

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Danville Division

CLERKS OFFICE U.S. DIST. COURT
AT DANVILLE, VA
FILED
JUN 08 2023
LAURA A. AUSTIN, CLERK
BY: s/ H. MCDONALD
DEPUTY CLERK

Lillie Howard,

PLAINTIFF

Civil Action No.: 4:23CV00016

VS.

Carrols Corporation, and Impossible
Foods Inc.,

COMPLAINT FOR NEGLIGENCE/
GROSS NEGLIGENCE/WILLFUL
AND WANTON NEGLIGENCE,
AND BREACH OF IMPLIED
WARRANTY OF
MERCHANTABILITY

DEFENDANTS.

INTRODUCTION

This is a cause of action that arises from a glass-filled burger that was made by Defendant Impossible Foods Inc. (hereinafter “IMP”) and sold to the Plaintiff through a Burger King location owned and operated by Defendant Carroll Corporation (Hereinafter “CC”). Upon eating a portion of the burger, the Plaintiff’s throat was severely lacerated and her injuries required a significant amount of time to heal. As a result, Plaintiff brings these actions for negligence/gross negligence/willful and wanton negligence, and breach of implied warranty of merchantability against both Defendants.

JURISDICTION & VENUE

1. This court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C.A. 1332 (a) (1) as to all causes of action herein.

2. Venue in this district has been selected by Plaintiff pursuant to 28 U.S.C. § 1391 (b) (1) because it is a District in the United States where Defendants reside and conduct business and under 28 U.S.C. §1391 (b)(2) because it is the judicial district in which the event occurred.
3. The amount in controversy in this action exceeds \$75,000.

PARTIES AND JURISDICTION

4. Plaintiff Lillie Mae Howard is domiciled in South Boston, Virginia.
5. Defendant Impossible Foods Inc. is incorporated in Delaware and is headquartered in Redwood City, CA.
6. Defendant Carrols Corporation is incorporated in Delaware and is headquartered in Syracuse, NY.
7. The incident forming the core of this lawsuit occurred in South Boston, Virginia.
8. The Virginia long arm statute, set forth in Virginia Code 8.01-328.1, provides that a court may exert personal jurisdiction over a person “[W]ho acts directly or through an agent, as to a cause of action arising from the person's: 1. Transacting any business in this Commonwealth; ... 3. Causing tortious injury by an act or omission in this Commonwealth; 4. Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth, if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this Commonwealth;”

FACTUAL ALLEGATIONS

9. Plaintiff visited the Burger King on 1005 Bill Tuck Highway in South Boston, VA on May 31, 2022, with her adult daughter, Brinda Howard.
10. Plaintiff purchased for herself a meal including a vegetarian burger made by Defendant IMP.
11. Plaintiff and her daughter returned to their home with the food and began to eat.

12. After several bites of her burger, Plaintiff began to feel a searing pain in the back of her throat and a constricted choking sensation.
13. As this feeling of distress became more severe, her daughter decided to take her to the emergency room, whereupon it was discovered that she had a large hematoma in her throat of unknown origin.
14. After being discharged, the Plaintiff went home with her daughter and tried to understand what had happened.
15. Since her distress began while eating, they examined the half-eaten burger that was still sitting on the table and discovered multiple fragments of glass embedded in the burger.
16. They wrapped the burger back up and placed it in the freezer to preserve it as evidence.
17. Plaintiff suffered lasting injuries, including the loss of her voice, inability to eat solid food, pain, suffering, emotional distress, nightmares, and an aversion to store-bought prepared food.

