

Fact or Fiction: Dealing with Guest Claims (Both Real & Imagined)

The Fourteenth Annual Hospitality Law Conference
February 22-24, 2016
Houston, Texas

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David is an attorney whose practice focuses of food, beverage and hospitality law. He earned his J.D. from the Southern Methodist University Dedman School of Law, and is a member of both the Texas and Tennessee State Bars.

David's firm counsels restaurants, bars and other members of the hospitality community around the nation on such matters as the formation, purchase and sale of business entities; private placements of securities (private equity funding); commercial leases and real estate transactions; franchising; trademark protection; employment matters; beverage alcohol licensing; and preventing foodborne illness and allergy liability. The firm also defends its clients in various types of civil litigation.

David's professional commitment to the food and beverage community is highlighted by his industry-wide involvement, including:

- GREATER DALLAS RESTAURANT ASSOCIATION Board of Directors, 2013-2016; Executive Committee 2015-2016.
- Speaker: 2009-2016 HOSPITALITY LAW CONFERENCES; 2015 Legal Issues in the Texas Hospitality Industry CLE; 2015 Dallas Startup Week; 2015 San Antonio Cocktail Conference; 2013-2014 NIGHTCLUB AND BAR Convention and Trade Show; 2013-2014 HOSPITALITY FINANCE & TECHNOLOGY PROFESSIONALS Conference; 2011 CLUB MANAGERS ASSOCIATION OF AMERICA Conference, 2011 RESORT HOTEL ASSOCIATION Conference, 2009 MEXICAN RESTAURANT ASSOCIATION Conference, 2009 FS/TEC Conference and 2008 DINEAMERICA Conference.
- David is a frequent contributor to *Restaurant Startup & Growth Magazine*, and has had articles featured in *QSR Magazine*, *Nightclub & Bar Magazine*, *In the Mix Magazine*, *Food Safety Solutions*, the *CMAA Newsletter* and various *HospitalityLawyer.com* newsletters.
- David is an adjunct professor and member of the Professional Advisory Committee for the INTERNATIONAL CULINARY SCHOOL AT THE ART INSTITUTE OF DALLAS.

David is also a Member of the NATIONAL RESTAURANT ASSOCIATION and the GLOBAL ALLIANCE OF HOSPITALITY ATTORNEYS.

Fact or Fiction: Dealing with Guest Claims (Both Real & Imagined)

It seems that incidents of guests claiming (usually after the fact) that they have suffered some injury or illness due to the restaurant are on the rise. When you get the "I broke my tooth at your restaurant," or "you guys made me sick last week," call, or any of the other innumerable allegations (scams?) that come in, what do you do? Who do you call first? Your insurance company? Attorney? The aggrieved party?

This session will explore what to take seriously, how to respond, and when to get your insurance company involved.

I. BEFORE: Preparing for allegations and claims

It's just a restaurant. What could possibly happen?

A. Most common claims

1. "I Broke My Tooth!"

A foreign object (teeth, cherry pits, fingertips, etc.) in food can cause broken teeth or other injuries, and it is often difficult to trace how the object found its way into the food. It is always possible that the presence of a foreign object can result from negligence at the manufacturer, but unless the object is distinct and uncommon, it will be difficult to trace its origin.

a. Inside the Premises

An interesting case to follow in this vein will likely be *Cyndi Scruggs v. Chick Fil-A Inc. et al.*,¹ which involves a lawsuit against Chick-Fil-A and its cherry supplier for allegations that a guest was injured by a cherry pit in the maraschino cherry served with her milkshake. The plaintiff claims "As a result of biting into the maraschino cherry with a pit inside, Plaintiff fractured two teeth below the gum line, and shortly after this incident, her gums became infected and she developed sepsis. Shortly thereafter, Plaintiff sustained a heart attack." See **Appendix 1**.

b. Outside the Premises

In the case of *Burns v. McDonald's Corp.*,² the Court stated the facts as follows:

As he drove his pickup truck onto Route 44 while finishing the cheeseburger, Burns had to brake so suddenly because of traffic that he had to restrain with his right hand his 75-pound dog, which had "started to go flying," and then grab the steering wheel with both hands to keep his truck under control. Indeed, he "needed to push" the cheeseburger into his mouth so he could grab the wheel. While braking, with cars around him swerving, including the car behind him "swerv[ing] out from underneath the truck and into the breakdown lane," Burns bit onto something and felt pain in the whole right side of his mouth. With his

¹ Case #: 3:15-cv-00024-L (N.D. TX).

² *Burns v. McDonald's Corp.*, 2010 Mass. App. Div. 205.

tongue, he felt a round and “hard and bumpy” object about the size of a “small pea.”

