

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR MIAMI-
DADE COUNTY, FLORIDA

CASE NO.

ARIANE GUTIERREZ, as Personal
Representative of the Estate of GERARDO
GUTIERREZ, deceased,

Plaintiff,

v.

PUBLIX SUPER MARKETS INC.,

Defendant.

COMPLAINT

COMES NOW the Plaintiff, ARIANE GUTIERREZ, as Personal Representative of the Estate of GERARDO GUTIERREZ, deceased, and hereby sues the Defendant, PUBLIX SUPER MARKETS, INC., and alleges as follows:

1. This is an action for damages in excess of \$30,000 exclusive of interest and costs.
2. At all times material hereto, the Plaintiff was or will soon be the duly appointed Personal Representative of the Estate of GERARDO GUTIERREZ, deceased.
3. At all times material hereto, the Plaintiff and GERARDO GUTIERREZ are and/or were residents of Miami-Dade County, Florida.
4. At all times material hereto, the Defendant, PUBLIX SUPER MARKETS, INC., (“PUBLIX”) was and is a Florida corporation doing business in the State of Florida and was the employer of GERARDO GUTIERREZ, deceased.

5. At all times material hereto, GERARDO GUTIERREZ, age 70, worked in the deli department of the PUBLIX store located at 1920 West Avenue in Miami Beach, Florida.

6. On January 17, 2020, the Centers for Disease Control and Prevention (“CDC”) announced enhanced screenings for those traveling to the United States in order to detect symptoms associated with the 2019 novel coronavirus (“COVID-19”), which was of increasing concern at that time.

7. COVID-19 is a dangerous, contagious respiratory disease caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), to which the general public can be easily exposed and it is not characteristic of or peculiar to any specific trade, occupation, process, or employment.

8. On January 30, 2020, the World Health Organization (“WHO”) declared a "public health emergency of international concern" because of the outbreak of COVID-19.

9. On January 31, 2020, United States Health and Human Services Secretary Alex M. Azar II declared a public health emergency indicating that COVID-19 posed a serious public health threat here in the United States.

10. On March 1, 2020, Florida reported its first confirmed case of COVID-19.

11. On March 1, 2020, Florida Governor Ron DeSantis issued Executive Order 20-51 directing the Florida Department of Health to issue a Public Health Emergency. That same day, the Florida Surgeon General and State Health Officer declared a Public Health Emergency existed in the State of Florida as a result of COVID-19.

12. On March 9, 2020, Florida Governor Ron DeSantis issued Executive Order 20-52 officially declaring a State of Emergency as a result of COVID-19.

13. On March 12, 2020, the President of the United States declared that the COVID-19 outbreak constituted a national emergency. At that time, 1,645 people from 47 states had been infected with the virus. By March 14, 2020, 56 people had died due to COVID-19 and the numbers were growing every day.

14. On March 16, 2020, the Centers for Disease Control and Prevention (“CDC”) issued guidance recommending that people adopt social-distancing measures to reduce their exposure to the deadly COVID-19 virus. These measures were extended on March 29, 2020, when the number of known deaths involving COVID-19 climbed to 3,169.

15. On March 24, 2020, in light of the deadly nature of COVID-19 and its respiratory transmission, Governor DeSantis issued Executive Order 20-83 directing the State Surgeon General and State Health Officer to issue a public health advisory urging the public to avoid social gatherings of 10 or more people and urging those who could work remotely to do so.

16. By late March 2020, COVID-19 had become a national crisis not seen in the past hundred years. Infection and death rates were growing daily, there was no vaccine to stop the transmission and there was no effective treatment. Life as we had known it had totally changed and people were scared. It is against this backdrop that PUBLIX’s actions must be scrutinized.

17. According to PUBLIX’s website, it “cares about the health of [its] associates and customers.” On or about March 25, 2020, PUBLIX uploaded to its website a statement from its CEO, Todd Jones stating: “PUBLIX has remained in close contact with the Centers for Disease Control and Prevention (CDC) and other federal and state agencies since January to monitor developments and updated guidance on coronavirus (COVID-19).” According to Mr. Jones, PUBLIX would “continue to focus on keeping [its] associates healthy—and [its] stores open and

stocked—to serve and support all our communities.” Mr. Jones further stated that PUBLIX was working “around the clock” to ensure its stores were adequately sanitized.

