

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

	:	
CATHY JONES, individually and as next friend	:	Civ. No 1:15-cv-00019
of J.S., a minor,	:	
	:	
Plaintiff,	:	<u>FIRST AMENDED COMPLAINT AND</u>
	:	<u>DEMAND FOR JURY TRIAL</u>
	:	
v.	:	
	:	
SMITH’S FOOD & DRUG CENTERS, INC., a	:	
Delaware Corporation, and BIDART BROS., a	:	
California corporation,	:	
	:	
Defendants.	:	
	:	
	:	
	:	

COMES NOW the Plaintiff, Cathy Jones, individually and as next friend of J.S., a minor, by and through her attorneys of record, J. Edward Hollington, Brendan J. Flaherty and Ryan M. Osterholm and allege as follows:

PARTIES

1. Plaintiff Cathy Jones is an adult resident of Albuquerque, New Mexico, and is the mother and next friend of J.S., a minor.
2. Defendant Smith’s Food & Drug Centers, Inc., (“Smith’s”) is a Delaware corporation with its principal place of business located in Salt Lake City, Utah.
3. Smith’s registered agent for service in New Mexico is the Corporation Service Company located at 123 East Marcy Street, Suite 101, Santa Fe, New Mexico 87501.
4. Smith’s is in the business of manufacturing, distributing, marketing and selling

food products in New Mexico, including caramel apples.

5. Smith's owns and operates retail grocery stores and pharmacies in New Mexico, including a store located at 4016 Louisiana Boulevard Northeast, Albuquerque, New Mexico, 87110.

6. Upon information and belief, Bidart Bros. ("Bidart Brothers") is a California corporation with its principal place of business located at 5055 East Lerdo Highway, Shafter, California, 93263. Bidart Brothers' agent for service is located at 7647 N Fresno St, Fresno, California 93720.

7. Bidart Brothers is in the business of manufacturing, processing, distributing and selling apples throughout the United States, including apples to Smith's that were ultimately sold in New Mexico.

JURISDICTION AND VENUE

8. Subject matter jurisdiction in this matter is proper based on the diversity of the parties, as the parties are citizens of different states, and the amount in controversy exceeds Seventy-Five Thousand Dollars (\$75,000.00), both as required under 28 USC § 1332(a)(2).

9. Venue of this matter is proper in this court pursuant to 28 USC §1391(a), as a substantial part of the events and omissions giving rise to the claim set forth herein occurred in this judicial district.

10. This Court has personal jurisdiction over Defendants Smith's and Bidart Brothers pursuant to N.M. Stat. Ann. § 38-1-16.

FACTS

LISTERIOSIS AND THE OUTBREAK

11. Listeriosis is a serious illness resulting from consumption of food contaminated with the bacteria *Listeria monocytogenes*. *Listeria monocytogenes* is one of the most virulent and deadly foodborne pathogens with a fatality rate of over twenty percent. Virtually all people who contract listeriosis require hospitalization. Those who are elderly, immune-compromised, or pregnant are particularly vulnerable.

12. The bacteria can be killed by cooking or pasteurizing food products; however, contact with *Listeria monocytogenes* after such a “killstep” will re-contaminate the food product. This risk is heightened because *Listeria monocytogenes* tends to thrive in food processing environments, particularly in floor drains and other cool damp areas. Moreover, *Listeria monocytogenes* can easily be transferred from one area of a processing facility to another through, for example, simple touching of equipment, water, mist, workers’ clothing, shoes and hands. In contrast to most other harmful bacteria, *Listeria monocytogenes* will grow slowly on foods stored in a refrigerator, and freezing has very little detrimental effect on the organism.

13. These characteristics render processed ready-to-eat food products particularly susceptible to *Listeria monocytogenes* contamination.

14. Once a food product, including processed apples, is adulterated with *Listeria monocytogenes*, the pathogen can easily be transferred to other food products or food production surfaces if strict sanitation procedures are not followed.

15. Because of the risks posed by *Listeria monocytogenes*, the Centers for Disease Control and Prevention (hereafter “CDC”), in collaboration with state public health officials, actively monitor listeriosis cases throughout the country.

16. State and CDC labs routinely subject samples of *Listeria monocytogenes* obtained from sickened individuals to a genetic subtyping process known as Pulsed-Field Gel Electrophoresis (“PFGE”). The results—akin to genetic fingerprints—are then loaded to a national database used to determine whether the illnesses were caused by a common genetic strain of *Listeria monocytogenes*.

17. Through this system, the CDC detected a unique genetic pattern of *Listeria monocytogenes* among listeriosis patients in November and December of 2014.

