

Tuesday, August 30, 2022 3:22:30 PM

2022CV0402 - Joel M Kuhlman

DOUGLAS F. CUBBERLEY
CLERK OF COURTS WOOD COUNTY OHIO

WOOD COUNTY COMMON PLEAS COURT

JENNIFER AVERY, on behalf of her
minor children, C.A. and M.A.,
4361 Defiance Pike
Wayne, OH 43466

Plaintiff,

v.

PERTORIA, INC., d/b/a Wendy's,
an Ohio Corporation
608 Madison Ave, Suite 930
Toledo, OH 43604

WENDY'S CO.
a Delaware Corporation
One Dave Thomas Blvd.
Dublin, OH 43017

JOHN DOE CORPORATIONS 1-5

Defendants.

CASE NO.:

Judge

COMPLAINT

JURY TRIAL DEMANDED

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COMES NOW Plaintiff, as set forth in the caption above, by and through her attorneys of record, and for causes of action against the Defendants: Pertoria Inc., d/b/a Wendy's (hereinafter "Pertoria"); Wendy's Co. (hereinafter "Wendy's"); and John Doe Corporations 1-5; complains, alleges, and states as follows:

I. PARTIES

1. Plaintiff Jennifer Avery is and was at all times material to this Complaint, a resident of Wayne, Wood County, Ohio, and the parent of C.A. and M.A., minors.

2. Defendant Pertoria, Inc. d/b/a “Wendy’s” (hereinafter “Pertoria”) is and was at all times material to this Complaint, a for-profit corporation incorporated and existing under the laws of Ohio, with its principal place of business located at 608 Madison Ave, Suite 930, Toledo, OH. At all times material to this complaint, Pertoria owned and operated the Wendy's restaurant located at 1504 E. Wooster Street, Bowling Green, OH 43402.

3. Defendant Wendy’s Co. (hereinafter “Wendy’s”) is a Delaware Corporation with its principal place of business located at One Dave Thomas Blvd., Dublin, OH 43017. On information and belief, with respect to Wendy’s restaurant located at 1094 S. Main Street, Bowling Green, OH 42402. Wendy’s is a franchisor that exercises control over the day-to-day operations of the restaurant.

4. Defendants John Doe Corporations 1-5, inclusive, whose identities are currently unknown, are manufacturers, distributors, importers, packagers, brokers, and/or growers of the product and/or its constituent ingredients that caused Plaintiff’s illness as well as the illnesses of other individuals sicked as a result of the subject outbreak. These defendants are in some manner responsible for the acts, occurrences, and transactions set forth herein and/or are the partners and/or alter ego(s) of the Defendant(s) named herein and therefore are legally liable to Plaintiff. Plaintiff will set forth the true names and capacities of the fictitiously named Doe Defendants together with appropriate specific charging allegations when ascertained.

II. JURISDICTION AND VENUE

5. This Court has jurisdiction over the subject matter of this action because, at all times material to this Complaint, Defendants transacted business, including the business of

manufacturing and selling food items to customers and consumers, and committed tortious acts within the State of Ohio, specifically Wood County.

6. The venue is proper in Wood County, Ohio, pursuant to Ohio Civ. R. 3(C) because Defendants conducted activity in this county, manufacturing and selling food products to its customers, which gave rise to Plaintiff's present claims for injuries, and all or part of Plaintiff's claims for relief arose in this county.

III. FACTUAL ALLEGATIONS

7. According to the Center for Disease Control (CDC), 84 people from Ohio (23) (although Wood County reports a total of 23), Michigan (53), Pennsylvania (2), and Indiana (6), have been infected with the same strain of *E. coli* O157:H7 in a multi-state outbreak linked to the consumption of contaminated food products from Wendy's restaurants. Nine case-patients have been hospitalized, with multiple case-patients having developed hemolytic uremic syndrome.

8. According to the CDC, among 62 individuals interviewed as part of the investigation, 54 (84%) reported having eaten at a Wendy's restaurant in the week before their illness started, specifically identifying having eaten Wendy's sandwiches with romaine lettuce. The Wendy's locations where sick individuals reported having eaten are spread across Ohio, Michigan, Pennsylvania, and Indiana.

9. In response to this outbreak, Wendy's has taken the precaution of removing romaine lettuce from its products in the Midwest region.

10. According to the Wood County Department of Health, twenty-three people in the Wood County, Bowling Green, Ohio area were recently infected by *E. coli* O157:H7, prompting the health department to begin an investigation. From 2016 to 2020, the county only saw twenty-seven cases in total. Those individuals who have fallen ill range from ages 13 to 68 years old.

