



WYOMING HIGH SCHOOL MOCK TRIAL

2010 State Competition

STATE OF WYOMING)
) ss.
COUNTY OF ALBANY)

IN THE DISTRICT COURT
SECOND JUDICIAL DISTRICT

LEE CAVANAUGH)
)
Plaintiff,)
)
vs.)
)
DON'S DRIVE-IN, INC., a Delaware)
corporation)
)
Defendant.)

Civil Action No. 2010-0143

Adapted from the case written by the South Carolina Bar for the 2008 South Carolina High School Mock Trial Competition.

Wyoming High School Mock Trial is supported by a grant from the Wyoming State Bar and operates under the auspices of the Wyoming Partnership for Civic Education, at the American Heritage Center, University of Wyoming. WPCE posts cases, rules of competition, rules of evidence and other information about WHSMT on its Web site, <http://ahc.uwyo.edu/eduoutreach/wypce/>

Contact WHSMT coordinators at wyminghsmt@gmail.com, or call Marguerite Herman at 307-638-1468. We have information about coaching teams and about serving as scoring and presiding judges during competition.

The 2010 WHSMT competition is Nov. 20, 2010, at the University of Wyoming School of Law. Competition is open to any team of 6-8 high school students. The winning team qualifies to attend the National High School Mock Trial competition May 4-8, 2011, in Phoenix.

High school mock trial is an opportunity for students to understand the American legal system by preparing a case for trial. Through this practical, hands-on experience, high school students gain understanding of our country's approach to justice: resolving disputes or determining criminal guilt by careful examination of evidence and logical presentation of a case to a judge and jury.

Young people who participate in the WHSMT program acquire skills in analysis, critical thinking and reasoning, public speaking, teamwork, citizenship and the art of persuasion. Mock trial programs present a unique experience for students to develop thinking, writing and speaking skills that benefit them across the high school curriculum and in any career they pursue.

The mock trial program provides an opportunity for the education and legal communities to come together to educate young people and help them prepare for citizenship, whatever their career paths. Attorneys and judges who participate as coaches or competition judges help teenagers understand and appreciate our legal system. They invest in their own profession and in our youth.

2010 Wyoming High School Mock Trial *Lee Cavanaugh vs. Don's Drive-In, Inc.*

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The case of *Lee Cavanaugh vs. Don's Drive-In, Inc.*, is based loosely on the 1990 case of *Liebeck vs. McDonald's*. However, all characters, events and circumstances in this mock trial case are fictitious.

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CIVIL COMPLAINT

COMES NOW the Plaintiff, LEE CAVANAUGH, by and through Plaintiff's attorneys, and does state and allege as follows:

1. Plaintiff is a citizen and resident of the City of Laramie, County of Albany, State of Wyoming.
2. Defendant is a corporation, incorporated under the laws of the State of Delaware, registered to do business in the State of Wyoming and doing business in the City of Laramie, County of Albany, State of Wyoming.
3. This court has jurisdiction over the subject matter of this action and over the person of all parties. Venue is properly laid in this court.
4. On or about June 21, 2008, at approximately 8:15 a.m., the Plaintiff purchased a cup of coffee from the drive through window at Defendant's establishment on Campbell Avenue in the City of Laramie, County of Albany, State of Wyoming.
5. As Plaintiff was holding the cup of coffee, the lid on the cup of coffee came off suddenly and unexpectedly, which allowed coffee to splash onto Plaintiff. Defendant's employee had not properly secured the lid prior to delivering the cup of coffee to Plaintiff. In addition, the coffee in the cup was served at an unreasonably hot temperature, which rendered the coffee unreasonably dangerous to the consumer.
6. Defendant and its employees were negligent, careless, reckless, grossly negligent, willful and/or wanton in one or more of the following particulars:
 - a. Maintaining and serving its coffee at a holding temperature, which rendered it unfit for consumption and unreasonably dangerous to customers, such as Plaintiff;
 - b. Serving its coffee in cups with lids that were insufficient to protect customers, such as Plaintiff, from the dangers posed by the unreasonably hot coffee;

- c. Failing to provide lids that were designed to securely contain the coffee in the cups and permit the safe delivery of coffee to customers, such as Plaintiff, in cars;
- d. Failing to secure the lid on the cup that was served to Plaintiff;
- e. Failing to train and supervise its employees in the preparation and serving of coffee;
- f. Failing to warn its customers, such as Plaintiff, of the dangers posed by the unreasonably dangerous temperature of the coffee;
- g. Failing to warn its customers, such as Plaintiff, of the dangers posed by its employee's failure to secure the lid on the cup of coffee properly prior to serving the coffee to customers;
- h. Failing to warn customers, such as Plaintiff, of the dangers posed by the dangerous and defective cups and lids used to serve coffee to customers; and
- i. Failing otherwise to exercise that degree of reasonable and ordinary care necessary to avoid foreseeable injuries to its customers, such as Plaintiff.

7. In addition and in the alternative, Defendant is also strictly liable for the injuries sustained by Plaintiff because it sold a product to Plaintiff that was defective and unreasonably dangerous to user under circumstances that included the following:

- a. The Defendant was in the business of selling the product to customers, such as the Plaintiff;
- b. The Defendant expected the product to reach its customers, such as the Plaintiff, without substantial change in condition;
- c. The product did reach Plaintiff without a substantial change in condition; and
- d. The product was delivered in a condition that rendered it unsafe, when put to a use that was reasonably foreseeable considering the nature and function of the product.

8. As a proximate result of Defendant's acts and omissions, negligence and strict liability, as alleged herein, Plaintiff has suffered injuries and damages, which include:

- a. Severe bodily injuries consisting of first, second and third degree burns to the leg, abdomen, arm, wrist and hand, which have required medical treatment;
- b. Past, current and future medical expenses for treatment of these injuries;
- c. Permanent disfigurement;
- d. Permanent impairment and disability;
- e. Past and future loss of wages and/or earning capacity; and
- f. Pain, suffering and loss of enjoyment of life.

WHEREFORE Plaintiff prays for judgment against Defendant and for an award of compensatory and punitive damages, recovery of costs as allowed by law and such other and further relief as may be proper in the premises;

DATED this 2nd day of June 2009.

Sam Jones

Sam Jones
Jones and Associates, LLC
100 North 3rd Street
Laramie, Wyoming 82070
Attorney for Plaintiff

STATE OF WYOMING)
) ss.
COUNTY OF ALBANY)

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ANSWER TO CIVIL COMPLAINT

COMES NOW the Defendant, Don's Drive-In, Inc., by and through its attorneys and for its answer to Plaintiff's Civil Complaint does state and allege as follows:

1. Defendant admits the allegations contained in paragraph 1 of Plaintiff's Civil Complaint.
2. Defendant admits the allegations contained in paragraph 2 of Plaintiff's Civil Complaint.
3. Defendant admits that this court has jurisdiction over the subject matter and the person of the parties and that venue is properly laid in this court. Defendant expressly denies that Plaintiff is entitled to any recovery and otherwise denies all other allegations contained in paragraph 3 of Plaintiff's Civil Complaint.
4. Defendant admits the allegations contained in paragraph 4 of Plaintiff's Civil Complaint.
5. Defendant denies the allegations contained in paragraph 5 of Plaintiff's Civil Complaint.
6. Defendant denies the allegations contained in paragraph 6 of Plaintiff's Civil Complaint.
7. Defendant denies the allegations contained in paragraph 7 of Plaintiff's Civil Complaint.
8. Defendant denies the allegations contained in paragraph 8 of Plaintiff's Civil Complaint.
9. As an affirmative defense Defendant states that Plaintiff's alleged damages and injuries were the proximate result of negligence or other fault on the part of the Plaintiff, in one or more of the following ways:

- a. Plaintiff failed to act reasonably for Plaintiff's own safety by removing the lid from the cup, while travelling in a moving vehicle and without permitting the coffee to cool;
- b. Plaintiff ignored the known risks and dangers of the product and otherwise failed to heed specific warnings regarding the product;
- c. Plaintiff mishandled and misused the product in an unsafe manner; and
- d. Plaintiff otherwise failed to exercise reasonable and ordinary care to avoid foreseeable injuries Plaintiff's self.

The negligence or fault of Plaintiff must be compared to any fault on the part of Defendant, if any, and such fault bars Plaintiff's recovery in whole or in part. Plaintiff's negligence or fault.

WHEREFORE Defendant prays that this court enter judgment against Plaintiff and award Defendant its costs as allowed by law and for such other and further relief as may be proper in the premises;

DATED this 5th day of August 2009.

Jeff Smith

Jeff Smith

Smith and Smith, LLC

200 North 5rd Street

Laramie, Wyoming 82070

Attorney for Defendant

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STIPULATIONS

THE PARTIES hereby stipulate as follows:

1. All of the trial exhibits are authentic and are true and accurate copies of the originals. No objection will be made as to authenticity of any trial exhibit. The parties reserve all other objections to the admissibility of any trial exhibit until time of trial. Any trial exhibit may be offered by either party, subject to the rules of evidence and stipulations of the parties.
2. The cup and lid in Exhibit # 5 are not the actual cup and lid, but they are identical to the type of cup and lid used by Defendant and sold to Plaintiff on June 21, 2008.
3. Issues relating to the constitutionality of punitive damage awards may not be raised at trial.

Dated this 2nd day of April 2010.