Interestingly, the Court mentioned that “Almost exactly a month before this incident . . . a piece of the tooth at issue here simply ‘had come off’ while Burns was eating.”³ Moreover, Burns never found the offending object onto which he allegedly bit. The Court ultimately upheld summary judgment in favor of McDonald’s, stating “The law in Massachusetts, then, is that, in order for a plaintiff reasonably to expect success at trial, he or she must be able to show, first, what the offending substance in the subject food was and, second, that the substance was one that a consumer would not reasonably expect to encounter in that particular foodstuff.”⁴

2. “I Got Sick Eating Your Food!”
 - a. Foodborne illnesses

Foodborne illness can be caused by food that is contaminated by a variety of germs, poisonous chemicals, or parasites. Raw or undercooked animal products are the most likely to be contaminated (meat and poultry, eggs, unpasteurized milk, and shellfish). Products that come from many individual animals (milk, eggs, or ground beef) are particularly hazardous because a pathogen present in any one of the animals may contaminate the whole batch. Raw fruits and vegetables are also a concern. Contamination can arise from improper refrigeration, a sick worker, or other unsanitary conditions.

Below is an example of an email one of my clients recently received. This kind of correspondence is not new to restaurateurs. What many owners (not to mention managers, hosts/hostesses (who often field phone calls from allegedly aggrieved guests), and other restaurant employees) fail to appreciate, however, is that many foodborne illnesses take a significant period of time to manifest their symptoms. See **Appendix 2**. Human nature being what it is, guests far too often make an immediate cause and effect connection between their symptoms and the last place they ate, without thinking about the science behind the sick. Appendix 2 details the most common foodborne pathogens, both bacterial and viral. For one in the unenviable position of evaluating a foodborne illness claim, Appendix 2 may assist in that evaluation by providing a quick reference for symptoms and incubation periods that can be compared with the complaint.

“I was at your Dallas-Fort Worth airport location and had a "mexican salad". While it was tasty and all that, just 2 and a half hours later I had the runs at 37 thousand feet. Thanks a lot !! (PS: I hadn't had any breakfast so don't tell me it wasn't you. That was the only thing that I ate that day. it's a good thing otherwise I would have had even more runs to deal with.)”

³ *Id.* at 206.

⁴ See *id.* at 208. (This case provides a good analysis of “foreign object” cases from various jurisdictions, as well as a discussion of the “reasonable expectations” test in determining liability for objects found in food).

As Appendix 2 shows, there is no common foodborne pathogen that will produce “the runs” within 2.5 hours. The guest jumps to what is almost certainly a faulty conclusion about his/her meal. There is, in fact, no evidence whatsoever that the guest’s runs were caused by any foodborne pathogen.

b. Allergies

An allergy is an adverse immune system reaction to a certain food that occurs soon after exposure to that food, and which can be severe and life-threatening (anaphylaxis). Common allergens are milk, eggs, fish, wheat, tree nuts, peanuts shellfish, and soy (known as the “Big Eight”), which account for approximately 90 percent of allergic food reactions.⁵

Allergic reactions are often very quick to occur, but there could be instances where a reaction does not present itself until the guest has left the premises (e.g. with an allergen consumed during desert, or a take-out meal).

3. “I Slipped/Fell and Hurt Myself!”

Even when a slip/fall incident allegedly happens on the premises, guests do not always report them. Wet or uneven surfaces are the most common causes of slip and falls. Other sources (using common sense here) include:

- Cluttered floors;
- Loose floorboards;
- Defective sidewalks;
- Parking lot potholes/debris;
- Poorly-constructed staircases;
- Torn carpeting or uneven rugs;
- Recently mopped or waxed floors;
- Protruding objects, fixtures or furniture;
- Surfaces made slick from rain, ice, snow, etc.

B. Expect and prepare for the worst

1. Developing Policies and Procedures

It is important to have policies and or procedures in your employee handbook to address these guest-related incidents. Procedures for handling complaints should be detailed and easily accessible to all employees, and should include specific procedures for handling different types of incidents as needed (e.g. allergic reaction, slip/fall, foreign object, etc.).

a. Incident Reports

Designate specific staff (preferably a manager-level position) to address guest incidents and oversee the completion of incident reports. More importantly, staff need to be routinely trained on how to handle incidents, including how to fill out incident reports. Reiterate the

⁵ See “Food Allergies: What You Need to Know,” Sept. 2, 2015, *available online at* <http://www.fda.gov/Food/ResourcesForYou/Consumers/ucm079311.htm> (last visited Feb. 5, 2016).

policies and procedures monthly in staff meetings. Make sure all new employees are trained thoroughly on your policies and procedures, sign an acknowledgement to that effect, and are given copies of the policies and procedures.

