

2009 HOSPITALITY LAW CONFERENCE

# Foodborne Illnesses & Allergens



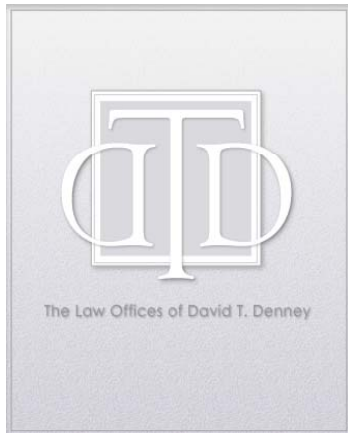
**Developing Policies & Procedures  
from Selected Cases & Settlements**



# Presenter



- David T. Denney, Esq.
- The Law Offices of David T. Denney, PC – Dallas, Texas
- The firm's Food, Beverage and Hospitality practice focuses on representing food and beverage clients in litigation, the formation, purchase and sale of entities, commercial leasing, employment matters and alcoholic beverage licensing.
- David created a quarterly seminar series for the Greater Dallas Restaurant Association entitled *How to Grow your Restaurant Company*.
- [www.foodbevlaw.com](http://www.foodbevlaw.com)





# Legal Foundations of Liability

- Breach of Warranty
  - Implied Warranties
    - Warranty of Fitness for Human Consumption  
(also plead as Strict Liability in Tort)
    - Warranty of Merchantability
  - Express Warranties
    - Written (“Wild Salmon”)
    - Oral (“We can serve you a meal without nuts.”)



