

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

ZACHARY T. NITZ,

Plaintiff,

Case No.: 22- - NO

-vs-

WENDY'S, Co., a Delaware Corporation; and
JOHN DOE CORPORATIONS 1-5,

Defendants.

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**There are no other pending or resolved civil actions arising
out of the transaction or occurrence alleged in this complaint.**

PLAINTIFF'S COMPLAINT FOR DAMAGES

NOW COME Plaintiff, ZACHARY T. NITZ, by his attorneys, MICHAEL G. HEILMANN and WILLIAM D. MARLER of MARLER CLARK, LLP (pending admission pro hac vice), pursuant to MCR 2.118(A)(1), to allege and state as follows:

I. PARTIES

1. The amount in controversy is substantially far in excess of the jurisdictional minimum of this court (Twenty-Five Thousand Dollars--\$25,000.00) or is otherwise within the jurisdiction of this Court.

2. At all times material hereto, the Plaintiff ZACHARY T. NITZ ("Plaintiff") was a resident of Kent County, State of Michigan.

3. Wendy's Co. (hereinafter "Wendy's or Defendant") is a Delaware Corporation, with its principal place of business located at One Dave Thomas Blvd, Dublin, OH 43017, that owns, operates, or franchises a restaurant located at 2333 28th St. SE, Grand Rapids, MI 49508. Venue is proper as this restaurant is located in Kent County, Michigan.

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. GENERAL ALLEGATIONS

7. According to the Center for Disease Control (CDC), 84 people from Ohio (23), Michigan (53), Pennsylvania (2), and Indiana (6), have been infected with the same strain of *E. coli* O157:H7, with illness onset dates ranging from July 26 through August 8,

2022. At least ten individuals have been hospitalized, and at three have developed hemolytic uremic syndrome, a potentially lethal complication of *E. coli* O157:H7 infection.

8. In a statement published on its outbreak webpage, CDC states as follows:

A specific food has not yet been confirmed as the source of this outbreak, but many sick people reported eating sandwiches with romaine lettuce at Wendy’s restaurants in Michigan, Ohio, Pennsylvania and Indiana before getting sick. Based on this information, Wendy’s is taking the precautionary measure of removing the romaine lettuce being used in sandwiches from restaurants in that region. Wendy’s uses a different type of romaine lettuce for salads. Investigators are working to confirm whether romaine lettuce is the source of this outbreak, and whether romaine lettuce used in Wendy’s sandwiches was served or sold at other businesses. Wendy’s is fully cooperating with the investigation.

9. At present, the Wendy’s locations where sick individuals reported having eaten are spread across Ohio, Michigan, Pennsylvania and Indiana as of the CDC’s latest report.

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

11. *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

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

12. *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.

13. *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.

14. The most severe cases of the *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.

15. 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.

16. *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.

17. 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.

18. 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.

The Plaintiff's *E. coli* O157:H7 Infection and Illness

19. Plaintiff consumed a Big Bacon Classic hamburger on August 4, 2022. The food was prepared and sold by Defendant Wendy's at the restaurant located at 2333 28th St. SE, Grand Rapids, Michigan.

20. On August 6, 2022, Plaintiff began experiencing symptoms of an *E. coli* O157:H7 infection, including diarrhea, nausea, and vomiting.

21. On August 7, 2022, Plaintiff began to suffer from bloody diarrhea, prompting him to seek medical treatment. While hospitalized, Plaintiff developed hemolytic uremic syndrome and remained hospitalized until August 10, 2022.

22. Plaintiff tested positive for *E. coli* O157:H7 while hospitalized and was later contacted by his local health agency and informed that he was part of the Wendy's multi-state outbreak of *E. coli* O157:H7.

Strict Liability: Count I

23. The Plaintiff incorporates by reference and makes a part of this count each and every foregoing paragraph of this Complaint.

24. At all times relevant hereto, the Defendants were manufacturers and sellers of the adulterated food product that is the subject of the action.

25. The adulterated food product that the Defendants manufactured, distributed, and/or sold was, at the time it left the Defendants' control, defective and unreasonably dangerous for its ordinary and expected use because it contained *E. coli* O157:H7, a potentially deadly pathogen.