Sam Jones
Sam Jones
Jones and Associates, LLC
100 North 3rd Street
Laramie, Wyoming 82070
Attorney for Plaintiff

Jeff Smith
Jeff Smith
Smith and Smith, LLC
200 North 5th Street
Laramie, Wyoming 82070
Attorney for Defendant

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INSTRUCTIONS

JURY INSTRUCTION NO. 1

DIRECT AND CIRCUMSTANTIAL EVIDENCE

There are two types of evidence from which you may find the truth as to the facts of a case - direct and circumstantial evidence. An example of direct evidence would be the testimony of one who asserts actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is the proof of facts or circumstances from which the existence or non-existence of other facts may be reasonably inferred. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. Both direct evidence and circumstantial evidence are acceptable forms of proof and should be given the weight you feel is appropriate in light of all the evidence.

JURY INSTRUCTION NO. 2

EXPERT TESTIMONY

A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education, sufficient to qualify him as an expert on the subject about which he testifies.

An expert witness may offer opinions on questions regarding the issues in the case to assist you in deciding the issues. You are not bound to accept an expert's opinion as conclusive, but should give it the weight to which you feel it is entitled.

In determining the weight to be given to an opinion, you may consider the qualifications of the expert, the credibility of the expert, the information upon which the opinion is based and the reason for the opinion.

You may disregard an expert's opinion if you find it to be unreasonable or not adequately supported.

JURY INSTRUCTION NO. 3

OPINION TESTIMONY BY LAY WITNESS

In determining the weight to be given to an opinion expressed by any witness [who did not testify as an expert witness], you should consider credibility, the extent of the witness's opportunity to perceive the matters upon which the opinion is based and the reasons, if any, given for it. You may disregard any opinion if you find it to be unreasonable or not adequately supported.

JURY INSTRUCTION NO. 4

PREPONDERANCE OF EVIDENCE – DEFINITION

“A preponderance of the evidence” is defined as the amount of evidence, taken as a whole, which leads the jury to find that the existence of a disputed fact is more probable than not. You should understand that “a preponderance of the evidence” does not necessarily mean the greater number of witnesses or exhibits.

JURY INSTRUCTION NO. 5

BURDEN OF PROOF

In this action, the plaintiff has the burden of proving by a preponderance of the evidence the following:

1. That the Defendant was at fault;
2. That the Defendant's fault was a cause of the injury and damage to Plaintiff; and
3. The nature and extent of the injuries and damages claimed

The defendant has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the following:

1. That the Plaintiff was at fault; and
2. That the Plaintiff's fault was a cause of the injury and damage to Plaintiff

In determining whether an issue has been proved by a preponderance of the evidence, you should consider all of the evidence bearing upon that issue regardless of who produced it.

JURY INSTRUCTION NO. 6

NEGLIGENCE AND ORDINARY CARE -DEFINED

When the word negligence is used in these instructions, it means the failure to use ordinary care. Ordinary care means the degree of care which should reasonably be expected of the ordinary careful person under the same or similar circumstances. The law does not say how such an ordinary careful person would act. That is for you to decide.

JURY INSTRUCTION NO. 7

CAUSE - DEFINED

An injury or damage is caused by an act, or a failure to act, whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about the injury or damage.

JURY INSTRUCTION NO. 8

MULTIPLE CAUSES

If more than one act or failure to act contributed to the claimed injury, then each act or failure to act may have been a “cause” of the injury within the meaning of these instructions. A cause does not have to be the only cause or the last or nearest cause. It is sufficient if the act or failure to act joins in a natural and probable way with some other act or failure to act to cause some or all of the claimed injury.

JURY INSTRUCTION NO. 9

FORESEEABILITY

The negligence, if any, of any person is not a “cause” of any injuries or damage to the plaintiff within the meaning of these instructions, unless injury to a person in the plaintiff’s situation was a reasonably foreseeable consequence of that negligence. The exact or precise injury need not have been foreseeable, but a person may be found to be a “cause” of plaintiff’s harm within the meaning of these instructions if a reasonably careful person, under similar or the same circumstances as defendant, would have anticipated that injury to a person in the plaintiff’s situation might result from defendant’s conduct.

JURY INSTRUCTION NO. 10

CUSTOM

In determining whether anyone was or was not negligent, you may consider any evidence of any custom of an industry in conducting its operations. However, the standard of care is not fixed by custom, as custom cannot overcome the requirements of reasonable safety and ordinary care. The standard is always ordinary care, and the presence or absence of custom does not alter that standard. What others do is some evidence of what should be done, but is not conclusive evidence, and is never a substitute for ordinary care. An operational practice, although long indulged in, but which does not afford reasonable protection to those engaged in that operation, does not relieve from liability those responsible if it results in negligently causing injury or damage.

JURY INSTRUCTION NO. 11

STRICT LIABILITY IN TORT

One who sells any product in a defective condition unreasonably dangerous to the user or consumer or his property is liable for physical harm caused thereby to the ultimate user or consumer or his property if the seller is engaged in the business of selling a product and it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

This rule applies although the seller has exercised all possible care in the preparation and sale of his product and the user or consumer has not bought the product from or entered into any contractual relation with the seller.

JURY INSTRUCTION NO. 12

DEFINITION OF UNREASONABLY DANGEROUS PRODUCT

A product is defective when it is in an unreasonably dangerous condition. The term “unreasonably dangerous” means unsafe when put to a use that is reasonably foreseeable considering the nature and function of the product.

JURY INSTRUCTION NO. 13

PRODUCTS LIABILITY -- DEFECTIVE CONDITION

A product is defective if, at time of sale or distribution, it contains a manufacturing defect, a design defect, or is defective because of inadequate instructions or warnings in the instructions or warnings reasonably necessary for the product’s safe use.

JURY INSTRUCTION NO. 14

DUTY OF BUYER, USER, OR CONSUMER

A seller is entitled to expect that the buyer, user or consumer of a product will use the product in a manner that is reasonably foreseeable by an ordinary consumer who purchases or uses the product with the ordinary knowledge of its characteristics that is common to the community.

JURY INSTRUCTION NO. 15

MEASURE OF DAMAGES PERSONAL INJURY

Regardless of how you decide on the question of liability, If you decide for the plaintiff on the question of liability, If you find that the plaintiff is 50% or less at fault, you must fix the amount of money that will reasonably and fairly compensate the plaintiff for those elements of damage proved by the evidence, taking into consideration the nature, extent and duration of the injury.

The claimed elements of damage are:

- (a) The pain, suffering and emotional distress experienced as a result of the injuries [and those reasonably probable to be experienced in the future;
- (b) Disability and/or disfigurement;
- (c) Loss of enjoyment of life and any loss of enjoyment of life reasonably probable to be experienced in the future. The award for this specific element should not duplicate the award given or any other element of damage;
- (d) Loss of earnings. The value of time, earnings, profits, salaries lost to this date and the present cash value of any earnings reasonably probable to be lost in the future, taking into consideration any lost earning capacity of the plaintiff;
- (e) Medical expenses. The reasonable expense of necessary medical care, treatment, and services received to date and any medical expense reasonably probable to be incurred in the future;

Whether any of these elements have been proved is for you to determine.

JURY INSTRUCTION NO. 16

COMPARATIVE FAULT (MULTIPLE THEORIES OF LIABILITY) –
THEORY AND EFFECT
(SINGLE PLAINTIFF AND SINGLE DEFENDANT)

Your verdict in this case must be determined on the basis of the comparative fault of the parties.

A defendant is at fault when 1) the defendant is “negligent” and/or is “strictly liable” for selling a defective product and 2) the Defendant’s conduct is a “cause” of plaintiff’s injury or damage, as explained in these instructions.

A plaintiff is at fault when 1) the plaintiff is “negligent” and 2) the Plaintiff’s conduct is a “cause” of plaintiff’s injury or damage.

It will be necessary for you to determine the comparative fault, if any, of each of the parties involved in the occurrence. It also will be necessary for you to determine the total amount of damages, if any, sustained by the plaintiff.

Your findings as to fault will affect the plaintiff’s recovery. It is my duty to explain how that may occur.

The defendant’s liability for damages is limited to the percentage of fault, if any, that you find is attributable to the defendant.

The plaintiff’s recovery is reduced by the percentage, if any, of fault that you find is attributable to the plaintiff. If you find that the plaintiff’s fault exceeds fifty percent, the plaintiff will not be entitled to recover any damages.

The verdict form provided to you includes spaces for you to record your determination of the parties’ comparative fault on a percentage basis.

If you find that the plaintiff was at fault in some percentage, do not make an adjustment to account for the percentage of fault you attribute to the plaintiff when you record the total amount of plaintiff’s damages on the verdict form. The judge – not the jury - is responsible for reducing plaintiff’s recovery to account for the percentage of fault, if any, that the jury attributes to the plaintiff.

In explaining the consequences of your verdict, I have not meant to imply that either the plaintiff or the defendant is at fault. That is for you to decide in conformity with these instructions.

JURY INSTRUCTION NO. 17

EXEMPLARY OR PUNITIVE DAMAGES – PHASE I OF BIFURCATED TRIAL

The plaintiff seeks from the defendant additional damages known, in the law, as exemplary, or punitive, damages.

Punitive damages are allowable, in a proper case, to punish the defendant and to deter the defendant and others similarly situated from engaging in similar conduct in the future.

If you find that the plaintiff is entitled to recover compensatory damages as a result of the defendant’s conduct, you may in your sole judgment and discretion award additional punitive damages

against the defendant if, and only if, you find by a preponderance of the evidence that the defendant was guilty of willful and wanton misconduct.

Willful and wanton misconduct is the intentional doing of an act, or an intentional failure to do an act, in reckless disregard of the consequences, and under such circumstances and conditions that a reasonable person would know, or have reason to know, that such conduct would, with a high degree of probability, result in harm to another.

