IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

APP DOCKET NO. IV

CHARYL AND MICHAEL RUTHERFORD	)	
	)	
Plaintiffs,	)	
vs.	)	CASE NO. 13 CV 2492
	)	
FRONTERA PRODUCE, LTD,	)	
PRIMUS GROUP INC. AND	)	
HOMELAND STORES INC.	)	
	)	
Defendants	)	
	)	
	)	

ORDER DENYNG MOTION OF DEFENDANT PRIMUS GROUP INC TO DISMISS

The court considers Primus Group Inc.'s ("Primus") Motion to Dismiss Plaintiffs' Petition pursuant to K.S.A. 60-212(b)(6), with prejudice and without leave to amend.

GENERAL BACKGROUND AND PLEADINGS

The Plaintiffs, Charyl and Michael Rutherford, filed the Petition in this case seeking damages for personal injuries alleged to have been sustained due to Ms. Rutherford's consumption of contaminated cantaloupe, manufactured, distributed and sold collectively by Jenson Farms[1], Frontera, and Homeland Stores. This case stems from a multi-state *Listeria* outbreak alleged to be linked to contaminated cantaloupes from Colorado.

The facts alleged in the petition are as follows:

Frontera was a manufacturer, distributor and seller of agricultural products in Colorado, including Jensen Farms Rock Ford brand cantaloupe. Petition, ¶ 2. Homeland Stores

[1] The parties advised the court that Jensen Farms has filed for bankruptcy.

maintained and operated retail grocery stores in Kansas, selling food products including cantaloupe. ¶ 3.

Primus was a company that provided auditing services for agricultural and other businesses involved in the manufacture and sale of food products, including the State of Colorado. Primus retained the services of subcontractors to provide the auditing services, including the audit of Jensen Farms, the Colorado manufacturer, distributor and seller of the Jensen Farms Rocky brand cantaloupe that is at issue in this case. ¶ 5.

In 2011, the Colorado Department of Public Health and Environment (CDPHE) notified the Center for Disease Control (CDC) of an outbreak of *Listeria* infections in Colorado. ¶ 7. The CDC determined that the contaminated cantaloupes that were the source of the *Listeria* outbreak were grown in the Rocky Ford region of Colorado and were grown by Jensen Farms and distributed by Frontera. ¶ 10.

Prior to the September 2011 outbreak, Jensen Farms or Frontera, or both, contracted with Primus to conduct an audit of the Jensen Farms facilities, including their growing area and packing house. ¶ 13. The agreement was to ensure that the facilities, premises and procedures used by Jensen Farms in the production of cantaloupes met or exceeded the applicable standards of care related to the production of cantaloupes, including, but not limited to, good agricultural manufacturing practices, industry standards, and relevant FDA industry guidelines. ¶ 14.

It was the intent of these contracting parties to ensure that the food products that Jensen Farms produced, and that Frontera distributed, would be of high quality for consumers, and would not be contaminated by potentially lethal pathogens such as *Listeria*. ¶ 15. Prior to the formation of the contract, Frontera represented to the public generally, and to retail sellers that

its cantaloupes were "Primus Certified". ¶ 16. Frontera intended for this certification to serve as an inducement for the purchase of its products. ¶ 17. All would benefit from Primus's audit and certification by having a high quality and safe product. ¶ 17.

Primus hired Bio Food Safety to conduct the audit of Jensen Farms. ¶ 18. Primus and Bio Safety held themselves out as experts in the analysis and assessment of food safety procedures, facility design and maintenance, Good Agriculture and Manufacturing Practices (GAMP). ¶ 19. Primus and Bio Safety intended for their audits to aid such companies in ensuring that the food products were of high quality, fit for human consumption and not contaminated. ¶ 20

Bio Safety, by its employee food safety auditor James Dilorio, conducted an audit of Jensen Farms ranchlands and packing facility on or about July 21, 2011, approximately one week before the CDC identified the first victim of the cantaloupe *Listeria* outbreak. Bio Safety gave Jensen Farms' packing house a "superior" rating and a score of 96%. ¶ 21. In this audit, Mr. Dilorio failed to properly observe, demerit or considered multiple conditions or practices that were in violation of Primus's audit standards, industry standards and FDA industry guidance applicable to cantaloupe packing houses. The deficiencies are further alleged in the petition. ¶ 22.

The FDA subsequently heavily criticized many aspects of Jensen Farms' operations that Mr. Dilorio's audit had found to be in total compliance. ¶ 25. Many of Jensen Farms' substandard conditions and practices should have caused Jensen Farms to receive a score in the July, 2011 audit that would have caused its cantaloupe packing house to fail. ¶ 27.

