

**IN THE SUPREME COURT
STATE OF GEORGIA**

No.: S17C1957

**JOSHUA PATTERSON and TAYLOR PATTERSON
Appellants-Plaintiffs,**

v.

**KEVON, LLC d/b/a BIG KEV'S BARBECUE
Appellee-Defendant.**

AMENDED BRIEF OF APPELLANTS-PLAINTIFFS

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I. INTRODUCTION

Joshua and Taylor Patterson (“the Pattersons” or “Appellants”) hereby file this Amended¹ Brief of Appellants. The Pattersons brought a lawsuit against Kevon, LLC d/b/a Big Kev’s Barbecue (“Big Kev’s”), alleging they suffered food poisoning after eating food Big Kev’s catered at a wedding rehearsal dinner. Big Kev’s moved for summary judgment, asserting a lack of proof of causation, and in opposing the motion the Pattersons introduced evidence supporting a finding of causation, including:

- (1) In addition to the Pattersons, four (4) other witnesses testified that they ate the food Big Kev’s served at the rehearsal dinner and became ill with symptoms similar to the Pattersons;
- (2) The only identified commonality between the Pattersons and the other four witnesses was the consumption of Big Kev’s food;
- (3) Joshua Patterson tested positive for salmonella poisoning;
- (4) One of the other witnesses who became ill, Andrew Love, also tested positive for salmonella poisoning (the others were not tested); and

¹ The Pattersons file this Amended Brief to conform previous references to record pages and transcripts in Appellants Initial Brief, docketed on February 2, 2017, with the appellate record that has since been uploaded to the Supreme Court’s e-file system, pursuant to Supreme Court Rule 19. Notwithstanding the amended record citations made herein, the entirety of the Appellants Brief docketed on February 2, 2017, remains unchanged.

(5) Witnesses were aware of approximately seventeen (17) other rehearsal dinner guests who became ill after eating Big Kev’s food. (R—Vol. 6, p. 25; R—Vol. 7, p. 15).

Despite this evidence, the trial court granted the motion for summary judgment, holding that since the Pattersons attempt to establish causation through circumstantial evidence – the Pattersons did not preserve Kevon’s food, so they cannot have it tested – they must “exclude every other reasonable hypothesis” in order to avoid summary judgment. (R—Vol. 1, p. 226.) On June 30, 2017, in a 5-4 decision, the Court of Appeals affirmed the trial court’s ruling. The Pattersons filed a Petition for Certiorari regarding the Court of Appeals’ decision and this Court granted the writ of certiorari on January 16, 2018.

Appellants submit that the Court of Appeals’ ruling confuses a plaintiff’s burden at summary judgment with a plaintiff’s burden at trial, and contradicts long-standing and fundamental principles of Georgia law that make a jury or other factfinder the arbiter to determine matters of reasonableness, such as whether a proffered hypothesis is reasonable. Consequently, this Court should reverse the Court of Appeals’ decision in this case.

II. STATEMENT OF FACTS

Joshua (“Josh”) and Taylor Patterson were two of approximately seventeen guests at a wedding rehearsal dinner who later became extremely ill after consuming

food served by Big Kev's. (R—Vol. 6, p. 25; R—Vol. 7, p. 15). In moving for summary judgment, Big Kev's offered five alternative theories of potential causation of the Pattersons' illnesses: (1) the rehearsal dinner dessert, supplied by a different caterer; (2) alcohol; (3) Big Kev's leftovers, eaten on the following day; (4) food another caterer served at the wedding reception; and (5) for Taylor Patterson, her care for Josh after he became ill. (R—Vol. 1, p. 98-100). In that context, the trial court and the Court of Appeals considered the following factual record:

On June 20, 2014, Josh and Taylor Patterson attended the wedding rehearsal dinner of K.C. and Abby Love in Morgan County at the Brady Inn. (R—Vol. 3, pp. 14-15; R—Vol. 4, pp. 11-12). Big Kev's catered the rehearsal dinner, serving chicken, baked beans, coleslaw, and macaroni and cheese. (R—Vol. 8, p. 27). Kevin Armstrong owns and operates Big Kev's. (R—Vol. 8, pp.15-16).