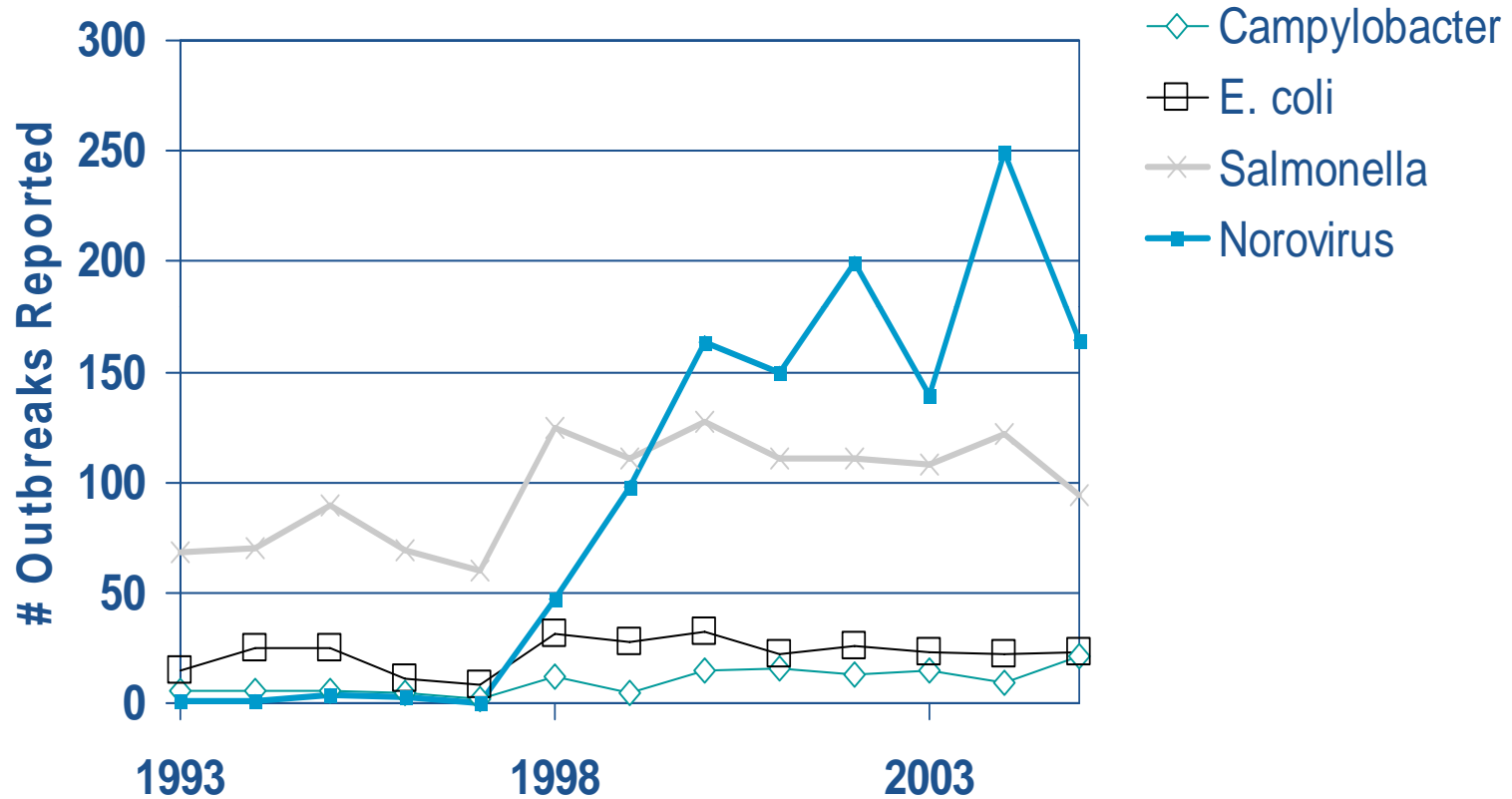
# Reasonable Expectation Test

- Foreign Substance (glass/metal/band-aid)
  - You probably lose.
- Natural but Unexpected Substance (bone/pit)
  - You may still lose.

The question becomes: **Was the food, upon delivery to the customer, in a condition that (a) was not contemplated, and (b) unreasonably dangerous.**



# Foodborne Illness



Source: Ecolab, Inc. and NRA



# Norovirus

- Estimated 23 million cases in U.S. each year
- Symptoms include nausea, vomiting, diarrhea and stomach cramps
- Spreads rapidly in large populations
  - Restaurants, hotels, cruise ships, schools, nursing homes, hospitals, correctional facilities and more;
  - Spreads from person to person, through unwashed hands, via contaminated food or water or contact with contaminated surfaces
- Resilient under a wide range of conditions
  - Heat, cold, chemicals, time
- Can damage the reputation of a business



# Estimated Norovirus Infections

## ...Among Restaurant Employees

Employees:	<b>12 million</b>
Diarrheal illness rate:	<b>(0.79 per person/yr)</b>
Illnesses among restaurant employees:	<b>9 million</b>
% of GI illnesses due to Norovirus:	<b>(11%)</b>
Norovirus among restaurant employees:	<b>990,000</b>
Food workers who work while ill:	<b>(5%)</b>
Norovirus-infected restaurant employees who work while ill:	<b>&gt;50,000</b>

**Source: NRA**



# Allergens

- 7-12 million Americans suffer from food allergies.
- Up to 32% of fatal food allergy incidents originate in restaurants.
- 25% of all peanut/tree nut allergy incidents occur in restaurants.
- The 8 most common food allergies are:
  - Milk
  - Eggs
  - Fish
  - Wheat
  - Tree Nuts
  - Peanuts
  - Crustaceans





# Allergies

## *Journal of Allergy and Clinical Immunology*

- Studied 59 restaurant workers in 58 units
- 38% managers, 38% servers, 20% chefs
- Self-ratings:
  - 76% “very” or “somewhat” comfortable in providing a safe meal
  - 54% “very” or “somewhat” comfortable in managing a food allergy emergency



# Allergies

## *Journal of Allergy and Clinical Immunology*

- 25% indicated consuming a small amount of allergen would be safe
- 34% believed fryer heat would “destroy” allergens
- 46% considered a buffet a safe choice if kept “clean”
- 29% thought removing an allergen from a finished meal (i.e. scraping) was safe



# Selected Foodborne Illness Cases



## *Sarti v. Salt Creek I, Ltd.*, G037818, Cal. App. 10/27/2008

### Background

- Plaintiff ate raw tuna and raw vegetables;
- Contracted *Campylobacter*, which subsequently caused Guillain-Barre syndrome
- Inspector identified 4 practices that *could* lead to contamination
- Trial court overturned \$3.2MM jury award
- Court of Appeals reversed, holding that causation could be *inferred* from evidence



*Evans v. MIPTT, LLC*, 2007 Tex.App.  
LEXIS 4680 (Houston, [1<sup>st</sup> Dist.] 2007)

## Background

- Plaintiff consumed 2 plates of crabs (and was at the buffet waiting for more) when she became ill
- Inspection revealed minor violations in the kitchen, but buffet checked out
- Held: Plaintiff's circumstantial evidence did nothing more than create a "suspicion" of causation.