Employees must be trained to give only relevant facts when completing incident reports:

Example 1:

NO: “A heavyset woman slipped by the bar...”

YES: “Guest claims she slipped by the bar.”

Example 2:

NO: “There was a large puddle of water by the bar, and he slipped in it.”

YES: “Guest stated that there was a large puddle of water by the bar, and said he slipped in it.”

Example 3:

NO: “There was a rock in her food and she cracked her tooth when she bit down.”

YES: “Guest claims that she cracked her tooth on an object in the food.”

Do NOT allow multiple versions (e.g. “corrected” reports) from the same person for the same incident. Incident reports are evidence if a lawsuit is brought, and witness credibility becomes an issue if there are different or conflicting versions of the same incident.

b. Menu Disclosures

Place disclosures on your menu and what your servers should be saying when asked about ingredients. Make sure your menu includes the proper disclosures for consumption of raw or undercooked meats, poultry, seafood, shellfish, or eggs (promulgated by the state or county health department). Unless you can absolutely guarantee there is no cross-contamination, never say a food is free of “nuts” (or whatever ingredient is at issue). The safest practice is to place a notice on your menu stating something akin to “our kitchen uses nuts, dairy, eggs, gluten and the like. Please make your server aware of any and all food allergies at the table.”

II. DURING: What to do when faced with an incident

A. On-premise Incidents

1. Stabilize the situation and take care of the guest

Always offer to call an ambulance or other emergency provider, then document the refusal (or acceptance) on the incident report. Ask questions of the guest (only if possible) and witnesses (including servers or managers). Focus on fact questions: who, when, where, what happened, and why. Ask for witnesses’ names and contact information so they can be contacted later if necessary.

2. Collect evidence

Take pictures of the alleged contaminated food, foreign object, floor, or other source of the alleged injury. Preserve the food and/or foreign object when possible, making sure to clearly mark the evidence to protect it from disposal. If you are in possession of evidence, you must preserve it. If the claimant is in possession of evidence, it is his/her responsibility to maintain the chain of custody. Interview witnesses, if any, and document the interview in the incident report. Make copies of video surveillance, if any, as DVR systems commonly overwrite content after only a few weeks. Complete an incident report at the first opportunity and notify the appropriate supervisors.

B. Handling allegations arising after the incident, by phone, email, etc.

Far too often, guests reach out after they have left the restaurant. These cases tend to arise when the incident surrounds food prepared for take-out/delivery, foodborne illness, or an injury resulting in the guest leaving the property without asking for help. When the restaurant is contacted there is usually only a small window of opportunity to address the guest's issue before it escalates to something involving attorneys and insurance companies.

When Guests Point Fingers...

In the case of *Johnson-Chambers v. Applebee's Restaurant*,⁶ the plaintiff ordered a chicken salad to go from a Metairie, Louisiana Applebee's in June 2004. When she began to eat the salad on her way back to work, she found a human fingertip in her food. Johnson-Chambers allegedly "called the restaurant and was given an apology."⁷ But the apology apparently failed to satisfy her, because she drove directly to her attorney's office. Her attorney promptly put "the very tip of a finger plus some of the fingernail" into a freezer in his office.⁸

On the day of the incident, a manager responded to the complaint she made by phone, and referred the matter to a district manager. Johnson-Chambers allegedly threatened to sue, and failed to return the district manager's call.⁹ An internal investigation by Applebee's revealed that a cook's knife slipped, accidentally cutting off the very tip his thumb. As the cook tended to his injury another cook stepped in, cleaned the workspace, and completed Johnson-Chambers' order.¹⁰

⁶ 101 So. 3d 473 (La. Ct. App. 2012).

⁷ "Fingertip in Applebee's Salad Leads Woman to Sue for Her PTSD," The Huffington Post (Sept. 8, 2011), available online at http://www.huffingtonpost.com/2011/09/08/fingertip-applebees-salad_n_954530.html (last visited Feb. 6, 2016).

⁸ "Woman: I Found Fingertip Applebee's Salad," Fox News (June 28, 2005), available online at <http://www.foxnews.com/story/2005/06/28/woman-found-fingertip-in-applebee-salad.html> (last visited Feb. 6, 2016).

⁹ "Applebee's not negligent in Metairie woman's lawsuit over fingertip found in salad," The Times-Picune (Sept. 7, 2011), available online at http://www.nola.com/crime/index.ssf/2011/09/applebees_not_negligent_in_met.html (last visited Feb. 7, 2016).

