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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

CARRIE HARPER and DAVID HARPER,	)	
	)	
Plaintiffs,	)	
v.	)	**Case No. 15-cv-3112**
	)	
UNITED STATES BEEF CORPORATION, d/b/a ARBY'S,	)	
	)	
Defendant.	)	

ORDER

INTRODUCTION

Plaintiffs Carrie and David Harper filed their Amended Complaint (#4) against Defendant United States Beef Corporation d/b/a Arby's ("Arby's") on April 17, 2015. Plaintiffs allege that Mrs. Harper sustained injuries after consuming tainted Pepsi purchased from Arby's. Plaintiffs allege strict liability, negligence, and *res ipsa loquitur* theories to hold Defendant liable for Mrs. Harper's injuries. Plaintiffs further allege Defendant is liable for Mr. Harper's loss of consortium with Mrs. Harper.

On May 10, 2018, Defendant filed a Motion for Summary Judgment (#60). On May 31, 2018, Plaintiffs filed a Response (#67). On June 14, 2018, Defendant filed a Reply (#71). This court has thoroughly reviewed the documents and evidence submitted by the parties. For the following reasons, Defendant's Motion for Summary Judgment (#60) is GRANTED.

BACKGROUND[1]

Carrie Harper's deposition shows she would testify as follows. On November 2, 2014, she was driving back to Illinois after a trip to Texas. She did not have breakfast that day. As she drove, she consumed potato chips, candy, cheese slices, and French onion dip. She drank a couple cans of Pepsi, a couple bottles of Borden's chocolate milk, and some Dasani bottled water.

In the evening, after driving all day and consuming the above items, Mrs. Harper visited Defendant's restaurant in Litchfield, Illinois. At about 8:40 p.m., she purchased a Jr. Roast Beef, Waffle Fries, and a Pepsi from the drive-through window. She started eating the sandwich, then drank one swallow of the Pepsi. She then felt like her mouth was burning and numb, and upon smelling the Pepsi thought it smelled like "floor cleaner or the yellow mop buckets you would see when you are out and someone's mopping a floor". She drove for about 10 minutes, to a rest area along Interstate 55 north of Litchfield, stopped, and called the Arby's where she purchased the food and drink. She told the Arby's employee who answered the phone that there was something wrong with her Pepsi, specifically that she thought there was a caustic chemical in it. She left her name and number and was told someone would call her back.

She then drove the rest of the way home. When she got home, she noticed little blisters or speckles on the back of her throat. She went to bed, and when she woke up

[1]The following facts are taken from Defendant's Motion for Summary Judgment and Plaintiffs' Response, as well as the exhibits attached thereto.

she was in pain, in her throat. She went to prompt care, who directed her to call poison control. Poison control told her to go to the emergency room, which she did, at Advocate Bromenn hospital in Normal, Illinois. She was admitted to the hospital and was released on Wednesday, November 4, 2014. Thereafter she was examined and treated by several medical professionals, whose deposition testimony is discussed in detail below.

John Fulk is a Physician's Assistant. He performed a medical consult of Mrs. Harper shortly after the incident. At his deposition he stated that he did not have the ability to test for the cause of Mrs. Harper's throat condition, so any opinion he would give about the cause of her injuries would be speculation.

Dr. Eric Hungness is a board certified general surgeon with a specialty in minimally-invasive gastro-intestinal surgery. Mrs. Harper was a patient of Dr. Hungness. Dr. Hungness does not have an opinion as to whether or not the drink Mrs. Harper consumed contained a caustic substance or was caustic.

Dr. Sharon Moy is a doctor of osteopathic medicine. Dr. Moy is of the opinion that the Pepsi had a foreign chemical in it. She never saw anything that confirmed there was a foreign chemical in Mrs. Harper's Pepsi, and defers to other doctors as to Mrs. Harper's diagnosis. She bases her conclusion that "there must have been" a foreign chemical in the Pepsi on Mrs. Harper's account of what happened, and "how they're doing all the specialist's workup." When a patient tells Dr. Moy something that she knows is false, she still puts it down in their records. She tries to believe her patients as

best she can. Dr. Moy's deposition shows the high value she places on her patient's account of the circumstances underlying their condition:

> **Q. (By Mr. Clark) So even if you saw a report that said there was no foreign chemicals in it, you would still think that there was foreign chemicals in it based upon what your patient told you. Is that what you're saying?**
>
> A. Correct.