*Woeste v. Washington Platform Rest.*,  
836 N.E.2d 52 (Oh. App. 2005)

- Plaintiff's husband, who had an immune deficiency, died after contracting *vibrio vulnificus* from raw oysters.
- Plaintiff ordered without reading the menu, which contained a warning about raw oysters.
- Held: Restaurant was not liable for diner's failure to read the warning.



*Edwards v. Hop Sin, Inc.*,  
140 S.W.3d 13 (Ky. Ct. App. 2003)

- Summary Judgment for restaurant overturned
  - Supplier delivered raw oysters in packing which included warning about consuming raw oysters.
  - Restaurant’s failure to pass the warning on to its customers rendered the oysters an “altered” and unsafe product that could be unreasonably dangerous



## Houlihan's – Geneva, IL (2007)

### Houlihan's Employee infected with Hep A in Jan. 07

- Plaintiffs: **anyone** who ate/drank between Jan. 8 and 19 (about 3,000)
- Alleged Damages included
  - Lost wages
  - Medical/travel expenses (for immunizations, etc.)
  - Emotional distress for fear of becoming infected
- Settled for \$300,000

**NO EVIDENCE ANY DINERS WERE INFECTED**





## Carrabba's – Lansing, MI (2006)

- Worker with Norovirus infected >400 diners
- Health dept. found 6 “critical” violations, including:
  - Infected employee was allowed to work;
  - Restaurant failed to enforce hand-washing policies.
- Restaurant apologized and asked plaintiffs to settle with insurance in full-page ad
- Only a few members of the class elected to sue