18. The CDC and other public health officials launched an epidemiological investigation to determine the source of the outbreak strain. As part of this study, food consumption histories were obtained for each individual who contracted listeriosis. The results demonstrated a strong association with commercially produced prepackaged caramel apples.

19. Further investigation revealed additional illness-causing strains of *Listeria* associated with commercially produced prepackaged caramel apples.

20. As of December 30, 2014, a total of 32 people infected with the outbreak strains of *Listeria monocytogenes* have been reported from 11 states.

21. The results from the public health investigation directly implicated apples produced and sold by Bidart Brothers.

22. On December 22, 2014, Bidart Brothers issued a recall of all Granny Smith apples it sold in 2014 to those customers known to produce caramel apples.

23. Smith’s issued a recall of caramel apples it received containing Bidart Brothers apples.

24. On December 23, 2014, a test of the Bidart Brothers facility found the presence of *Listeria monocytogenes* on the apple production line.

25. On December 24, 2014, Bidart Brothers notified all customers receiving Granny Smith apples in 2014 to recall those apples if they had been used to make caramel apples.

26. On January 6, 2015 Bidart Brothers recalled all Granny Smith and Gala Apples shipped from Bidart Brothers' Shafter, California facility in 2014.

CATHY JONES'S LISTERIOSIS INFECTION

27. In late October of 2014 a member of Cathy Jones's family purchased several commercially produced prepackaged caramel apples from the Smith's retail store located at 4016 Louisiana Boulevard Northeast, Albuquerque, New Mexico, 87110.

28. Plaintiff Cathy Jones consumed the caramel apple product later that day.

29. On information and belief, the caramel apple product contained an apple manufactured and sold by Bidart Brothers.

30. Upon information and belief, when the apple product left the control of Bidart Brothers, it was adulterated with *Listeria monocytogenes*.

31. Plaintiff Cathy Jones was pregnant when she consumed the adulterated caramel apple.

32. Plaintiff Cathy Jones developed symptoms of *Listeria monocytogenes* on or about November 7, 2014.

33. Plaintiff Cathy Jones sought medical attention for her *Listeria monocytogenes* symptoms on or about November 7, 2014 at Lovelace Hospital in Albuquerque, New Mexico.

34. On or about November 8, 2014 minor plaintiff J.S. was born several months premature at Lovelace Hospital.

35. Testing on J.S. revealed that he too had contracted *Listeria monocytogenes*. Doctors determined his premature birth was caused by his mother's *Listeria monocytogenes* infection.

36. J.S. remained hospitalized in the neonatal intensive care unit (NICU) at Lovelace for over four weeks.

37. J.S. suffered and continues to suffer medical complications as a direct and proximate result of his *Listeria monocytogenes* infection and premature birth.

38. Health officials from the New Mexico Department of Health performed PFGE testing on the sample of *Listeria monocytogenes* taken from J.S. These samples were then linked to the multi-state caramel apple outbreak of *Listeria monocytogenes*.

I. CAUSE OF ACTION AGAINST BIDART BROTHERS
STRICT PRODUCT LIABILITY CLAIM

39. Plaintiff incorporates the preceding paragraphs by this reference as if each paragraph was set forth herein in its entirety.

40. Defendant Bidart Brothers manufactured and sold the adulterated apples that injured the Plaintiff Cathy Jones and her minor son J.S.

41. The apple Cathy Jones consumed was contaminated with *Listeria monocytogenes* when it left the control of Defendant Bidart Brothers.

42. Cathy Jones's consumption of the contaminated apple caused her to become infected with *Listeria monocytogenes*, and pass it on to her son J.S. in utero. J.S. suffered permanent injury as a direct and proximate result of his infection.

43. Apples that are contaminated with *Listeria monocytogenes* are unsafe and thus defective when used in a reasonably foreseeable manner – i.e., eating it. *Listeria monocytogenes*-contaminated apples are unfit for human consumption and pose an unreasonable risk of injury to consumers because reasonably prudent persons, having full knowledge of the risk, would find the risk unacceptable.

44. The Bidart Brothers apple that Cathy Jones consumed was contaminated with

Listeria monocytogenes and was therefore, defective and unreasonably dangerous.

45. Cathy Jones's consumption of the contaminated Bidart Brothers apple was a reasonably anticipated use of the food product. It is reasonably anticipated a *Listeria* infection would pass from mother to baby.

46. Defendant Bidart Brothers is strictly liable to the Plaintiff and her minor son J.S. for the harm proximately caused by the manufacture and sale of an unsafe and defective apple.

II. CAUSE OF ACTION BIDART BROTHERS:
NEGLIGENCE and NEGLIGENCE PER SE

47. Plaintiff incorporates the preceding paragraphs by this reference as if each paragraph was set forth herein in its entirety.

