

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

KEITH COMSTOCK,

Plaintiff,

v.

**COMPLAINT AND DEMAND
FOR JURY TRIAL**

APPLE MINNESOTA, LLC d/b/a
Applebee's Neighborhood Grill and
Bar,

Defendant.

Plaintiff Keith Comstock for his Complaint against the Defendant states and alleges as follows:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff KEITH COMSTOCK is a resident of the City of Oakdale, Minnesota.
2. Defendant APPLE MINNESOTA, LLC, is a corporation organized under the laws of Delaware with its principal business operations located in the State of Ohio.
3. Defendant APPLE MINNESOTA, LLC's registered agent for service in Minnesota is Corporation Service Company, 380 Jackson Street #700, Saint Paul, Minnesota, 55101.
4. Upon information and belief, Apple Minnesota, LLC (hereafter "Applebee's") owns, operates and controls Applebee's Neighborhood Grill and

Bar restaurants throughout the twin cities metropolitan area, including the restaurant located at 10150 Hudson Road, Suite 165, Woodbury, Minnesota.

5. At all relevant times, Defendant Applebee's manufactured, produced, packaged, promoted and sold food to the public in the State of Minnesota.

6. This Court has jurisdiction pursuant to 28 U.S.C. §1332 (c) because the amount in controversy exceeds Seventy-Five Thousand Dollars (\$75,000.00), exclusive of interest and costs, and because there is complete diversity of citizenship between the Plaintiff and Defendant.

7. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391 because a substantial part of the acts and omissions giving rise to the claims asserted occurred in this district.

FACTUAL ALLEGATIONS

***E. coli* O111**

8. *E. coli* O111 is a foodborne pathogen highly toxic when consumed by humans.

9. *E. coli* O111 infections typically result in severe stomach cramps, diarrhea, bloody diarrhea and vomiting.

10. Even if these acute gastrointestinal symptoms subside, those sickened are at dramatically increased risk for a variety of chronic conditions, including high blood pressure and chronic kidney disease.

11. The infectious process can also cause much more severe injuries,

including complete kidney failure and death. The elderly, the young and those with compromised immune systems are at particular risk of both contracting *E. coli* O111 infections and sustaining serious injury or death.

Applebee's *E. coli* O111 OUTBREAK

12. On or about June 24, 2014, Keith Comstock dined at Applebee's in Woodbury, Minnesota.

13. He ordered and consumed an oriental chicken salad which contained, among other things, carrots, cabbage and greens.

14. Unbeknownst to him, the oriental chicken salad consumed that day was contaminated with *E. coli* O111 bacteria and wholly unfit for human consumption.

15. On or about June 27, 2014, Plaintiff Keith Comstock began to suffer symptoms of *E. coli* O111, most notably severe abdominal cramping within the expected incubation period.

16. The symptoms quickly progressed to the point where he was in debilitating pain and sought medical treatment.

17. While being treated for his acute symptoms, Plaintiff Keith Comstock tested positive for *E. coli* O111.

18. Plaintiff continued to remain ill for several weeks after his acute *E. coli* O111 illness.

19. Medical personnel reported the positive test result to the Minnesota Department of Health (hereinafter "MDH").

20. MDH then performed pulsed-field gel electrophoreses (PFGE) genetic testing on the *E. coli* samples taken from the Plaintiff. From this testing, MDH investigators determined that the Plaintiff's illness was genetically indistinguishable from the illness-causing bacteria isolated from other individuals who also ate at Applebee's restaurants in Roseville, Blaine, Monticello and Duluth, Minnesota in late June.

21. Representatives of Applebee's stated publicly that the outbreak is a result of a "vendor produce issue."

22. As of July 15, 2014, MDH identified at least 13 people who contracted *E. coli* O111 infections in Minnesota in late June.

23. MDH concluded that at least seven individuals, including the Plaintiff, contracted *E. coli* O111 from eating at Applebee's restaurants in Minnesota.

24. As a direct and proximate result of consuming food contaminated with *E. coli* O111 at Defendant Applebee's restaurant, Plaintiff contracted serious gastrointestinal illnesses requiring medical treatment.

25. As a result of these injuries, Plaintiff has in the past and will in the future incur medical and hospital expenses for the treatment of the injuries; has in the past and will in the future suffer physical and mental pain; and has been damaged and injured in the an amount greater than Seventy-Five Thousand Dollars (\$75,000.00).

COUNT I - NEGLIGENCE

26. Plaintiff reasserts and realleges each and every matter and thing as set forth in the preceding paragraphs.

27. Defendant produced, distributed, prepared and served food products that were adulterated with *E. coli* O111, a dangerous foodborne pathogen. These products, as a result of adulteration, were unfit for human consumption, and were not reasonably safe as served.

28. Defendant owed a duty to all persons who were its guests and customers, including the plaintiff, to manufacture and sell food and drink that was safe to eat, that was not adulterated with potentially harmful pathogens and that was not in violation of applicable food and safety regulations.

29. Defendant owed a duty to all persons who were its guests and customers to maintain its premises in a sanitary and safe condition so that no one eating on the premises, or purchasing food from it, would be exposed to, or infected by, a potentially harmful pathogen like *E. coli* O111.