A. The Pattersons' Illnesses

Prior to eating the food items served at the rehearsal dinner, Josh and Taylor were not ill, nor were they around anyone else who was ill. (R—Vol. 3, p. 22). To the contrary, Josh and Taylor were in good health until they consumed the food Big Kev's prepared. (R—Vol. 3, p. 22; R—Vol. 4, p. 14).

At the rehearsal dinner, both Josh and Taylor consumed chicken and various sides, including potato salad, coleslaw and baked beans, all of which Big Kev's prepared and served. (R—Vol. 3, p. 19; R—Vol. 4, p. 13). On Saturday, Josh and

some other members of the wedding party ate leftover Big Kev's barbeque (R—Vol. 3, p. 26), while Taylor and others only consumed Big Kev's food on Friday, at the rehearsal dinner (R—Vol. 4, p. 15). Josh and Taylor then drove to Tampa on Sunday for a vacation. (R—Vol. 3, p. 37). They managed to eat only one meal on the way to Tampa, prior to the onset of Josh's illness. (*Id.*)

On Monday, Josh began to suffer the symptoms of salmonella infection. (*Id.*) Early that evening, Josh began to have gastrointestinal problems – first diarrhea and then vomiting. (R—Vol. 3, p. 38). Josh then began to have a high fever and chills, which lasted throughout the night. (*Id.*) He took over-the-counter medication, but it failed to alleviate his symptoms. (R—Vol. 3, p. 39). Josh went to a local medical provider, Bayfront HMA Convenient Care, where he was told he had an inflamed colon, colitis, and should go the Emergency Room. (R—Vol. 3, p. 40). Josh presented to the St. Petersburg General Hospital Emergency Room on Tuesday, June 24, 2016 and was admitted with a fever and serious dehydration due to diarrhea, along with colitis and proctitis. (R—Vol. 3, pp. 40-42).

The Hospital took blood and stool samples from Josh that tested positive for salmonella. (*Id.* at 41-43; R—Vol. 1, pp. 167-170). Josh's initial symptoms lasted approximately one week (R—Vol. 3, p. 39); however, due to the diarrhea Josh suffered during that time, he continued to have lingering problems, which caused him to sustain an anal fissure (*Id.* 43-44). After conservative treatment for this

condition failed, a specialist recommended that Josh undergo surgery. (*Id.* 44-45; R—Vol. 1, pp. 171-187).

On Wednesday, Taylor Patterson also began to experience symptoms of salmonella poisoning. (R—Vol. 4, p. 18). Taylor experienced the same symptoms as Josh—diarrhea, cramping and vomiting. (*Id.*) Taylor also experienced stomach pain and fever. (*Id.*) On Thursday, Taylor went to the Family Clinic at Bardmoor for treatment. (R—Vol. 1, pp. 188-190). The providers were able to access Josh’s medical records from the hospital, and learned that he had a positive culture for salmonella. (R—Vol. 3, pp. 42-43; R—Vol. 4, p. 21; R-188). Based on this, and the particulars of her symptoms, the doctor treated Taylor for salmonella infection, as well. (R—Vol. 4, p. 21). The Pattersons spent another night in a Tampa hotel before they returned home the following morning, with Taylor still experiencing diarrhea and nausea. (*Id.* at 18).

B. Others Suffering Food Poisoning

Upon returning home, Josh and Taylor learned that several others who had attended the rehearsal dinner had also experienced symptoms consistent with salmonella infection, and they began investigating to determine the cause. (*Id.* at 20-21; R—Vol. 3, pp. 46-48). Ultimately, they found that numerous people, including Todd Wischerth, Leslie Reynolds, Andrew Martin, and Andrew Love, ate Big Kev’s food at the rehearsal dinner and subsequently experienced similar symptoms to

theirs, commencing at around the same time and lasting a similar duration. (R—Vol. 3, pp. 46-49).