As part of the audit, Mr. Dilorio made material misrepresentations about the conditions and practices of Jensen Farms, despite the existence of conditions that should have caused him to fail the packing facility on the audit. ¶ 28.

At the time of the July 25, 2011 audit, Jensen Farms should not have passed and should not have been approved for the manufacture and sale of cantaloupe. The contaminated cantaloupe that caused Charyl Rutherford's illness would not have been distributed by Frontera in a dangerous condition if Jensen Farms had not passed the audit. ¶ 29.

Charyl Rutherford ate contaminated cantaloupe purchased at Homeland, distributed by Frontera, and processed by Jensen Farms. Ms. Rutherford contracted *Listeria* and has suffered damages as a result. (Summary of ¶¶ 30-42.)

As the primary contractor for the July 2011 audit, Primus owed a duty to those people that it knew, or had reason to know, would be the ultimate consumers of Jensen Farms cantaloupes to act with reasonable care in the selection, approval and monitoring of its subcontractors. Primus breached this duty. ¶ 81.

The audit was not done with reasonable care and breached the duty that Primus owed to the consumers of Jensen Farms cantaloupes. Mr. Dilorio's acts and omissions of negligence, Primus's negligence in selecting, approving and monitoring Bio Food Safety as its auditor constituted the proximate cause of Ms. Rutherford's *Listeria* infection and resulting damages. ¶ 83.

Again, the above paragraphs are merely the allegations in the Petition.

APPLICABLE STANDARDS ON K.S.A. 60-212(b)(6)

The parties have properly stated the standards for a motion to dismiss for failure to state a claim upon which relief can be granted. When a motion to dismiss under K.S.A. 60-212(b)(6) contests the legal sufficiency of a claim, the question must be decided from the well-pleaded facts of a plaintiff's petition. *Halley v. Barnabe*, 271 Kan. 652, 656 (2001).

A petition should not be dismissed for failure to state a claim unless, after reviewing the petition in the light most favorable to the plaintiff and with every doubt resolved in plaintiff's favor, that, under plaintiff's pleadings, the plaintiff can prove no set of facts, under plaintiff's theory or under any other possible theory in support of plaintiff's claim, which theory would entitle the plaintiff to relief. *Dye v. WMC, Inc.*, 38 Kan. App. 2d 655, 661 (2007). Dismissal is justified only when the allegations of the petition clearly demonstrate plaintiff does not have a claim. *Halley*, 271 Kan. at 656.

In considering the question, the court must accept a plaintiff's description of events, along with any reasonable inferences that may be drawn therefrom. Nevertheless, the court is not required to accept conclusory allegations as to the legal effect of the events if the allegations are not supported or are contradicted the description of the events. *Id.*

NEGLIGENCE

Primus argues the case against it should be dismissed on the grounds that the Plaintiffs have not sufficiently pleaded and cannot plead a negligence claim against Primus for which relief can be granted under Kansas law. In order to establish a negligence claim, the plaintiffs must establish the existence of a duty owed to the plaintiffs by the defendant, a breach of that duty, proximate cause, and an injury or damages. *D.W. v. Bliss*, 279 Kan. 726, 734 (2005).

DUTY

Primus argues that, under the law, it owed no duty to consumers of the Jensen Farms cantaloupes.

Whether a duty exists is a question of law. Whether the duty has been breached is a

question of fact. *Duflinger v. Artiles,* 234 Kan. 484, 488 (1983). If no duty exists there can be no negligence. *Hanna v. Huer, Johns, Neel, Rivers & Webb,* 233 Kan. 206, Syl. para. 5, (1983).

The Plaintiffs' primary argument is that Primus owed at duty at common law and pursuant to the Restatement (Second) of Torts § 324A as intended third party beneficiaries of the audit services that Primus provided to Jensen Farms. Central to this argument is the application of the Restatement (Second) of Torts § 324A which provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> "(a) his failure to exercise reasonable care increases the risk of such harm, or
>
> "(b) he has undertaken to perform a duty owed by the other to the third person, or
>
> "(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Kansas courts have approved the use of § 324A for determining whether a duty of care exists in appropriate circumstances. *See, Schmeck v. City of Shawnee, et al*, 232 Kan. 11, 27 (1982). Kansas courts first recognized and adopted the principles upon which § 324A is based in *Jenree v. Street Railway Co.,* 86 Kan. 479 (1912). *Gooch v. Bethel A.M.E. Church*, 246 Kan. 663, 669 (1990).