JURY INSTRUCTION NO. 18

EXEMPLARY OR PUNITIVE DAMAGES – LIABILITY OF EMPLOYER FOR MISCONDUCT OF EMPLOYMENT

Punitive damages can be properly be awarded against Defendant because of the action of its employee, Alex Frye, if, but only if, one of the following elements has been proven by a preponderance of the evidence:

1. The defendant employer authorized the doing and the manner of the act of the employee/agent, or
2. The employee was unfit and the defendant employer was reckless in employing or retaining the employee/agent, or
3. The employee/agent was employed in a managerial capacity and was acting in the scope of employment, or
4. The defendant employer ratified or approved the acts[s] of the employee/agent.

GENERAL JURY INSTRUCTIONS

The role of a jury is quite different from that of the judge. Your purpose in the trial is to determine the facts and, in our system, that duty is exclusively one for the jury. It is especially important that you are both diligent and conscientious in determining the facts because ordinarily there are no means to correct errors you might make in that regard. These instructions constitute the only law for your guidance in this case. You must accept and follow the law as instructed, even though you may disagree with it. You must determine the facts only from the evidence produced here in the courtroom. For example:

1. the testimony of witnesses;
2. documents, photographs, charts, and other papers or things;
3. video or audio tape recordings; and
4. in-court demonstrations.

You should not decide this case upon information you, or other juror may have heard outside of the trial, such as radio or newspaper accounts of the case or comments made outside of the courtroom. You may, however, rely upon your common sense and the general insights you have gained about human affairs as a result of your life experiences.

To save time, attorneys sometime agree certain things are true. You will be told of any stipulated facts and must accept them as proved. Also, if any party admits a fact to be true, you may consider that admission.

Occasionally, during the trial one party will object to evidence offered by another. The Judge will then decide whether that evidence can be admitted for you to consider.

If, by a question, an attorney hints that certain things are or are not true, you should disregard that hint. A question is not evidence and should be considered only to the extent that it supplies meaning to the answer. You will decide which witnesses you believe and how much weight you assign to testimony. A witness is any person, including a party, who testifies during the trial; it does not matter whether the testimony was in the courtroom or by deposition. In deciding what you believe, you may consider anything about a witness which tends to prove or disprove truthfulness, including the following:

1. the conduct, attitude, and manner of the witness while testifying;
2. the physical and mental capacity of the witness to have heard or seen that about which the testimony relates;
3. the ability of the witness to remember and tell you, here in court, what was heard or seen;
4. evidence, if any, of the reputation of the witness for honesty and truthfulness or for dishonesty and untruthfulness;
5. whether the witness has a bias, a prejudice, an interest in the outcome of the trial, or any other motive for not telling the truth; and,
6. whether the facts related are inherently believable or unbelievable.

In evaluating witness credibility, other facts are also important:

1. You should consider statements made by a witness at some other time or place that are either consistent or inconsistent with testimony given in this trial.
2. If a witness admits to untruthfulness at some other time you may consider that admission but you should take into account all the circumstances surrounding it, for instance; whether it was sworn statement, whether it was made under pressure, whether it was self serving, and whether it was an important or merely a minor misstatement.
3. If you conclude that a witness has willfully lied under oath about any material fact in this case, you may distrust all of the testimony of that witness. On the other hand, if you think the testimony, or some of it, is reliable, giving fair consideration to all the other evidence, you may accept what you find to be reliable. Differences between one witness' testimony and that of others, does not necessarily mean someone is untruthful. Two persons who witness an incident may see or hear it differently. In resolving differences in testimony, you should consider all the circumstances of the case and whether the discrepancy concerns are an important fact or a trivial one. You should not decide a fact based on the number of witnesses who testify about it. The testimony of one witness you believe, giving fair consideration to all of the other evidence, is sufficient to prove any fact. You must listen attentively. You will not be provided a written transcript of the testimony. During your deliberations, you will be expected to rely upon your collective recollection of the testimony.

The attorneys will take an active role in the trial. They will make opening statements, question witnesses, make objections to evidence, and argue the case. It is through them that evidence is produced for your consideration. Their role is important in organizing evidence, presenting it in an orderly and logical manner, and in helping you understand their clients' positions. Remember, the attorneys are advocates; it is their duty to present their clients' cases. But, the statements, questions and arguments of counsel are not evidence.

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VERDICT FORM

We, the jury, present the following answers to the questions submitted by the court:

1. Was the Defendant negligent?
Yes _____ No _____

2. Is the Defendant strictly liable for selling a defective product, as defined by the instructions?
Yes _____ No _____

If you have answered both questions "No," do not proceed further. Sign the verdict form and inform the Bailiff you have reached a verdict. If you have answered one or both questions "Yes," proceed to answer the following question.

3. Was the negligence and/or strict liability of the Defendant a cause of Plaintiff's injuries and damage?
Yes _____ No _____

If you have answered question 3 "No," do not proceed further. Sign the verdict form and inform the Bailiff you have reached a verdict. If you have answered question 3 "Yes," proceed to answer the following question.

4. Was the Plaintiff negligent?
Yes _____ No _____

If you have answered question 4 "No," go to question 7. If you have answered question 4 "Yes," proceed to answer the following question.

5. Was the negligence of Plaintiff a cause of Plaintiff's injury and damage?
If you have answered question 5 "No," go to question 7. If you have answered question 5 "Yes," proceed to answer the following question.

6. What percentage of the total fault is attributable to the following persons (note: the total fault must add up to 100%):

Plaintiff	_____	%
Defendant	_____	%
TOTAL	100%	

7. What is the total amount of damages sustained by Plaintiff? (Do not reduce the amount of damages by the percentage of fault you have found. The court will reduce this amount by the percentage of fault attributed to Plaintiff.)

\$ _____

Dated this 20th day of November, 2010.

Jury Foreperson

Witnesses and Affidavits

WITNESSES AND AFFIDAVITS

The Plaintiff and Defense each may call three witnesses.

PLAINTIFF

Lee Cavanaugh (Plaintiff)

Cam Gentry, MD (Plaintiff's Treating Physician)

Taylor Vickers (Albany County Health Department, supervisor of food inspection)

DEFENSE

Devon Rutledge (Director of Quality Assurance for the Defendant)

Alex Frye (Weekday Manager for the Defendant's Laramie, Wyoming, location)

Jody Bartlett (Plaintiff's co-worker)

EXHIBITS AVAILABLE TO BOTH PARTIES

The parties have stipulated to the authenticity of the trial exhibits listed below. The Court will, therefore, not entertain objections to authenticity of these trial exhibits. The parties have reserved any objections to the admissibility of any of these exhibits until the trial of the above-captioned matter. The trial exhibits may be introduced by either the Plaintiff or the Defendant, subject to the Rules of Evidence and the stipulations of the parties contained in the materials.

EXHIBITS AVAILABLE TO BOTH PARTIES

- #1 Photos of the Plaintiff's Burns Taken at the Hospital
- #2 Diagram of Healthy Dermis Layers
- #3 Illustration of Dermis Layers with Varying Degrees of Burn Injuries
- #4 Exposure to Hot Liquids Chart
- #5 Photo of Don's Drive-In Coffee Cup and Lid
- #6 Memo of Devon Rutledge Regarding Coffee Cup Purchase Recommendation
- #7 **MustSearch** Market Research Study
- #8 Albany County Health Department Inspection Report

The parties reserve the right to dispute any other legal or factual conclusions based on these items and to make objections to these items based on other evidentiary issues.

Affidavit of Lee Cavanaugh

1 My name is Lee Cavanaugh. I am 30 years old. I live at 1212 Penny Lane in Laramie, Wyoming.
2 I was born and raised in Laramie and I am a single parent. I am employed by Laramie Community Bank
3 as the Loan Department Manager. I have been with the bank since graduating from the University of
4 Wyoming. As the Department Head, I am responsible for loans for all four branches of the bank, although
5 my office is located in the City Center Branch.

6 My hobbies are playing guitar and playing tennis. Well, those used to be my hobbies, anyway. My
7 injuries – particularly to my right arm and hand – prevent me from doing those things.

8 I was severely burned when I spilled hot coffee on my right arm, stomach, and right leg. This
9 happened on June 21, 2008. I was on my way to work with my co-worker, Jody Bartlett. We carpool to
10 work because we live close to each other. Also, we both work at the City Center Branch and have the
11 same hours. Jody is one of six loan officers who work for me. We worked together as tellers until I was
12 promoted to head teller for the branch. Jody and I have worked our way up at the bank together. Jody had
13 been there a few years and was my trainer when I started as a teller. We both moved over to customer
14 service and then to the loan department at about the same time. Even though I had gotten the promotion
15 to head up the loan department when Jody had also applied for it, we remained friends.

16 The week of June 19, 2008, was Jody's week to drive. I was in the passenger seat. Jody had
17 missed breakfast, so we decided to stop at the drive-thru at Don's Drive-In. I usually wait until I get to
18 work to have my second cup, but Don's Drive-In has pretty good coffee, so I ordered a large regular with
19 cream and sugar. Jody handed the cup to me with the sugar and cream packets. We were pulling out of the
20 parking lot when the top popped off the cup. There must have been a hump or drop or something between
21 the driveway and the street because Jody's SUV bounced as we were turning out.

