

COPY

AUG 12 2013



MICHAEL R. JAMES, CLERK
J. ORTIZ
DEPUTY CLERK

Jonathan V. O'Steen, Esq. – State Bar #024043
O'STEEN & HARRISON, PLC
300 W. Clarendon Ave., Suite 400
Phoenix, Arizona 85013-3424
(602) 252-8888
josteen@vanosteen.com
Attorneys for Plaintiff

William D. Marler, Esq. – Pro Hac Vice Pending
MARLER CLARK
1301 Second Ave., Suite 2800
Seattle, Washington 98101
(206) 346-1876
bmarler@marlerclark.com
Attorneys for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

NICKOLAS ROLF,

Plaintiff,

v.

FEMEX, LLC, an Arizona limited liability
company, d/b/a/ Federico's Mexican Food,

Defendant.

NO.

CV2013-005107

COMPLAINT

Tort/Products Liability

1. Strict Products Liability
2. Negligence
3. Negligence Per Se
4. Breach of Warranties

DEMAND FOR JURY TRIAL

Plaintiff, Nickolas Rolf, by and through undersigned counsel, and for his claims against the Defendant, alleges as follows:

PARTIES

1. Plaintiff NICKOLAS ROLF resides in Maricopa County, Arizona.
2. Defendant FEMEX, LLC is an Arizona limited liability company that owns and operates the retail foodservice establishment named "Federico's Mexican Food" located at 13132 W. Camelback Rd. in Litchfield Park, Arizona.

JURISDICTION AND VENUE

- 1
- 2 3. The acts and events hereinafter alleged occurred in Maricopa County, Arizona.
- 3 4. Venue is proper under A.R.S. § 12-401.

4 **FACTUAL ALLEGATIONS**

- 5 5. On or about August 2, 2013, Federico's Mexican Food restaurant located at 13132
- 6 W. Camelback Rd. in Litchfield Park, Arizona voluntarily closed for business after an
- 7 epidemiological investigation by the Maricopa County Department of Public Health
- 8 and Environmental Services and the Arizona Department of Health Services
- 9 revealed that the restaurant was the source of an E. coli O157:H7 outbreak.
- 10
- 11 6. As of this date, at least thirty-three (33) individuals with suspected E. coli O157:H7
- 12 infections interviewed by public health officials either have purchased food from or
- 13 eaten at this particular Federico's Mexican Food—i.e., the restaurant located at
- 14 13132 W. Camelback Rd. in Litchfield Park, Arizona. No other Federico's Mexican
- 15 Food restaurant locations presently are suspected as the source of any illnesses in
- 16 this outbreak. At least fifteen (15) of these individuals have been hospitalized, and
- 17 at least two (2) have developed hemolytic uremic syndrome.
- 18
- 19 7. On or about July 23, 24, and 25, 2013, Plaintiff NICKOLAS ROLF consumed food
- 20 that had been manufactured and prepared by the Defendant. On one or all of these
- 21 occasions, the food that Plaintiff consumed was contaminated by E. coli O157:H7,
- 22 causing the infection and illness described below.
- 23
- 24 8. Onset of illness caused by Plaintiff's E. coli O157:H7 infection occurred on or about
- 25 July 28, 2013, with a nauseated, uncomfortable stomach. This continued, and
- 26 Plaintiff developed extreme abdominal pain and diarrhea on or about July 30, 2013.
- 27
- 28

1 9. On or about August 1, 2013, Plaintiff observed that his ongoing bouts of diarrhea
2 had turned bloody. He went to a local emergency room for treatment, where he
3 received intravenous fluids for rehydration, and morphine for pain control. At this
4 visit, Plaintiff underwent a CT scan of his abdomen. Plaintiff's symptoms continued
5 thereafter, causing him to return to the emergency room for additional treatment on
6 or about August 3, 2013.

7
8 10. Plaintiff has had additional medical treatment for his ongoing symptoms, including
9 treatment with various antibiotics and pain medications. As of the date of this filing,
10 Plaintiff continues to suffer from gastrointestinal discomfort, reduced appetite, and
11 remains weak and fatigued.