11. Individuals who contract the illness can experience different levels of sickness and

gastrointestinal symptoms. Out of the twenty-three people who have contracted *E. coli* O157:H7 in Wood County, seven were or are currently in the hospital. The Wood County Health Department has sent lab samples to the Ohio Department of Health to learn whether the illnesses are connected. Results, and more information, are expected early next week.

12. Public health authorities are continuing their investigation into this outbreak and expect more case-patients to be identified. The State of Michigan Department of Health has identified at least 53 case-patients who were infected by the same strain of *E. coli* O157:H7, but not all of these individuals have yet been included in the CDC’s outbreak summary. The State of Michigan Department of Health reports that as many as 115 *E. coli* O157:H7 may be linked.

13. Illness onset dates for the Michigan case-patients range from late July through early August 2022. Cases have been reported from 18 Michigan jurisdictions, including the counties of Allegan, Branch, Clinton, Genesee, Gratiot, Jackson, Kent, Macomb, Midland, Monroe, Muskegon, Oakland, Ogemaw, Ottawa, Saginaw, Washtenaw, and Wayne and the City of Detroit. The age range of those affected is 6 to 94 years old. Among the Michigan outbreak cases with available information to date, 56% have been hospitalized, and four cases have developed hemolytic uremic syndrome.

Historical outbreaks associated with contaminated leafy greens

14. *E. coli* O157:H7 outbreaks associated with lettuce and other leafy greens are by no means a new phenomenon. Outlined below is a list of foodborne pathogen outbreaks involving contaminated lettuce or leafy greens:

Date	Vehicle	Etiology	Confirmed Cases	States/Provinces
July 1995	Lettuce (leafy green; red; romaine)	<i>E. coli</i> O157:H7	74	1:MT

Sept. 1995	Lettuce (romaine)	<i>E. coli</i> O157:H7	20	1:ID
Sept. 1995	Lettuce (iceberg)	<i>E. coli</i> O157:H7	30	1:ME
Oct. 1995	Lettuce (iceberg; unconfirmed)	<i>E. coli</i> O157:H7	11	1: OH
May-June 1996	Lettuce (mesclun; red leaf)	<i>E. coli</i> O157:H7	61	3: CT, IL, NY
May 1998	Salad	<i>E. coli</i> O157:H7	2	1:CA
Feb.-Mar. 1999	Lettuce (iceberg)	<i>E. coli</i> O157:H7	72	1:NE
Oct. 1999	Salad	<i>E. coli</i> O157:H7	92	3: OR, PA, OH
Oct. 2000	Lettuce	<i>E. coli</i> O157:H7	6	1:IN
Nov. 2001	Lettuce	<i>E. coli</i> O157:H7	20	1: TX
July-Aug. 2002	Lettuce (romaine)	<i>E. coli</i> O157:H7	29	2: WA, ID
Nov. 2002	Lettuce	<i>E. coli</i> O157:H7	13	1: IL
Dec. 2002	Lettuce	<i>E. coli</i> O157:H7	3	1:MN
Oct. 2003-May 2004	Lettuce (mixed salad)	<i>E. coli</i> O157:H7	57	1:CA
Apr. 2004	Spinach	<i>E. coli</i> O157:H7	16	1:CA
Nov. 2004	Lettuce	<i>E. coli</i> O157:H7	6	1: NJ
Sept. 2005	Lettuce (romaine)	<i>E. coli</i> O157:H7	32	3:MN, WI, OR
Sept. 2006	Spinach (baby)	<i>E. coli</i> O157:H7 and other serotypes	205	Multi-state and Canada
Nov./Dec. 2006	Lettuce	<i>E. coli</i> O157:H7	71	4: NY, NJ, PA, DE
Nov./Dec. 2006	Lettuce	<i>E. coli</i> O157:H7	81	3: IA, MN, WI
July 2007	Lettuce	<i>E. coli</i> O157:H7	26	1:AL
May 2008	Romaine	<i>E. coli</i> O157:H7	9	1: WA
Oct. 2008	Lettuce	<i>E. coli</i> O157:H7	59	Multi-state and Canada
Nov. 2008	Lettuce	<i>E. coli</i> O157:H7	130	Canada
Sept. 2009	Lettuce: Romaine or Iceberg	<i>E. coli</i> O157:H7	29	Multi-state

