UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

THERESA SEPE, Plaintiff, v. RED ROBIN GOURMET BURGERS, INC., Defendant.	C. A. No. 13-511-M

JURY INSTRUCTIONS

I. GENERAL INSTRUCTIONS

Now that you have heard all of the evidence and the arguments of counsel, it is my job to instruct you on the law that is applicable to this case.

I will send a written copy of my instructions into the jury room.

A. PROVINCE OF THE COURT AND JURY

It is your duty as jurors to follow the law as I shall state it to you. It is your duty to apply that law to the facts of the case as you determine those facts to be from the evidence in this case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

You are not to be concerned with the wisdom of any rule of law stated by me.

Further, nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case. Also, nothing that I have said or done during the trial is to be taken as an indication that I have any opinion about the facts of the case. I do not. It is not my function to determine the facts, but rather it is your function to do so.

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you to be governed by sympathy, prejudice, or public opinion. All parties --

and the law -- expect that you will carefully and impartially consider all the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations of life. All parties are entitled to the same fair trial at your hands. All parties stand equal before the law, and are to be dealt with as equals in a court of justice.

B. EVIDENCE IN THE CASE

The evidence from which you are able to decide what the facts are consists of: the sworn testimony of witnesses; the exhibits which have been received into evidence; and any facts to which the lawyers have agreed or stipulated.

In determining the facts in this case, you are to consider only the evidence that has been properly put before you. Evidence that the court admits in full is properly before you for your consideration; evidence that this court has stricken or refused to admit is not a proper subject for your deliberations and should not be given consideration by you. Admitted evidence will be available to you in the jury room for consideration during your deliberations.

It is the duty of counsel to protect the rights and interests of his client, and in the performance of that duty he freely may make objections to the admission of proffered evidence and should not, in any manner, be penalized for doing so.

The fact that the Court admitted evidence over objection should not influence you in determining the weight you should give such evidence. Nor should statements made by counsel, either for or against the admission of such evidence, influence your determination of the weight you will give the evidence, if admitted. In other words, you should determine the weight you

will give such evidence on the basis of your own consideration of it and without regard to the ruling of the Court or the statements of counsel concerning the admissibility of such evidence.

C. NOT EVIDENCE

Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements and closing arguments, and at other times, is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory controls.

2. Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

3. Testimony that has been excluded is not evidence and must not be considered.

4. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at trial.

D. EVIDENCE – DIRECT, INDIRECT, OR CIRCUMSTANTIAL

There are two types of evidence from which you may properly find the facts of a case. One is direct evidence – such as the testimony of an eyewitness. The other is indirect or circumstantial evidence – that is, the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule, the law makes no distinction between direct or circumstantial evidence. You are simply required to find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

E. CREDIBILITY OF WITNESSES

You are the sole judges of the credibility of the witnesses and the weight their testimony deserves. In deciding the facts of this case, you may have to decide which testimony to believe and which testimony not to believe. In considering the testimony of any witness, you may take into account:

1. the opportunity and ability of the witness to see or hear or know the things testified to;
2. the witness's memory;
3. the witness's manner while testifying;
4. the witness's interest in the outcome of the case and any bias or prejudice the witness may have;
5. whether other evidence contradicted the witness's testimony; and
6. the reasonableness of the witness's testimony in light of all the evidence.

After making your own judgment, you may believe everything a witness says, or part of it, or none of it at all. Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or non-existence of any fact. You may find that the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

F. INFERENCES

In your consideration of this evidence, you are not limited to the bald statements of the witnesses. In other words, you are not limited to what you see and hear as the witnesses testify. You are allowed to make reasonable inferences from the evidence. Let me give you an example of an inference. If your mailbox was empty when you left home this morning, and you find mail in it when you go home tonight, you may infer that the letter carrier delivered the mail. Now, obviously, you didn't see the letter carrier deliver the mail, but from the fact that it was empty this morning and is filled tonight, you can properly infer that the letter carrier came in the interim and delivered the mail. That is all that we mean by an inference. You are permitted to draw reasonable inferences that seem justified in light of your experience, and from facts that you find have been proven.

Inferences are deductions or conclusions that reason and common sense lead you to draw from facts that have been established by the evidence in this case. Inferences, however, may not be based on speculation or conjecture.

G. OPINION EVIDENCE - EXPERT WITNESS

While the rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions, an exception exists as to those persons whom we refer to as expert witnesses. These are witnesses who, by education and experience, have become experts in some art, science, profession, or calling, and thus may state their opinions as to relevant and material matters in which they profess to be experts, and may also state their reasons for the opinion.