48. Bidart Brothers designed, manufactured, distributed, and sold apples that were contaminated with *Listeria monocytogenes*, a deadly pathogen.

49. Bidart Brothers owed a duty to all persons who consumed its products, including Plaintiff Cathy Jones and her minor son, J.S., to manufacture and sell apples that were safe to eat, that were not adulterated with deadly pathogens like *Listeria monocytogenes*, and that were not produced in violation of applicable food and safety regulations. The Defendant breached this duty.

50. Bidart Brothers owed a duty to all persons who consumed its products, including Cathy Jones and her minor son, J.S., to ensure that any representations regarding the certifications its products had undergone prior to distribution and sale were made with reasonable care. Defendant breached this duty.

51. Bidart Brothers had a duty to comply with all statutes, laws, regulations, or safety codes pertaining to the manufacture, distribution, storage, and sale of its food product, but failed to do so, and was therefore negligent. Cathy Jones and J.S. were among the class of persons designed to be protected by these statutes, laws, regulations, safety codes or provision pertaining

to the manufacture, distribution, storage, and sale of food products.

52. Bidart Brothers breached the duties owed to the ultimate consumers of its apple products by committing the following acts and omissions of negligence:

- a. Failing to adequately maintain or monitor the sanitary conditions of its products, premises, equipment and employees;
- b. Failing to properly operate its facilities and equipment in a safe, clean, and sanitary manner;
- c. Failing to apply its food safety policies and procedures to ensure the safety and sanitary conditions of its food products, premises, and employees;
- d. Failing to apply food safety policies and procedures that met industry standards for the safe and sanitary production of food products, and the safety and sanitary condition of its premises and employees;
- e. Failing to prevent the transmission of *Listeria monocytogenes* to consumers of its apples;
- f. Failing to properly train its employees and agents how to prevent the transmission of *Listeria monocytogenes* on its premises, from its facility or equipment, or in its food products;
- g. Failing to properly supervise its employees and agents to prevent the transmission of *Listeria monocytogenes* on its premises, from its facility or equipment, or in its food products; and
- h. Failing to test its apples for microbial pathogens, like *Listeria monocytogenes*.

53. Bidart Brothers owed a duty to Cathy Jones and J.S. to use reasonable care in the

manufacture, distribution, and sale of its food products to prevent contamination with *Listeria monocytogenes*. The Defendant breached this duty.

54. Cathy Jones and J.S.'s injuries proximately and directly resulted from the negligence of the Defendant Bidart Brothers, and from the Defendant's violations of statutes, laws, regulations, and safety codes pertaining to the manufacture, distribution, storage, and sale of food.

**III. CAUSE OF ACTION AGAINST BIDART BROTHERS:
BREACH OF WARRANTY**

55. Plaintiff incorporates the preceding paragraphs by this reference as if each paragraph was set forth herein in its entirety.

56. By offering apples for sale to the general public, Bidart Brothers impliedly warranted that such apples were safe to eat, that it was not adulterated with a deadly pathogen, and that the apples had been safely prepared under sanitary conditions.

57. Bidart Brothers breached the implied warranties with regard to the food it manufactured and sold to the public, including food sold that was consumed by Cathy Jones and her family.

58. Cathy Jones and J.S.'s injuries proximately and directly resulted from Bidart Brothers' breach of implied warranties, and the Plaintiff is thus entitled to recover for all actual, consequential, and incidental damages that flow directly and in a foreseeable fashion from these breaches.

**IV. CAUSE OF ACTION AGAINST SMITH'S:
STRICT PRODUCT LIABILITY CLAIM**

59. Plaintiff incorporates the preceding paragraphs by this reference as if each paragraph was set forth herein in its entirety.

60. Defendant Smith's offered caramel apples for sale to the public.

61. Defendant Smith's sold the adulterated caramel apples that ultimately injured Cathy Jones and J.S.

62. The caramel apple consumed by Cathy Jones was contaminated with *Listeria monocytogenes* when it left the control of Smith's.

63. Cathy Jones' consumption of the contaminated apple caused her and J.S. to become infected with *Listeria monocytogenes* and suffer permanent injury as a direct and proximate result.

64. Apples that are contaminated with *Listeria monocytogenes* are unsafe and thus defective when used in a reasonably foreseeable manner – i.e., consuming it. *Listeria monocytogenes*-contaminated caramel apples are unfit for human consumption, and pose an unreasonable risk of injury to consumers because reasonably prudent persons, having full knowledge of the risk, would find the risk unacceptable.

65. The caramel apple that Cathy Jones consumed from Defendant Smith's was contaminated with *Listeria monocytogenes* and was therefore, as a result, defective and unreasonably dangerous.