¹⁰ See *id.*

In this matter, however, the plaintiff lost her jury trial in September 2011, and Applebee's was found not to have been negligent. But even when you win, you may still lose. The process from complaint to verdict lasted seven years, and Applebee's suffered a two percent decline in its stock price (albeit a temporary one) after announcing that its investigation had determined that the fingertip had come from one of its employees.¹¹

The next time might not go so smoothly.

Unfortunately, next time occurred in December 2015, when a pregnant woman and her family allegedly found a "piece of bloody fingertip in her salad" at an Applebee's in Paso Robles, CA.¹² She and her family filed suit in January 2016. (Look for more on that at the 2017 Hospitality Law Conference.)

1. Expressions of Remorse

Be careful! Expressions of sympathy or remorse can be used as evidence! In Texas, an expression of general sympathy is not admissible, but statements regarding liability or negligence (even those made inadvertently) are.¹³ For example, "I'm sorry you had a bad experience with us" would not be admissible, but "I'm sorry our food made you sick," or "I'm sorry we put peanuts in your food" would be admissible to prove liability. Counsel your staff on the appropriate way to respond. Many restaurateurs fail to make the distinction between the two types of messages. *See Appendix 3.*

2. Handling the Complaint

Designate specific people to handle emailed and other written complaints, and have standard responses ready. *See Appendix 4.* Obtain any information you can from the alleged victim, including:

1. The guest's contact information;
2. The date and time of the transaction (whether dine-in, take-away, or delivery);
3. Whether the guest dined alone, or with others. If a group, get all their names;
4. All food/drink ordered by the party;
5. Proof that the guest visited as claimed (receipt or credit card record);
6. If a foodborne illness claim, request a food log describing everything the person has consumed in the past seven days, and where it was consumed (i.e. was it eaten in a restaurant or prepared at home?);
7. Proof of any medical visits along with any written diagnosis; and
8. If a foreign object is alleged to have been involved, ask for the object (he/she might not have it).

¹¹ "Applebee's stock dips, rebounds after finger in salad," Kansas City Business Journal (Jul. 5, 2005), available online at <http://www.bizjournals.com/kansascity/stories/2005/07/04/daily8.html> (last visited Feb. 7, 2016).

¹² "Bloody fingertip found in salad at Applebee's in Paso Robles, woman claims," The San Luis Obispo Tribune (Jan. 7, 2016), available online at <http://www.sanluisobispo.com/news/local/article53524005.html> (last visited February 4, 2016).

¹³ TEX. CIV. PRAC. & REM. CODE ANN., § 18.061 (2004 & Supp. 2005).

III. AFTER: How to evaluate the allegation and mitigate potential damages

Damage control for serious injuries or claims:

- A. Protect the evidence (after the situation is stabilized and the guest is no longer in distress). Establishing the chain of custody can be very important.
- B. Call your attorney.
- C. Deal with the authorities as necessary.

Handle questions from investigating authorities. Cooperate, but don't volunteer information. They are not your friends! Follow company procedures (and use that as an excuse, if needed) governing what can be delivered to an investigator. Know what your responsibilities are in the event health department or alcoholic beverage compliance officers show up at your door.

- D. Get a release.

Always try to get a signed release from the allegedly injured customer before paying any money. If possible, pay the medical provider, or obtain proof of payment from the guest (a receipt of payment from the provider to the customer) prior to paying the customer. Material terms include a full and final release of liability on all claims concerning the incident, confidentiality & non-disparagement language for the settlement, and no admission of liability. Make a copy of the guest's driver's license or other identification for record-keeping purposes.

- E. Involve your insurance carrier

Determine the value of the claim if it is clear what the damages or injuries are. For example, if a guest claims a foreign object in her food caused a tooth to chip, tell her you would like to see the invoice for dental work. You can offer to reimburse directly to the dentist, instead of the Guest, thus limiting the possibility of deceit.

The cost of the claim may not be worth the cost of paying the deductible on your general liability policy and potentially increasing future premiums. Determine if paying the dental bill is a better business decision. If settling, make sure you get a signed release.

Do not fail to appreciate that all insurance policies involve a duty to disclose potential claims to the insurance carrier. Failure to make such a disclosure can seriously impact your ability to make a viable claim. Report all potential claims to your agent or the carrier directly. Review the relevant provisions in your policy, or have your attorney do so. Remember that reporting a potential claim is different from making a claim. If you wish to make a claim, you must do so according to the terms of the policy.