If testimony from an expert witness is to have any evidentiary value, it must speak in terms of "probabilities" rather than mere "possibilities." Although absolute certainty is not required, the conclusions of an expert must be reached to a reasonable degree of certainty – that

is, to a probability. In order for an expert's opinion to be considered by you, it must have substantial probative value and not be based on speculation, conjecture, or surmise.

You should give an expert opinion such weight as you may think it deserves, whether it was based on personal observations or on hypothetical questions. If you conclude that the reasons given in support of the expert's opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

H. BURDEN OF PROOF: PREPONDERANCE OF THE EVIDENCE

The burden is on the plaintiff in a civil action, such as this, to prove every essential element of its claims by a preponderance of the evidence. If the proof should fail to establish any essential element of the plaintiff's claim by a preponderance of the evidence in this case, then you should find for the defendant. The defendant does not have any obligation to disprove that which the plaintiff asserts or claims.

To establish by "a preponderance of the evidence" means to prove that something is more probably true than not true. In other words, if you were looking at opposite ends of a scale, the plaintiff's evidence would have to make one end of the scale tip somewhat to its side.

When I say in these instructions that a party has the burden of proof on any proposition, or use the expression "if you find," I mean you must be persuaded, considering all the evidence in the case, that the proposition is more probably true than not true. This rule does not, of course, require proof to an absolute certainty or even a near certainty.

II. CASE-SPECIFIC INSTRUCTIONS

A. NATURE OF THE PLAINTIFF'S CLAIMS

This is a civil case brought by Theresa Sepe against Red Robin Gourmet Burgers, Inc. She alleges that she injured her knees, back, hip, buttocks, and coccyx bone when she slipped

and fell in a Red Robin Gourmet Burgers restaurant in Warwick, Rhode Island on July 29, 2011. You are being asked to determine whether Red Robin is liable for any alleged negligence in failing to maintain the interior of its restaurant in a safe condition and if so, how much money to award Ms. Sepe in damages.

B. COUNT ONE: NEGLIGENCE

Ms. Sepe brings a single claim for negligence. The law of negligence is founded on the concept that under certain circumstances we each owe a duty of care to the other to act with care for the other's safety. In other words, our surrounding circumstances may require us to act with care toward others so that we do not jeopardize their safety. This duty is called a duty of care. Negligence is some conduct that breaches the duty of care owed by one person to another because of the circumstances.

1. NEGLIGENCE DEFINED

Generally, negligence is the failure of one person, acting in a given set of circumstances, to exercise that degree of care for the safety of another person that a reasonably prudent person would ordinarily exercise in the same or similar circumstances.

Negligence may result from not doing something that a reasonably prudent person would do or it may result from doing something that a reasonably prudent person would not do under the same or similar circumstances.

In other words, when a person either by acting or not acting in a given set of circumstances, fails to exercise the degree of care for the safety of another person that a reasonably prudent person would have used under the same or similar circumstances, you have negligence. When we say that a person was acting with due and reasonable care, we mean that this person was not negligent.

2. DUTY OF CARE – PREMISES LIABILITY

Ladies and gentlemen, now that I have explained the general concepts of negligence to you, I will take a moment to explain the law of negligence as it relates to situations similar to this case. This area of law is called the law of premises liability and it governs the relationship between landowners or others in control of property and those who are reasonably expected to come onto the property. The plaintiff in this case was on Red Robin's property with Red Robin's permission. As such, Red Robin owed a duty to her.

Under the law, a property owner has a general duty to use reasonable care in seeing that the premises are free from dangerous conditions that might cause injury to those who enter upon the property. Within the context of that general duty, a property owner is also under a duty or obligation to keep and maintain the premises in a safe condition and to use reasonable care in inspecting the premises so as to discover dangerous conditions or defects. A property owner also has a duty to use reasonable care to cure or remedy those conditions so that the premises are made safe. In other words, a property owner has a duty to use reasonable care to keep and maintain the premises in a safe condition and to protect those individuals reasonably expected to be on the premises against the risks to be apprehended from a dangerous condition existing on the premises.

In this case, Red Robin had a duty to Ms. Sepe to exercise reasonable care to keep and maintain the premises in a reasonably safe condition for Ms. Sepe's visit to Red Robin's restaurant.

3. NOTICE OF A DANGEROUS OR UNSAFE CONDITION ON PREMISES

But before a property owner can be held responsible for failing to remedy or cure a dangerous condition, a plaintiff must prove that the property owner knew or should have known

about the condition and failed to exercise the reasonable care to remedy or cure the condition within a reasonable time after having discovered it. In this case, Ms. Sepe must prove by a preponderance of the evidence that the dangerous condition on the premises existed for a sufficiently long period of time in order to have afforded Red Robin with reasonable notice of the existence of the condition, and that Red Robin, after having acquired such notice of the dangerous condition, failed to remedy the condition or warn the Plaintiff of the dangerous condition.