In *Schmeck*, the plaintiff was injured at an intersection in the City of Shawnee while driving. The City had hired co-defendant Kansas City Power and Light (KCPL) to design a proper traffic control system that the City would install. In holding that the trial court had properly applied § 324A to the plaintiff's claim against KCPL, the Kansas Supreme Court reaffirmed that Kansas courts recognize that public policy considerations impose a duty upon

parties to private contracts, running to third persons, where negligence in performance creates a danger to the general public. 232 Kan. at 27.

The threshold requirement for the application of § 324A is that the defendant must undertake, gratuitously or for consideration, to render services to another. *Gooch*, 246 Kan. at 669-670. The Kansas Supreme Court in *Gooch* stated:

> In each of the Kansas cases imposing liability under § 324A, it was clear that this requirement was met. In *Schmeck v. City of Shawnee, 232 Kan. 11, 651 P.2d 585 (1982)*, KCPL agreed to and was hired to render traffic engineering services to the City. In *Ingram v. Howard-Needles-Tammen & Bergendoff, 234 Kan. 289, 672 P.2d 1083 (1983)*, the Kansas Turnpike Authority hired Howard-Needles as its consulting engineers to make safety inspections of the turnpike and thus render services to the KTA. In *Cansler v. State, 234 Kan. 554, 675 P.2d 57 (1984)*, there was evidence the county agreed with Kansas State Penitentiary officials and other law enforcement agencies to notify these agencies of escapes from the penitentiary.

246 Kan. at 669-670.

As pleaded in this case, Primus contracted with Jensen Farms to perform a food safety audit of the fruit packing plant's processes and procedures, the purpose of which was to advise Jensen Farms of the safety of the food products that were delivered by that plant for the ultimate consumption by consumers. The court finds the plaintiffs have pleaded sufficient facts to support the undertaking element of § 324A of the negligence claim against Primus.

With the finding that the plaintiffs have sufficiently pleaded an undertaking, the court considers the general application of § 324A to this case. The court finds helpful the Kansas Supreme Court's decision in *Ingram v. Howard-Needles-Tammen and Bergendoff*, 234 Kan.

289 (1983).

A wrongful death case, the decedent in *Ingram* was killed while driving across a bridge maintained by the Kansas Turnpike Authority (KTA). The decedent's tractor-trailer struck a large hole that was in the final stages of deterioration and caused the truck to swerve, hit a guard rail and plunged twenty feet to the ground. The defendant, Howard-Needles, was an engineering firm that had been hired by the Kansas Turnpike Authority to perform an annual inspection of all the bridges and other facilities of which the Kansas Turnpike was comprised. Howard-Needles had been inspecting the bridges from 1957 through 1977, the date of the accident. Kansas Supreme Court held that the defendant Howard-Needles, as consulting engineers, had a legal duty to members of the traveling public, including Ingram, to exercise reasonable care in providing safety inspections for the turnpike bridges. 234 Kan. at 296. The Court reasoned,

> Clearly, in the case now before us, Howard-Needles, as consulting engineers, contracted to render services to KTA by making annual safety inspections *which the consulting engineers should have recognized were necessary for the safety of the traveling public.* Under the principles of law adopted in *Schmeck,* Howard-Needles owed a duty to the members of the traveling public, including Robert E. Ingram, to exercise reasonable care in providing safety inspection services. In this regard, we also note the annotation at *6 A.L.R.2d 284* which cites cases holding *there is liability to third persons for breach of an assumed duty to inspect property where danger to the public may be involved.*

Id. at 295. (emphasis added)

The court finds the reasoning in *Ingram* to be persuasive and applicable to the Plaintiffs'

claim in this case. Like the engineering firm in *Ingram*, a company that performs food safety audits for a company such as Jensen Farms should have recognized that the inspections were necessary for the safety of the public who consumed Jensen Farms cantaloupes. In this case, both the CDC and the FDA became involved after the *Listeria* outbreak, so public safety has been sufficiently pleaded. Jensen and Frontera advertised that the cantaloupes were "Primus Certified" by the sellers. Accordingly, the court holds that Kansas law imposes a duty on companies such as Primus to consumers to exercise reasonable care, and companies such as Primus can be held liable for negligent acts in performing that duty.

The court finds that the Plaintiffs' Petition sufficiently pleads facts to support the duty element of the negligence action against Primus.[2]

CAUSATION

Primus argues that the plaintiffs have failed to plead sufficient facts to demonstrate that Primus's actions caused the plaintiffs' injuries.

Both sides have accurately stated the law of proximate cause in Kansas. Proximate cause is a prerequisite under Kansas law for finding liability for negligence. *St. Clair v. Denny*, 245 Kan. 414, 419 (1989). Despite the adoption of comparative fault in Kansas, Kansas courts continue to adhere to the common law requirement of proximate cause. *See, Hale v. Brown*, 287 Kan. 320, 323 (2008).