12 **COUNT ONE**
13 **STRICT PRODUCTS LIABILITY**

14 11. Plaintiff incorporates herein by reference the allegations in paragraphs 1–10.

15 12. Defendant FEMEX, LLC is a product manufacturer, distributor and seller of the
16 product that injured Plaintiff NICKOLAS ROLF.

17 13. Defendant FEMEX, LLC owed a duty to Plaintiff NICKOLAS ROLF to manufacture
18 and distribute a product that was reasonably safe in construction, that did not
19 materially deviate from applicable design specifications, and that did not otherwise
20 deviate in some material way from otherwise identical units in its product line, but
21 failed to do so.

22
23 14. Defendant FEMEX, LLC owed a duty to Plaintiff NICKOLAS ROLF to manufacture
24 and distribute a product that conformed to its express warranties, i.e., that the food
25 was, among other things, not adulterated and was fit for human consumption, but
26 failed to do so.
27
28

1 15. Defendant FEMEX, LLC owed a duty to Plaintiff NICKOLAS ROLF to manufacture
2 and distribute a product that conformed to its implied warranties, including, but not
3 limited to, the implied warranty that the food was for human consumption, but failed
4 to do so.

5 16. The product that infected Plaintiff NICKOLAS ROLF with E. coli O157:H7 was not
6 reasonably safe in construction, and did not conform to Defendant FEMEX, LLC's
7 express or implied warranties, because it was contaminated and adulterated with,
8 among other things, E. coli O157:H7.

9 17. Because the product was not reasonably safe in construction, and did not conform
10 to Defendant FEMEX, LLC's express or implied warranties, Defendant is strictly
11 liable to Plaintiff NICKOLAS ROLF for the harm proximately caused by the
12 contaminated food.

13 18. As a direct and proximate result of Defendant FEMEX, LLC's culpable acts and
14 omissions, Plaintiff NICKOLAS ROLF suffered severe and permanent personal
15 injuries, as well as substantial economic loss.

16
17
18 **COUNT TWO**
19 **NEGLIGENCE**

20 19. Plaintiff incorporates herein by reference the allegations in paragraphs 1–18.

21 20. Defendant FEMEX, LLC breached duties of reasonable care that it owed to Plaintiff
22 NICKOLAS ROLF by manufacturing, distributing and selling a product that was not
23 reasonably safe.

24 21. Defendant FEMEX, LLC was negligent in manufacturing, distributing and selling a
25 product that was not reasonably safe because it was contaminated with E. coli
26 O157:H7 and because adequate warnings or instructions were not provided,
27

including, but not limited to, the warning that the product may contain, or be contaminated by, E. coli O157:H7.

22. Defendant FEMEX, LLC had a duty to comply with all applicable federal and state statutory and regulatory provisions that pertained or applied to the manufacture, distribution, storage, labeling and sale of food products, including, but not limited to, the Federal Food, Drug, and Cosmetics Act, which bans the manufacture, sale and distribution of any "adulterated" food, but failed to do so. Plaintiff NICKOLAS ROLF is among the class of persons intended to be protected by the statutory and regulatory provisions pertaining to Defendant's manufacture, distribution, storage, labeling and sale of food.

23. Defendant FEMEX, LLC had a duty to use supplies and/or raw materials in producing and distributing products that were in compliance with applicable federal, state, and local laws, ordinances and regulations; that were from safe and reliable sources; that were clean, wholesome and free from contamination and adulteration; and that were safe for human consumption, but failed to do so.

24. The wrongful acts alleged above were each substantial and proximate causes of Plaintiff NICKOLAS ROLF's injuries and damages.

COUNT THREE
NEGLIGENCE PER SE

25. Plaintiff incorporates herein by reference the allegations in paragraphs 1–24.

26. Defendant FEMEX, LLC owed Plaintiff NICKOLAS ROLF a duty to comply with all statutory and regulatory provisions that pertained or applied to the manufacture, distribution, storage, labeling and sale of its food products (including the Recalled Product), including the applicable provisions of the federal Food, Drug and Cosmetic Act, and the Arizona adulterated food statutes (A.R.S. § 36-901 *et seq.*).