Most policies cover the cost of defense with the covered loss, though policies can vary widely on how those costs are paid. What does not vary much, however, is that an insured inevitably has a duty to notify the carrier of potential claims, cooperate with the carrier's

investigation and defense of the suit, and a duty to not interfere with the carrier's handling of the lawsuit.

G. You Can't Always Talk Your Way Out of It

Sometimes an apology is not enough, and settlement is not possible. In the event you are served with process, immediately contact your attorney, then your insurance carrier. Get a copy of the citation and petition/complaint to your attorney. Utilize corporate counsel to oversee the insurance-defense litigation, if possible, from the company's perspective.

IV. Conclusion

Proper risk management in the hospitality industry requires foresight. You know there will occasionally be complaints, both during and after guests visit the restaurant, so the best course of action is to be mentally prepared for whatever might come your way. While not every alleged injury will result in a settlement, insurance claim or lawsuit, those outcomes are certainly possible. Developing policies and procedures to allow your business to act quickly and decisively when faced with guest claims (both real and imagined) will ensure that claims are handled properly, and with as little disruption and cost as possible.

APPENDIX 1

North St. Paul Street, Dallas, Texas 75201-4234. Said Defendant has answered or otherwise appeared in this lawsuit.

3. Defendant Harry G. Durbin (and/or d/b/a and/or a/k/a Chick-Fil-A at Custer and 121) is a Texas corporation doing business in Texas. Service of process may be upon Harry G. Durbin, the President and Owner, at 8700 State Highway 121, in McKinney, Texas 75070. Said Defendant has answered or otherwise appeared in this lawsuit.

4. Defendant Dell's Maraschino Cherries Co., Inc. is a foreign corporation doing business in Texas, with no principal office or registered agent in the State of Texas. Said Defendant has answered or otherwise appeared in this lawsuit.

II.

JURISDICTION AND VENUE

1. Venue is proper in this District because a substantial part of the actions or omissions giving rise to Plaintiff's causes of actions occurred within this District.

2. Defendants Chick-Fil-A, Inc. and Dell's Maraschino Cherries Co., Inc. removed this case from state court, and removal was based on diversity jurisdiction.

III.

FACTS

1. On or about May 10, 2014, Plaintiff Cyndi Scruggs entered a Chick-Fil-A restaurant (Store No. 01951), located at 8700 State Highway 121, in McKinney, Texas, to order and eat an ice cream milkshake. The ice cream milkshake was topped with whipped cream and a maraschino cherry. Cyndi Scruggs paid for the milkshake, and while inside Chick-Fil-A, she put the maraschino cherry in her mouth, to chew and swallow it, and upon biting down on it, realized that the maraschino cherry was not properly de-pitted, as expected.

2. As a result of biting into the maraschino cherry with a pit inside, Plaintiff fractured two teeth below the gum line, and shortly after this incident, her gums became infected and she developed sepsis. Shortly thereafter, Plaintiff sustained a heart attack.

3. Recently, Plaintiff had the two fractured teeth professionally pulled, and will be enduring tooth implant procedures in the future.

4. At all times material herein, Chick-Fil-A and/or Harry G. Durbin (and/or d/b/a and/or a/k/a Chick-Fil-A at Custer and 121) owned, operated, and occupied the premises at 8700 State Highway 121, in McKinney, Texas, where this incident occurred, which included the inside area where Cyndi Scruggs placed and accepted her order.

5. On the date of Plaintiff's incident, and at all times material thereto,

Defendant Chick-Fil-A and/or Harry G. Durbin (and/or d/b/a and/or a/k/a Chick Fil-A at Custer and 121) owned or were otherwise in control of this Chick-Fil-A premises. Because Plaintiff was a customer and an invitee of Chick-Fil-A at the time of the incident in question, said Defendant, and its employees, agents, and/or representatives owed a duty to customers and invitees like her, to use ordinary care in serving its food, to inspect and ensure quality, and to make safe any dangerous condition it creates or presents to customers or invitees like Plaintiff, or to give an adequate warning of any such dangerous or potential dangers. Said Defendant's employees, agents, and/or representatives failed to properly inspect the cherry in question, before selling and serving it to Plaintiff, which was a cause of Plaintiff's injuries or damages.

6. In addition, at the time of the incident in question, Defendants Chick-Fil-A and/or Harry G. Durbin (and/or d/b/a and/or a/k/a Chick Fil-A at Custer and 121) received maraschino cherries from Defendant Dell's Maraschino Cherries Co., Inc., a New York company, who was in the business of processing, de-pitting, packaging, and distributing pit-less maraschino cherries to restaurants like Chick-Fil-A nationwide. Defendant Dell's Maraschino Cherries Co., Inc. failed to de-pit the maraschino cherry in question, which was a cause of Plaintiff's injuries and damages.

