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5 **UNITED STATES DISTRICT COURT**  
6 **DISTRICT OF NEVADA**

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8 MARGARET OAKES, an individual, ) Case No.: 2:09-cv-01123-RLH-RJJ  
9 )  
10 Plaintiff, ) **O R D E R**  
11 ) (Motion for Summary Judgment #18)  
12 CARRABBA'S ITALIAN GRILL, LLC, a )  
13 foreign corporation doing business in the State )  
of Nevada; DOES I-X; and Roe Corporations )  
I-X, inclusive, )  
14 Defendants. )  
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16 Before the Court is Defendant Carrabba's Italian Grill's **Motion for Summary**  
17 **Judgment** (#18), filed March, 17, 2010. The Court has also considered Plaintiff Margaret Oakes'  
18 Opposition (#19), filed March 31, 2010, and Carrabba's Reply (#20), filed April 19, 2010.

19 **BACKGROUND**

20 This case involves a personal injury dispute arising from a meal Plaintiff Margaret  
21 Oakes ate at Defendant Carrabba's Italian Grill. On May 26, 2007, Oakes went to Carrabba's and  
22 ordered "pescatore linguine," a pasta dish that includes mussels served in their shells. During the  
23 meal, Oakes choked on a mussel shell fragment. She was taken to a hospital where she underwent  
24 two surgeries to remove the shell. On June 26, 2009, Oakes filed suit against Carrabba's alleging  
25 claims for (1) negligence, (2) strict products liability, and (3) violation of the implied warranty of  
26 merchantability.

On June 23, 2009, Carrabba's removed the case to this Court based on diversity of the parties. Carrabba's has now moved for summary judgment on all three of Oakes' claims. For the reasons discussed below, the Court denies Carrabba's Motion for Summary Judgment.

## DISCUSSION

## I. Legal Standard

A court will grant summary judgment if “the pleadings, the discovery and disclosure materials on file, and any affidavits show there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). An issue is “genuine” if there is a sufficient evidentiary basis on which a reasonable fact-finder could find for the nonmoving party, and a dispute is “material” if it could affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986). In evaluating a motion, a court views all facts and draws all inferences in the light most favorable to the nonmoving party. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982).

The movant bears the burden of showing that there are no genuine issues of material fact. Id. “In order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party’s claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Once the movant satisfies the requirements of Rule 56, the burden shifts to the party resisting the motion to “set forth specific facts showing that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 256; *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The nonmoving party “may not rely on denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery material, to show that the dispute exists,” *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and “must do more than simply show that there is some metaphysical doubt as to the material facts,” *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986).

1           **II. Motion for Summary Judgment**

2           **A. Negligence**

3           Oakes claims Carrabba's acted negligently when it failed to remove the shell  
4 fragment while preparing her meal. To bring a negligence claim in Nevada, a plaintiff must show  
5 that (1) defendant owed plaintiff an existing duty of care; (2) defendant breached that duty; (3)  
6 defendant's breach was the legal cause of the plaintiff's injuries; and (4) damages. *Turner v.*  
7 *Mandalay Sports Entm't, LLC*, 180 P.3d 1172, 1175 (Nev. 2008). The Court notes that California  
8 has held as follows: "it is a question for the trier of fact to determine whether the presence of the  
9 injury-producing substance was caused by the failure of the defendants to exercise reasonable care  
10 in the preparation of the food, and whether the breach of the duty to exercise such care caused the  
11 consumer's injury." *Mexicali Rose v Superior Court*, 822 P.2d 1292, 1303 (Cal. 1992).

12           Carrabba's argues it is entitled to summary judgment because it took all possible  
13 care and followed all reasonably necessary steps when preparing Oakes' dish. Oakes argues that  
14 Carrabba's could not have taken all possible care because it failed to spot and remove the fragment  
15 before serving the dish. The Court agrees with California courts on this issue and finds that  
16 whether or not Carrabba's was negligent in failing to remove the shell fragment is a factual  
17 question that must be determined following a trial on the merits. In order to determine whether  
18 Carrabba's breached its duty of care, the fact finder must weigh all of the relevant evidence that will  
19 be presented at trial. For this reason, the Court denies Carrabba's Motion for Summary Judgment  
20 in regards to Oakes' negligence claim.

21           **B. Implied Warranty of Merchantability**

22           Oakes also claims that Carrabba's is liable for violating the implied warranty of  
23 merchantability. Under the Nevada Uniform Commercial Code, "there is an implied warranty that  
24 a good is merchantable and suitable for a particular purpose." *Vacation Vill., Inc. v. Hitachi Am.,*  
25 *Ltd.*, 874 P.2d 744, 747 (Nev.1994) (citing NRS §§ 104.2314-2315). NRS 104.2314 describes  
26 merchantable goods as those which "[p]ass without objection in the trade under the contract

1 description; and in the case of fungible goods, are of fair average quality within the description;  
2 and are fit for the ordinary purposes for which such goods are used.” NRS § 104.2314.