NEGLIGENCE/GROSS NEGLIGENCE/WILLFUL AND WANTON NEGLIGENCE

18. Paragraphs 1-17 of this Complaint, inclusive, are hereby incorporated by reference as if set forth in full herein.
19. In Virginia, courts follow “the common law doctrine that one who sells foodstuff for human consumption impliedly warrants its fitness and wholesomeness for such purpose, and is liable not only for the result of any negligent act involved in failing to use due and reasonable care in the preparation and handling of his product; but is also liable on the implied warranty where there is privity of contract between the vendor and vendee.” *Swift and Company v. Wells*, 201 Va. 213, 217 (Va. 1959).
20. The presence of glass in food meant for consumption creates an inference of negligence. *Norfolk Coca-Cola Bottling Works v. Krausse*, 173 S.E. 497, 502 (Va. 1934). An inference is “a logical deduction from circumstances known to exist.” *Id.*
21. Both Defendants had a duty to provide the Plaintiff with food fit for consumption
22. By manufacturing, preparing, and/or serving a burger filled with shards of glass to the Plaintiff, Defendants breached their duty to the Plaintiff.

23. As a direct result of this breach, the Plaintiff suffered injuries, including a lacerated throat, lasting injuries, emotional trauma, nightmares, food avoidance, and the inability to speak or eat solid food for an extended period of time.
24. “Gross negligence requires a showing of “indifference ... and an utter disregard of prudence that amounts to a complete neglect of the safety of another person.” *Cowan v. Hospice Support Care, Inc.*, 603 S.E.2d 916, 918 (Va. 2004). “This requires a degree of negligence that would shock fair-minded persons, although demonstrating something less than willful recklessness.” *Id.*
25. In the setting of food manufacture or preparation, an accident involving shattered glass should result in the disposal of every piece of food in the area with even the slightest chance of having been contaminated by broken glass. The self-evident fact that this was not done bespeaks a degree of negligence that would shock fair-minded persons.
26. “Willful and wanton negligence is acting consciously in disregard of another person's rights or acting with reckless indifference to the consequences, with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct probably would cause injury to another.” *Etheron v. Doe*, 597 S.E.2d 87, 90 (Va. 2004).
27. [I]ll will is not a necessary element of willful and wanton negligence. *Alfonso v. Robinson*, 514 S.E.2d 615, 618 (Va. 1999). Willful and wanton conduct is that which occurs with “actual or constructive consciousness of the danger involved.” *Fravel v. Ford Motor Co.*, 973 F. Supp. 2d 651, 655 (W.D. Va. 2013).
28. The facts and circumstances explaining how broken glass could come to fill a burger are unknown at this stage, but the possibilities range from the intentional sabotage of the burger by an employee to the willful disregard of the likelihood that the burger had been contaminated.

29. It is improbable in the extreme that an accident involving glass would not have involved one or more of either Defendant's employees in either the accident that broke the glass or in cleaning up the broken glass that self-evidently was in a food preparation or manufacture area.
30. Upon information and belief, one or more employees of either Defendant had either active or constructive consciousness that a dangerous glass-contaminated burger might be served to a customer.
31. Plaintiff seeks compensatory damages in an amount to be determined at trial but not less than \$250,000.
32. Plaintiff seeks punitive damages in an amount of \$350,000.

BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY

33. Paragraphs 1-32 of this Complaint, inclusive, are hereby incorporated by reference as if set forth in full herein.
34. Code of Virginia §8.2-314 reads, in relevant part: “(2) Goods to be merchantable must be at least such as:
 - (a) pass without objection in the trade under the contract description; and
 - (b) in the case of fungible goods, are of fair average quality within the description; and
 - (c) are fit for the ordinary purposes for which such goods are used; and
 - (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
 - (e) are adequately contained, packaged, and labeled as the agreement may require; and
 - (f) conform to the promises or affirmations of fact made on the container or label if any....”
35. Defendants CC and IMP are merchants because they manufacture and/or sell for retail profit food products including the vegetarian burger purchased and consumed by the Plaintiff.
36. A burger containing fragments of glass does not “pass without objection in the trade.”