7. Defendants' failure to exercise reasonable care to reduce or eliminate this pit risk, or to warn Plaintiff of same, was a proximate or producing cause of

the incident and injuries in question, and Plaintiff's harm and damages resulting from the incident in question.

8. In this Complaint, whenever Plaintiff has alleged that Defendants did any act or thing, it is meant that Defendants' officers, agents, servants, employees, and/or representatives may have done such act or thing and that, at the time such act or thing was done, it was done with the full authorization or ratification of Defendants, or was done in the normal and routine course and scope of employment of Defendants' officers, agents, servants, employees, and/or representatives.

IV.

CAUSES OF ACTION AGAINST DEFENDANTS

A. NEGLIGENCE

1. Plaintiff bases her cause of action in part upon negligence or negligence per se as these terms are defined under the common law and statutes of Texas. Plaintiff invokes the doctrine of *respondeat superior* and *res ipsa loquitur* where applicable.

2. Plaintiff would show the Court that the negligent actions and omissions of Defendants, as set out herein, separately and collectively, and otherwise, were a direct and proximate or producing cause of the incident in question and the resulting injuries and damages sustained by Plaintiff.

3. Chick-Fil-A and Dell's Maraschino Cherries knew or should have known that serving and distributing a maraschino cherry to customers or purchasers, that was not properly de-pitted, constitutes a dangerous condition and imposed an unreasonable risk of harm to customers or invitees like Plaintiff.

4. Defendants failed to exercise ordinary care to remove this dangerous condition, and/or failed to adequately warn Plaintiff of the dangerous condition, or of the possibility that such dangerous condition would or could exist, and failed to make the maraschino cherries it sold or distributed reasonably safe for customers like Plaintiff.

5. Chick-Fil-A, as owner, operator, and/or occupant in charge of the premises where the incident in question occurred, failed to use that degree of care that would be used by a restaurant or a food establishment owner or occupier of ordinary prudence under the same or similar circumstances. Defendants' breach was a proximate cause of Plaintiff's injuries and damages.

6. Defendant Dell's Maraschino Cherries, as a producer, supplier, and distributor of maraschino cherries to restaurants or food establishments throughout the United States, including Texas, failed to use that degree of care that would be used by a maraschino cherry de-pitting owner or company of ordinary prudence under the same or similar circumstances. Defendant's breach proximately caused Plaintiff's injuries and damages.

7. The aforementioned acts, omissions, and other conduct of Defendants constituted negligence, which was a proximate or producing cause of the occurrence or incident in question, and the resulting harm and damages sustained by Plaintiff. These acts or omissions of negligence include, among others:

- a. failing to de-pit, and selling and/or serving a non-de-pitted maraschino cherry, while aware of the potential risks of doing so;
- b. creating and maintaining a condition that posed an unreasonable risk of harm;
- c. failing to adequately warn customers like Plaintiff of a non-de-pitted maraschino cherry, or of the possibility that a maraschino cherry it sold or served had not been properly de-pitted;
- d. failing to properly inspect the maraschino cherries for pits, including the cherry in question;
- e. failing to adequately instruct and/or supervise its employees, agents, and/or representatives with respect to inspecting maraschino cherries, removing and/or de-pitting maraschino cherries with pits, and/or warning of the possibility that a maraschino cherry may contain a pit; and
- f. failing to implement safety and inspection policies and procedures to prevent selling and serving food which constituted an unreasonable risk of harm to purchasers, customers, and invitees.

B. STRICT PRODUCTS LIABILITY AND BREACH OF IMPLIED WARRANTY CLAIMS

8. Moreover, in addition to her negligence claims, Plaintiff alleges strict products liability and breach of implied warranty claims against Defendants. The

distributed and sold maraschino cherry in question contained a pit, and thus, was a defective product that was unreasonably dangerous to Plaintiff. Though the maraschino cherry in question was a prepared product that was intended and offered for sale by Defendants to the general public, through a general channel of trade, the maraschino cherry in question was unfit for the purpose intended – human consumption – because of this defect. Plaintiff consumed the maraschino cherry, which was atop an ice cream milkshake with whipped cream, and bit into the maraschino cherry, which contained a pit. Defendants are liable to Plaintiff for all of her damages flowing from biting into the maraschino cherry in question that Defendants served Plaintiff.