26. The adulterated food product that the Defendants manufactured, distributed, and/or sold was delivered to Plaintiff without any change in its defective condition. The adulterated food product that the defendants manufactured, distributed, and/or sold was used in the manner expected and intended, and was consumed by the plaintiff.

27. The Defendants owed a duty of care to Plaintiff to design, manufacture, and/or sell food that was not adulterated, that was fit for human consumption, that was reasonably safe in construction, and that was free of pathogenic bacteria or other substances injurious to human health. The Defendants breached this duty.

28. The Defendants owed a duty of care to Plaintiff to design, prepare, serve, and sell food that was fit for human consumption, and that was safe to the extent contemplated by a reasonable consumer. The Defendants breached this duty.

29. The Plaintiff suffered injury and damages as a direct and proximate result of the defective and unreasonably dangerous condition of the adulterated food product that the Defendants manufactured, distributed, and/or sold.

Breach of Warranty: Count II

30. The Plaintiff incorporates by reference and makes a part of this count each and every foregoing paragraph of this Complaint.

31. Defendants produced, distributed, and sold the contaminated food product that injured Plaintiff and caused her *E. coli* O157:H7 infection. Defendants are, therefore, a manufacturer, distributor, and/or seller of an adulterated food product, and the adulterated food product reached Plaintiff without substantial change from the condition in which it was sold by Defendants.

32. Defendants are subject to liability to the Plaintiff for their breaches of express and implied warranties made to Plaintiff with respect to the food product sold to her, including the implied warranties of merchantability and of fitness for a particular use. Further, Defendants expressly warranted, through the sale of food to the public, and by the statements and conduct of their employees and agents, that the food product ultimately sold to Plaintiff was fit for human consumption, and not otherwise adulterated or injurious to health.

33. The food product sold by Defendants and ultimately consumed by Plaintiff, which product was contaminated with *E. coli* O157:H7 and related filth and adulteration,

would not pass without exception in the trade, and was thus in breach of the implied warranty of merchantability.

34. Plaintiff further alleges that the contaminated food sold by Defendants and consumed by Plaintiff was not fit for the uses and purposes intended by either Plaintiff or Defendants, i.e., human consumption, and that this product was therefore in breach of the implied warranty of fitness for its intended use.

35. As a further direct and proximate result of the conduct of Defendants and their agents, servants, and/or employees as aforesaid, Plaintiff suffered an *E. coli* O157:H7 infection and the adverse effects associated with the same, as described in previous paragraphs of this complaint.

36. As a further direct and proximate result of the conduct of Defendants and their agents, servants, and/or employees, Plaintiff was forced to endure great pain, suffering, and inconvenience and may endure the same in the future. She was forced to submit to medical care and may be forced to submit to the same in the future.

37. As a further direct and proximate result of the conduct of Defendants and their agents, servants, and/or employees, Plaintiff suffered an inability to perform the activities of daily living or some of them.

Negligence: Count III

38. Plaintiff incorporates by reference and makes a part of this Count each and every foregoing paragraph of this Complaint.

39. Defendants had a duty to comply with all statutory and regulatory provisions that pertained or applied to the manufacture, distribution, storage, labeling, and sale of the food product that injured Plaintiff, including the applicable provisions of the Federal

Food, Drug and Cosmetic Act, and similar Michigan food and public health statutes, including without limitation the provisions of MCLA 289.5101 which prohibits the manufacture and sale of any food that is adulterated or otherwise injurious to health.

40. The food product that Defendants manufactured and sold, and that Plaintiff purchased and consumed, was adulterated within the meaning of the federal Food, Drug and Cosmetic Act, and similar Michigan statutes, because it contained a deleterious substance that rendered it injurious to health, i.e., *E. coli* O157:H7 bacteria.

41. Defendants violated federal, state, and local food safety regulations by their manufacture and sale of adulterated food. These federal, state, and local food safety regulations are applicable here, and establish a positive and definite standard of care in the manufacture and sale of food. The violation of these regulations constitutes negligence as a matter of law.

42. Plaintiff is in the class of persons intended to be protected by these statutes and regulations, and Plaintiff was injured as the direct and proximate result of the Defendants' violation of applicable federal, state, and local food safety regulations.