1 27. The food that Defendant FEMEX, LLC manufactured and sold, and that Plaintiff
2 consumed, was "adulterated" within the meaning of the Federal Food, Drug and
3 Cosmetic Act, and the Arizona adulterated food statutes (A.R.S. § 36-901 *et seq.*),
4 because (*inter alia*): it contained a deleterious substance that rendered it injurious to
5 health; it consisted in whole or in part of a diseased, contaminated, filthy, putrid or
6 decomposed substance, or was otherwise unfit for food; and/or it had been
7 produced, prepared, packaged or held under insanitary conditions whereby it
8 became unwholesome or injurious to health.

10 28. Defendant FEMEX, LLC violated federal, state and local food safety regulations by
11 its manufacture and sale of adulterated food.

12 29. The federal, state and local food safety regulations applicable here, and as set forth
13 above, establish a positive and definite standard of care in the manufacture and
14 sale of food, and the violation of these regulations constitute negligence *per se*.

15 30. Plaintiff NICKOLAS ROLF was in the class of persons intended to be protected by
16 these statutes and regulations

17 31. The wrongful acts alleged above were each substantial and proximate causes of
18 Plaintiff NICKOLAS ROLF's injuries and damages.

19
20 **COUNT FOUR**
21 **BREACH OF WARRANTIES**

22 32. Plaintiff incorporates herein by reference the allegations in paragraphs 1–31.

23 33. Defendant FEMEX, LLC is liable to Plaintiff NICKOLAS ROLF for breaching express
24 and implied warranties made to him, or for which Plaintiff was the intended third-
25 party beneficiary, with respect to the product that caused Plaintiff's infection and
26 resulting injuries.
27
28

1 34. The contaminated product was not fit for the uses and purposes intended by
2 Defendant FEMEX, LLC, as represented by Defendant, and thus was in breach of
3 implied warranties of fitness for its intended use.

4 35. The wrongful acts alleged above were each substantial and proximate causes of
5 Plaintiff NICKOLAS ROLF's injuries and damages.
6

7 **DAMAGES**

8 36. Plaintiff has suffered general and special, incidental and consequential damages as
9 the direct and proximate result of the acts and omissions of Defendant FEMEX, LLC
10 in an amount in excess of the minimum jurisdictional limits of the Court, which
11 damages shall be fully proven at the time of trial. These damages include, but are
12 not limited to: damages for general pain and suffering; damages for loss of
13 enjoyment of life, both past and future; medical and medical related expenses, both
14 past and future; travel and travel-related expenses, past and future; emotional
15 distress, and future emotional distress; pharmaceutical expenses, past and future;
16 related wage and lost earning capacity damages; and all other ordinary, incidental
17 and consequential damages as would be anticipated to arise under the
18 circumstances.
19

20 **PRAYER FOR RELIEF**

21 **WHEREFORE**, Plaintiff prays for the following relief:

- 22
- 23 1. That the Court award Plaintiff judgment against Defendant, in such sums as
24 shall be determined to fully and fairly compensate Plaintiff for all general, special,
25 incidental and consequential damages incurred, or to be incurred, as the direct
26 and proximate result of the acts and omissions of Defendant, in an amount to be
27 proven at trial.
 - 28 2. That the Court award Plaintiff his costs, disbursements and reasonable
attorneys' fees incurred.

- 1 3. That the Court award Plaintiff the opportunity to amend or modify the provisions
2 of this Complaint as necessary or appropriate after additional or further
3 discovery is completed in this matter, and after all appropriate parties have been
4 served; and
5 4. That the Court award such other and further relief as it deems necessary and
6 proper in the circumstances.

7 **JURY DEMAND**

8 Plaintiff demands a trial by jury on all issues so triable with the maximum number of
9 jurors permitted by law.

10 DATED this 12th day of August 2013.

11 **O'STEEN & HARRISON, PLC**

12 

13 Jonathan V. O'Steen
14 300 W. Clarendon Ave., Suite 400
15 Phoenix, Arizona 85013-3424
16 Attorneys for Plaintiff

17 **MARLER CLARK**

18 William D. Marler

19 Attorneys for Plaintiff
20
21
22

23 c:\clients\federicos\rolf, nickolas\pleadings\complaint\complaint.doc
24
25
26
27
28