22 I know that Don's Drive-In is trying to say that I took the lid off the cup, but I didn't. I did order
23 cream and sugar, but I wasn't going to put it in the coffee while I was in the car. I was just holding the
24 cup when the car bounced. I don't know if the lid came off because it wasn't secured properly or if I
25 squeezed that flimsy paper cup with the jolt. All I know is the lid came off. That is when the coffee
26 spilled and changed my life forever.

1 The coffee spilled on my right hand, the inside of my right forearm, my lower abdomen on the
2 right side, and the front and inside of my right thigh. My first reaction was to scream. I grabbed the first
3 thing that I could find – the pile of napkins Jody had placed on the middle console and tried to wipe the
4 coffee off. It was too late. It is kind of hazy, but I think Jody pulled off the street and tried to help me. I
5 remember that Jody’s food ended up in my lap and on the floor, along with my cup, the sugar and cream
6 packets, and what was left of my coffee. It was a mess, but I didn’t care. The pain was unimaginable.

7 Jody came around and opened my door. I sort of dove out. It was like my clothes were on fire. I
8 tore off my pants. That was a mistake. The coffee had fused my clothes to my skin, so the pants took my
9 flesh with it. I think that must have been when I passed out.

10 The next thing I remember is returning to consciousness when one of the EMTs touched my
11 arm. I guess he was treating it somehow. All I know is it felt like my head exploded with pain. There
12 was yelling and movement and horrible pain. They must have given me some medication or something
13 because I have no memory of anything after that until I woke up in the hospital bed.

14 I was still kind of out of it, but I remember seeing Dr. Gentry and the nurses. I remember
15 someone cutting off my clothes. I certainly remember the debridement (di-‘brēd-mənt) procedure.
16 That was the worst pain I have ever experienced in my life. It was like I was being burned over and
17 over again with each piece of burned skin or melted clothing the doctor removed. I kept begging for
18 pain medication, but they just told me that they were already giving me something in an IV. After what
19 seemed like hours of this painful procedure, Dr. Gentry told me that I needed to have surgery to graft the
20 skin from my uninjured leg to my burned arm. That is when I knew just how serious my injuries were.

21 I guess I was somewhat naïve to think that the skin graft would be the end of it. When I was
22 finally released from the hospital after more than a week, Dr. Gentry told me that my ordeal was far from
23 over. I was told to expect one and possibly more reconstructive surgeries and months of physical therapy
24 to regain function in my hand.

25 It turned out that I had to undergo two more surgeries and I still don’t have normal function. I
26 cannot play tennis at the level I used to. My game had really been improving when I was injured. But
27 the guitar is truly a tragic loss for me. I know that I was an amateur, but in my heart I think that I might
28 have had a career in it if I hadn’t been burned. I played regular gigs with a small band on the weekends

1 at local night spots; we even did some shows in Cheyenne that summer.

2 Then there are the scars. The one on my thigh is just awful. Shorts and bathing suits are out of
3 the question unless I want to deal with rude stares and thoughtless questions. But I can't hide the scar
4 on my hand and wrist. I spend all day at the bank across the desk from customers. I am right handed. I
5 have to write, talk on the phone, pass documents - all with my right hand with the customer right there.
6 Every time I reach for something, my scars are there. It is very awkward for my customers. I can tell
7 they are uncomfortable, the way that they look away or seem distracted from our conversation.

8 If you had asked me the day before how badly a person could be hurt by a spilled cup of coffee,
9 I would have said that you might expect it to hurt; maybe some blistering that would take a few days
10 to heal. I never would have guessed that coffee would cause you to be burned so badly that you would
11 have to have multiple surgeries and live with gruesome and debilitating scars for the rest of your life.

12 After this lawsuit started, I realized that the manager who served the coffee was the parent
13 of a girl in the same soccer league as my daughter. A few weeks before I was burned, our daughters'
14 teams were playing each other and his/her daughter tripped mine. When I yelled that it was a foul, Alex
15 (whose name I did not know at the time) yelled at me, "She needs to learn how to play and stop blaming
16 everyone else for her problems." I think I replied something like, "We'll see what the league officials
17 have to say about it" or something like that, but I never pursued it. I had really forgotten about that until
18 this lawsuit.

19 I don't think the soccer incident had anything to do with my being burned. I'm not sure the
20 manager could have even seen me enough to recognize me in the passenger seat of Jody's car. It's just a
21 weird coincidence.

I have reviewed this statement. The material facts are true and correct.

Signed,

Lee Cavanaugh

Lee Cavanaugh

SIGNED AND SWORN to me January 15, 2010.

C.M. McCormack

C.M. McCormack, Notary Public, State of Wyoming

My Commission Expires: December 31, 2010

Affidavit of Cam Gentry, MD

1 My name is Cam Gentry. I received my bachelor’s degree at Boston College and my medical
2 degree from the University of Colorado. After a residency in the University of Colorado Department
3 of Surgery, I completed a clinical fellowship in the University of Northern Colorado Hospital Burn
4 Center. I am now an attending surgeon at Ivinson Memorial Hospital where I have been the Director of
5 the Trauma Center for seven years. In addition to fulfilling duties in patient care, I am a virtual (Internet)
6 consultant for the University of Northern Colorado Hospital Burn Center Research Laboratory that has
7 an emphasis on aberrant (a-‘ber-Ənt) healing processes including hypertrophic (hī-pƏr-trō-fik) scar
8 formation and chronic non-healing wounds. I have published 34 articles in the area of wound repair,
9 treatment for burns, and scar prevention. I have been a member of the National Burn Association since
10 1991 and have served on that organization’s Research, Ethics, and Outreach Committees. I am also on
11 the editorial board of the American Burn Treatment Journal.

12 I was on duty at the Ivinson Trauma Center when Lee Cavanaugh was brought in by
13 ambulance. The patient was somewhat sedated but clearly in extreme discomfort. She was conscious,
14 and I asked her what had happened. She said, “I’m not sure. I’ve never gotten burned drinking coffee
15 before.” We removed the clothing and immediately assessed the patient’s burns. The patient was
16 reasonably stable. We began to administer intravenous (in-trƏ-‘vē-nƏs) pain and anxiety medication.

17 The most crucial element of burn treatment is to evaluate the extent and degree of
18 the injury. A skin burn is damage to the dermis (dƏr-mƏs) caused by exposure to heat, electricity, or
19 chemicals. Extreme heat causes cell damage through rapid protein denaturation (dē-nā-chƏ-rā-shƏn).
20 The depth of the burn depends on how deeply the heat penetrates the skin. Lee suffered a scald (skóld).
21 A scald is a burn caused by hot liquid or steam, known as “wet heat.” A scald travels much more
22 quickly into the skin and underlying tissues than a burn caused by a flame, known as “dry heat.” A
23 scald resulting from wet heat with a surface temperature of more than 156°F will produce immediate
24 vessel clotting and death of the tissue. Dry heat results in such damage at a higher temperature. Burn
25 depth depends on four factors: the temperature of the heat source, whether the source is wet or dry,

1 the thickness of the affected skin layer, and the length of time the source is in contact with the skin.
2 Extended exposure to a high temperature wet heat source on thinner skin is the most damaging type of
3 burn injury.

4 Burns are usually classified in terms of degree. First-degree burns are minor and extend
5 only into the epidermis (ep-ə-ˈdɪr-məz). (I have provided a chart to illustrate the dermis layers.)
6 First-degree burns are characterized by erythema (er-ə-thē-mə) or redness and relatively minor pain at
7 the burn site. In addition to erythema, second-degree burns fill with clear fluid and blister superficially.
8 Although it might seem counter-intuitive, a second-degree burn might be more or less painful than
9 a first-degree burn. It depends on the extent of nerve damage. The more damage to the nerves, the
10 less pain. Less nerve damage, however, results in excruciating pain. Second-degree burns ordinarily
11 extend through the epidermis and into the papillary (pap-ə-,ler-ē) dermis layer, but can also involve
12 the reticular (ri-ˈtik-yə-lɪr) dermis. Third-degree burns turn red, blister, fill with a purplish fluid, and
13 have skin charring resulting in eschars (ˈes-,kär), or hard, leathery scabs. Third-degree burns are usually
14 painless because of the destruction of the nerve endings in the burned areas.

15 Lee suffered burns on the front of the right thigh and abdomen and on the right hand,
16 wrist, and forearm. The burn to Lee's abdomen was a first degree burn. The burns to Lee's thigh were
17 second-degree burns. The burns to Lee's hand and forearm were third-degree burns.

18 In addition to the degree of the burn, the extent of the injury must also be evaluated. We calculate
19 the percentage of the body affected by both second and third degree burns.

20 Lee suffered second degree burns to about 6 percent of his/her body and third degree burns to
21 about 5% of his/her body. The burns to the hand and arm were more severe probably due to the fact
22 that those areas were exposed to the hot liquid first and for a longer period of time. The application of
23 ice at the scene likely worsened the injury to the arm and hand. The leg injury, while less severe, was
24 complicated by the fact that the patient's pants were made of a synthetic fabric that adhered to the skin.

25 Lee was treated first with a douse of cool water for approximately 10 minutes. This was done to
26 help alleviate the pain and reduce swelling. We then debrided (di-ˈbrēd) or cut away the blistered skin
27 on the thigh, then covered it loosely with a sterile dressing to prevent infection. The injury to the hand,
28 wrist, and arm required more extensive treatment. The surgery included excision of the dead tissue and

1 preliminary grafting. Unless they are smaller than about an inch square, third degree burns require a skin
2 graft to heal. We removed healthy skin from Lee’s left thigh and transplanted it to the wrist and forearm.
3 Lee was hospitalized for nine days. This was necessary because it takes seven to fourteen days for the
4 grafted skin to properly adhere to the wound site. Until that occurs, there is significant risk of tearing
5 and infection. Not only that, but the site from which we harvest the healthy skin, known as the “donor
6 site” takes up to fourteen days to heal, as well. In addition, the patient experiences significant pain at
7 both sites, which generally should be managed in a hospital setting.