18. In reality, PUBLIX’s conduct at that time stood in stark contrast to Mr. Jones’ statement. During the very time period that PUBLIX was touting its efforts to keep employees and customers safe, PUBLIX was prohibiting employees from wearing personal protective equipment of any type despite the rapidly escalating COVID-19 virus.

19. Incredibly, at least one PUBLIX employee was reportedly told, “You can either work without a mask or go home.” Making matters worse, another employee reported, “We have been instructed to not wear gloves or masks in case we ‘incite panic’ on the floor. There is disciplinary action if we refuse to remove them.”

20. On March 19, 2020, just six days prior to Mr. Jones’ statement, the Occupational Safety and Health Administration (“OSHA”) received a complaint stating that the PUBLIX store located at 14601 South Dixie Highway in Palmetto Bay, Florida was “refusing to let employees wear gloves or masks because of corporate claiming it will scare the customers”

21. The next day, on March 20, 2020, OSHA received another complaint regarding the PUBLIX store located at 2270 SW 27th Avenue, Miami, Florida. A customer reported that employees at the PUBLIX were not permitted to wear gloves or masks despite the fact that there were over 100 reported cases of COVID-19 in Florida at that time.

22. On March 21, 2020, OSHA received yet another complaint about PUBLIX. The caller ominously described the complaint as “life threatening.” According to the caller—an employee of a PUBLIX store in Destin, Florida—PUBLIX had “**ordered** [employees] not to wear masks.” (emphasis added).

23. On March 23, 2020, PUBLIX was notified by OSHA that it had received notice of alleged workplace hazards at a PUBLIX store in Tallahassee, Florida. Specifically, OSHA had been informed that PUBLIX was not providing employees with personal protective equipment despite the mounting COVID-19 crisis. Even more concerning, an employee reported that PUBLIX associates were “barred from wearing [gloves].” According to notes taken by the OSHA representative, PUBLIX, consistent with its callous disregard for the safety of its employees, declined the employee’s request for a mask and gloves because it “didn’t want customers to panic.”

24. On March 24, 2020, PUBLIX was notified by OSHA that it had received another notice of alleged workplace hazards at a PUBLIX store in Sandestin, Florida. In that report, OSHA had been informed that PUBLIX “[e]mployees are not allowed to wear their personally provided PPE in fear of contracting the COVID-19 virus.” The employee reported that PUBLIX “prohibited [employees] from wearing face masks to protect themselves from breathing in the coronavirus from the hundreds of customers who com[e] to the store every day. The store provides no such protection for them.”

25. In an e-mail dated April 3, 2020, Paul Coil, PUBLIX’s Senior Manager for safety, admitted that “PUBLIX previously prohibited associates from voluntarily wearing gloves or masks.” Mr. Coil explained that PUBLIX had imposed this prohibition allegedly based upon CDC guidance asking people to refrain from using masks so that the supply chain could be preserved for health care workers. At best, this statement ignores the fact that many of PUBLIX’s employees could not socially distance in compliance with the CDC guidelines issued in March of 2020. At worst, it was an after-the-fact excuse to cover up what PUBLIX’s employees were told by management: you cannot wear the masks, even if you bring your own, because it scares off the

customers. PUBLIX's concerns about losing business, however, substantially increased the risk of COVID-19 exposure to each of its employees and in particular, GERARDO GUTIERREZ.

26. In his April 3, 2020 e-mail, Mr. Coil stated that PUBLIX would only "allow select associates who are not normally required to wear a mask or gloves the option to [wear] these items for their personal comfort." Meanwhile, just two days earlier, Mr. Coil had written to OSHA's Jacksonville office that PUBLIX would begin allowing associates to wear masks/gloves "on a voluntary basis (where it does not impact food safety guidelines)."

27. Despite its public statements, PUBLIX lagged behind its competitors every step of the way, knowingly endangering its employees and customers by exposing them to the very real risk that they would contract COVID-19 and die.

28. By contrast, several other large grocery stores at the time were allowing and encouraging employees to wear masks and other personal protective equipment, checking employees' temperatures, and limiting the number of customers who could enter their store at one time. PUBLIX, however, did none of that at that time.

29. As COVID-19 was spreading throughout Florida, unlike its competitors, PUBLIX prohibited employees, including the decedent, GERARDO GUTIERREZ, from wearing masks and gloves.

30. GERARDO GUTIERREZ, was told by PUBLIX that he could not wear a mask despite the fact that he wanted to wear one, but he continued to go to work each day because he believed PUBLIX's statements that it was taking all measures necessary to keep him safe.