Todd Wischerth deposed he was not ill prior to the rehearsal dinner. (R—Vol. 7, p. 29). At the rehearsal dinner, Todd consumed the barbecue chicken and coleslaw that Big Kev's prepared and served. (*Id.* at 13). However, Todd did not consume any dessert (which was not a Big Kev's product) (*Id.*), nor did he consume any of the leftover food from the rehearsal dinner (*Id.* at 19-20). On Sunday, June 22, 2014, Todd became physically ill, experiencing fever, chills, diarrhea, nausea, and aches. (*Id.* at 20-21). Todd's symptoms persisted for a week, during which time he was only able to consume muffins, crackers, water, and broth. (*Id.* at 22-24).

Similarly, Leslie Reynolds testified that she was not ill prior to the rehearsal dinner. (R—Vol. 6, p. 31). At the rehearsal dinner Leslie consumed the barbecue chicken, baked beans, and macaroni and cheese that Big Kev's prepared and served. (*Id.* at 14). Like Todd Wischerth, Leslie ate no dessert at the rehearsal dinner (*Id.* at 15), nor did she consume any of the leftover food from the rehearsal dinner (*Id.* at 26). On Sunday June 22, 2014, Leslie became ill, experiencing diarrhea and dehydration. (*Id.* at 16-17). Leslie's symptoms persisted for a week, causing her to miss work on Monday, Tuesday, and Wednesday. (*Id.* at 32).

Likewise, Andrew Martin testified that he consumed Big Kev's barbecue chicken, baked beans, coleslaw, and potato salad at the wedding rehearsal dinner.

(R—Vol. 5, p. 14). However, Mr. Martin did not consume any dessert (*Id.*), nor any of the leftover food from the rehearsal dinner on the following day (*Id.* at 27). On Sunday, June 22, 2014, Mr. Martin became physically ill, experiencing severe diarrhea and chills. (*Id.* at 17). Mr. Martin's symptoms persisted for a week, causing him to miss work on Thursday and Friday. (*Id.* at 34-35).

In addition, Andrew Love deposed that he was in good health and experiencing no illness prior to the rehearsal dinner. (R—Vol. 1, pp. 163-166). At the rehearsal dinner, Mr. Love consumed the barbecue chicken, baked beans, coleslaw, and macaroni and cheese that Big Kev's prepared and served. (*Id.* at 163). The following day, on June 21, 2014, Mr. Love consumed a banana for breakfast, and leftover food from the rehearsal dinner for lunch. (*Id.* at 164). However, Mr. Love did not consume any food at the wedding reception dinner, itself. (*Id.*).

On Tuesday, June 24, 2014, Mr. Love became ill, experiencing diarrhea, vomiting, fever and chills. (*Id.*). These symptoms continued into Wednesday morning and became so severe that Mr. Love checked himself into the emergency room. (*Id.*). At the emergency room doctors took a stool sample from Mr. Love, which tested positive for salmonella. (*Id.*). Doctors advised Mr. Love that the positive salmonella test was the result of food poisoning. (*Id.*). Mr. Love continued to suffer salmonella infection symptoms for a week. (*Id.*).

While investigating the cause of all their illnesses, it became apparent to Josh, Taylor, Todd Wischerth, Leslie Reynolds, and Andrew Martin that their only shared commonality was the consumption of food that Big Kev's catered at the rehearsal dinner. (R—Vol. 3, p. 24; R—Vol. 4, pp. 20-21; R—Vol. 5, pp. 18-19, 28; R—Vol. 6, pp. 18-20; R—Vol. 7, pp. 22-23). Only guests who attended the rehearsal dinner became ill (*Id.*); Appellants, along with Mr. Martin, Ms. Reynolds and Mr. Wischerth, all testified that they knew of people who became ill after eating at the rehearsal dinner who did not even go to the wedding. (R—Vol. 3, pp. 30-31; R—Vol. 5, p. 27; R—Vol. 6, pp. 23-25; R—Vol. 7, p. 19).