8 I have followed Lee’s rehabilitation and reconstruction treatment since discharge from the
9 hospital. The burn site on Lee’s abdomen remains discolored, but is expected to have a completely
10 normal appearance. The burns on Lee’s thigh and forearm near the elbow are hypertrophic. Hypertrophic
11 scars are raised scars that are thick and red. Generally, hypertrophic scars improve with time. Lee
12 has been receiving steroid injections and applications to speed this improvement. Unfortunately, Lee
13 has what is called a contracture (kŌn-‘trak-chŌr) scar on the area between the right forefinger and
14 right thumb extending down and around to the inside of the right wrist. A contracture is a permanent
15 tightening of skin that develops when the normal elastic connective tissue is burned and inelastic fibrous
16 (fi-brŌs) tissue replaces it during the healing process. The muscles and tendons beneath the surface of
17 the skin contract preventing normal movement – hence the name. Contractures limit mobility and can
18 ultimately result in degeneration of the nerves.

19 Function restoration is a second step in the treatment process, after healing. Lee’s treatment
20 required two additional operations to correct or release the contracture on the hand and wrist. Extensive
21 physical therapy was required following each restoration procedure. In spite of these efforts, Lee is not
22 likely to regain full function of the right hand and wrist. In addition, Lee will have permanent scarring
23 on the thigh and arm and permanent scarring and deformity on the hand and wrist. Although in my
24 opinion to a reasonable degree of medical certainty Lee should be physically able to resume activities
25 such as tennis and playing the guitar, I would expect the skill level to be diminished as a result of the
26 permanent loss of strength and dexterity in the affected areas. In terms of her employment, I do not
27 think that her injuries will cause any permanent disability. To my knowledge, she has been able to return

1 to her regular job without limitations or restrictions.

2 Obviously, it is my medical opinion that exposure to the hot coffee served by the Defendant
3 was the cause of Lee's injuries.

4 Although I am a practicing trauma surgeon I am frequently hired as an expert witness in
5 burn cases. I cannot tell you how much income I make per year from being an expert witness, as my
6 spouse keeps track of that and handles all the accounting and taxes for that income. I do know that
7 my income from expert fees in litigation is now greater than my income from the hospital (which is
8 about \$250,000 per year), but I do not think I could ever leave "the real world" of trauma surgery;
9 money isn't everything. This is reinforced every day when I see people like Lee – or especially
10 children – who've been horribly injured through no fault of their own. No amount of money could
11 adequately compensate someone for trauma like that.

12 I charge \$400 per hour for expert testimony, with a minimum of \$2,500 per day that I am in
13 court for trial testimony. I have been hired as an expert in approximately 200 cases in the past three
14 years. My role as an expert usually begins with a review of the records and a preliminary opinion to
15 the attorney who hired me. If the attorney wishes to use my opinion, I am then asked to do additional
16 work such as examining the injured victim and providing deposition and possibly trial testimony.

17 I treated Lee, so my involvement with this case was not initially through the attorney.
18 However, I am both a fact witness and an expert witness for my opinions today, so I am being paid
19 for my expertise and experience at my usual rate in rendering my opinions for this case.

I have reviewed this statement. The material facts are true and correct.

Signed,

Cam Gentry, MD
Cam Gentry, MD

SIGNED AND SWORN to me January 15, 2010.

C.M. McCormack
C.M. McCormack, Notary Public, State of Wyoming
My Commission Expires: December 31, 2010

Affidavit of Taylor Vickers

1 My name is Taylor Vickers. I am 48 years old. I live in Laramie, Wyoming. I am employed by
2 the Albany County Health Department.

3 One job of the Albany County Department of Health is to protect the public by
4 preventing food-borne illness. The county health department has adopted uniform regulations for food
5 service operations that were developed by the Wyoming Department of Health. I am Food Protection
6 Supervisor for the Albany County Health Department. My job is to supervise the permitting and
7 inspection of all retail food establishments in the county. We are the people who put up those Albany
8 County Food Safety Inspection stickers that you see in food retail businesses. The food safety ratings
9 are based on a numerical score that coincides with a letter grade, just like a test grade in school. If you
10 see Grade A, then the establishment scored between 88 and 100 points at its last inspection. A Grade A
11 facility typically exhibits very good to acceptable scores based on an unannounced routine inspection or
12 an upgrade following remedial efforts based on a prior lower grade. The county health department will
13 also conduct unannounced complaint inspections in response to complaints from citizens.

14 An important mission of the Albany County Health Department -- and the regulations
15 that provide the framework for its activities in restaurant inspection -- primarily concern food-borne
16 illnesses. Our job is to make sure that establishments serving food maintain their food at proper
17 temperatures and maintain a sanitary environment to avoid the spread of disease-causing bacteria. Our
18 regulations do not address burn prevention practices. We do not inspect for burn hazards, and burn risk
19 is not part of our evaluation, permitting, or food safety rating system. I am very concerned about this. I
20 believe that assessment of burn injury risk is an integral part of food safety.

21 Approximately 2 million people seek medical attention for burns in the United States
22 each year. Between 50,000 and 70,000 of them require hospitalization. Did you know that the second
23 most frequent area where those burns occur is in the kitchen (outdoors is the most common)? Water
24 and coffee scalds account for 40 percent of burn injuries to restaurant workers, the fourth most
25 common occupation of victims. Given this tremendous risk, I do not understand why the county health

1 department regulations do not include requirements for burn prevention. It wouldn't cost any more
2 money. We already conduct comprehensive inspections of the premises. In fact, we already have the
3 equipment – we use industrial thermometers to measure the temperature of the water used to clean
4 equipment, dishes, and utensils as well as the tap water. Measuring the temperature of hot beverages
5 like coffee or tea and hot liquid foods like soup or gravy could simply be part of the routine inspection.
6 I have written memos to my supervisors and letters to members of the Wyoming Legislature, but the
7 regulations have not changed.

8 I believe that injuries like those suffered by the Plaintiff in this case could easily be
9 avoided if restaurants and other food service establishments were required to comply with guidelines
10 designed to prevent burns. I am sure that this particular injury would not have occurred because I had
11 received complaints about the temperature of the coffee sold at this Don's Drive-In in the past. In fact,
12 in the two years prior to Lee Cavanaugh's accident, I processed nine complaints about coffee sold at the
13 Laramie Don's Drive-In. By "processed," of course, I mean that I only read them and passed them on to
14 the manager, Alex Frye. Because the complaints did not raise a potential food regulation violation, my
15 hands were tied. I was unable to conduct a Complaint Inspection or require that Don's Drive-In reduce
16 the hold and serving temperatures of its coffee. I could only mention the complaints to the Don's Drive-
17 In manager during my twice-yearly Routine Inspections. Although I was not happy about the coffee
18 complaints, the Don's Drive-In restaurant in Laramie has received a Grade A rating at every inspection
19 since the establishment opened.

20 I had had just about enough of it, though, when I found out about what happened to Lee
21 Cavanaugh. I received a call from Dr. Gentry at the Laramie Medical Center late in the afternoon on
22 June 23, 2008. That is when I decided to take matters into my own hands. I pulled out my inspection
23 equipment the following Monday morning and went to Don's Drive-In for an unannounced Complaint
24 Inspection. I measured the temperature in the three coffee machines. The temperatures were 189° F,
25 194° F, and an unbelievable 201° F. These temperatures rendered this coffee not fit for consumption and
26 potentially hazardous to the health of the workers and customers who handled it.

27 The severity of injury with scalds depends largely on the temperature of the hot liquid.
28 According to the Exposure to Hot Liquids Chart published by the National Institute for Injury Burn

1 Prevention, at 120° F (the recommended temperature setting for home water heaters), skin requires five
2 minutes of exposure for a third-degree burn to occur. Increase that to 125° F, and the exposure time to
3 third-degree burning is reduced to two minutes. When the temperature of a hot liquid is increased to
4 140° F it takes only five seconds for a serious burn to occur. Coffee and other hot beverages are usually
5 served at 160° to 180° F. Such beverages are not fit for consumption at those temperatures. While it
6 might be appropriate to store such liquids at those high temperatures, they should not be served or
7 consumed until they have sufficiently cooled to about 125° F.

8 You might wonder how I know this. I have been with the Albany County Health
9 Department for 10 years, but before that I was a health and safety inspector in California. My area
10 of expertise was fire prevention. In the course of that job, which I held for more than 14 years, I
11 participated in a variety of training and educational programs. I have been certified by the California
12 Association of Fire Safety and the National Institute for Burn Injury Prevention after completing each
13 association's continuing education program series. I currently serve on the Wyoming Burn Injury Task
14 Force and previously served as that group's chair. I am also a lay member on the Community Outreach
15 Committee of the Ivinson Memorial Hospital, which produces pamphlets for adults and coloring books
16 for children about the household hazards that frequently cause burn injuries. This is where I met Dr.
17 Gentry.

18 Prevention of burn injuries in children is of particular importance to me. When I was
19 a child, my cousin suffered third-degree burns over 40% of his body from a scald when a babysitter
20 put him into a bathtub without checking the water temperature. He suffered the rest of his life from
21 debilitating scars and was never able to live a normal life.