9. In addition to the above-referenced causes of action, and/or in the alternative, based on the facts set forth above, Defendants have breached the implied warranty that, as a retailer, the food it serves will be wholesome and fit for human consumption. Defendants failed and refused to fulfill this commitment to the public and its consumers, including Plaintiff; therefore, Defendants are liable to Plaintiff for her damages, and are not shielded through any purported claim of lack of knowledge or lack of mishandling.

10. Defendants' conduct, through its officers, employees, agents, and/or representatives, as set forth herein and otherwise, constitute negligence by act or omission, each and all of which was a proximate or producing cause of the

occurrence in question and Plaintiff's injuries and damages resulting from the occurrence in question.

V.

DAMAGES

1. As a result of the incident described herein, Plaintiff Cyndi Scruggs has incurred medical expenses in the past and in all reasonable probability such medical expenses will continue in the future.

2. Plaintiff has experienced mental anguish and emotional distress in the past and in all reasonable probability such mental anguish and emotional distress will continue in the future.

3. Plaintiff has experienced physical pain and suffering in the past and in all reasonable probability such physical pain and suffering will continue in the future.

4. Plaintiff has experienced physical disfigurement in the past and in all reasonable probability will suffer disfigurement in the future.

5. Plaintiff has experienced physical impairment in the past and in all reasonable probability will suffer impairment in the future.

VI.

CLAIM FOR PREJUDGMENT AND POST-JUDGMENT INTEREST

1. Plaintiff herein claims interest in accordance with Texas Finance Code §304.001 *et seq.* and any other applicable law.

VII.

JURY DEMAND

1. Plaintiff demanded a jury trial and tendered the appropriate fee with the Original Petition.

VIII.

NOTICE OF PRESERVATION

1. Defendants are hereby given notice that any document or other material, including electronically stored information, that may be evidence or relevant to any issue in this case is to be preserved in its present form until this litigation is concluded.

IX.

PRAYER

WHEREFORE PREMISES CONSIDERED, Plaintiff prays that Defendants be cited to appear and answer herein and upon final hearing of this cause, Plaintiff have judgment against Defendants, jointly and severally, for damages described herein, for costs of suit, pre-judgment and post judgment interest permitted by law, and for such other and further relief to which Plaintiff may be justly entitled.

Respectfully submitted,

TURLEY LAW FIRM

/s/ Steven S. Schulte

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ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

This is to certify that on this 26th day of May, 2015, a true and correct copy of the foregoing document was forwarded to all counsel of record by the CM/ECF system.

Steven S. Schulte

APPENDIX 2

EXHIBIT A

These general descriptive criteria have been used by the national Foodborne Disease Outbreak Surveillance System for many years. They were published in Center for Disease Control and Prevention *CDC Surveillance Summaries*, March 17, 2000. MMWR 2000; 49(No.SS-1) updated July 27, 2006, available online at: <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5002a1.htm#tab1> (last visited Feb. 2, 2016).

Bacterial

Pathogen	Incubation	Symptoms	Duration	Source
Bacillus cereus	1-6 hours (vomiting); 6-24 hours (diarrhea)	Nausea and vomiting <i>or</i> colic and diarrhea	24 hours (short form); 24-48 hours (long form)	Soil organism found in raw, dry and processed foods (e.g. rice)
Campylobacter	2-10 days; usually 2-5 days	Diarrhea, cramps, fever and vomiting; diarrhea may be bloody	2-10 days	Raw and undercooked poultry, unpasteurized milk, water
Clostridium botulinum (botulism)	2 hours to 8 days; usually 12-48 hours	Vomiting, diarrhea, blurred vision, double vision, difficulty swallowing, descending muscle weakness	Variable (days to months)	Home-canned food, improperly canned commercial foods
Clostridium perfringens	6-24 hours	Cramps, diarrhea	24-48 hours	Meats, poultry, gravy; foods kept warm
Enterohemorrhagic E. coli, including E. coli O157:H7 and other Shiga toxin-producing E. coli (STEC)	1-10 days; usually 3-4 days	Diarrhea, frequently bloody; abdominal cramps (often severe); little or no fever; 5-10% develop Hemolytic-uremic syndrome (HUS) and average of 7 days after onset, when diarrhea is improving (more common in children, elderly and immune-compromised)	5-10 days	Ground beef, unpasteurized milk and juice, raw fruits and vegetables, contaminated water, sprouts, person to person