Dr. Vijay Misra is a board certified doctor in Gastroenterology. Dr. Misra determined that Mrs. Harper ingested a caustic chemical – based on Mrs. Harper telling her providers she ingested a caustic chemical. Dr. Misra testified that it was possible Mrs. Harper ingested a caustic chemical, but made clear that she did not have an opinion about what caused Mrs. Harper's injury.

Dr. Peter Kahrilas is board certified in internal medicine and Gastroenterology. Dr. Kahrilas determined that Mrs. Harper had a contractile problem with the esophagus that he characterized as esophageal hyper-contractility with EGJ outflow obstruction. Dr. Kahrilas related her condition to drinking the Pepsi from Defendant. The sole basis for him relating it to the Pepsi was the history relayed to him by Mrs. Harper.

Dr. David O'Dell is a general thoracic surgeon. Dr. O'Dell testified "Really, anything that creates an inflammatory state within the wall of the esophagus can lead to dysfunction of the nervous system within the wall of the esophagus and can lead to these difficulties with normal esophageal motor function." Dr. O'Dell stated "my opinion, based upon the history I was given by Mrs. Harper, as well as the timing, suggests to me that this was a caustic injury. That's my opinion." The timing of Mrs.

Harper's treatment relative to when she suffered the injury is based on what Mrs. Harper told Dr. O'Dell and various other medical providers, about what happened and when she sought treatment. Dr. O'Dell went on to state "You know, its – I use the term questionable in the operative report because there – you know, there is a question there. I cannot definitively state that it was or it wasn't. I believe that there probably – based upon that time frame and the lack of symptoms beforehand, I believe there was some event that happened there."

Mrs. Harper has been taking morphine for 10 years. Plaintiffs agree this is an undisputed material fact. Defendant's Motion for Summary Judgment, Document #61, at 4 (fact #20); Plaintiffs' Response, Document #67, at 3.

In response to a separate fact (#19) that mentions Mrs. Harper's other medications and *also* mentions Mrs. Harper's morphine use, Plaintiffs "dispute that said facts have a causal relationship to her current situation." Plaintiffs' Response, Document #67, at 5. However, aside from that bare assertion, no affidavit, deposition, or other evidence before the court substantiates Plaintiffs disputing that a possible causal connection between Mrs. Harper's 10-year morphine use and esophageal dysmotility exists. Dr. Hungness' deposition included the following exchange:

> **Q. Did you come up with a diagnosis then?**
>
> A. Well, she [Mrs. Harper] was referred kind of with the diagnosis. I had reviewed the records and it looked like she had a diagnosis of likely what's called Type III – a variant of Type III achalasia.
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> ---

Q. Your records indicate hypercontractile achalasia. What is that? Is that the same thing as Type III achalasia?

A. Yeah. Type III hypercontractile achalasia is pretty much the same thing.

Q. Has narcotic addiction ever been linked to achalasia, like morphine use?

A. I'm aware that there are some thoughts that opioid use has been linked to Type III achalasia, yes.

Q. And were you aware that this patient was actively taking opioids?

A. It's in my record that she was on morphine.

Dr. Kahrilas' deposition included the following exchange:

Q. There was also an indication that she was taking multiple medications. I think you had indicated, you know, some pretty high-dose narcotic stuff. Let's see. Speaking with other doctors in the past, they've indicated that that causes patients to sometimes become hypersensitive. Could that be a situation that occurred here and have any causal relationship to her complaints or her underlying condition?

A. I wouldn't say it causes patients to become hypersensitive, but it does cause contractile abnormalities of the esophagus; it does cause EGJ outflow obstruction; and it can be associated with some degree of hypercontractility.

Q. Does that mean in this case that the medications that she was taking before this could have a causal relationship to her condition?

A. It is possible, but this would be very, very extreme relative to what has ever been described.

Q. Is it any less possible than the ingestion of the chemical that she described to you?

A. I really can't -- I can't answer that one way or the other. I'm stuck with the fact of the temporal relationship where it's obvious that narcotic use was long standing.

Dr. O'Dell's deposition included the following exchange:

Q. Are you aware of narcotic addiction with its potential relationship to this condition and the same sort of issues that Ms. Harper's having?

A. So narcotic dependency can cause a pan-intestinal slowing of transit or dysmotility. We see this, you know, kind of, most classically with delayed gastric emptying. We can see it with any part of the GI tract, esophagus included.