C. Big Kev's Food Preparation

The deposition testimony of Big Kev's owner, Kevin Armstrong, provides evidence supporting a jury issue as to causation. On June 20, 2014, Mr. Armstrong prepared and cooked the chicken, baked beans, coleslaw, and macaroni and cheese for the rehearsal dinner. (R—Vol. 8, p. 27). Mr. Armstrong has never had any formal food preparation procedures in place for his catering business or restaurant. (*Id.* at 32). Mr. Armstrong did not have a set time allotted for the chicken to cook when he prepared it for the rehearsal dinner. (*Id.* at 37). He cooked twenty pounds of chicken on a grill, which he testified varies in temperature from 300 to 400 degrees, for an uncertain amount of time. Thereafter, he transferred the chicken to a pan of water, also for an unspecified amount of time, in order for the chicken to continue cooking.

(*Id.*). After the chicken was removed from the pan of water, it was placed into heating boxes and transferred to the rehearsal dinner venue. (*Id.* at 42).

Mr. Armstrong was solely responsible for monitoring all of the food's temperature, including the twenty pounds of chicken, from the time it began cooking at his restaurant until it was served at the rehearsal dinner. (*Id.* at 46). However, Mr. Armstrong admitted at his deposition that *he did not check the internal temperature of each piece of chicken prior to serving it.* (*Id.* at 47-48). Rather, Mr. Armstrong simply spot-checked pieces of chicken, and felt that if one piece of chicken was "pretty much temperature-wise," he could consider them all "temperature-wise." (*Id.* at 47).

III. ENUMERATION OF ERROR

1. Statement of Jurisdiction

This Court has jurisdiction through its grant of Appellants' timely filed Petition for Certiorari on January 16, 2018. The case is on the Court's May 2018 oral argument calendar.

2. Enumeration of the Error.

The Court of Appeals erred in affirming the grant of summary judgment to the Defendant/Appellee. In granting the writ of certiorari in this case, the Court identified particular concern with the issue: "Was summary judgment for the defendant properly granted in this food poisoning case?"

IV. ARGUMENT

A. The Court of Appeals Erred by Requiring the Pattersons to Meet Their Trial Burden at Summary Judgment

The law is well established in Georgia that a party moving for summary judgment always has the burden of establishing that there is no genuine issue as to any material fact and it is entitled to judgment as a matter of law; it has that burden even as to issues upon which the opposing party would have the burden at trial. *See Meade v. Heimanson*, 239 Ga. 177, 236 S.E.2d 357 (1977); *Ham v. Ham*, 230 Ga. 43, 195 S.E.2d 429 (1973); and *Massey v. National Homeowners Sales Service Corp. of Atlanta*, 225 Ga. 93, 165 S.E.2d 854 (1969). Only if the moving party discharges this burden does the burden shift to the nonmovant to point to specific evidence giving rise to a triable issue. *Lau's Corp., Inc. v. Haskins*, 261 Ga. 491, 495, 405 S.E.2d 474 (1991), abrogated by *Robinson v. Kroger Co.*, 268 Ga. 735, 493 S.E.2d 403 (1997).

As an initial matter, the Court of Appeals acknowledged the moving party's burden of demonstrating the absence of material facts creating genuine issues for trial. The Court, however, bypassed any consideration of whether Big Kev's met its initial burden and addressed only the sufficiency of the non-moving parties' (the Pattersons) opposing evidence in response to unsupported theories that Big Kev's advanced. *See Patterson v. Kevon, LLC*, 342 Ga. App. 256, 258-59 (2017), *cert. granted* (Jan. 16, 2018).

In this regard, through its motion for summary judgment, Big Kev’s posited five theories of causation: the rehearsal dinner dessert provided by a separate caterer, a bartender’s service of alcohol at the rehearsal dinner², Big Kev’s leftovers eaten the following day, food served at the wedding reception by another caterer, and as to Taylor, her care for Josh after he became ill. (R—Vol. 1, pp. 98-99). Big Kev’s introduced no evidence supporting any of these theories – for example, evidence that the dessert was defective. It simply suggested that the theories could not be eliminated.