Listeria	9-48 hours for GI symptoms; 2-6 weeks for invasive disease	Fever, muscle aches and nausea or diarrhea; pregnant women may have flu-like illness and stillbirth; elderly, immune-compromised and infants infected from mother can get sepsis and meningitis	Variable	Fresh soft cheeses, unpasteurized or inadequately pasteurized milk, ready-to eat deli meats and hot dogs
Salmonella	6 hours to 10 days; usually 5-48 hours	Nausea, diarrhea, cramps, fever	4-7 days	Poultry, eggs, meat, unpasteurized milk or juice, raw fruits and vegetables (e.g., sprouts), person to person
Shigella	12 hours to 6 days; usually 2-4 days	Abdominal cramps, fever and diarrhea; stool may contain blood and mucus	4-7 days	Contaminated food or water, raw foods touched by food workers, raw vegetables, egg salads, person to person
Staph (toxin)	30 minutes to 8 hours; usually 2-4 hours	Nausea, cramps, vomiting, diarrhea	24-48 hours	Custards, cream fillings, potato or egg salad, sliced meats
Vibrio cholerae	1-5 days	Profuse watery diarrhea and vomiting, severe dehydration	3-7 days	Contaminated water and shellfish, street vended food
Vibrio parahaemolyticus	4-30 hours	Watery diarrhea, abdominal cramps, nausea, vomiting	2-5 days	Undercooked or raw seafood (fish and shellfish)
Vibrio vulnificus	1-7 days	Vomiting, diarrhea, abdominal pain; more severe in patients with liver	2-8 days	Raw seafood, particularly oysters, harvested from

		disease or who are immune-compromised; can cause invasive infection (sepsis)		warm coastal waters
Yersinia	1-10 days; usually 4-6 days	Appendicitis-like symptoms (diarrhea and vomiting, abdominal pain)	1-3 weeks	Undercooked pork, unpasteurized milk, contaminated water

Viral

Pathogen	Incubation	Symptoms
Hepatitis A	15-50 days; median: 28 days	Jaundice, dark urine, fatigue, anorexia, nausea
Norovirus (NoV)	12-48 hrs (median 33 hours)	Diarrhea, vomiting, nausea, abdominal cramps, low-grade fever
Astrovirus	12-48 hrs	Diarrhea, vomiting, nausea, abdominal cramps, low-grade fever

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See also <http://www.cdc.gov/foodsafety/fdoss/data/annual-summaries/mmwr-questions-and-answers-1998-2008.html> (last visited Feb. 2, 2016).

APPENDIX 3

SUBCHAPTER C. ADMISSIBILITY

Sec. 18.061. COMMUNICATIONS OF SYMPATHY. (a) A court in a civil action may not admit a communication that:

(1) expresses sympathy or a general sense of benevolence relating to the pain, suffering, or death of an individual involved in an accident;

(2) is made to the individual or a person related to the individual within the second degree by consanguinity or affinity, as determined under Subchapter B, Chapter 573, Government Code; and

(3) is offered to prove liability of the communicator in relation to the individual.

(b) In this section, "communication" means:

(1) a statement;

(2) a writing; or

(3) a gesture that conveys a sense of compassion or commiseration emanating from humane impulses.

(c) Notwithstanding the provisions of Subsections (a) and (b), a communication, including an excited utterance as defined by Rule 803(2) of the Texas Rules of Evidence, which also includes a statement or statements concerning negligence or culpable conduct pertaining to an accident or event, is admissible to prove liability of the communicator.

Added by Acts 1999, 76th Leg., ch. 673, Sec. 1, eff. Sept. 1, 1999.

APPENDIX 4

SAMPLE SCRIPT FOR CONTACT WITH COMPLAINING PARTY

Thank you for contacting us. We take all complaints very seriously and will do a thorough investigation of your complaint. I am very sorry that you did not have an enjoyable experience at our restaurant. [this one can be tweaked based on the complaint]

Will you please help us look into this by providing me with some more information?

What date and time did you visit us?

Which location?

Where there other people with you? What are their names?

What did you order and what did they order? Did you eat just your food or did you try their food, too? What about drinks, what did you have to drink?

Did you pay by credit card (you name on the card)?

When did you start to feel differently? [This is for foodborne illness. It is not really necessary if someone states that they broke a tooth, had allergic reaction or was injured on premise].

Did you seek medical attention?

If yes, what did the doctor say? Did the doctor release you? Is there any further treatment recommended?

Can you send us those records/diagnosis/bills or receipt of payment?

[for foodborne illness] It would be extremely helpful if you could provide us with a food log of what you ate (and where) within the last 7 days.

We are going to investigate right away. If there is anything else you'd like to give us or tell us, please call [designated person [can be manager or attorney]] directly at (#)."

[If the person on the call is not a manager-level employee]

I want you to know that I am going to bring this to my Manager's attention, and he/she will be calling you back within [the day, 24-hours] [depends on schedule, time of day, etc.]