The proximate cause of an injury is the cause that in a natural and continuous sequence, unbroken by any superseding cause, both produced the injury and was necessary for the injury. *Hale,* at 322. The injury must be the natural and probable consequence of the wrongful act. *Id.*

[2] The parties have presented this court with orders from other district courts that have made similar rulings arising out of this incident. *See, Underwood v Jensen Farms*, et al, 6:11CV348 (E.D. Okla March 10, 2014) (after reconsideration); *Braddock v. Primus*, 8:13CV258, (D. Neb. February 5, 2014); *Robertson v. Frontera Produce, et al*, CIV-11-1321 (W.D. Okla. January 24, 2014). Each of these case applied § 324A as adopted by their State appellate courts.

Persons are not responsible for all possible consequences of their negligence, but only those consequences that are probable according ordinary and usual experience. *Id.*

Whether conduct in a given case is the cause in fact or proximate cause of the plaintiff's injuries is normally a question of fact for the jury. *Baker v. City of Garden City*, 240 Kan. 554, 557 (1987). The issue of proximate cause can become a question of law when all the evidence relied upon by a party is undisputed and susceptible of only one inference. *St. Clair*, 245 Kan. at 420.

The court, in its analysis of this issue, is considering only the Petition. This case is not at summary judgment or at a motion made at the close of the Plaintiffs' case. Essentially, the argument is as follows: Jensen Farms and Frontera made the decisions to ship the cantaloupe after the audit, not Primus. Primus had no control over the decision to ship cantaloupes. With this in mind, arguably Jensen Farms and Frontera could have chosen to ship the contaminated cantaloupes even if the audit results had been poor or marginal. As such, the argument is that the Primus audit results could not be the cause of the Plaintiffs' injuries because Jensen Farms and Frontera ultimately had the decision as the intervening cause.

As the court noted, the court is reviewing only the Petition. As such, the court agrees with the Plaintiffs that paragraph 29 of the Petition alleges that Jensen Farms and Frontera would not have distributed the contaminated cantaloupes if Jensen Farms had not passed the audit. Either the statement in paragraph 29 is true or it is not, but the statement is capable of more than one inference. Therefore, the statement is a question of fact to be determined at trial.

If the statement is true, a jury could determine that the Plaintiffs' injuries were the probable consequence of Primus's alleged negligent acts. As result, Primus's motion on the issue of causation fails

LOSS OF CONSORTIUM

The court agrees with the Plaintiffs' argument that the motion to dismiss the loss of consortium claim is derivative of this court's ruling on the motion to dismiss the negligence claim. If the negligence claim survives the motion to dismiss, then the loss of consortium claim also survives the motion.

PUNITIVE DAMAGE CLAIM

Primus's argument appears to be addressing paragraph *b* on pages 19 and 20 of the Petition's prayer for relief, that the claim in paragraph *b* is premature and violates K.S.A. 60-3703. K.S.A. 60-3703 states:

> No tort claim or reference to a tort claim for punitive damages shall be included in a petition or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed. The court may allow the filing of an amended pleading claiming punitive damages on a motion by the party seeking the amended pleading and on the basis of the supporting and opposing affidavits presented that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim pursuant to K.S.A. 60-209, and amendments thereto. The court shall not grant a motion allowing the filing of an amended pleading that includes a claim for punitive damages if the motion for such an order is not filed on or before the date of the final pretrial conference held in the matter.

The court agrees that the claim for punitive damages is premature. However, dismissal of the punitive damage claim is not the appropriate remedy at this stage of the proceeding. The appropriate remedy is for the claim for punitive damages be stricken until an appropriate motion has been timely filed, considered and approved by the court after notice and hearing. The court orders paragraph *b* on pages 19 and 20 of the prayer relief be stricken from the Petition.

CONCLUSION

The court finds the Plaintiffs have stated a claim that sufficiently meets the pleading requirements for a claim of negligence against Primus for which relief can be granted under Kansas law. The Plaintiffs' claim for punitive damages, as stated in paragraph *b* on page 19 and 20, is premature and shall be stricken from the Petition.

IT IS SO ORDERED.

4/20/14
Date

Judge William S. Woolley

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HOMELAND STORES INC.	)	
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Defendants,	)	
	)	
	)	

CERTIFICATE OF MAILING

On this 30th day of April, 2014, I do hereby certify that a true and correct copy of the foregoing **ORDER DENYING MOTION OF DEFENDANT PRIMUS GROUP INC TO DISMISS** was deposited the same in the United States Mail, postage prepared, addressed to the following:

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