintiff acknowledged that there was a period of 6 weeks between feeling something "stuck" in her throat and feeling any pain in her abdomen. Mitchell Dep. 59:6-12.

The only medical testimony in this case is that of Dr. Milton Arras, a practicing

pathologist at Colleton Medical Center. Arras Dep. 5:14-18. Dr. Arras testified that he had conducted a microscopic examination of the specimen obtained from the Plaintiff's bowel during a surgery performed by Dr. Karl Steigler. Arras Dep. 8:6-9:1. Additionally, in preparation for his deposition and testimony as an expert in the field of pathology, he had reviewed the Plaintiff's medical records. Arras Dep. 14:10-16; 15:6-22; 16:7-12. Dr. Arras testified that it is his opinion that the foreign body removed from the Plaintiff was most likely a toothpick. Arras Dep. 8:20-9:23. However, it is impossible to know how long that toothpick had been in her body:

Q. And Doctor, can you tell me with a reasonable degree of medical certainty how long that toothpick has been in her body?

A. No.

Q. What would it take to determine that?

A. I'm not sure.

Arras Dep. 9:20-10:4.

Q. All right. And as such, Doctor, you can't tell how long the toothpick had been there. Is that correct?

A. That's correct.

Q. Don't know where it came from. Is that correct, Doctor? There was no history of where it came from, because, actually, there was no history of her swallowing a toothpick; was there?

A. Not from my review of the chart, but I don't concern myself with that.

Q. I understand, Doctor. And what I'm looking at is more as to what caused her problem. And I think that's what lawyers, we're looking to find out, what caused this and how long the toothpick had been there. Can anybody say with any reasonable degree of certainty?

A. No.

Arras Dep. 17:15-4.

There is no evidence that Parker's has toothpicks in its stores. See Defendant's Responses to Plaintiff's Request for Admission at #4 (denying Defendant had toothpicks available to its employees) and Defendant's Answers to Interrogatories at #16 ("The

Defendant further states toothpicks are not used in food service at Defendant's establishments."). Moreover, Defendant's employees are not permitted to chew gum or toothpicks while they are working. Davis Dep. 28:14-20; Bodaford Dep: 15:3-5. The Plaintiff agreed that she had never even seen a toothpick in a Parker's store. Mitchell Dep. 58:23-59:5.

LEGAL STANDARD

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that the moving party is entitled to summary judgment if the evidence before the court shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The "mere scintilla" standard does not apply under Rule 56; rather, the proper standard is the genuine issue of material fact standard and it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine. *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 892 S.E.2d 297 (2023). A genuine issue of fact can be created only by evidence that would be admissible at trial. *Hansen v. DHL Labs., Inc.*, 316 S.C. 505, 510, 450 S.E.2d 624, 627 (Ct. App. 1994), *aff'd*, 319 S.C. 79, 459 S.E.2d 850 (1995). See also *Hall v. Fedor*, 349 S.C. 169, 175-76, 561 S.E.2d 654, 657 (Ct. App. 2002) ("materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence."). Additionally, speculation and conjecture is insufficient to survive summary judgment. See *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 17, 677 S.E.2d 612, 615-16 (Ct. App. 2009) (affirming summary judgment for the defendant where plaintiff's assertions of liability were speculative and based upon conjecture).

ANALYSIS

This case is pled as a negligence action. In order to prove negligence against the Defendant, the Plaintiff must show that the Defendant owed her a duty, it breached that

duty, and that damages proximately resulted from the breach. *Bloom v. Ravoira*, 339 S.C. 417, 422, 529 S.E.2d 710, 712 (2000). The burden is on the Plaintiff to prove that the food she consumed was unfit for consumption and caused her injury. *Miller v. Atlantic Bottling Corp.*, 259 S.C. 278, 191 S.E.2d 518 (1972). In the present case, Plaintiff's negligence claim fails as a matter of law due to a lack of evidence to show that the Defendant breached a duty of care owed to the Plaintiff, or that any such breach proximately caused the Plaintiff's injuries. Importantly, in South Carolina, a plaintiff cannot prove negligence through the doctrine of *res ipsa loquitur*. *Eickhoff v. Beard-Laney*, 199 S.C. 500, 20, S.E. 2d 153 (1942). For that reason, it is not enough for the Plaintiff to testify that she gummed a mouthful of macaroni and cheese from Parker's and, 6 weeks later, underwent surgery to remove a toothpick from her intestine. Causation is proved by establishing the plaintiff's injury would not have occurred "but for" the defendant's negligence. *Hard v. Williamsburg County*, 353 S.C. 596, 579 S.E.2d 136 (Ct. App. 2003). Causation "must be based on probabilities, not mere possibilities." *Nguyen v. Uniflex Corp.*, 312 S.C. 417, 419-420, 440 S.E.2d 887, 889 (Ct. App. 1994). It is not sufficient that the condition in question "possibly" or "could have" or "might have" resulted in the injury. *Gambrell v. Burlison*, 252 S.C. 98, 165 S.E.2d 622 (1969).

In this case, there is simply no evidence that there was a toothpick in the Parker's food. In fact, there is no evidence that Parker's even has any toothpicks in its store. It does not sell toothpicks. Its employees are not permitted to have toothpicks in their mouths as they prepare food. Although the Plaintiff argued that it is a possibility that an employee was using a toothpick anyway and the toothpick may have fallen out of the employee's mouth while scooping out the macaroni and cheese, this assertion is based on speculation and not on any admissible evidence.

Additionally, the Plaintiff did not see a toothpick in the Parker's food. She did not feel a toothpick while she was chewing the Parker's food. She did not feel a toothpick while she was swallowing the Parker's food. The sensation that she felt was not a scratch from an inch and a half long portion of a toothpick.¹ Rather, the Plaintiff felt like something was stuck, probably the more likely result of "gumming" her food instead of chewing her food. The Plaintiff then swallowed the food. She did not spit it out or retain part of the toothpick². The Plaintiff then did not exhibit or report any symptoms until 6 weeks after the purported ingestion. Even the Plaintiff's own medical expert testified that there is no way to tell how long the toothpick had been there or where it came from. Because liability cannot rest on mere "possibilities," the Plaintiff's claims fail as a matter of law.

ORDER

For the foregoing reasons, the Defendant's Motion for Summary Judgment is hereby GRANTED. This ends the case.

AND IT IS SO ORDERED.

BY: _____
The Honorable Patrick C. Fant, III
Greenville County Courthouse
305 East North Street
Greenville, SC 29601
(864) 467-8559 (Telephone)
(864) 467-8815 (Fax)

Beaufort, South Carolina

¹ Only an inch and a half of a purported toothpick was recovered from the Plaintiff's intestine. Arras Dep. 16:14-25.

² Dr. Arras testified that the remaining part of the toothpick would not have been digested by the body. Arras Dep. 17:5-8. Therefore, if indeed bit into by the Plaintiff, the other half could have been retained.



Beaufort Common Pleas

Case Caption: Christine Mitchell , plaintiff, et al VS Parkers Llc , defendant, et al

Case Number: 2022CP0700056

Type: Order/Summary Judgment

So Ordered

Patrick C. Fant, III