Arby's generated an Incident Report following Mrs. Harper's call on the evening of November 2, 2014. The report indicates that an Arby's employee, Alicia Dewitt, tasted the Pepsi around closing time that night, and said "it tasted like a chemical". The report makes no indication what sort of "chemical" the Pepsi tasted like, any sensation she felt in her mouth or throat, and makes no mention of anything Alicia Dewitt noticed that was otherwise unusual about the Pepsi.

On November 3, 2014, Arby's district manager Joanna McFarland went to the Litchfield Arby's. While there, she "brixed" the soda machine – a process to see if the correct amount of carbonation is being added to the syrup. The soda machine was adding too much carbonation.[2] Too much carbonation will cause an aftertaste. Joanna McFarland and other Arby's employees "taste-tested" the soda on November 3, 2014, and the sodas tasted like they had too much carbonation.[3]

Several lab tests have been performed by Defendant on various samples of the

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[2] According to Oxford Dictionaries' definition, to "carbonate" is to dissolve carbon dioxide (chemical compound CO_2) in a liquid (in this case another chemical compound, water and Pepsi syrup).

[3] Plaintiffs contend that facts related to the soda carbonation ratio are immaterial. Nevertheless, because the fact that the soda was over-carbonated directly affects the taste of the soda and will cause an aftertaste, these facts are material in determining what inferences may reasonably be drawn from the circumstantial evidence Plaintiffs rely upon.

Pepsi Mrs. Harper consumed. At Defendant's request, Carrie Harper gave a sample to St. Louis Testing Laboratories ("St. Louis Testing"). St. Louis Testing analyzed a sample of the Pepsi for foreign substances.[4] Plaintiffs also gave a sample of the remaining Pepsi directly to Defendant, who had that sample tested by Avomeen Analytical Services ("Avomeen"). Defendant obtained a sample of the substance St. Louis Testing tested, along with a control sample of Pepsi, and sent those to Avomeen for analysis as well.

Both labs tested the Pepsi using gas chromatography mass spectrometry – a test that detects a range of volatile and semi-volatile substances within a sample. Plaintiffs focus on two sanitizers – Chlor Powder and Quat Sanitizer – as their prime suspects for causing Mrs. Harper's injuries. While the *active* ingredients in those products are non-volatile salts and therefore would not show up on gas chromatography test results, the remaining 85.92 percent (Quat) and 93 percent (Chlor) of those products are comprised of a proprietary blend of other substances – the amount of which is volatile, semi-volatile, or non-volatile is not clear. A different test, liquid chromatography, *may have* produced more accurate results if the cleaning compound alleged to be present did not contain detectable levels of any volatile or semi-volatile ingredient.[5]

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[4] Plaintiffs argue St. Louis Testing's results are unreliable (among other reasons) because there is no chain of custody of the sample they tested. The court will address that argument, along with Plaintiffs' other arguments, below.

[5] Plaintiffs argue additional possibilities to cast doubt on the test results. First, they argue it is possible Mrs. Harper ingested *all* the contamination allegedly in the Pepsi in the one swallow she took, or if she did not consume it all in the one swallow she took, it is possible that *all* the alleged contaminant evaporated before the tests were performed.

After analysis, St. Louis Testing was unable to say if the four active ingredients in Quat Sanitizer were or were not present in the sample they tested. In Avomeen's analysis comparing both samples to the control sample of Pepsi, Avomeen did *not* detect ingredients of a cleaning agent.

Neither party has performed the liquid chromatography test on the Pepsi that remained in Mrs. Harper's cup, nor have they performed any tests on any of the cleaning compounds Plaintiffs think are the cause of Mrs. Harper's injuries (in either their diluted-in-water, diluted-in-Pepsi, or non-diluted forms). Such tests may have helped to determine, for example, those substances' volatility, solubility, specific gravity, causticity or acidity, or other potentially useful information.

Arby's cleans their soda fountain nozzles with a solution of sanitizer and water. Chelsea Matthews, an Arby's employee who worked the drive-through on November 2, 2014, and who cleans the drive-through Pepsi machine dispenser nozzles, would, as part of her usual routine, after cleaning the nozzles, remove the nozzles from the bucket of sanitizer solution and put them directly back on the Pepsi machine.