30. Defendant breached the duties it owed to its guests and customers by committing the following negligent acts and omissions, among others:

- a) Failing to require its produce vendors to maintain and follow adequate food safety programs, including, but not limited to, an *E. coli* O111 testing program and other safe food manufacturing process;
- b) Failing to adequately inspect or otherwise verify the safety of produce received from its vendors;

- c) Failing to adequately maintain or monitor the sanitary conditions of its food, premises, and employees;
- d) Failing to properly operate its foodservice in a safe, clean, and sanitary manner;
- e) Failing to apply its food safety policies and procedures to ensure the safety and sanitary conditions of its food, premises, and employees;
- f) Failing to prevent the transmission of *E. coli* O111 from its food to its business invitees and customers;
- g) Failing to properly train its employees and agents how to prevent the transmission of *E. coli* O111, and other harmful pathogens, on its premises, or in its food;
- h) Failing to properly supervise its employees and agents to prevent the transmission of *E. coli* O111 on its premises, or in its food;
- i) Failing to design, implement, have, or enforce a hand-washing or glove-use policy effective to prevent the transmission of *E. coli* O111 on its premises, or in its food; and
- i) Other acts and omissions as revealed through discovery.

31. As a result of the Defendant's foregoing acts and omissions of negligence, among others, Plaintiff sustained damages as set forth in the preceding paragraphs.

COUNT II – NEGLIGENCE PER SE (Minn. Stat. § 31.02)

32. Plaintiff reasserts and realleges each and every matter and thing as set forth in the preceding paragraphs.

33. Defendant, its employees, agents, or those working on its behalf, as providers of food products within the State of Minnesota, owe a duty to comply with Minn. Stat. Ch. 31, the Minnesota Food Law.

34. The Minnesota Food Law, Minn. Stat. § 31.02 et seq., states in part:
- Section 31.02 Prohibited Acts

The following acts set out in this section and the causing of such acts within this state are prohibited:

- (a) The manufacture, sale, or delivery, holding or offering for sale of any food that is adulterated or misbranded;
- (b) The adulteration or misbranding of any food;
- (c) The receipt in commerce of any food that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise.

35. Defendant, its employees, agents, or those working on its behalf failed to comply with the Minnesota Food Law. Such conduct constitutes negligence *per se*.

36. As a result of the failure of Defendant, its employees, agents, or those working on its behalf to comply with the Minnesota Food Law, Plaintiff sustained damages as set forth in the preceding paragraphs.

COUNT III – NEGLIGENCE PER SE (21 U.S.C. § 331)

37. Plaintiff reasserts and realleges each and every matter and thing as set forth in the preceding paragraphs.

38. Defendant, their employees, agents, or those working on its behalf, as providers of food products in the United States of America, owe a duty to comply with 21 U.S.C. § 331.

39. 21 U.S.C. § 331 states in part:

21 U.S.C. § 331 Prohibited Acts

The following acts and the causing thereof are prohibited:

- (a) The introduction or delivery for introduction into interstate commerce of any food . . . that is adulterated or misbranded;
- (b) The adulteration or misbranding of any food . . . in interstate commerce;
- (c) The receipt in interstate commerce of any food . . . that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise.

40. Defendant, its employees, agents, or those working on its behalf failed to comply with 21 U.S.C. § 331. Such conduct constitutes negligence *per se*.

41. As a result of the failure of Defendant, their employees, agents, or those working on its behalf to comply with 21 U.S.C. § 331, Plaintiff sustained damages as set forth in the preceding paragraphs.

COUNT IV - NEGLIGENCE PER SE (Minnesota Rules Chapter 4626)

42. Plaintiff reasserts and realleges each and every matter and thing as set forth in the preceding paragraphs.

43. Defendant, its employees, agents, or those working on its behalf, as providers of food products are subject to regulation under Minnesota Health Codes – Minnesota Rules Chapter 4626 (the Minnesota Food Code).

44. Defendant, its employees, agents, or those working on its behalf failed to comply with Minnesota Rules Chapter 4626. Such conduct constitutes negligence *per se*.

45. As a result of the failure of Defendant, their employees, agents, or those working on its behalf to comply with Minnesota Rules Chapter 4626, Plaintiff sustained damages as set forth in the preceding paragraphs.

COUNT V – STRICT LIABILITY

46. Plaintiff reasserts and realleges each and every matter and thing as set forth in the preceding paragraphs.

47. The food product produced and sold by Defendant that caused Plaintiff's *E. coli* O111 infection was adulterated with *E. coli* O111 and was therefore in a defective condition unreasonably dangerous to ordinary consumers and members of the public.

48. The adulterated food product produced and sold by Defendant that caused Plaintiff's *E. coli* O111 infection was in a defective condition when it left the control of Defendant.

49. Because *E. coli* O111 bacteria is colorless and odorless, ordinary consumers, including Plaintiff, could not detect the contamination of the food products sold by Defendant.

50. As a result of the conduct set forth in the preceding paragraph, Plaintiff has sustained damages as set forth in the preceding paragraphs.

RELIEF REQUESTED

WHEREFORE, Plaintiff prays judgment against the Defendant in an amount greater than Seventy-Five Thousand Dollars (\$75,000.00) together with interest, costs, and disbursements incurred herein and such other relief as the court may find just and equitable.

Dated: this 15th day of July, 2014

PRITZKER OLSEN, P.A.

By: /s/ Ryan M. Osterholm
Brendan Flaherty (#327657)
Ryan M. Osterholm (#0390152)
Fred Pritzker (#88465)
PritzkerOlsen P.A.
Plaza VII, Suite 2950
45 South Seventh Street
Minneapolis, MN 55402-1652
Telephone: (612) 338-0202
Email: brendan@pritzkerlaw.com
ryan@pritzkerlaw.com
fhp@pritzkelaw.com

Attorneys for Plaintiff