31. PUBLIX, however, minimized, downplayed, misrepresented, and otherwise concealed the risk posed to its employees by its prohibition on masks and other personal protective equipment. PUBLIX was more concerned with protecting its sales and profits fabricating the

excuse that customers would be “turned off” by employees wearing masks. PUBLIX intentionally chose to protect sales over the health and well-being of its employees and customers knowing that employees, especially a 70-year employee working next to a sick co-worker, such as GERARDO GUTIERREZ, would be exposed to COVID-19 and die.

32. PUBLIX’s conduct served to provide false comfort to GERARDO GUTIERREZ that masks would *not* prove effective in preventing the spread of COVID-19 when it knew that just the opposite was true.

33. In March 2020, PUBLIX employees across the state were becoming infected with COVID-19 and PUBLIX knew that. Meanwhile, PUBLIX continued to prohibit employees, including GERARDO GUTIERREZ and others in the deli department, from wearing protective masks despite their close proximity to other employees, customers, and suppliers who were undoubtedly transmitters of the virus.

34. On March 27, 2020 and March 28, 2020, GERARDO GUTIERREZ worked in the deli department of the PUBLIX supermarket located at 1920 West Avenue, Miami Beach, Florida alongside a co-worker, “Jane Doe”.¹

35. At that time, Jane Doe was exhibiting signs and symptoms consistent with COVID-19, including coughing.

36. PUBLIX knew or should have known that Jane Doe was exhibiting signs and symptoms consistent with COVID-19 prior to and/or soon after her arrival for work at the store, but failed to send her home or ensure that she did not present for work. PUBLIX also knew that Jane Doe was not wearing a mask due to PUBLIX’s policy prohibiting personal protective

¹ This employee’s first name is known to Plaintiff and will be provided in discovery.

equipment, but did not order Jane Doe to quarantine at home and did nothing to protect GERARDO GUTIERREZ who was working alongside her.

37. Shortly thereafter, Jane Doe tested positive for COVID-19, which was reported to PUBLIX.

38. On April 2, 2020, PUBLIX sent GERARDO GUTIERREZ home from work and told him to self-isolate based upon his contact with Jane Doe. He complied, but it was too little, too late.

39. Not surprisingly, on April 6, 2020, GERARDO GUTIERREZ, like Jane Doe, began experiencing a cough and fever. He called his health care provider and made an appointment for the following day.

40. On April 7, 2020 GERARDO GUTIERREZ continued to experience a fever and was tested for COVID-19. The test came back positive. GERARDO GUTIERREZ became yet another COVID-19 casualty that PUBLIX knew and expected when it continuously enforced its prohibition on personal protective equipment. It was not a question of if, but when this would happen to him.

41. On or about April 10, 2020 GERARDO GUTIERREZ was hospitalized due to complications caused by COVID-19.

42. On April 28, 2020, GERARDO GUTIERREZ's physicians notified his family that a priest was being called to read GERARDO GUTIERREZ his last rights. Family and friends gathered by Zoom to say their goodbyes, unable to hold his hand or give him one last hug. Later that day, GERARDO GUTIERREZ died as a result of complications caused by COVID-19.

43. As a direct and proximate result of GERARDO GUTIERREZ's death the Plaintiff brings this action on behalf of the following:

- a. On behalf of Ariane Gutierrez, the decedent's surviving daughter, the Plaintiff seeks damages for lost support and services due to her father's death, the value of lost parental companionship, instruction and guidance and mental pain and suffering from the date of his death. These losses are either permanent or continuing in nature and Ariane has suffered these losses in the past and will suffer these losses in the future.
- b. On behalf of Gerardo Gutierrez, the decedent's surviving son, the Plaintiff seeks damages for lost support and services due to his father's death, the value of lost parental companionship, instruction and guidance and mental pain and suffering from the date of his death. These losses are either permanent or continuing in nature and Gerardo has suffered these losses in the past and will suffer these losses in the future.
- c. On behalf of Rene Gutierrez, the decedent's surviving son, the Plaintiff seeks damages for lost support and services due to his father's death, the value of lost parental companionship, instruction and guidance and mental pain and suffering from the date of his death. These losses are either permanent or continuing in nature and Rene has suffered these losses in the past and will suffer these losses in the future.
- d. On behalf of Jerryana Gutierrez, the decedent's surviving daughter, the Plaintiff seeks damages for lost support and services due to her father's death, the value of lost parental companionship, instruction and guidance and mental pain and suffering from the date of his death. These losses are either permanent or

continuing in nature and Jerryana has suffered these losses in the past and will suffer these losses in the future.