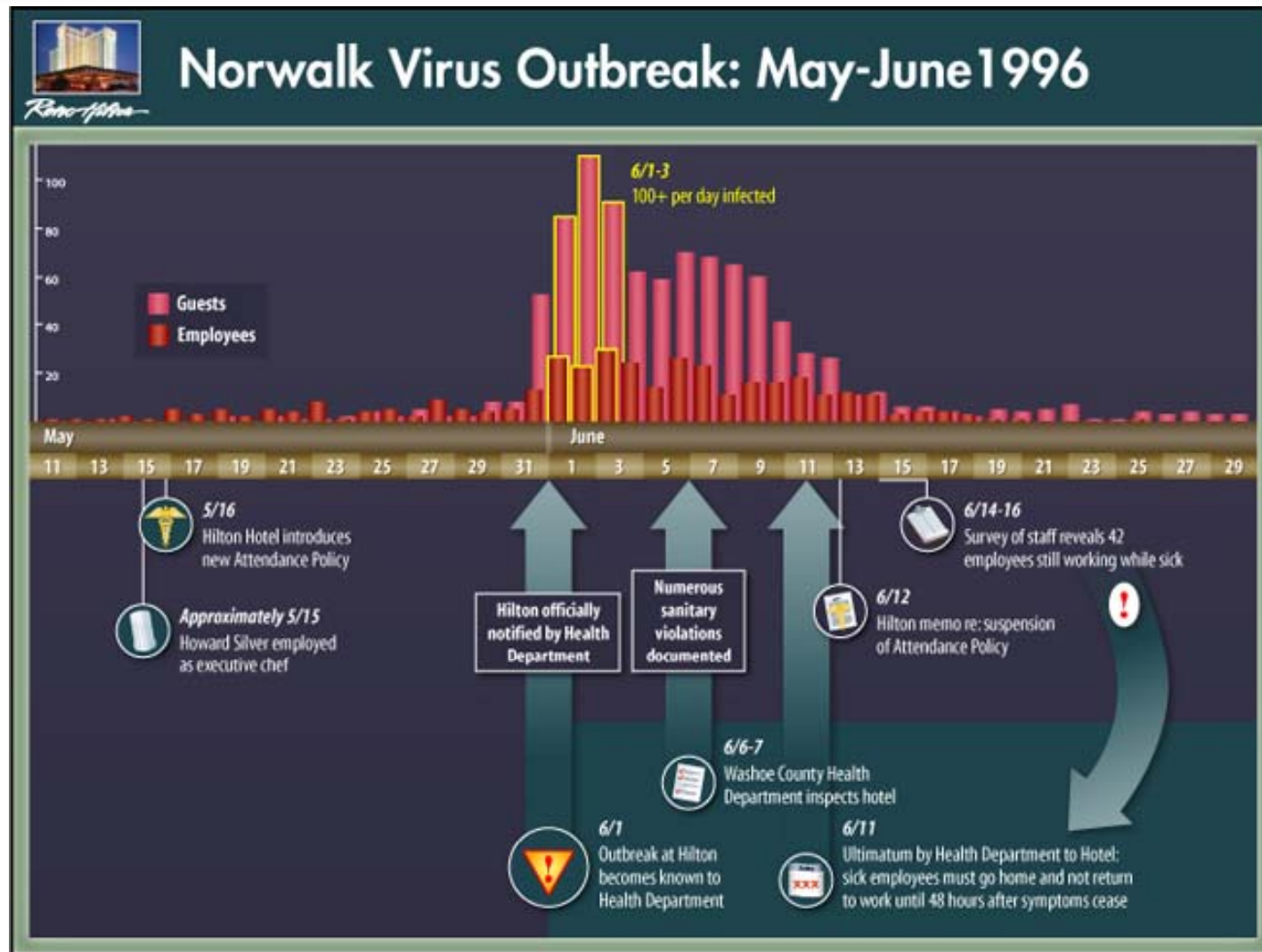


## *Reno Hilton v. Verderber*, 106 P.3d 134 (Nevada 2005)

- Norovirus outbreak sickened > 1,300 in **1996**
- Trial Court:
  - Jury found lack of sick-leave policy was the proximate *cause* of the outbreak;
  - Jury awarded plaintiffs \$25MM in punitive damages in Phase I of the trial.
- Court of Appeals:
  - Hilton lost a procedural motion in **2005** that would have reversed Phase I verdict.




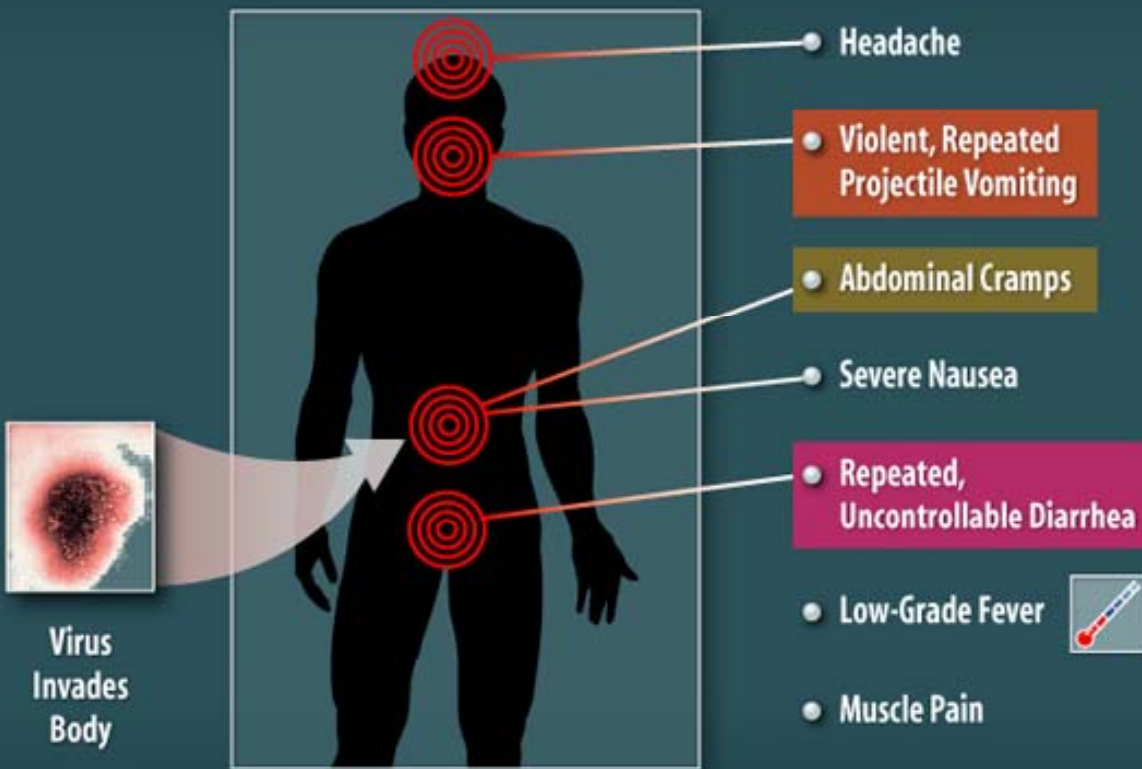
# Slides from Plaintiff's trial presentation in *Verderber v. Reno Hilton* (The Focal Point, LLC)