ANALYSIS

Summary Judgment Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In ruling on a motion for summary judgment, a district court "has one task and one task

only: to decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial." *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994). In making this determination, the court must construe the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of that party. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Singer v. Raemisch*, 593 F.3d 529, 533 (7th Cir. 2010). However, a court's favor toward the nonmoving party does not extend to drawing inferences which are only supported by speculation or conjecture. See *Singer*, 593 F.3d at 533. In addition, this court "need not accept as true a plaintiff's *characterization* of the facts or a plaintiff's legal conclusion." *Nuzzi v. St. George Cmty. Consol. Sch. Dist. No. 258*, 688 F. Supp. 2d 815, 835 (C.D. Ill. Feb. 23, 2010) (emphasis in original).

Summary judgment is the "put up or shut up" moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events. *Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 901 (7th Cir. 2003). Therefore, in order to successfully oppose a motion for summary judgment, a plaintiff must do more than raise a metaphysical doubt as to the material facts. *Michael v. St. Joseph Cty.*, 259 F.3d 842, 845 (7th Cir. 2001). Instead, it must present definite, competent evidence to rebut the motion. *Id.* Where the plaintiff has the ultimate burden of proof at trial, the defendant may succeed on a motion for summary judgement simply by indicating the absence of evidence to support the plaintiff's claim. *Celotex Corp.*, 477 U.S. at 322.

Defendant's Motion for Summary Judgment

Illinois law governs the extent of Defendant's liability in this diversity action. See *Reid v. Kohl's Dep't Stores, Inc.*, 545 F.3d 479, 481 (7th Cir. 2008); *Pace Comm. Services Corp v. Express Prod., Inc.*, 18 N.E.3d 202, 208 (Ill. App. Ct. 2014). The Illinois Supreme Court has held that while furnishing food to the general public, the retailer impliedly warrants that the product is fit for human consumption at the time it leaves its control, and where the food proves to be deleterious, the retailer may be required to respond in damages to the injured consumer. *Tiffin v. Great Atl. and Pac. Tea Co.*, 162 N.E.2d 406, 411 (Ill. 1959). However, a plaintiff must establish a causal connection between the retailer, the unsafe food, and injury suffered by the plaintiff. *Id.*

Illinois law allows Plaintiffs to proceed under theories of tort, breach of warranty, or strict liability. See *Greene v. KFC Nat. Mgmt Co.*, 1985 WL 2110 (N.D. Ill. Aug. 1, 1985) (not reported in F. Supp.).

"Liability may not be based on imagination, speculation, or mere conjecture, and the question of its existence should be submitted for jury determination only where there is some direct evidence supporting each material allegation of the complaint or some circumstantial evidence from which inferences of such facts clearly preponderate." *Id.*, citing *Tiffin*, 162 N.E.2d at 412-13. Where a plaintiff relies on circumstantial evidence to establish their case, a fact cannot be inferred from the circumstantial evidence when the existence of another fact inconsistent with the first can be inferred with equal certainty from the same evidence. *Pyne v. Witmer*, 343 N.E.2d

1304, 1313; see also *Vuletich v. Alivotvodic*, 392 N.E.2d 663, 667 (Ill. App. Ct. 1979) (if plaintiffs rely on circumstantial evidence to establish their case, the evidence must also exclude other possible extrinsic causes of injury). That being said, circumstantial evidence need not both create a reasonable inference of the fact to be shown and also exclude *all other possible* inferences. *Pyne*, 343 N.E.2d at 1313 (emphasis added).

The court understands the rule in *Pyne* and *Vuletich* to mean that the circumstantial evidence a plaintiff intends to use to avoid summary judgment does not have to rule out *unreasonable* inferences, but it must rule out other reasonable inferences. An inference equally likely to another inconsistent inference is speculation or conjecture, and will not avoid summary judgment.

Strict Liability Claim – Count I

In order to recover on a strict liability theory, a plaintiff must prove: "1) that the plaintiff's injury resulted from a condition of the product; 2) the condition was an unreasonably dangerous one; and 3) the condition existed at the time the product left [defendant's] control." *Consolino v. Thompson*, 468 N.E.2d. 422, 424 (Ill. App. Ct. 1984).