In deciding whether Red Robin should have known of and remedied a dangerous condition, you may consider that a reasonable time to discover and remedy a condition will vary depending on the circumstances, such as:

1) the nature of the business

2) the size of the business

3) the number of customers visiting the premises

4) the location of the dangerous condition and

5) the opportunity of the defendant to see and observe the dangerous condition.

4. RESPONDEAT SUPERIOR – EMPLOYER LIABILITY

An employer is liable for the acts of an employee when the employee is acting within the scope of his or her employment. Red Robin's employees at the Warwick restaurant were acting within the scope of their employment. If you find that Ms. Sepe's injuries were proximately caused by any Red Robin employees' negligence, then Red Robin is legally responsible for his or her negligence.

5. PROXIMATE CAUSE

Negligence and the legal term proximate cause work together. Proximate cause is a necessary element of negligence. A person will not be held responsible or liable unless his or her actionable conduct caused actual harm to someone else. If that conduct is not a substantial or moving cause of some harm, then the person should not be held responsible for his or her negligence. Only where a person's actionable conduct causes harm do we hold the person responsible for that harm. There must be a link or connection between the conduct and the harm in order to hold a person responsible.

The question is to what extent did the actionable conduct cause the slip and fall? The law requires that the connection or link between the conduct and the resulting harm be legally sufficient, that is, something more than insubstantial or insignificant.

Proximate cause means a cause that in a natural, continuous and unbroken sequence produces an injury and without which the injury would not have occurred. The proximate cause of an injury is a substantial, primary or moving cause without which the injury would not have happened. Causes that are merely incidental are not proximate causes. Unless Red Robin's negligence is a proximate cause of Ms. Sepe's slip and fall at Red Robin restaurant, then Red Robin is not responsible to Ms. Sepe.

A cause that is a proximate cause may be the sole or only cause of an injury. Or, it may be one of two or more or even several causes of an injury some of which are a proximate cause and some of which are not. A cause is a proximate cause even if it comes together with or unites with some other cause and produces the injury. The test is whether the particular cause at issue is a substantial cause or whether it is merely incidental.

If you find Red Robin was negligent, then you must then consider whether that actionable conduct was a proximate cause of Ms. Sepe's slip and fall at Red Robin restaurant.

For a cause to be a proximate cause, it need not of necessity be the sole or only cause or even the last or nearest cause. It is the proximate cause if it continues or unites with some other cause in acting at the same time and in combination with some other cause produces the injury. It is the proximate cause if, but for that cause, the accident would not have happened.

C. AGGRAVATION OF PRE-EXISTING CONDITION

The defendant must take the plaintiff as it finds her at the time of the accident. If Ms. Sepe had a physical condition prior to the accident that caused her to endure more pain and suffering as a result of the accident than an ordinary person in good health would have endured, Red Robin nevertheless is liable to her for all the damages that resulted from its negligence. This includes all of the damages resulting from the aggravation of a pre-existing medical condition.

It is unimportant that the condition pre-existed the accident. The defendant is liable for the natural and probable consequences of its negligence including aggravation of a pre-existing condition.

D. DAMAGES

I will now turn to the question of damages. In so doing, this Court does not intend to indicate that it is of the opinion that Red Robin is liable or that Ms. Sepe is owed damages. If you find that Red Robin is not liable, you will not consider the question of damages.

Ms. Sepe alleges that she has sustained damages as a proximate result of Red Robin's negligence. Just as she has the burden of proving liability by a preponderance of the evidence, the plaintiff must prove her damages by a preponderance of the evidence.

Damages are defined in the law as that amount of money that will compensate an injured party for the harm or loss sustained. These damages are referred to as compensatory damages. The rationale behind compensatory damages is to restore a person to the position he/she was in prior to the harm or the loss. Compensatory damages, then, is the amount of money that will replace, as near as possible, the loss or harm proximately caused by a defendant's negligence.

The damages you award must not be oppressive or unconscionable, and you may assess only such damages as will fairly and reasonably compensate plaintiff insofar as the same may be computed in money. You must confine your deliberations to the evidence, and you must not indulge in guesswork, speculation or conjecture.

I will now discuss the type of damages sought by plaintiff in this case – they are medical expenses and compensatory damages in the form of pain and mental suffering.