Sept. 2009	Lettuce	<i>E. coli</i> O157:H7	10	Multistate
April 2010	Romaine	<i>E. coli</i> O145	33	5:MI, NY, OH, PA, TN
Oct. 2011	Romaine	<i>E. coli</i> O157:H7	60	Multistate
April 2012	Romaine	<i>E. coli</i> O157:H7	28	1:CA Canada
June 2012	Romaine	<i>E. coli</i> O157:H7	52	Multistate
Sept. 2012	Romaine	<i>E. coli</i> O157:H7	9	1:PA
Oct. 2012	Spinach and Spring Mix Blend	<i>E. coli</i> O157:H7	33	Multistate
Apr. 2013	Leafy Greens	<i>E. coli</i> O157:H7	14	Multi-state
Aug. 2013	Leafy Greens	<i>E. coli</i> O157:H7	15	1:PA
Oct. 2013	Ready-To-Eat Salads	<i>E. coli</i> O157:H7	33	Multi-state
Apr. 2014	Romaine	<i>E. coli</i> O126	4	1:MN
Apr. 2015	Leafy Greens	<i>E. coli</i> O145	7	3:MD, SC, VA
June 2016	Mesclun Mix	<i>E. coli</i> O157:H7	11	3:IL, MI, WI
Nov. 2017	Leafy Greens	<i>E. coli</i> O157:H7	67	Multi-state and Canada
Mar. 2018	Romaine	<i>E. coli</i> O157:H7	219	Multi-state and Canada
Oct. 2018	Romaine	<i>E. coli</i> O157:H7	62	Multi-state and Canada
Nov. 2019	Romaine	<i>E. coli</i> O157:H7	167	Multistate
Dec. 2020	Leafy Greens	<i>E. coli</i> O157:H7	40	Multi-state
Jan. 2021	Baby Spinach	<i>E. coli</i> O157:H7	15	Multistate
Mar. 2022	Packaged Salad	<i>E. coli</i> O157:H7	10	Multistate

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***E. coli* O157:H7 Infection and Hemolytic Uremic Syndrome**

15. *Escherichia coli* are the name of a common family of bacteria, most members of which do not cause human disease. *E. coli* O157:H7 is a specific member of this family that can cause bloody diarrhea (hemorrhagic colitis) in humans. In the years since *E. coli* O157:H7 was first identified as a cause of diarrhea, this bacterium has established a reputation as a significant public health hazard.

16. *E. coli* O157:H7 lives in the intestines of cattle and other ruminants. *E. coli* O157:H7 is also notable among pathogenic bacteria for its extremely low infectious dose—that is, the number of bacteria necessary to induce infection in a person. While for most pathogenic bacteria, it takes literally millions of bacterial colonies to cause illness, it is now known that fewer than 50 *E. coli* O157:H7 bacteria can cause illness in a child. The practical import is that even a microscopic amount of exposure can trigger a devastating infection.

17. The most severe cases of *E. coli* O157:H7 infection occur in young children and in the elderly, presumably because the immune systems in those age populations are the most vulnerable. After a susceptible individual ingests *E. coli* O157:H7, the bacteria attach to the inside surface of the large intestine and initiate an inflammatory reaction in the intestine. Which ultimately results in the painful, bloody diarrhea and abdominal cramps characteristic of the intestinal illness.

18. The mean incubation period (time from ingestion to the onset of symptoms) of *E. coli* O157:H7 is estimated to be two to four days (range from 1-21 days). Typically, a patient with an acute *E. coli* O157:H7 infection presents with abdominal cramps, bloody diarrhea, and vomiting. The duration of diarrhea in children with *E. coli* O157:H7 infections is significantly longer than that of adults.

19. *E. coli* O157:H7 can produce a wide spectrum of diseases from mild, non-bloody diarrhea to severe, bloody diarrhea accompanied by excruciating abdominal pain to life-threatening complications. In most infected individuals, the intestinal illness lasts about a week and resolves without any long-term effects. Antibiotics do not appear to aid in combating these infections, and recent medical studies suggest that antibiotics are contraindicated for their risk of provoking more serious complications. Apart from good supportive care, which should include close attention to hydration and nutrition, there is no specific therapy.

20. About 10% of individuals with *E. coli* O157:H7 infections (mostly young children) go on to develop hemolytic uremic syndrome (HUS), a severe, potentially life-threatening complication. The essence of the syndrome is described by its three central features: the destruction of red blood cells, destruction of platelets (those blood cells responsible for clotting), and acute renal failure due to the formation of micro-thrombi that occlude microscopic blood vessels that make up the filtering units within the kidneys.

21. There is no known therapy to halt the progression of HUS. The active stage of the disease usually lasts one to two weeks, during which a variety of complications are possible. HUS is a frightening illness that, even in the best American medical facilities, has a mortality rate of about 5%. The majority of HUS patients require transfusion of blood products and develop complications common to the critically ill.