Plaintiffs put forth no direct evidence in support of their assertion that the Pepsi Defendant served to Mrs. Harper had a caustic chemical in it, and they have no obligation to do so. The question, then, is whether there is a genuine issue as to any material fact, and whether the circumstantial evidence Plaintiffs put forth supports reasonable inferences of Defendant's liability, or instead raises inferences that are mere speculation and conjecture.

Defendant primarily relies on three cases in support of its motion for summary judgment: *Tiffin v. Great Atl. and Pac. Tea Co.*, 162 N.E.2d 406 (Ill. 1959), *Greene v. KFC Nat. Mgmt Co.*, 1985 WL 2110 (N.D. Ill. Aug. 1, 1985) (not reported in F. Supp.), and *Warren v. Coca-Cola Bottling Co. of Chicago*, 519 N.E.2d 1197 (Ill. App. Ct. 1988). Plaintiffs argue Defendant's reliance on *Tiffin* is misplaced. Plaintiffs make no mention of, or argument against, the applicability of *Greene* or *Warren*.

In *Tiffin*, the Illinois Supreme Court analyzed the issue of when a foodstuffs preparer or merchant is liable for injuries alleged to have been caused by deleterious food products. The *Tiffin* plaintiffs sought to recover damages claimed to have been sustained from eating a processed ham manufactured and sold by the defendants. *Tiffin*, 162 N.E.2d at 408. The *Tiffin* plaintiffs did not offer direct proof of contamination at the time the ham left the control of the defendants; rather they offered a litany of circumstantial evidence including the opportunity for contamination when under the defendants' control, lab findings showing staph bacteria in the ham, and the recognized symptoms of the corresponding illness which the plaintiffs suffered. *Id*. at 411-12.

The Illinois Supreme Court held that the evidence which plaintiff presented, even when considered most favorably to plaintiffs, showed only that the illness may have resulted from staph poisoning. *Id*. at 413. The court continued that while they could theorize that perhaps the alleged bacteria was present at the time of the purchase, "there are other theories which are equally plausible []." *Id*. Thus, the Illinois Supreme Court held, the trial court erred in denying the defendants' motion for directed verdict.

Plaintiffs argue Defendant's reliance on *Tiffin* is misplaced, because that case was not decided at summary judgment, but rather on a motion for directed verdict following a jury trial. Plaintiffs' argument is correct that the procedural posture of *Tiffin* is different than this case. However, *Tiffin* establishes the framework for analysis of cases like the one, and the facts and arguments are similar. *Tiffin* is thus useful to the court in understanding what facts are material, what elements Plaintiffs would have to prove at trial, and how the court should analyze circumstantial evidence in determining whether a genuine issue of material fact exists here.

Plaintiffs also argue Defendant misinterprets *Tiffin* as a bar on plaintiffs prevailing based solely on circumstantial evidence. Defendant does not make that argument. As explained above, Plaintiffs *could* survive summary judgment based solely on circumstantial evidence if that evidence gives rise to non-speculative inferences.

In *Greene*, the Northern District of Illinois granted summary judgment for defendant KFC restaurant. The *Greene* plaintiff alleged defendant served him spoiled fried chicken, causing injury to him. There too, the plaintiff relied on circumstantial evidence in opposing defendant's motion for summary judgment. The circumstantial evidence included testimony of other customers who purchased bad-smelling chicken from the same restaurant at about the same time, and the plaintiff's testimony that he felt fine before eating the chicken, but within two hours of eating it became severely ill. The Northern District of Illinois held that the facts did not adequately prove a causal connection between KFC's food and Greene's illness. *Greene*, 1985 WL 2110, at *2.

> "The circumstantial evidence presented by Greene makes food poisoning a reasonable *possibility*, but it is not enough to exclude other extrinsic causes of his illness. We cannot say that the inference that KFC's chicken caused Greene's ailment clearly predominates other permissible inferences, so the question of KFC's liability should not be submitted for jury determination."

Id.

Finally, in *Warren*, the plaintiff alleged she became ill after consuming what she believed was a tainted Coca-Cola soft drink. That plaintiff took a sip of the beverage and immediately thought it tasted bad. *Warren*, 519 N.E.2d at 1199. She stated in her deposition that upon her first drink from the can of Coca-Cola she began to feel ill. *Id*. at 1202. The plaintiff in *Warren* sought treatment at a hospital emergency room, and explained that she got sick after drinking the soda. *Id*. at 1201. The emergency room attending physician's report indicates plaintiff's condition was "acute gastritis" caused by ingestion of the Coca-Cola. *Id*. at 1201. The plaintiff in *Warren* argued that physician's report substantiated a finding of an issue of fact as to proximate cause.