Under Georgia law, summary judgment under such circumstances is improper. “A summary judgment should not be granted if the evidence merely preponderates toward the movant's theory or if the evidence does no more than disclose circumstances under which satisfactory proof of the opposing party's case on trial appears to be highly unlikely.” *Shutley v. Hite*, 118 Ga. App. 664, 664, 165 S.E.2d 169, 170 (1968). In this case, the Court of Appeals flouted this principle, citing *Stevenson v. Winn-Dixie Atlanta, Inc.*, 211 Ga. App. 572, 440 S.E.2d 465

² Big Kev’s baseless promotion of their “bartender theory” as a cause of the Pattersons’ illnesses is pure speculation. Despite acknowledging “little is known about” the bartender, (*See* Brief of the Petitioner at 27 n.3, *Patterson v. Kevon, LLC* (July 19, 2017) (Supreme Court No. S17C1957)), and admitting—albeit subtly through a footnote—there is no admissible evidence, only hearsay, that the bartender was ill, Big Kev’s argued to the Court that “the presence of the bartender . . . could very well be the source of contamination . . .” (*Id.*) This theory is pure conjecture and speculation. Indeed, Big Kev’s presented no evidence that this bartender ever had contact with the Pattersons or all independent witnesses who became ill.

(1993), in finding that cases offering circumstantial evidence of food poisoning are a “unique species of negligence cases” in which a plaintiff may only avoid summary judgment by introducing evidence showing the defendant’s conduct is “the only reasonable hypothesis” for the illness, “to the exclusion of all other reasonable theories.” *Patterson v. Kevon, LLC*, 342 Ga. App. 256, 259, 802 S.E.2d 442, 445 (2017), *cert. granted* (Jan. 16, 2018). *Stevenson* is plainly distinguishable from the facts of this case. In *Stevenson*, the plaintiff alleged to have contracted food poisoning from ice cream that she said was sold to her after its expiration date. *Stevenson*, 211 Ga. App. at 573. However, the theory that the product was sold past its expiration date was actually “excluded by the evidence.” *Id.* at 574. Unlike the present case, in which Josh Patterson tested positive for salmonella, in *Stevenson* the plaintiff’s physician “discounted salmonella.” *Id.* at 573. The particular batch of ice cream from which the plaintiff purchased ice cream came, was laboratory tested and met State and Federal standards. *Id.* Finding that the plaintiff’s circumstantial evidence of illness after consuming the ice cream was insufficient to withstand summary judgment, the Court concluded: “Circumstantial evidence is not probative against positive and uncontradicted evidence to the contrary.” *Id.* at 574 The circumstantial evidence of the plaintiff’s illness did not create a genuine issue of fact in view of the defendant’s uncontroverted direct evidence.

In the current case, the Pattersons have not merely introduced evidence of their own illnesses after eating Big Kev's food. They have introduced the testimony of four (4) other witnesses who also became ill, evidence of a laboratory test establishing that Josh Patterson contradicted food poisoning, evidence that Andrew Love also confirmed salmonella poisoning through a laboratory test, and evidence that approximately seventeen (17) others became ill after consuming Big Kev's catered food. (R—Vol. 6, p. 25; R—Vol. 7, p. 15). Unlike *Stevenson, supra*, *Mann v. D.L. Lee & Sons, Inc.*, 245 Ga. App. 224, 537 S.E.2d 683 (2000) and similar cases in which a plaintiff attempted to establish causation through proof of their illness, alone, the Pattersons introduced compelling corroborating evidence of causation that warrants a jury's consideration.

Furthermore, as Judge Doyle's dissenting opinion notes – though the majority opinion ignores it – the Pattersons responded to **each** of the theories advanced by Defendant, more than meeting their obligation as nonmovants at summary judgment, by pointing to **evidence** in the record refuting the theory, thereby creating a genuine issue of material fact that precluded summary judgment on causation. *See Bituminous Ins. Co. v. Coker*, 314 Ga. App. 30, 31 (2012).