# Slides from Plaintiff's trial presentation in *Verderber v. Reno Hilton* (The Focal Point, LLC)

 **Symptoms of the Norwalk Virus**



- Headache
- **Violent, Repeated Projectile Vomiting**
- **Abdominal Cramps**
- Severe Nausea
- **Repeated, Uncontrollable Diarrhea**
- Low-Grade Fever 
- Muscle Pain


  
Virus Invades Body



# Slides from Plaintiff's trial presentation in *Verderber v. Reno Hilton* (The Focal Point, LLC)


## Why Did the Majority of Reno Hilton Staff Work While Ill?

**Reno Hilton Employees**



**Regulations**

Illness: 24-60 hrs



Recovery: 48 hrs

**Reno Hilton Attendance Policy**

No pay for employees taking time off for illness

Written warning to employees taking time off for illness

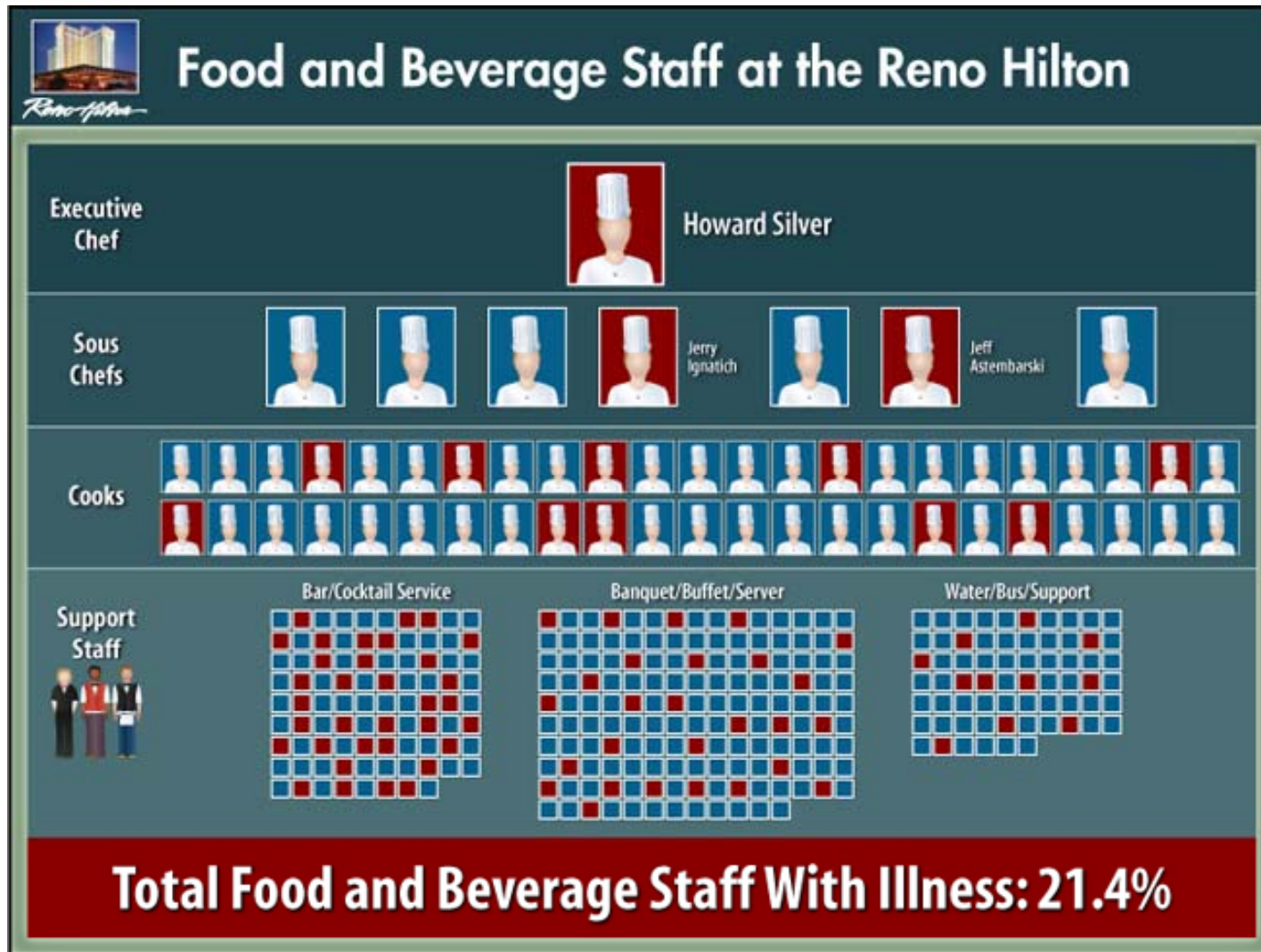
**NEVADA ADMINISTRATIVE CODE**

**WARNING**

The slide features a large grey arrow pointing from the kitchen staff image towards the attendance policy box. A circular inset on the left shows a hand with a red, itchy rash.



# Slides from Plaintiff's trial presentation in *Verderber v. Reno Hilton* (The Focal Point, LLC)





# Selected Allergen Cases



## Chinese Restaurant, Minneapolis (1992)

- **Allergic diner asked server** whether egg roll was fried in peanut oil, because he was allergic
- Server “assured him” it was not.
- She was right.
- She did not know, however, that the recipe called for peanut butter to enhance flavor.
- Diner died 90 minutes later.
- \$450,000 settlement.





*Livingston v. Marie Callender's, Inc.*  
(1999) 72 Cal.App. 4<sup>th</sup> 830

- **Allergic diner asked server** whether soup contained MSG, and was “assured” it did not.
- Server was wrong (again).
- Appellate court remanded for trial on the “failure to warn” issue
  
- The Appellate Court also reversed the trial court’s order dismissing MC’s parent entities.



## *Walker v. Bertucci's, Inc.*

- **Allergic diner asked server** whether the chicken *pesto* sandwich contained nuts.
- Server “assured” her it did not.
- \_\_\_\_\_.
- Anaphylactic shock resulted in a coma that lasted for a week until she died.
- Resulting suit sought \$10MM in damages.
- Server did not know the ingredients because of the “secret recipe.”