3           Although Nevada does not specifically address this issue, various courts have  
4 determined that the implied warranty of merchantability applies to transactions between a  
5 restaurant and its customer. *Mix v. Ingersoll Candy Co.*, 59 P.2d 144, 145 (1936). California for  
6 example has held that, “upon the sale of food[] by a retail dealer . . . an implied warranty ar[ises]  
7 that the commodity [is] reasonably fit for such purpose and the dealer [sh]ould be held liable for  
8 damage suffered as the result of eating the food[.]” *Mix v. Ingersoll Candy Co.*, 59 P.2d 144, 145  
9 (1936). Similarly, North Carolina has held, “a warranty that the goods shall be merchantable is  
10 implied in a contract for their sale if the seller is a merchant with respect to goods of that kind . . .  
11 [T]he serving of food or drink to be consumed either on the premises or elsewhere is a sale.”

12 *Goodman v. Wenco Foods, Inc.*, 423 S.E.2d 444, 447-48 (N.C. 1992)

13           Three main tests have developed to determine what defines “merchantable” food:  
14 the foreign/natural test, the consumer expectations test, and the hybrid test. *Mexicali Rose*, 822  
15 P.2d at 1295-1302. Under the foreign/natural test, a restaurant is liable when it serves food that  
16 contains a substance foreign to the type of food (for example a wire) and it is not liable if the  
17 substance is natural (for example a bone in a chicken dish). *Id.* at 1294. The consumer  
18 expectations test, on the other hand, bases liability not on whether the substance is foreign to the  
19 dish, but whether a consumer could have reasonably expected the substance to be in the dish (for  
20 example a half inch bone in a ground beef patty might be natural but not reasonably expected). *Id.*  
21 at 1297-98., *Goodman*, 423 S.E.2d at 450-51. Finally, other courts including California, have  
22 combined the foreign/natural test and the consumer expectations test and follow a hybrid model:

23           If the injury-producing substance is natural to the preparation of the food served, it  
24 can be said that it was reasonably expected by its very nature and the food cannot  
25 be determined unfit or defective. . . . By contrast, if the substance is foreign to the  
26 food served, then a trier of fact additionally must determine whether its presence (I)  
could reasonably be expected by the average consumer and (ii) rendered the food

unfit for human consumption or defective under the theories of the implied warranty of merchantability or strict liability. *Id.* at 1301-02.

The Court notes that Nevada has not indicated which of the tests it follows. At this time the Court does not address which test Nevada would apply because a factual dispute exists that precludes summary judgment in any event. Oakes argues that the food was unmerchantable because the dish contained whole mussel shells, not shell fragments, and she could not have expected a shell fragment in the dish. On the other hand, Carrabba's argues that the fragment was natural to the dish because the dish contained mussels and mussel shells, and that Oakes should have reasonably expected that shell fragments could be in the dish because it contained mussel shells. Whether the presence of a shell fragment in the dish made the food unmerchantable is a factual determination. It is up to the jury to determine whether Oakes could have reasonably expected a shell fragment in her dish and whether a shell fragment in a dish containing whole shells is "natural." Accordingly, the Court denies Carrabba's Motion for Summary Judgment as to this claim.

### **C. Strict Products Liability**

Finally, Oakes claims Carrabba's is liable under a theory of strict products liability because her food was defective. "To present a *prima facie* case for strict liability in tort, a plaintiff must establish that her injuries were caused by a defect in the product, and that the defect existed when the product left the defendant's control." *Madulike v. Agency Rent-A-Car*, 1 P.2d 24, 27 (1998). The Court notes that the same three tests that apply to the merchantability analysis are also used to determine what constitutes a "defect" for strict liability purposes. *Mexicali Rose*, 822 P.2d at 1295-1302.

The Court denies Carrabba's Motion for Summary Judgment on this claim. Without addressing which test Nevada is most likely to adopt, the Court finds that a question of fact exists as to whether or not a mussel shell fragment in a pasta dish with mussels constitutes a defect under each of the three tests. Thus, the same basic question of fact that exists as to Oakes'

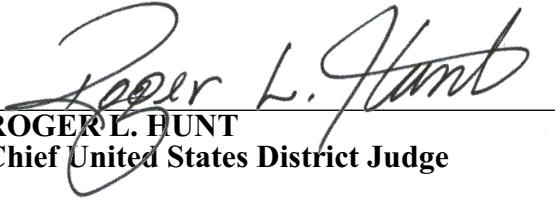
1 claim for violation of implied warranty of merchantability also pertains to Oakes' strict products  
2 liability claim. The Court therefore denies Carrabba's Motion for Summary Judgment on this  
3 claim.

4 **CONCLUSION**

5 Accordingly, and for good cause appearing,

6 IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment (#18)  
7 is DENIED

8 Dated: July 6, 2010.

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11 ROGER L. HUNT  
12 Chief United States District Judge  
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