

# Defendant Seeks a Change of Menu

by Norman G. Tabler Jr.



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In the heat of an argument in an Italian restaurant, an attorney hurled his steaming pasta dinner at a fellow patron. The pasta hit the target, but it also hit a bystander.

The bystander sued the attorney, alleging that he had covered her with pasta with fra diavolo sauce. In response, the attorney denied throwing pasta with fra diavolo sauce. As the case proceeded, the basis of his denial was revealed: The pasta was cavatelli with sausage and broccoli, not pasta with fra diavolo sauce.

Aside from featuring the first-ever change-of-menu defense and illustrating the legal concept of the *negative pregnant*, the case may help explain why the public holds lawyers in such low regard.

## What Happened

While dining at Roma's Ristorante in Oakville, Conn., on March 29, 2015, attorney James Sweeney argued with Michael Cosmos and another patron, objecting to their language as too coarse for the ears of Sweeney's female companion. Sweeney picked up his pasta dinner and threw it at Cosmos.<sup>1</sup>

The dinner struck Cosmos. It also struck Constance Koulmey, who had the misfortune of walking by just as Sweeney launched the missile. The pasta and topping struck her on the head and dripped onto her face, into her eyes, and onto her scarf and coat. Startled by the impact, she fell and struck her head on a side rail. In the confusion of the moment, she thought that her head injury came from Sweeney's bowl rather than the side rail.

Sweeney didn't apologize to the bystander. He didn't even approach her. Instead, he fled out the back door and was long gone when the police arrived in response to Koulmey's 911 call. It was several weeks before the police tracked Sweeney down.

Meanwhile, Koulmey was taken to Waterbury Hospital, where medical records confirm a concussion, contusion, neck pain, and related injuries. Later, she would complain of continuing neck and back pain, blurred vision, and migraine headaches resulting from the incident.

Based on the ensuing police investigation, including interviews of Cosmos, the bartender, and Koulmey, as well as review of the restaurant's video surveillance tape of the incident, Sweeney was

arrested and charged with the crimes of breach of peace<sup>2</sup> and third-degree assault resulting in physical injury.<sup>3</sup> Charges were dismissed after his successful completion of a rehabilitation program for first-time offenders.<sup>4</sup>

## Koulmey's Suit

Koulmey sued Sweeney on two counts: negligence and battery. In her negligence count, she alleged that Sweeney was intoxicated and threw pasta with fra diavolo sauce on her, and she claimed damages for physical injuries, blurred vision, pain, emotional upset, elevated blood pressure, and risk of future medical complications. She also sought compensation for damage to her scarf and coat.

In her battery count, she alleged that Sweeney was intoxicated and intended to cause physical harm to his intended target, Cosmos, and that Sweeney "recklessly or intentionally and willfully caused physical injury to her [the plaintiff]." She sought damages for her injuries and losses, as well as punitive damages.<sup>5</sup>

## Sweeney's Response

In his answer, Sweeney denied that he was intoxicated and stated that he threw his pasta at a man who threatened him. He specifically denied that the pasta he threw was topped with fra diavolo sauce. As to Koulmey's claim that she had been hit with pasta, he claimed insufficient knowledge on which to form a belief, but he specifically denied any misconduct on his part and denied that Koulmey suffered any injury.

His answer included two "special defenses." As to Koulmey's negligence count, he pleaded self-defense. As to the battery count, he pleaded that he was "provoked into acting."

But he didn't stop there. He filed a counterclaim against Koulmey in three counts: fraud/intentional misrepresentation, intentional infliction of emotional distress, and malicious prosecution.

The essence of all three counts was that Koulmey told the police and medical personnel that she was hit with a bowl of pasta when, in fact, she was hit merely with the *contents* of a bowl of pasta and that she had not suffered a concussion or any substantial injury. Besides that, he insisted, the dinner he threw was not pasta with fra diavolo sauce!<sup>6</sup>

## Sweeney's Summary Judgment Motion

Sweeney moved for summary judgment on both counts of Koulmey's complaint.<sup>7</sup> As to her negligence count, he insisted that his actions were not the proximate cause of any injury because there was no evidence that he threw a bowl (as distinguished from its contents) or that she was injured. The court rejected the position almost out of hand, noting that the hospital records documented injuries, including a concussion.

Sweeney's argument for summary judgment on Koulmey's battery count was that there was no evidence that he *intended* to injure her or that she was injured. The court noted that reckless disregard of consequences, as well as intention, can support a claim of battery. The court also pointed to Koulmey's medical records as evidence that she did, in fact, suffer injury.