C.A.'s and M.A.'s Injuries

22. C.A. and M.A. consumed cheeseburgers with lettuce, tomato, onion, and other condiments at Wendy's restaurant located at 1094 S. Main Street, Bowling Green, Ohio, on August 1, 2022. The cheeseburgers were contaminated by *E. coli* O157:H7 and had been prepared and

sold by MBG Main at Wendy's restaurant located at 1094 S. Main Street, Bowling Green, OH 42402.

23. On August 5 and 7, 2022, respectively, C.A. and M.A. began experiencing symptoms of an *E. coli* O157:H7 infection, including abdominal cramps and diarrhea.

24. C.A. and M.A. continued to deteriorate over the next few days, and their mother, Plaintiff Jennifer Avery, rushed them for medical attention. C.A. was taken first to the Promedica Emergency Room in Maumee, OH, on August 7, 2022. M.A. was later taken to an urgent care facility in Bowling Green on August 9, 2022. M.A. submitted a stool sample for testing, and both children underwent various diagnostic tests and procedures.

25. On August 10, 2022, Plaintiff learned that M.A.'s stool sample had tested positive for *E. coli* O157:H7.

26. Plaintiff was contacted by the Wood County Health Department and interviewed as part of the investigation into the subject outbreak.

IV. CAUSES OF ACTION

COUNT I - Product Liability

27. By this reference, Plaintiff incorporates the foregoing paragraphs as if each was set forth here in its entirety.

28. At all times relevant to this action and the allegations in this complaint, the Defendants were manufacturers within the meaning of the Ohio Product Liability Act, ORC §2307.71, *et seq.*

29. Defendants manufactured the food product contaminated with *E. coli* O157:H7 that caused Plaintiff's illnesses and injuries.

30. The *E. coli* O157:H7-contaminated product that caused Plaintiff's injuries was a product within the meaning of ORC §2307.71 (A)(12)(a).

31. The food product that caused Plaintiff's injuries was, at the time it left Defendants' control, defective within the meaning of ORC §2307.73 (A)(1). More specifically, the food product was unreasonably dangerous for its ordinary and expected use because it contained *E. coli* O157:H7, a potentially deadly pathogen.

32. The food product was sold to Plaintiff without any change in its defective condition, and the food product was used in the manner expected and intended, i.e., human consumption.

33. Plaintiff's injuries occurred as a direct and proximate result of the defective and unreasonably dangerous condition of the adulterated food product that was manufactured and sold by Defendants.

COUNT II - Negligence

34. By this reference, Plaintiff incorporates the foregoing paragraphs as if each was set forth here in its entirety.

35. For all times relevant to this action, Defendants owed a duty to the ultimate consumers of their food products to use reasonable care in the manufacture of such products and to prevent or eliminate the risk that their food products would be contaminated with *E. coli* O157:H7 or any other similarly deadly pathogen.

36. For all times relevant to this action, Defendants had a duty to comply with all statutes, laws, regulations, or safety codes pertaining to the manufacture, distribution, storage, and sale of their food products.

37. With reference to duties identified in the preceding paragraphs, Defendants did not comply with such duties in the manufacture of the *E. coli* O157:H7-contaminated food products, the exposure to which was the proximate cause of Plaintiff's injuries.

38. Plaintiff is among the class of persons designed to be protected by these statutes,

laws, regulations, safety codes, or provisions pertaining to the manufacture, distribution, storage, and sale of Defendants' food products.

39. Defendants had a duty to properly supervise, train, and monitor their employees and to ensure that their employees complied with all applicable statutes, laws, regulations, or safety codes pertaining to the manufacture, distribution, storage, and sale of their food products.

40. Defendants had a duty to use ingredients, supplies, and other constituent materials that were reasonably safe, wholesome, free of defects, and that otherwise complied with the Pure Food and Drug Law of Ohio. Such compliance requires that the Defendants' products, ingredients, supplies, and other constituent materials are clean, free from adulteration, and safe for human consumption.

41. Defendant Wendy's had a duty, given its knowledge of prior outbreaks of *E. coli* O157:H7 and other pathogenic bacteria on leafy greens, to take reasonable measures to ensure that the leafy greens utilized by its restaurants nationally were safely grown; they were not grown in proximity to cattle operations; were not grown in proximity to recognized vectors for the transmission of *E. coli* O157:H7; were not grown under conditions, generally, that are known, or reasonably should be known, to the food industry to be unsafe.