The Pattersons presented this evidence through deposition and affidavit testimony of four independent witnesses. Todd Wischerth, Leslie Reynolds, Andrew Martin, and Andrew Love all became ill after consuming Big Kev's rehearsal dinner

food. (R—Vol. 5, pp. 14-17; R—Vol. 6, pp. 15-17; R—Vol. 7, pp. 19-21; R—Vol. 1, pp. 163-166). The indistinguishable facts and circumstances of their illness, shared with the Pattersons, unequivocally identifies Big Kev’s food as the root cause. The only commonality shared by all six (6) witnesses who have testified to suffering similar symptoms after the rehearsal dinner – Josh Patterson, Taylor Patterson, Todd Wischerth, Leslie Reynolds, Andrew Martin, and Andrew Love – is that they all ate Big Kev’s food. (*Id.*). Addressing each of the five alternative theories Big Kev’s has offered for the Pattersons’ illnesses:

- (1) The rehearsal dinner dessert. A separate caterer provided the dessert at the rehearsal dinner, so Big Kev’s has suggested that the dessert could have been the cause of all of the witnesses’ illnesses. But Leslie Reynolds, Todd Wischerth and Andrew Martin all testified that they did not eat the dessert, but still became ill after eating Big Kev’s catered food. (R—Vol. 5, p. 14; R—Vol. 6, p. 15; R—Vol. 7, p. 13). Thus, the Pattersons offered evidence excluding the dessert as a reasonable hypothesis for their illnesses.
- (2) The bartender’s service of alcohol at the rehearsal dinner. As previously noted, Big Kev’s suggestion that the bartender may have been ill at the rehearsal dinner is pure speculation. In addition, as Judge Doyle’s dissenting opinion noted, there is no evidence that Taylor Patterson had any alcohol at the rehearsal dinner, and Andrew Love testified that the

bartender ate Big Kev's food and contracted food poisoning, also. *Patterson v. Kevon, LLC*, 342 Ga. App. 256, 261, n. 3, 802 S.E.2d 442, 446 (2017), *cert. granted* (Jan. 16, 2018) (Doyle, J., dissenting). Furthermore, there is no evidence of the bartender having any symptoms of illness at the rehearsal dinner. *Id.*

- (3) Big Kev's leftovers eaten the following day. Some guests ate Big Kev's leftovers the day after the rehearsal dinner; therefore, Big Kev's has theorized that they could have become ill due to a failure to properly store the food. However, neither Taylor Patterson, (R—Vol. 4, p. 15), nor Mr. Martin, Ms. Reynolds, or Mr. Wischerth consumed any of the rehearsal dinner's leftover food. (R—Vol. 5, p. 27; R—Vol. 6, p. 26; R—Vol. 7, pp. 19-20). Consequently, the Pattersons have excluded this as a reasonable hypothesis for their illnesses.
- (4) Food served at the wedding reception by another caterer. Andrew Love testified that he consumed Big Kev's food at the rehearsal dinner, but did not consume any food at the wedding reception, but still became ill. (R—Vol. 1, p. 164) Furthermore, he tested positive for salmonella and was diagnosed with salmonella poisoning, just like Josh Patterson. (*Id.*) Mr. Love's testimony excludes the wedding reception food as a reasonable theory for the cause of the Patterson's illnesses.

(5) As to Taylor Patterson, her care of Josh Patterson. Big Kev's has speculated that Taylor could have contracted an illness from Josh while taking care of him. Obviously, this would not explain Josh's illness, nor the illnesses of the independent witnesses. Therefore, this is not a reasonable theory for the cause of the Pattersons' illnesses.

The Pattersons, as nonmovants at summary judgment, pointed to evidence establishing that the only food items the Pattersons and the independent witnesses consumed in common, prior to becoming ill, were those items prepared and served by Big Kev's. This is compelling circumstantial evidence that Big Kev's food proximately caused the Pattersons' illnesses.