43. Defendants were negligent in the manufacture, distribution, and sale of a food product that was adulterated with *E. coli* O157:H7, not fit for human consumption, and not reasonably safe because adequate warnings or instructions were not provided.

44. Once Defendants learned, or in the exercise of reasonable care should have learned, of the dangers associated with preparing and selling food, including, but not limited to, cross-contamination between foods, and the dangers associated with improperly cleaned or washed food, they had a duty to warn Plaintiff but failed to do so.

45. Defendants had a duty to use supplies and raw materials in producing their food products that were in compliance with applicable federal, state, and local laws, ordinances and regulations; that were from reliable sources; and that were clean, wholesome, free from adulteration, and fit for human consumption, but failed to do so, and therefore breached that duty.

46. Defendants were negligent in the selection of their suppliers, or other agents or subcontractors, and failed to adequately supervise them, or provide them with adequate standards, and, as a result, produced and sold food that was adulterated with *E. coli* O157:H7.

47. Defendants had a duty to properly supervise, train, and monitor their employees, or the employees of their agents or subcontractors, engaged in the preparation and sale of their food products, to ensure compliance with Defendants' operating standards and to ensure compliance with all applicable health regulations. Defendants failed to properly supervise, train, and monitor these employees engaged in the manufacture, preparation and delivery of the food product ultimately sold to Plaintiff and thus breached that duty.

48. 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; were not grown in proximity to cattle operations; were not grown in proximity to recognized vectors for the transmission of *E. coli* O157:H7; and were not grown under conditions, generally, that are known, or reasonably should be known, to the food industry to be unsafe.

Negligence Per Se: Count IV

49. Plaintiff incorporates by reference and makes a part of this Count each and every foregoing paragraph of this Complaint.

50. The Defendants had a duty to comply with all applicable state and federal regulations intended to ensure the purity and safety of their food product, including the requirements of the Federal Food, Drug and Cosmetics Act (21 U.S.C. § 301 et seq.), and the Michigan adulterated food statutes (MCL 289.5101.).

51. Plaintiff is in the class of persons intended to be protected by these statutes and regulations, and Plaintiff was injured as the direct and proximate result of the Defendants' violation of applicable federal, state, and local food safety regulations.

52. The Defendants failed to comply with the provisions of the health and safety acts identified above, and, as a result, were negligent *per se* in their manufacture, distribution, and sale of food adulterated with *E. coli* O157:H7, a potentially deadly pathogen.

53. As a direct and proximate result of conduct by the Defendants that was negligent *per se*, Plaintiff sustained injury and damages in an amount to be determined at trial.

Violation of Michigan Consumer Protection Act – Count V

54. Plaintiff incorporates by reference and makes a part of this Count each and every foregoing paragraph of this Complaint.

55. The Defendants breached an implied warranty that resulted in a violation of the Michigan Consumer Protection Act, entitling the consumer to attorney fees under MCL 445.903(1).

56. The Defendants expressly promised that the food sold was of high quality and violated that promise under the Michigan Consumer Protection Act, MCL 445.903(1).

57. As a direct and proximate result of conduct by the Defendants that was in violation of the Michigan Consumer Protection Act, the Plaintiff sustained injury and damages in an amount to be determined at trial.

VI. DAMAGES

44. Plaintiff incorporates by reference and makes a part of this Count each and every foregoing paragraph of this Complaint.

45. The Plaintiff has suffered general, special, incidental, and consequential damages as the direct and proximate result of the acts and omissions of the Defendants as stated herein, in an amount that 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; medical and medical related expenses, both past and future; travel and travel-related expenses, past and future; 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.

WHEREFORE, Plaintiff prays for judgment against the Defendants as follows:

A. Award damages in whatever amount substantially over \$25,000.00 the Plaintiff is found to be entitled;

B. Ordering compensation for all general, special, incidental, and consequential damages suffered by the Plaintiff as a result of the Defendants' conduct;

C. Awarding the Plaintiff her reasonable attorney's fees and costs, to the fullest extent allowed by law; and

D. Granting all such additional and/or further relief as this Court deems just and equitable.

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Dated: August 31, 2022

JURY DEMAND

Wherefore, Plaintiff hereby requests a trial by jury of the within cause.

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Dated: August 31, 2022