42. Plaintiff's *E. coli* O157:H7 illness and injuries occurred as a direct and proximate result of Defendants' breach of duties and noncompliance with applicable law and safety regulations.

COUNT III - Negligence per se

43. By this reference, Plaintiff incorporates the foregoing paragraphs as if each was set forth here in its entirety.

44. The food product that Defendants manufactured, produced, and sold that caused the Plaintiff's injuries was adulterated within the meaning of the Pure Food and Drug Law of Ohio,

ORC §3715.59(A).

45. Defendants violated ORC §3715.52(A)(1) by the manufacturing, production, and/or sale of the adulterated food product.

46. The Pure Food and Drug Law of Ohio establishes a positive and definite standard of care in the manufacture and sale of food, and the violation of this law is negligent per se.

47. Plaintiff is among the class of persons designed to be protected by these laws and safety regulations pertaining to the manufacture, distribution, storage, and sale of Defendants' food products.

48. Plaintiff's injuries occurred as a direct and proximate result of Defendants' violation of the Pure Food and Drug Law of Ohio.

COUNT IV - Ohio Consumer Sales Practices Act, ORC § 1345.01 et seq.

49. By this reference, Plaintiff incorporates the foregoing paragraphs as if each was set forth here in its entirety.

50. Defendants are "supplier[s]" as that term is defined in ORC § 1345.01(C).

51. Plaintiff is a "consumer" as that term is defined in ORC § 1345.01(D).

52. Defendants' acts and practices, as described above, were unfair or deceptive acts or practices in connection with a consumer transaction, in violation of ORC § 1345.02, in that Defendants, among other things, represented that food that they manufactured and sold and that caused the Plaintiff's *E. coli* O157:H7 infection and related injuries:

- (a) had performance characteristics, uses, or benefits that it did not have;
- (b) was of a particular standard or quality that it was not; and
- (c) had been supplied in accordance with a previous representation when it was not.

53. As a direct and proximate result of Defendants' violations of the Ohio

Consumer Sales Practices Act, ORC § 1345.01, et seq., Plaintiff is entitled to damages as set forth in ORC § 1345.09, trebled, including noneconomic damages, attorney's fees, and expenses.

COUNT V - Uniform Commercial Code, ORC § 1302.01, et seq.

54. By this reference, Plaintiff incorporates the foregoing paragraphs as if each was set forth here in its entirety.

55. Defendants are "seller[s]" and "merchant[s]" as those terms are defined in ORC § 1302.01(A)(4) and (5).

56. Defendants made express and/or implied warranties about the food that they manufactured and sold and that caused Plaintiff's *E. coli* O157:H7 infection and related injuries, including, but not limited to, the following:

- (a) affirmations of fact or promise which related to the goods and became part of the basis of the bargain;
- (b) description of the goods that became part of the basis of the bargain;
- (c) that the food items were merchantable, as defined in ORC § 1302.27, in that they would pass without objection in the trade, were fit for the ordinary purpose for which they were sold, were adequately contained, packaged and labeled, and conformed to promises or affirmations of fact on the container; and
- (d) that the food items were fit for the purpose for which they were purchased, as defined in ORC § 1302.28, in that Defendants had reason to know that they would be consumed, and that Plaintiff would rely on Defendants' skill or judgment to furnish suitable goods.

57. Defendants breached the express and/or implied warranties they made because

they manufactured and sold food items that caused Plaintiff's *E. coli* O157:H7 infection and related injuries.

58. As a direct and proximate result of Defendants' breaches of express and/or implied warranties, Plaintiff is entitled to damages.

V. DAMAGES

59. Plaintiff has suffered general, special, incidental, and consequential damages as the direct and proximate result of the acts and omissions of Defendants, in an amount which shall be fully proven at the time of trial. These damages include, but are not limited to: damages for general pain and suffering; damages for loss of enjoyment of life, both past and future; past medical and medical-related expenses; future medical and medical-related expenses; travel and travel-related expenses, both past and future; lost wages; emotional distress, past and future; pharmaceutical expenses, past and future; and all other ordinary, incidental, or consequential damages that would or could be reasonably anticipated to arise under the circumstances.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

- (a) compensation for all general, special, incidental, and consequential damages suffered by Plaintiff as a result of Defendants' conduct;
- (b) statutory prejudgment interest;
- (c) reasonable attorneys' fees and costs, to the fullest extent allowed by law; and
- (d) all such additional and further relief as this Court deems just and equitable.

VII. JURY DEMAND

A jury is demanded for the trial of this action.

Dated: August 30, 2022

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To the Clerk:

Please serve this Complaint by Certified Mail.