66. Cathy Jones's consumption of the contaminated caramel apple was a reasonably anticipated use of the food product. It is reasonably anticipated a *Listeria* infection would pass from mother to baby.

67. Defendant Smith's is strictly liable to the Plaintiff for the harm proximately caused by the manufacture and sale of an unsafe and defective caramel apple.

**V. CAUSE OF ACTION AGAINST SMITH'S:
NEGLIGENCE and NEGLIGENCE PER SE**

68. Plaintiff incorporates the preceding paragraphs by this reference as if each paragraph was set forth herein in its entirety.

69. Smith's distributed, and sold caramel apples that were contaminated with *Listeria monocytogenes*, a deadly pathogen.

70. Smith's owed a duty to all persons who consumed its products, including Cathy Jones, to sell apples that were safe to eat, that were not adulterated with deadly pathogens, like *Listeria monocytogenes*, and that were not in violation of applicable food and safety regulations. The Defendant breached this duty.

71. Smith's owed a duty to all persons who consumed its products, including Cathy Jones, to ensure that any representations regarding the certifications its products had undergone prior to distribution and sale were made with reasonable care. Defendant Smith's breached this duty.

72. Smith's had a duty to comply with all statutes, laws, regulations, or safety codes pertaining to the distribution, storage, and sale of its food product, but failed to do so, and was therefore negligent. Cathy Jones and J.S. were among the class of persons designed to be protected by these statutes, laws, regulations, safety codes or provision pertaining to the distribution, storage, and sale of food products.

73. Smith's breached the duties owed to the ultimate consumers of its caramel apple products by committing the following acts and omissions of negligence:

- a. Failing to adequately maintain or monitor the sanitary conditions of its products, premises, equipment and employees;
- b. Failing to properly operate its facilities and equipment in a safe, clean, and sanitary manner;
- c. Failing to apply its food safety policies and procedures to ensure the safety and sanitary conditions of its food products, premises, and employees;

- d. Failing to apply food safety policies and procedures that met industry standards for the safe and sanitary production and sale of food products, and the safety and sanitary condition of its premises and employees;
- e. Failing to prevent the transmission of *Listeria monocytogenes* to consumers of its apples;
- f. Failing to properly train its employees and agents how to prevent and detect *Listeria monocytogenes* on its food products;
- g. Failing to inspect and/or investigate the facilities it was purchasing food products from; and
- h. Failing to test its apples for microbial pathogens, like *Listeria monocytogenes*;

74. Smith's owed a duty to the Cathy Jones to use reasonable care in the distribution and sale of its food product to prevent contamination with *Listeria monocytogenes*. Defendant breached this duty.

75. Cathy Jones and J.S.'s injuries proximately and directly resulted from the negligence of the Defendant Smith's, and from the Defendant's violations of statutes, laws, regulations, and safety codes pertaining to the manufacture, distribution, storage, and sale of food.

VI. CAUSE OF ACTION AGAINST SMITH'S: BREACH OF WARRANTY

76. Plaintiff incorporates the preceding paragraphs by this reference as if each paragraph was set forth herein in its entirety.

77. By offering caramel apples for sale to the general public, Smith's impliedly warranted that such caramel apples were safe to eat, that they were not adulterated with a deadly pathogen, and that the apples have been safely prepared under sanitary conditions.

78. Smith's breached the implied warranties with regard to the food it sold that Cathy Jones consumed.

79. Cathy Jones and J.S.'s injuries proximately and directly resulted from Smith's breach of implied warranties, and they are thus entitled to recover for all actual, consequential, and incidental damages that flow directly and in a foreseeable fashion from these breaches.

DAMAGES

80. Cathy Jones and J.S. have suffered general, special, incidental, and consequential damages as a direct and proximate result of the acts and omissions of the Defendants, in an amount that shall be fully proven at the time of trial. These damages include, but are not limited to: loss of companionship, medical and medical related expenses, travel and travel-related expenses, past and future; emotional distress, past and future; and all other ordinary, incidental, or consequential damages that would or could be reasonably anticipated to arise under the circumstances.

JURY DEMAND

81. The Plaintiff hereby demands a jury trial.

PRAYER FOR RELIEF

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

- a. compensatory damages in an amount to be determined at trial;
- b. punitive and/or exemplary damages for wanton, willful, fraudulent, reckless acts of Defendants which demonstrated a complete disregard and reckless indifference for the safety and welfare of the general public and to the Plaintiff in an amount sufficient to punish Defendants and deter future similar conduct;
- c. attorneys' fees, expenses, prejudgment interest, and costs of this action; and
- d. for any other relief this Court deems just and proper under the circumstances.

Dated: January 9, 2015

Respectfully Submitted,

J. EDWARD HOLLINGTON & ASSOCIATES,
P.A.

/s/

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