22 It is true that I was an active member of the environmental protection group Save Our
23 Mother when I was in California, and that I participated in rallies protesting food production practices
24 by fast food restaurants such as Don's Drive-In that cause slash and burn deforestation (dē-fōr-ē-'stā-
25 shŌn) in order to raise cattle in developing countries, but there is no active chapter in Wyoming, so I still
26 pay my dues and get the newsletter but I no longer actively participate in these protests.

27 Like I said, what happened to Lee Cavanaugh was a completely preventable tragedy, just
28 like what happened to my cousin. Unfortunately, Don's Drive-In is not subject to any penalty because

1 the cause of this tragedy is unregulated by the Albany County Health Department. For that reason, my
2 boss required me to delete my Complaint Inspection from the county database. I did keep a copy for my
3 reference, however.

I have reviewed this statement. The material facts are true and correct.

Signed,

Taylor Vickers

Taylor Vickers

SIGNED AND SWORN to me January 15, 2010.

C.M. McCormack

C.M. McCormack, Notary Public, State of Wyoming

My Commission Expires: December 31, 2010

Affidavit of Devon Rutledge

1 My name is Devon Rutledge. I live in Cheyenne, Wyoming. I am a graduate of the Johnson and
2 Wales Business School in Denver, where I obtained both my B.S. in Marketing and Management and
3 my M.B.A. I am the Director of Quality Assurance (DQA) for Don's Drive-In Food Corporation. The
4 Quality Assurance Division is responsible for conducting research and developing policy related to
5 product and service quality for all 127 Don's Drive-In stores nationwide.

6 Before landing the top spot at Don's Drive-In in 2002, I was a customer service research
7 analyst for Tar Cups Coffee, LTD. I am confident that my experience with Tar Cups is what made me
8 attractive to the VIPs at Don's Drive-In. Everyone is so into coffee these days. To survive in the food
9 and beverage business, you must offer a good cup of coffee. Don's Drive-In execs were looking at a new
10 campaign that would change the company's image from a fast food burger joint to a restaurant offering
11 a variety of menu items cooked fresh, to order, and fast. That means serving a higher-quality coffee.
12 That is a challenge for a fast food company. We aren't a coffee shop like Tar Cups. We aren't going to
13 sell four-dollar lattes from our drive-thru windows. Our customers want a hot cup of good coffee, served
14 fresh and fast.

15 I know this because one of my first assignments as DQA at Don's Drive-In was to
16 review market research on the issue. Don's Drive-In takes customer satisfaction very seriously. We are
17 constantly measuring customer satisfaction and expectation through a variety of methods. We have
18 response cards at the stores, we offer promotions through our 1-800 number available to customers
19 to give us feedback, and we review and address every negative comment or complaint we receive. In
20 addition to these methods of gauging the level of satisfaction of our current customers, we also study the
21 needs and wants of potential customers through market research tools like surveys and product testing.
22 We use a company called MustSearch for our surveys. MustSearch has a database of 10,000 consumers
23 who have agreed to periodically participate in market research. If we have a new product idea, or if sales
24 slump for a particular menu item, or if we want to know if people prefer straws with wrappers or straws

1 without wrappers, we develop a survey or product test with MustSearch. They conduct the study and
2 provide us with the resulting data.

3 We did one such study regarding fast food coffee in February 2004. I studied that report
4 very carefully before making my recommendations to the company in a memo dated March 30, 2004.
5 From that study, we learned that both taste and temperature were important factors to coffee drinkers.
6 Our customers want hot coffee and they want it to stay hot until they finish drinking it. Two factors
7 determine whether that can be accomplished: the holding temperature and the make-up of the cup and
8 lid. It was as a result of this study that we selected our coffee brand, developed our marketing strategy,
9 and wrote relevant updates to our operations and training manual.

10 Don's Drive-In started selling coffee in 1996, at the same time the breakfast menu was
11 launched and the operating hours were extended to begin at 6:30 a.m. We sell 1.3 million cups of coffee
12 every year. In the ten years since Don's Drive-In started selling coffee, the company has received
13 approximately 264 complaints of burns allegedly caused by Don's Drive-In coffee. That is miniscule –
14 statistically insignificant.

15 Approximately half of those involved had what I would consider serious burns – that is,
16 burns that required medical treatment. In cases where the burn was caused by an employee, such as a
17 cashier spilling coffee on a customer, overfilling a cup, or failing to secure a lid, the company has made
18 settlements. Of course, that is the right thing to do in such a case. Lee Cavanaugh's claim is a different
19 story. There is no indication of employee error here.

20 In spite of that handful of claims, we did not feel that it was necessary to consult burn
21 experts or change our policies regarding coffee temperature. A burn hazard exists with any food
22 substance served at 140 degrees or above. You have to brew coffee at a temperature higher than that
23 because it won't brew otherwise. You have to hold and serve coffee at a higher temperature than that or
24 you lose flavor and the ability to maintain heat until it is fully consumed. I did recommend using foam
25 cups instead of cheaper paper ones, but that was to maintain the temperature of the coffee longer, not to
26 enable us to hold it at a lower temperature. The company chose to go with the #837907 unit.

27 It is simple. If we are at fault, we pay. But we won't pay when we are not at fault. Our
28 coffee is hot. The cup says so. People know it even without being told. Sure your average person

- 1 wouldn't expect that a coffee spill would cause you to wind up in the emergency room or in surgery
2 because of a third-degree burn, but people do know that coffee is hot and that they need to be careful.

I have reviewed this statement. The material facts are true and correct.

Signed,

Devon Rutledge

Devon Rutledge

SIGNED AND SWORN to me January 15, 2010.

C.M. McCormack

C.M. McCormack, Notary Public, State of Wyoming

My Commission Expires: December 31, 2010

Affidavit of Alex Frye

1 My name is Alex Frye. I am 28 years old. I live at 76 Oak Street. I am the weekday manager
2 at the Don's Drive-In on Campbell Avenue in Laramie. I began my career with the Don's Drive-In
3 Corporation when I was 16. I worked as a cashier part-time evenings and weekends and full-time in
4 the summer at the Don's Drive-In in my hometown of Casper. After graduating from high school, I
5 attended Don's Drive-In University, a three-month training program for employees wishing to move into
6 management positions. Shortly after completing the program at Don's Drive-In-U, I moved to Laramie
7 to take the position of assistant manager at the Don's Drive-In store that was just opening. The Don's
8 Drive-In on Campbell Avenue was the one-hundredth store in the nation. It was a very exciting and
9 important milestone for the company. I was promoted to weekday manager four years ago.

10 I am the top production manager (in terms of sales and profit) in Laramie and one of the top five
11 in this state. You don't reach this achievement by being sloppy. I know what I am doing and I know how
12 to run a restaurant. Because of this, I receive not only monetary bonuses but also additional stock in the
13 Don's Drive-In Company. I am not only an employee, I am a stockholder and I am proud of our ability
14 to properly and safely serve good food at reasonable prices.

15 I was on duty on the morning of June 21, 2008, when Lee Cavanaugh spilled the coffee.
16 In fact, I was covering the drive-thru. It was a very busy morning, as most had become since we started
17 promoting our new coffee. I am aware that the Don's Drive-In operations and training manual says that
18 our coffee must be brewed at 195° to 205° Fahrenheit and held at 180° to 190° Fahrenheit for optimal
19 taste. Don's Drive-In actively enforces this policy. This is within the standards recommended by the
20 American Coffee Association. I do not believe that our coffee was held at a temperature higher than that.
21 I was not at work when Taylor Vickers came for inspection on June 26, so I can't verify the numbers in
22 the Complaint Inspection Report. However, I spot check the coffee urns once a week and have never
23 encountered a holding temperature above 190°. Of course, as I said, brew temperatures might be higher
24 than that.

1 The health inspector did report to me a few complaints that our coffee was too hot, and
2 I know that the company has received other claims of burns from hot coffee, but I am sure that if we
3 sold coffee at a lower temperature, our customers would not be happy. Coffee is supposed to be hot; that
4 is what our customers expect according to the market research reports conducted through our Quality
5 Assurance Division which are shared with all store managers. Maybe we could use foam cups instead of
6 paper ones, but the profit margin on coffee sales is important. Our customers want their coffee fast, hot,
7 and cheap. Fancy cups increase the price.

8 I am sure that the people who complained were like Lee Cavanaugh, trying to drink hot
9 coffee in their cars. That is the rare case. Our drive-thru and to-go customers buy coffee on their way to
10 work or home, with the intention of consuming it when they get there. And guess what? They want it to
11 still be hot when they get there.

12 Of course hot coffee can cause burns, but unless the corporate office changes its policy
13 – which I don't think it should – then I have no intention of reducing the holding temperature of our
14 coffee.

15 Besides, all of our customers are on notice that our coffee is hot. The cup says “Hot” on
16 the side of it. Sure our soda cups say “Cold” on them, so it is not really a warning, but it is a reminder.
17 People are responsible for themselves. I get so tired of these frivolous claims. People tripping on the
18 sidewalk, poking themselves with a fork, burning their lips on hot coffee, then trying to blame us. Well,
19 we are an easy target – deep pockets. Blame Don's Drive-In, make them pay, they have tons of money.
20 It's not right. Don's Drive-In is made up of hard-working employees, just trying to earn a decent living
21 for their families. These crazy lawsuits put all that at risk.

22 This case in particular. I served that cup of coffee to the Plaintiff. I said, “Be careful!
23 That coffee is hot!” I know that lid was on tight, because I put it on there. I always double-check lids,
24 especially on hot drinks. It didn't spill on me or on the driver. Lee Cavanaugh must have been taking the
25 lid off to put in the cream and sugar when it spilled.