In granting summary judgment for defendant Coca-Cola Bottling Company, the court held that the "plaintiff's own speculation is insufficient to establish the necessary inference of causation in order to provide a basis for recovery, and must be discounted as surmise and conjecture." *Id*. at 1202 (citation omitted). The court also found the treating physician's report did not create any issue of fact. First, the physician's statements only established the possibility that the plaintiff's illness was attributable directly to the Coca-Cola. Moreover, the diagnosis and causation assessment was based entirely on the plaintiff's own statements of the history of the occurrence. *Id*. at 1203.

Using these cases as the framework to consider Plaintiff's claims, the reasonable inferences that may be drawn from the evidence before the court in support of Plaintiffs proving any of the necessary legal elements are mere speculation and conjecture.

There is evidence from which a reasonable inference can be drawn that Mrs. Harper was injured from ingesting *something* harmful. But Mrs. Harper's own speculation that Defendant's product caused her injury is not enough to create an issue of fact. *Warren*, 519 N.E.2d at 1202-03.

Likewise, the medical professionals' voluminous testimony does not support the non-speculative inference Plaintiffs must demonstrate.

PA John Fulk and Dr. Eric Hungness did not have an opinion as to the causation of Mrs. Harper's injuries.

Dr. Sharon Moy based her conclusion that "there must have been" a foreign chemical in the Pepsi on Mrs. Harper's account of the event and "how they're doing all the specialist's workup".

Dr. Misra determined Mrs. Harper ingested a caustic chemical also solely based on Mrs. Harper telling her providers that is what happened.

Dr. Kahrilas related Mrs. Harper's condition to drinking the Pepsi from Defendant. The sole basis for him relating it to the Pepsi was the history relayed to him by Mrs. Harper.

Dr. David O'Dell stated "my opinion, based upon the history I was given by Mrs.

Harper, as well as the timing,[6] suggests to me that this was a caustic injury. That's my opinion."

Thus all the medical professionals' opinions tying the ingestion event *to Defendant's Pepsi* are based on Mrs. Harper telling them as much. The court does not find this evidence supports a non-speculative inference that Defendant's Pepsi caused Mrs. Harper's injuries. *Warren*, 519 N.E.2d at 1202-03. And insofar as the medical professionals testified that *something* Mrs. Harper ingested *may* have caused her injuries, equally likely is the inference that the potato chips, candy, cheese slices, French onion dip, cans of Pepsi, bottles of Borden's chocolate milk, or Dasani bottled water Mrs. Harper consumed that same day contained a harmful substance.

Plaintiffs also argue that Defendant's process of cleaning their soda nozzles supports a reasonable inference that a caustic chemical transferred from the Pepsi nozzle and into Mrs. Harper's soda.

However, a number of equally likely and inconsistent inferences can be drawn from the evidence. One reasonable and inconsistent inference is that the water-diluted sanitizer solution Defendant uses is not harmful to human tissue. Another is that the water-diluted sanitizer solution dripped or evaporated off the sanitized nozzle either before any Pepsi was dispensed, or before Mrs. Harper's Pepsi was dispensed. Another is that Pepsis dispensed to other customers, before Mrs. Harper's was dispensed,

[6] Also provided by Mrs. Harper.

flushed any remaining water-diluted sanitizer solution off the Pepsi nozzle. The fact that Defendant sanitizes its soda nozzles does not support a non-speculative inference that Mrs. Harper's Pepsi had a "caustic chemical" in it.

Defendant suggested in its motion that Plaintiffs may point to the incident report completed by Defendant at about closing time on November 2, 2014, in which Arby's employee Alicia Dewitt is quoted as saying the Pepsi "tasted like a chemical," in arguing an issue of material fact exists. Plaintiffs have made no such argument in their Response. Plaintiffs also do not contest the fact that the drive-through soda machine was over-carbonating the drinks, and that over-carbonating soft drinks will cause an aftertaste. Defendant's uncontested argument is that an equally likely explanation for the "tasted like a chemical" comment in the incident report[7] is that the soda was over-carbonated. The court finds that drawing an inference from Ms. Dewitt's statement in support of there being a caustic chemical in Mrs. Harper's Pepsi would be speculation and conjecture, particularly in light of Plaintiffs providing no argument to the contrary.