1. MEDICAL EXPENSES

If you find that is Red Robin liable, Ms. Sepe is entitled to recover reasonable and necessary medical expenses incurred. In assessing these damages, you may consider evidence that establishes that her medical treatment was necessary as a result of her fall at Red Robin and you may consider evidence that establishes the reasonable charge for the medical, hospital and/or nursing services.

2. COMPENSATORY DAMAGES--PAIN AND SUFFERING

The plaintiff seeks to be compensated for the conscious pain and suffering that she endured as a result of the negligence complained of.

I will define pain and suffering for you. Pain means physical pain, the kind resulting from a physical impact or injury. It includes what we ordinarily think of as physical pain as well as discomfort, stiffness, and restriction of bodily motion that is caused by the pain or discomfort

brought about by moving. Pain must be conscious pain, that is, something that Ms. Sepe was aware of. The law does not allow a jury to award damages for pain to a person while that person was unconscious.

Suffering, on the other hand, can be equated with what we sometimes call the mental anguish that arises from physical pain or injury to the body. Suffering means recognizing the pain, the danger resulting from the pain, and the knowledge that the pain and treatment for it will continue. If you find that Ms. Sepe has proven that in addition to physical pain, she has also experienced fright, anguish, nervousness, grief, anxiety, worry, humiliation, embarrassment, shock or terror, she is entitled to recover for this mental suffering.

An award for pain and suffering must be fair and reasonable. It must be grounded in the evidence and not based upon speculation or conjecture. Nor may you arbitrarily pick some amount. Your award for pain and suffering should be based on the evidence that has been presented to show just how much pain and suffering Ms. Sepe endured as a result of her injuries.

There is no particular formula by which to compute damages for pain and suffering. There are no objective guidelines by which you can measure the money equivalent of this injury; the only real measuring stick, if it can be so described, is your collective and enlightened conscience. You alone are the sole judges of what, if anything, should be awarded for pain and suffering.

III. FINAL PROCEDURAL INSTRUCTIONS

Ladies and Gentleman, in a moment I will dismiss you so that you may commence your deliberations. However, before I do that I need to give you some instructions about the procedures you must use in the course of your deliberations.

As I said at the beginning of my instructions, it goes without saying that prejudice,

sympathy or compassion should not be permitted to influence you in the course of your deliberations. From what I have said I do not and did not mean to imply that you should approach your consideration of this case in an intellectual vacuum. You are not required to put aside or to disregard your experiences and observations in the ordinary, everyday affairs of life. Indeed, your experiences and observations in the ordinary, everyday affairs of life are essential to your exercise of reasonably sound judgment and discretion in the course of your deliberations; and it is your right and duty to consider the evidence in the light of such experience and observations.

During your deliberations, you must not communicate with or provide any information to anyone outside of the jury room by any means about this case. You may not use any electronic device or media, such as the telephone, a cell phone, or computer. You may not communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. You can only discuss the case in the jury room with your fellow jurors during deliberations.

Now, in order for you to return a final verdict, your decision must be unanimous. That means that you cannot return a verdict unless and until all eight of you are in agreement as to the verdict.

Therefore, in the course of your deliberations and in your consideration of the evidence, you should exercise reasonable and intelligent judgment. It is not required that you yield your conviction simply because a majority holds to the contrary view, but in pursuing your deliberations you should keep your minds reasonably open to conviction with respect to the point in dispute so that you will not be precluded or prevented from achieving a unanimous verdict by mere stubbornness. It is your right to maintain your conviction. Each vote of each juror is as

important as the vote of any other juror, and you need not give up your sincerely held conviction simply because a majority holds to the contrary.

I am designating juror # __, _____, as the Foreperson of this jury. _____, it will be your responsibility to organize the group and facilitate organized and healthy deliberations. The Foreperson's opinion, voice, or vote, however, is no more meaningful than any other juror.

When you are in the jury room, you will be provided with the evidence that has been admitted in this case. It may take us a few minutes to gather it up, but as soon as we do it will be brought to the jury room.

You will also be given a verdict form. When you have reached a verdict, the Foreperson will fill out that form and sign it. Once the verdict form is complete, you will inform the Court Security Officer.

[REVIEW OF VERDICT FORM]

If, in the course of your deliberations, you deem it necessary to be further instructed or assisted by the Court in any way, the Foreperson should reduce such request or question to writing, sign it, and give it to the Court Security Officer in whose charge you will now be placed. The Court Security Officer will then bring such written request to me and I, in consultation with the attorneys, will determine an appropriate response. Other than this method, please do not attempt to communicate privately or in any other way with the Court or with anyone outside the jury room.