26 I do admit that I was surprised when I heard that Lee Cavanaugh suffered third-degree
27 burns. I think that is the worst burn you can get. I did not know that even really hot coffee was hot

1 enough to cause that severe of a burn. None of the other complaints we received involved such
2 serious burns. It only goes to show how important it is for people to be careful when they are handling
3 something as hot as a cup of coffee.

4 I've been told that Lee Cavanaugh is claiming I yelled something derogatory during
5 a soccer match between our daughters' teams a few weeks before the incident. I don't remember
6 that specifically but I do tend to be one of those parents who yells a lot at games. I guess I am pretty
7 competitive and I like to see that in my kids as well. I certainly did not do anything to intentionally hurt
8 Lee Cavanaugh with the coffee. I see a lot of people go through the drive-thru and I did not recognize
Lee at all.

I have reviewed this statement. The material facts are true and correct.

Signed,

Alex Frye
Alex Frye

SIGNED AND SWORN to me January 15, 2010.

C.M. McCormack
C.M. McCormack, Notary Public, State of Wyoming
My Commission Expires: December 31, 2010

Affidavit of Jody Bartlett

1 My name is Jody Bartlett. I am 36 years old. I live at 4488 Abbey Road in Laramie. I was raised
2 in Lander and attended UW. I am married and have a three year-old little boy. I work as a loan officer at
3 Laramie Community Bank. I started as a teller at State Bank & Loan just after I graduated. I left SB&L
4 after a few years to take a job at Laramie Community Bank as a Teller II, then worked my way up to
5 customer service representative then to loan officer.

6 Lee and I have been carpooling to work together for about six years, just after Lee came
7 to the City Center Branch. By that time I was a Teller III, which is essentially a teller manager. I trained
8 Lee. It was kind of funny, since we lived in the same neighborhood and worked the same hours, we
9 would follow each other in to the bank in the morning and then home in the evening. One day one of us
10 said we might as well be riding together, so we started carpooling. I drive one week, Lee drives the next.
11 It works out pretty well.

12 On the morning of the accident, I remember I was running a little late. My son was still
13 a baby and we had had a bad night – a new tooth coming in was causing him a lot of pain and he cried
14 most of the night. I didn't have time to fix myself breakfast, so I asked Lee if we could run though the
15 drive-thru somewhere. Don's Drive-In was right there on the way.

16 The cashier handed me Lee's coffee and stuff first, then my bag of food. I didn't order a
17 beverage. I don't like coffee. I remember the cashier saying something about the coffee being hot. I'm
18 not sure of the exact words. Of course coffee is hot. I guess I didn't realize just how seriously coffee
19 could burn you if you aren't careful. Not so funny now.

20 After I got the food, I passed everything over to Lee. I then got ready to put the car in
21 drive and to leave the drive-through. As I was doing so, I remember hearing Lee ask, "Where's the sugar
22 and cream? I can't drink this stuff black." I pulled out and as we entered the street there was a bit of a
23 drop. That is when I heard Lee scream. I looked over and saw her. Her eyes and mouth were wide open.
24 The cup was still in her hand. I did not see the lid. It was not on the cup. Then Lee started flailing around
25 and sending food, napkins and everything flying.

1 I pulled right back off the road into the parking lot of the gas station next to Don's Drive-In. I got
2 out and ran around to the passenger side. Lee was out before I could get the passenger door all the way
3 open. Lee was like an animal, seething, yelping, crying, and tearing at his/her clothes. When I saw that
4 Lee's clothes were pulling off skin, I realized how serious the situation was. I knew I had to act quickly.
5 I grabbed my cell phone and called 911. By that time, Lee had fainted. I didn't know what to do. A few
6 people had come out from their cars or whatever, but no one was doing anything for Lee. I remember
7 yelling for someone to get me some ice. I was pouring a bag of convenience store ice on Lee when the
8 paramedics got there. Although it seemed like hours, the ambulance must have arrived in just minutes.

9 I followed the ambulance to the hospital and stayed there until Lee's sister and brother
10 arrived.

11 Lee is my boss and also my friend. But it doesn't matter who subpoenas me to testify, I
12 am going to tell the truth. I did not see Lee take the lid off the cup, but I think that's what happened. I
13 think that Lee was taking the lid off the coffee cup to put the cream and sugar in it because I handled the
14 cup myself and there was no indication of the lid being loose. It didn't spill when it was handed to me or
15 when I handed it to Lee. I hate what happened, but Lee should have been more careful.

I have reviewed this statement. The material facts are true and correct.
Signed,

Jody Bartlett
Jody Bartlett

SIGNED AND SWORN to me January 15, 2010.

C.M. McCormack
C.M. McCormack, Notary Public, State of Wyoming
My Commission Expires: December 31, 2010

EXHIBITS

Exhibit #1 - Photos of Burns



Exhibit #2 - Diagram of Healthy Dermis Layers

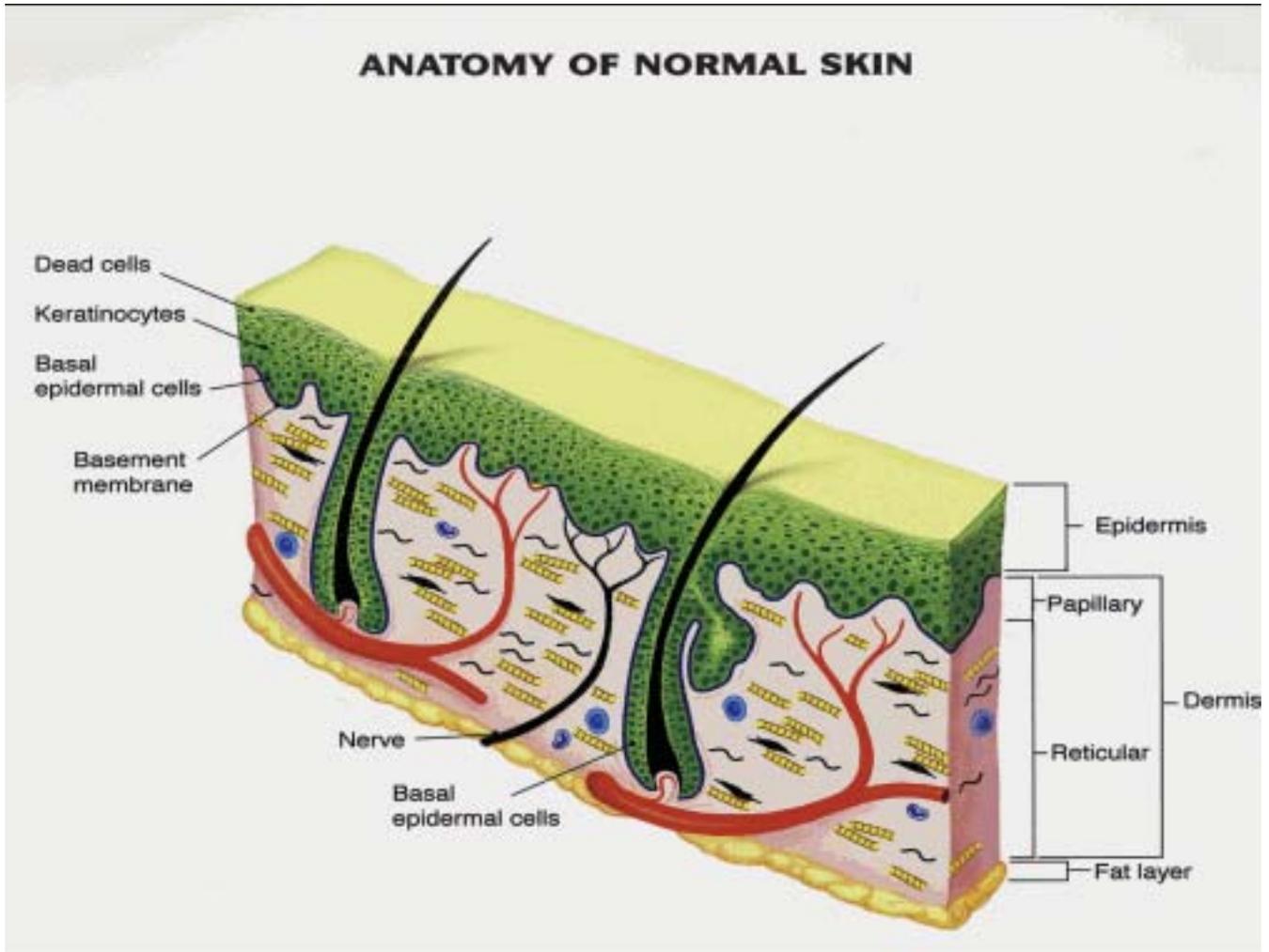
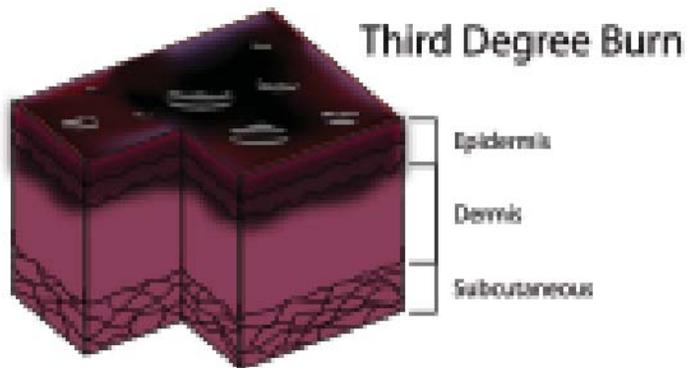
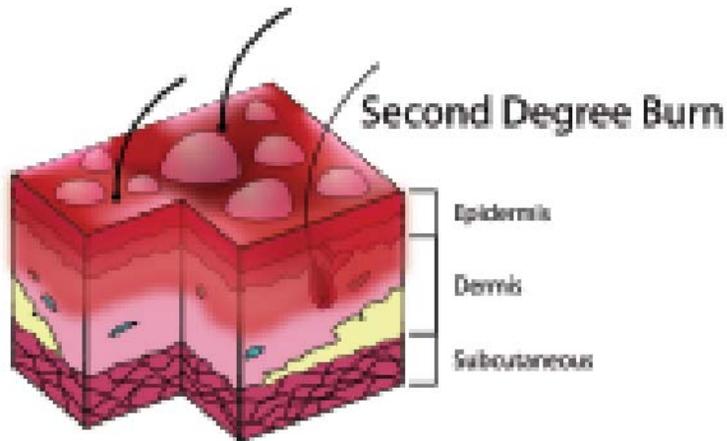
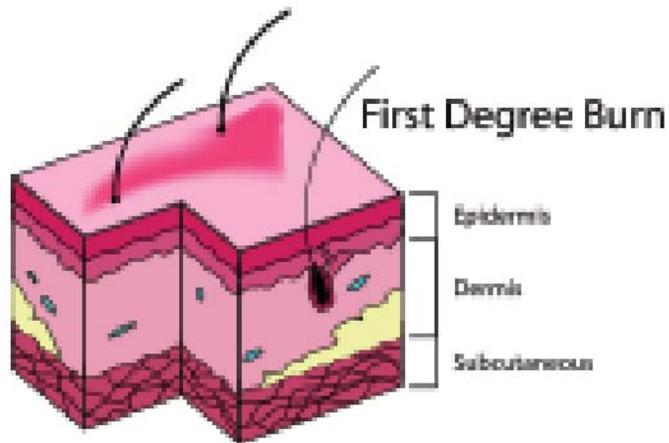