As for Sweeney's claim of self-defense, the court noted that (1) there was evidence that Cosmos did not threaten him; (2) even if Cosmos *did* make a threat, there was a question whether it was reasonable for Sweeney to resort to physical action in response to "the mere use [by Cosmos] of offensive words, without more"; and (3) no legal principle supported Sweeney's position that he was insulated from liability for injuring Koulmey because he felt threatened by Cosmos. The motion was denied.<sup>8</sup>

## Koulmey's Summary Judgment Motion

Koulmey moved for summary judgment on Sweeney's three counterclaim counts, but not on her own claims.<sup>9</sup>

The theory of Sweeney's counterclaim for intentional misrepresentation was that Koulmey falsely told the police and medical personnel that she was hit by a bowl rather than merely its contents. Noting the absence of evidence that Sweeney was induced to rely on Koulmey's statements or that he did rely on them—elements necessary for a claim of misrepresentation—the court granted Koulmey's motion as to that count.

Sweeney's counterclaim for intentional infliction of emotional distress was based on the same theory: that Koulmey falsely claimed to have been hit by a bowl. It met with the same fate as his first counterclaim count.

As to the third counterclaim count, for malicious prosecution, the court noted that Sweeney failed the fundamental requirement for such a claim: that the criminal proceedings at issue terminated in favor of the person claiming malicious prosecution.

In Sweeney's case, the proceedings did not terminate in his favor. They were dismissed only after he completed a rehabilitation program for first-time *offenders*. That confirmed that he was an offender in the incident that Koulmey reported to the police.

Koulmey's motion was granted in full.<sup>10</sup>

## Settlement Negotiations

Koulmey filed a formal offer of compromise: She would accept \$75,000 in settlement.<sup>11</sup>

Sweeney's response: He would settle if Koulmey *paid him* \$50,000.<sup>12</sup>

## The Trial

The case was tried before a jury on May 31, 2018—more than three years after Sweeney covered Koulmey with pasta and sauce. The jury deliberated for about three-and-a-half hours before finding in fa-

vor of Koulmey. She was awarded \$22,300 for past medical expenses, \$17,800 for future medical expenses, \$5,000 for past noneconomic damages, and \$40,000 for future noneconomic damages, for a total of a little over \$85,000<sup>13</sup>—over \$102,000 with interest.

A high price for a pasta dinner, whether pasta with fra diavolo sauce or cavatelli with broccoli and sausage.

## Lessons Learned

What lessons can we take away from this case? The most obvious is that if you're angered by another person's words, you should resist the temptation to throw your dinner at him. If you're unable to resist the temptation, you should take care that no bystanders are in the trajectory of your missile.

If a bystander *is* struck, you should consider approaching her, apologizing, and offering to assist her in any way you can.

If the police have been summoned, you should consider waiting for them and explaining the situation, putting the best face on it that you reasonably can.

You should probably not mount a defense based on a quibble over what kind of pasta topping you used in assaulting your victim.

Before countersuing, you should reflect on the likelihood that a judge or jury will be sympathetic to the claim that you have been victimized by the woman you covered in pasta before fleeing the scene.

If your criminal prosecution for the incident results in your entering a program for *offenders*—even first-time offenders—you should probably not sue your victim for malicious prosecution.

Alternatively, you can disregard these lessons, cover an innocent bystander with pasta, flee the scene, hide from the police, argue over pasta toppings, sue your victim, litigate for over three years, and end up paying more than \$100,000 for your dinner—a dinner you never got a chance to eat. ☹

## Endnotes

<sup>1</sup>This recitation of facts is taken primarily from Memorandum of Decision Re Motions for Summary Judgment, *Koulmey v. Sweeney*, No. uwy. cv-15-602 875 7-5. Super. Ct. J.D. of Waterbury, issued May 17, 2018.

<sup>2</sup>Conn. Gen. Stat. Ann. § 53a-61.

<sup>3</sup>Conn. Gen. Stat. Ann. § 53a-181a.

<sup>4</sup>Conn. Gen. Stat. Ann. § 54-56e.

<sup>5</sup>Second Amended Complaint, *Koulmey v. Sweeney*.

<sup>6</sup>Answer and Counterclaim, and Defendant's Amended Answer and Special Defenses to Plaintiff's Amended Complaint, *Koulmey v. Sweeney*.

<sup>7</sup>Defendant's, James Sweeney, Motion for Summary Judgment, *Koulmey v. Sweeney*.

<sup>8</sup>See *supra* note 1.

<sup>9</sup>Constance Koulmey's Motion for Summary Judgment on Defendant's Counterclaim, *Koulmey v. Sweeney*.

<sup>10</sup>See *supra* note 1.

<sup>11</sup>Offer of Compromise [by Plaintiff], *Koulmey v. Sweeney*.

<sup>12</sup>Offer of Compromise by Counterclaim Plaintiff, *Koulmey v. Sweeney*.

<sup>13</sup>Plaintiff's Verdict for Constance Koulmey, *Koulmey v. Sweeney*.