The court turns next to the laboratory tests performed at the behest of Defendant, on various samples of the Pepsi Mrs. Harper consumed. Defendant argues the tests are conclusive direct evidence that shows no caustic chemicals were present in Mrs. Harper's Pepsi, while Plaintiffs argue the tests are worthless. The court need not resolve that question.

[7] Which was completed several hours after Mrs. Harper purchased her drink.

For the sake of argument, if the court were to accept Plaintiffs' position, then the tests show nothing aside from a total paucity of direct evidence. Plaintiffs bear the burden of putting forth evidence to demonstrate a genuine issue of material fact. The court is confident that the lab tests do not support a non-speculative inference that something other than Pepsi *was present* in the samples, and Plaintiffs make no such argument. Instead, Plaintiffs expend great effort in attacking the test methodology and questioning the chain of custody of the Pepsi samples. Plaintiffs' effort to discredit the lab tests also extends to arguing possibilities such as Mrs. Harper consuming all the alleged caustic chemicals in the one swallow she took, or that everything harmful evaporated, prior to testing, leaving only the Pepsi behind. The court finds these arguments, at best, speculative, and arguably ridiculous.

The court turns, finally, to Mrs. Harper's ten-year history of morphine use. Similar to the court's discussion of the laboratory tests, the court need not resolve whether an issue of fact exists regarding the effect of Mrs. Harper's long history of opioid consumption. There is no inference *favorable to Plaintiffs' position* that arises from the possible connection between ten years of narcotic use and esophageal dysmotility. In assessing whether Plaintiffs have put forth sufficient evidence to avoid summary judgment, such an inquiry is unnecessary.

Because the inferences Plaintiffs have put forth to avoid summary judgment are merely speculation and conjecture, the court need not delve into the quality of the defense evidence. Defendant is not required to prove a negative, nor is it required to

definitively prove the source of Mrs. Harper's esophageal condition. *Plaintiffs* must show that non-speculative inferences can be drawn from their circumstantial evidence to support their claim, and they have failed to do so.

After a review of all the evidence, it is clear that the inferences offered by Plaintiffs necessitate heavy reliance on speculation and conjecture. Therefore, the court finds that the evidence presented by Plaintiffs is insufficient to avoid summary judgment. See *Singer*, 593 F.3d at 533. Summary judgment is granted in favor of Defendant as to Count I.

General Negligence Claim – Count II

In order to recover under a tort or warranty theory, a plaintiff must prove that the defendant's product was unfit for consumption and that the food's condition caused the plaintiff's illness. *Shaw v. Swift & Co.*, 114 N.E. 330, 333 (Ill. App. Ct. 1953).

For the same reasons detailed above, Plaintiffs have not put forth anything beyond speculation and conjecture to avoid summary judgment. Summary judgment is granted in favor of Defendant as to Count II.

Res Ipsa Loquitor Claim – Count III

Illinois law regarding *res ipsa* requires that the plaintiff show she was injured "(1) in an occurrence that ordinarily does not happen in the absence of negligence, (2) by an agency or instrumentality within the defendant's exclusive control." *Heastie v. Roberts*, 877 N.E.2d 1064, 1076 (Ill. 2007).

For the same reasons detailed above, Plaintiffs have failed to raise a non-

speculative inference that Mrs. Harper actually was injured by an agency or instrumentality within Defendant's control. Plaintiffs have failed to put forth non-speculative evidence of causation. Summary judgment is granted in favor of Defendant as to Count III.

Loss of Consortium Claim – Count IV

Plaintiffs' Count IV is an ancillary claim dependent on a finding of Defendant's liability under one of Counts I-III. The court has granted summary judgment for Defendant on those counts. Summary Judgment is therefore granted in favor of Defendant as to Count IV.

IT IS THEREFORE ORDERED THAT:

(1) Defendant's Motion for Summary Judgment (#60) is GRANTED. Judgment is entered in favor of Defendant and against Plaintiffs on all counts.

(2) Plaintiff's Motion to Compel (#72) is DENIED as MOOT.

(3) Plaintiff's Motions in Limine (#75) and (#77) are DENIED as MOOT.

(4) This case is terminated.

ENTERED this 23rd day of July, 2018

/s/ Colin Stirling Bruce
COLIN S. BRUCE
U.S. DISTRICT JUDGE