Exhibit #3 - Illustration of Burn Damage to Dermis Layers



Source: Wikipedia

EXPOSURE TO HOT LIQUIDS CHART

Estimated Times and Temperatures Causing Full Thickness Burns in Adults

If the temperature Fahrenheit (F) is ...	A third-degree burn will occur after ...
120 degrees F	5 minutes
125 degrees F	2 minutes
130 degrees F	35 seconds
140 degrees F	5 seconds
150 degrees F	2 seconds
160 degrees F	1 second

Exhibit #5 - Photo of Don's Drive-In Coffee Cup and Lid



MEMO - CONFIDENTIAL

TO: **J. Pettipone**
Office of the Director of Purchasing

FROM: **Devon Rutledge**
Office of the Director of Quality Assurance

DATE: **March 30, 2004**

RE: COFFEE CUP/LID PURCHASE RECOMMENDATION

We have reviewed the three cup/lid options you provided for the new coffee product line. Factors considered include the customer preference, product quality, and cost. Of the three options you submitted, #837992 (plastic foam with secure lid option) provides the most heat retention – both with regard to product temperature and outside surface temperature. The plastic foam cup is made from 10% post-consumer material and is recyclable. It has a raised base and is reinforced at both the base and rim for added stability and optimal crush-resistance. The lid has a double-lock base and perforated, snap back opening with a small steam release vent. The cost is \$0.12 per cup/lid combination. The cost increases to \$0.19 per cup/lid with a one-color logo imprint and to \$0.21 with a two-color logo imprint. The second option is #837907 (paper board with secure lid option). This cup option provides less heat retention than the #837992 model. It is made from 90% post consumer materials and is recyclable. The cup includes a raised base and base and rim reinforcement for standard crush-resistance. The lid has a single-lock base and perforated, removable opening with a small steam release vent. The cost is \$0.09 per cup/lid combination. The cost increases to \$0.16 per cup/lid with a one-color logo imprint and to \$0.18 with a two-color logo imprint. The third option is #837964 (paper board with flat snap lid option). This cup offers minimal heat retention. It is made from 20% post-consumer materials, but is not recyclable. It has a flat, unreinforced base with a rolled, reinforced rim. Crush resistance is minimal. The lid is single-lock, with no opening or vent. The cost is \$0.05 per cup/lid combination. The cost increases to \$0.12 per cup/lid with a one-color logo imprint. Two-color logo imprinting is not available on this option.

My recommendation is the first option #837992. This recommendation is based on its heat retention, stability, crush resistance, and visual appeal including a two-color logo imprint.

MustSearch

THE VOICE OF THE AMERICAN CONSUMER

REPORT OF MARKET RESEARCH STUDY
DON'S DRIVE-IN INC.
FEBRUARY 2004

Thank you for choosing MustSearch for your market research needs. We have completed your study regarding consumer preferences for restaurant coffee. The three-question survey was mailed to all 10,000 MustSearch Consumer Panel Members. MustSearch Consumer Panel Members are all adults over the age of twenty-one. They consist of male and female respondents and identify themselves with a wide range of ethnic and economic backgrounds. A total of 6,241 responses were received. Complete results of this study are attached. Please note that 14% of Consumer Panel Members who submitted responses to this survey indicated that they never purchased coffee from restaurants in response to Question #1. Those Consumer Panel Members were instructed to return the survey without completing Question #2 or 3. Therefore, the results include only 5,368 responses to Questions #2 and 3.

We are happy to assist you with all of your market research needs.

MustSearch

THE VOICE OF THE AMERICAN CONSUMER

Dear Consumer Panel Member:

This month we are interested in your preferences and opinions about restaurant coffee. Please complete the following survey and return it in the envelope provided. If you return your survey by March 1, 2004, your name will be entered in our drawing for a chance to win one of ten \$100.00 prizes. Thank you for your assistance with this important survey.

- How often do you purchase prepared coffee (not grounds or beans for home preparation) from a restaurant for your personal consumption? [6240 responses]
 - More than one time per day 08.99% (561)
 - One time per day 32.00% (1997)
 - Three to five times per week 17.05% (1064)
 - One or two times per week 12.85% (802)
 - One to three times per month 08.13% (507)
 - Less than one time per month 07.00% (437)
 - Never (Please return this survey.) 13.98% (872)

- Please rank the following factors in order of importance. (Please use numbers 1 through 3, do not use the same number twice.) [5368 responses]

	1	2	3
Taste	38%	31%	31%
Temperature	41%	51%	08%
Cost	21%	18%	61%

- Indicate the extent you agree or disagree with the following statements. (1- agree; 2-neither agree nor disagree; 3-disagree) [5368 responses]

I drink my coffee black, with nothing added.

1	2	3
54%	02%	44%

When I buy coffee from a restaurant, I prefer to drink with a meal.

1	2	3
21%	22%	57%

As long as it's hot, the taste of my coffee is not that important.

1	2	3
43%	19%	38%

I drink coffee only in the morning.

1	2	3
39%	21%	40%

I add cream and/or sugar to my coffee.

1	2	3
42%	06%	52%

Coffee from fast food restaurants doesn't taste good.

1	2	3
29%	34%	37%

When I get coffee to go, I expect it to stay hot until I finish drinking it.

1	2	3
57%	22%	21%

The cheaper the coffee, the worse it tastes.

1	2	3
43%	28%	29%

I don't like to drink coffee with a meal.

1	2	3
52%	28%	20%

I drink to-go coffee in my car.

1	2	3
50%	08%	42%

Good-tasting, rich-flavored coffee is important to me.

1	2	3
34%	18%	48%

I drink coffee because the caffeine wakes me up.

1	2	3
49%	13%	38%

I buy coffee to-go to drink when I get to work.

1	2	3
54%	12%	34%

I am willing to pay more for a great tasting coffee.

1	2	3
40%	21%	39%

The hotter the coffee, the better the taste.

1	2	3
53%	09%	38%

I only buy coffee at coffee shops.

1	2	3
29%	34%	37%

I drink coffee all day long.

1	2	3
40%	31%	29%

I prefer decaffeinated coffee.

1	2	3
32%	24%	44%



Albany County Health Department Complaint Inspection Report

Date of Complaint 6-23-2008
Complaint Number 2008-00782
Establishment Name Don's Drive-In
Establishment Owner Don's Drive-In Inc.
Complaint/Source Cam Gentry, Ivinson Medical Center
Date of Incident/Violation 6-21-2008
Inspector T. Vickers

Nature of Complaint

Agent Vickers received a phone call from Cam Gentry, MD., from Ivinson medical Center. Dr. Gentry reported that a customer of the Don's Drive-In establishment on Campbell Avenue suffered serious burns from coffee purchased there. Numerous previous complaints regarding coffee temperature at this establishment. Agent Vickers conducted an unannounced inspection at the establishment the following Monday. Using standard equipment, Agent Vickers measured the temperature in the three coffee machines found at the establishment. Liquid temperatures in the coffee machines were determined to be 189 F, 194 F and 201 F.

Inspection Conclusion

The temperatures in the coffee machines at the establishment exceeded industry standards and resulted in the production and sale of beverages unfit for consumption and hazardous to the health of the establishment's employees and consumers.

Remedial Measures Recommended

Reduce holding temperature of establishment's coffee machines. Install standard liquid thermometers. Establish written policies for routine checks on coffee temperatures. Provide burn prevention training to all establishment employees.

Re-Inspection

Date of Re-Inspection TBD
Re-Inspection Status Pending