In Georgia courts, questions of causation are reserved for the jury, except in plain and undisputed cases. *Castleberry's Food Co. v. Smith*, 205 Ga. App. 859 (1992). Causation is far from plain and undisputed in this food poisoning case.

Georgia law provides that a Plaintiff can prevail on their claim **at trial** by introducing circumstantial evidence that supports causation and excludes other reasonable possibilities as to the cause of a plaintiff's illness. *See Worthy v. Beautiful Restaurant*, 252 Ga. App. 479, 481 (1) (2001); *Castleberry's Food Co. v. Smith*, 205 Ga. App. 859, 861 (2) (1992). Although the Court of Appeals correctly notes that such a burden is a "heavy burden" for a food poisoning plaintiff to meet, *Patterson*, 342 Ga. App. at 260, that is a plaintiff's burden of proof **at trial**.

It is for the jury to determine whether the other causation theories advanced by Big Kev's are reasonable and, if so, are adequately excluded by the Pattersons' evidence. Requiring the Pattersons to do more than point to such evidence creating an issue of material fact, as the Court of Appeals' decision does, is error.

B. The Court of Appeals Erred in Failing to View Evidence in Favor of the Nonmovants on Summary Judgment

Contributing to the incorrect heightening of the Pattersons' burden of proof at summary judgment, the majority's decision does not view the evidence in a light most favorable to the Pattersons as the nonmovant, and does not afford them the benefit of every reasonable inference, as Georgia law requires.³ Moreover, the decision establishes precedent that essentially eliminates this principle in food poisoning cases, requiring courts to weigh evidence at the summary judgment stage and putting plaintiffs in such cases to the task of convincing the court that every causation *theory* a defendant offers in a motion for summary judgment is unfounded before allowing the case to proceed to trial.

“The cardinal rule of the summary procedure is that the court can neither resolve facts nor reconcile the issues but only look to ascertain if there is an issue.”

³ See *Lau's Corp. v. Haskins*, 261 Ga. at 494; *Millar Elevator Svc. Co. v. O'Shields*, 222 Ga. App. 456, 475 S.E.2d 188 (1996); *Service Merchandise v. Jackson*, 221 Ga. App. 897, 473 S.E.2d 209 (1996); *Harvey v. McLaughlin*, 198 Ga. App. 105, 400 S.E.2d 635 (1990); *Holland v. Sanfax Corp.*, 106 Ga. App. 1, 5, 126 S.E.2d 442 (1962).

Daniel v. Bank South Corp., 183 Ga. App. 274, 276, 358 S.E.2d 664, 666 (1987). “If the trial court is presented with a choice of inferences to be drawn from the facts, all inferences of fact must be drawn against the movant and in favor of the party opposing the motion.” *Barlow v. Orkin Exterminating Co., Inc.*, 196 Ga. App. 822, 823, 397 S.E.2d 170, 171 (1990).

The majority’s decision engages in the type of evidence weighing that Georgia law reserves for a jury. The Court explains that it is simply not convinced that the evidence is sufficient to exclude every reasonable causation theory Big Kev’s has offered because “the record shows that a number of individuals who consumed the same food that evening did not become ill. Thus, the Pattersons’ theory of the case does not exclude the possibility that the illness was transmitted to them from a source other than the food served by Big Kev’s. . .” *Patterson*, 342 Ga. App. at 258-59.

In reaching this conclusion, not only does the Court of Appeals improperly invade the province of the jury, it completely ignores Kevin Armstrong’s testimony which, taken in the light most favorable to the nonmovants as Georgia law requires, provides the very explanation the decision claims the Pattersons are missing—why some who consumed Big Kev’s food did not become ill. Mr. Armstrong testified that he controlled all food items served at the rehearsal dinner, he had no quality control procedures in place to ensure the wholesomeness of the food prior to serving it, he did not have a set time allotted for the chicken to cook and he did not check

the internal temperature of each piece of chicken prior to serving it. (R—Vol. 8, pp. 32-35, 37, 47-48). Certainly, if the Court of Appeals gave inferences to Appellants as the nonmovants, it is reasonable to infer that some pieces of chicken cooked to a higher internal temperature than others.