37. A burger containing fragments of glass is not “fit for the ordinary purpose” of consumption.
38. Under Code of Virginia §8.2-314, a merchant in goods of the kind at issue is held to make an implied warranty that the goods will be fit for the ordinary purposes for which such goods are used. The courts in Virginia have held that when the “implied warranty of fitness for a particular purpose” involves food for human consumption, it equates to a warranty of “wholesomeness.” *Swift and Company v. Wells*, 201 Va. 213, 217 (Va. 1959).
39. Virginia law requires the same showing both for negligence and for breach of warranty of wholesomeness. A plaintiff must show “(1) that the goods were unreasonably dangerous either for the use to which they would ordinarily be put or for some other reasonably foreseeable purpose, and (2) that the unreasonably dangerous condition existed when the goods left the defendant’s hands.” *Bussey v. E.S.C. Rests., Inc.*, 620 S.E.2d 764, 767 (Va. 2005).
40. Food containing broken glass is inherently dangerous and unfit for consumption.
41. The Plaintiff was in possession of the wrapped burger from the time it was handed to her until she unwrapped it to eat.
42. The Plaintiff took no intervening action that could explain the presence of the glass in her burger. She did not remove the burger from the bag or unwrap it in any way until she sat down to eat.
43. The Plaintiff consumed the burger in the inherently dangerous condition it was in when it left the Defendant’s hands.
44. As a result of Defendants’ breach of warranty, Plaintiff was caused to suffer ongoing mental and emotional distress, the inability to eat solid food or to speak for an extended period of time, pain, and loss of appetite.
45. The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (“DSM-V”) recognizes the Avoidant/Restrictive Food Intake Disorder (“ARFID”).

46. Psychology has recognized that psychological avoidance of certain foods can result from stressful experiences while eating.

47. The Plaintiff has experienced a continuing aversion to any store-bought prepared food.

PRAYER FOR RELIEF

48. Wherefore, Plaintiffs pray for relief from this Honorable Court as follows:

49. On the first causes of action for negligence/gross negligence/willful and wanton negligence, an amount to be determined at trial, but not less than \$250,000.

50. On a second cause of action for breach of implied warranty, an amount to be determined at trial but not less than \$250,000.

51. Punitive damages in an amount of \$350,000

JURY TRIAL

52. Pursuant to the Federal Rules of Civil Procedure, Plaintiff demands a trial by jury of all issues so triable.

Respectfully Submitted,

/s/ William T. Woodrow III

William T. Woodrow III (VSB 88122)

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Attorney for Plaintiff

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
Lillie Howard
(b) County of Residence of First Listed Plaintiff
(c) Attorneys (Firm Name, Address, and Telephone Number)
Stone & Woodrow LLP, 250 West Main St, STE 201, Charlottesville, VA 22902, 855 275 7378

DEFENDANTS
Carrols Corporation and Impossible Foods Inc.
County of Residence of First Listed Defendant
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.
Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
PTF DEF
Citizen of This State [X] 1 [] 1
Citizen of Another State [] 2 [] 2
Citizen or Subject of a Foreign Country [] 3 [] 3
Incorporated or Principal Place of Business In This State [] 4 [] 4
Incorporated and Principal Place of Business In Another State [] 5 [X] 5
Foreign Nation [] 6 [] 6

IV. NATURE OF SUIT (Place an "X" in One Box Only) Click here for: Nature of Suit Code Descriptions.

Table with columns: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, INTELLECTUAL PROPERTY RIGHTS, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Personal Injury, Labor, Intellectual Property, etc.

V. ORIGIN (Place an "X" in One Box Only)
[X] 1 Original Proceeding
[] 2 Removed from State Court
[] 3 Remanded from Appellate Court
[] 4 Reinstated or Reopened
[] 5 Transferred from Another District (specify)
[] 6 Multidistrict Litigation - Transfer
[] 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
Brief description of cause: broken glass in burger

VII. REQUESTED IN COMPLAINT:
CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.
DEMAND \$ 600,000
CHECK YES only if demanded in complaint: JURY DEMAND: [X] Yes [] No

VIII. RELATED CASE(S) IF ANY (See instructions):
JUDGE DOCKET NUMBER

DATE Jun 7, 2023 SIGNATURE OF ATTORNEY OF RECORD William T Woodrow III

FOR OFFICE USE ONLY
RECEIPT # 4202077 AMOUNT \$402 APPLYING IFP JUDGE Cullen MAG. JUDGE 4:23CV16