## *Puccio v. Apple American Group*, 07-C-726 (W. Va) (Nov. 1, 2007)

- Diner informed his server that he was **extremely allergic to fish**.
- He had dined at the same restaurant six months earlier and suffered a severe allergic reaction, so he took *special care* to inform his server of his condition.
- His food (which contained no fish) **was prepared on a grill that had previously been used to prepare seafood**. [Cross-contamination]
- He was then promptly rushed to the emergency room for life-saving treatment.



# Developing Allergy Policies

- Designate one manager-level employee per shift to handle ingredient/allergen questions.
  - Ensure she is trained on the information.
  - Train the staff to look to her for answers.
  - High turnover of both front- and back-of-house personnel prevent you from consistently training employees on detailed ingredient/allergy information.
  - Consider publishing allergy policies on the web.
  - Disclose on the menu when possible.



## Developing Allergy Policies, Cont'd.

- Train all staff about potential allergens and how to spot symptoms of a severe allergic reaction.
  - NRA *Food Allergy Training Guide*: \$100
- *Track the Ticket from the table to kitchen, and back to the table* (consider colored ticket)
- Avoid cross-contamination:
  - color-coded cutting boards; designated stations/tools
  - Be aware of surroundings (i.e. watch for spillage)
  - Replace oils/garnishes/salt
- Place notice on menus alerting diners to inform you of allergic conditions.



# Headlines to Avoid

- **Calif. Eatery Gives Toddler Margarita**
  - Margarita mix (incl. tequila and triple sec) was in plastic bottle at the bar identical to one containing juice.
  - The two-year-old grew drowsy, started vomiting a few hours later and was rushed to the hospital
- **Asparagus Sauce Killed Diner at Award-Winning Tables**
  - Bacteria likely built up when cream sauce was left out after having been refrigerated and re-heated over at least 48-hours
  - “A chef of about 30 years...he said he believed his taste and smell test was enough to ascertain its safety”;
- **Woman allegedly bites into roach at FW restaurant**



# Conclusion

- Training
- Cleanliness
- Preparation
- Enforcement