Correctly applying the Pattersons' burden of proof as nonmovants by resolving all doubts as to evidence and the benefit of any conflict in favor of the Pattersons and against Defendant, the evidence in this case demonstrates not only that a jury might reasonably infer that the Pattersons' sickness was caused by the food that Big Kev's served them (through the deposition and affidavit testimony of the independent witnesses proffered by the Pattersons), but also, when given the benefit of all favorable inferences that may be drawn from the evidence, the record establishes—through the testimony of Mr. Armstrong—that Big Kev's failed to exercise the proper degree of care in preparing and cooking the food items served.

The Pattersons have introduced a wealth of circumstantial evidence in support of their food poisoning claims. Big Kev's has offered countering theories – with no supporting evidence – for the cause of the Pattersons' illnesses, and the Pattersons have submitted evidence that tends to disprove those theories. The sufficiency of the Pattersons' evidence is not for a trial or appellate court to decide at summary judgment. *See McCarty v. Nat'l Life & Acc. Ins. Co.*, 107 Ga. App. 178, 183, 129 S.E.2d 408, 412 (1962) (If circumstantial evidence reasonably establishes a

plaintiff's theory, the case must be submitted to a jury to decide whether the evidence preponderates to that theory or to some other, and whether it excludes all other less reasonable hypotheses); *see also Worthy v. Beautiful Restaurants, Inc.*, 252 Ga. App. 479, 482 (2001). The Pattersons have introduced more than enough evidence of causation to create a genuine issue of material fact for a jury to decide. Thus, the Court of Appeals erred in affirming summary judgment in favor of Big Kev's and its ruling should be reversed.

V. CONCLUSION

The Court of Appeals' decision is in error for two primary reasons. First, the Court erred in requiring the Pattersons to meet their ultimate burden at trial on summary judgment as the party opposing summary judgment. As demonstrated herein, the record is replete with evidence that raises a genuine issue of material fact, which should be resolved by a jury.

Second, the Court of Appeals' weighing of the Pattersons' circumstantial evidence without viewing the evidence in a light most favorable to the Pattersons as the nonmovant, and affording them the benefit of every reasonable inference, warrants overturning the Court's ruling. The circumstantial evidence the Pattersons introduced, when correctly viewed in a light most favorable to them, clearly showed (i) the absence of any preexisting illness suffered by the Pattersons prior to consuming Big Kev's food at the rehearsal dinner, (ii) the absence of any preexisting

illness suffered by Todd Wischerth, Leslie Reynolds, Andy Martin, or Andrew Love prior to consuming Big Kev's food at the rehearsal dinner, (iii) the like symptoms, like illnesses and like duration of illnesses suffered by the Pattersons, Todd Wischerth, Leslie Reynolds, Andy Martin, and Andrew Love after consuming Big Kev's food at the rehearsal dinner, (iv) the identical stool sample test results of Appellant Josh Patterson and Andrew Love for salmonella after eating the food Big Kev's catered at the rehearsal dinner, and (v) Big Kev's failure to check the internal temperature of each piece of chicken prior to serving it at the rehearsal dinner. Accordingly, the evidence creates a fact question regarding whether there is a reasonable alternative hypothesis—save Big Kev's food—for the proximate cause of the Pattersons' illnesses.

The majority's decision essentially requires a plaintiff in a food poisoning case to produce evidence of direct testing of the food in order to avoid summary judgment. In so doing, it violates fundamental principles of Georgia law which govern the use of summary judgment. For the reasons stated herein, the Pattersons ask this Court to reverse and direct the trial court to deny the motion for summary judgment.

Respectfully submitted, this 9th day of February, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served the above and foregoing Brief of Appellants electronically through the Court's E-Filing System, which serves all parties of record by electronic means and by placing a true and correct copy of same in the United States Mail, first-class postage prepaid and addressed to the following counsel of record prior to filing:

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