- e. On behalf of the Estate of GERARDO GUTIERREZ, the Plaintiff seeks damages for loss of prospective net accumulations which might have been reasonably expected but for his wrongful death.
- f. Medical and funeral expenses resulting from the death of GERARDO GUTIERREZ paid by survivors.

COUNT I

44. Plaintiff realleges paragraph 1 – 43 as though set forth specifically herein and further alleges as follows:

45. PUBLIX was the employer of GERARDO GUTIERREZ, and owner of the store where he was employed.

46. PUBLIX knew and/or had been warned of the dangers posed by COVID-19, particularly as it pertained to grocery workers and older employees like GERARDO GUTIERREZ.

47. PUBLIX knew and/or had been warned that employees in its deli department, including GERARDO GUTIERREZ and Jane Doe would be working in close proximity to one another and unable to exercise any meaningful social distancing.

48. PUBLIX knew and/or had been warned that if employees, such as Jane Doe and GERARDO GUTIERREZ, were prohibited from wearing masks it would render them much more susceptible to becoming infected with COVID-19 and/or spreading COVID-19 to others, particularly where the employees were working in close quarters and amongst many customers, such as in the deli department where GERARDO GUTIERREZ and Jane Doe worked.

49. PUBLIX knew and/or had been warned that older employees such as GERARDO GUTIERREZ, were at increased risk for severe illness and/or death caused by COVID-19.

50. PUBLIX knew and/or had been warned that the conditions it imposed on GERARDO GUTIERREZ and his fellow employees were dangerous and would expose them to the risk of death, but failed to take the necessary steps to ensure the safety of its employees and customers.

51. PUBLIX was aware that many of its employees throughout the state were becoming infected with COVID-19 and that whatever steps it claimed to be taking for the safety of its employees were ineffective.

52. Through customer and employee complaints, PUBLIX had been warned that its policies with respect to employee use of personal protective equipment were woefully inadequate and causing employees to become sick, but failed to take timely action.

53. PUBLIX did not take timely steps to ensure the use of personal protective equipment by its employees. Instead, PUBLIX prohibited its employees from utilizing personal protective equipment which put them at increased risk of contracting the virus and subsequently dying.

54. PUBLIX intentionally misrepresented and concealed the danger posed by its policies, assuaging its employees, including GERARDO GUTIERREZ, to falsely believe that the masks and other personal protective equipment were not necessary to protect against COVID-19 when, in fact, they were.

55. PUBLIX knew that by prohibiting GERARDO GUTIERREZ from wearing a mask he would be needlessly exposed to the dangers of COVID-19 and virtually certain to contract COVID-19 from his infected co-worker and die.

56. As a result of PUBLIX's actions, GERARDO GUTIERREZ died and Plaintiff suffered the damages described above.

COUNT II

57. Plaintiff realleges and reavers paragraphs 1 – 43 as though set forth specifically herein and further alleges as follows:

58. PUBLIX had a duty to not knowingly expose GERARDO GUTIERREZ to COVID-19 and the risk of subsequent death, just so it could continue to make money for its shareholders.

59. PUBLIX owed a duty to GERARDO GUTIERREZ to maintain its premises in a reasonably safe condition. This duty included, but was not limited to, ensuring that employees known or suspected to be sick with COVID-19 did not present to work or were immediately sent home, and ensuring that employees were able to use personal protective equipment for their protection and prevention against the spread of COVID-19.

60. PUBLIX also had a duty to warn GERARDO GUTIERREZ of dangerous conditions on its premises, including the presence of others suspected to be sick with COVID-19, and to warn GERARDO GUTIERREZ of the potential for the spread of COVID-19 while he was at work.

61. PUBLIX breached its duty and was negligent in at least the following respects:

- a. Failing to allow its employees, including GERARDO GUTIERREZ to wear personal protective equipment;
- b. Failing to ensure that its employees wore personal protective equipment while working at PUBLIX;
- c. Failing to ensure that employees who were sick did not present to work; and

- d. Failing to ensure that employees who exhibited symptoms consistent with COVID-19 were immediately sent home.

62. As a result of PUBLIX's actions, GERARDO GUTIERREZ contracted COVID-19 and died and Plaintiff suffered the damages described above.

WHEREFORE, the Plaintiff demands judgment against the Defendant and demands a trial by jury of all issues triable as of right by a jury.

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