

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Syerra Rodriguez, by her natural parents)
and next friends, Andre Rodriguez and)
Anissa Rodriguez, and individually,)
)
Plaintiffs,)
)
v.) C.A. No. N11C-08-029 JRJ
)
Intel Corporation, Motorola Solutions, Inc)
(f/k/a Motorola, Inc.), Celerity Group, Inc.,)
Kinetic Systems, Inc., Biokinetics, Inc.,)
Foster Wheeler Biokinetics, Inc., Kinetic)
Systems, Inc., and XYZ Corporations I-III,)
)
Defendants.)

Date Submitted: November 6, 2013

Date Decided: January 28, 2014

OPINION

Upon Defendants' Motion to Dismiss: **GRANTED**

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Jurden, J.

I. INTRODUCTION

This is a “clean room”¹ case involving Plaintiff Father’s alleged exposures to reproductively harmful chemicals while working as an independent contractor at the premises of Defendants Intel Corporation (“Intel”) and Motorola Solutions, Inc. (“Motorola”). While the case centers on Plaintiff Father’s exposures, the claims are based on Minor Plaintiff’s several birth defects, which Plaintiffs allege are the result of Plaintiff Father’s exposures. Defendants Intel and Motorola move to dismiss Plaintiffs’ First Amended Complaint (“FAC”), arguing that Plaintiffs fail to plead a legally viable theory of causation and fail to state a claim under Arizona law. For the reasons set forth below, Defendants’ Motion to Dismiss is **GRANTED**.

II. FACTS

Minor Plaintiff Syerra Rodriguez (“Syerra”) was born July 18, 1998, with severe birth defects, including Crouzon’s syndrome, acanthosis nigricans, coronal craniosynostosis, bilateral choanal atresia, hydrocephalus, chiari malformation, and thoracic spinal asymmetry.² Plaintiffs allege that Syerra’s injuries were caused by her father’s prolonged exposure to reproductively toxic chemicals while working

¹ See *Tumlinson v. Adv. Micro Devices, Inc.*, 2012 WL 1415777, at *1, n. 2 (Del. Super. Jan. 6, 2012) (Silverman, J) (“A clean room is a manufacturing area with particle counts less than or equal to 100 particles per cubic foot [], of a particle size greater than 0.5 microns.”).

² First Amended Complaint (“FAC”), Apr. 24, 2013, Trans. ID 51955162, ¶ 51.

as a sheet metal apprentice at semiconductor manufacturing facilities³ owned, operated, and controlled by Intel and Motorola.⁴ Syerra's father, Plaintiff Andre Rodriguez ("Andre"), was not an employee of Intel or Motorola, rather he was an independent contractor employed by J.B. Rodgers, a company with which these Defendants contracted to perform installation, maintenance, and other services at their facilities.⁵

Throughout his work at Intel and Motorola, Andre frequently worked in and around fabrication areas and elsewhere where wafers, microchips and boards were manufactured.⁶ Plaintiffs allege that "[n]o generalized ventilation system was configured explicitly to protect the workers from inhalation or skin exposure to the liquids, vapors, gases and fumes from the chemicals – in clean rooms or elsewhere at Intel or Motorola."⁷ Andre claims that as a consequence of his work in or around these areas, he was exposed to reproductively toxic chemicals and substances including, but not limited to, ethylene and propylene-based glycol ethers, fluorine compounds, chlorinated compounds, arsenic compounds, organic

³ The Court will refer to "facilities" and "premises" interchangeably, as did Defendants' briefing. *See* Defts. Intel and Motorola's Mot. To Dismiss ("Mot."), May 10, 2013, Trans. ID 52230051, 3; Defts.' Reply Br. ("Reply"), 11-12.

⁴ *Id.* ¶¶ 10, 41. Intel and Motorola are Delaware Corporations. *Id.* ¶¶ 3-4.

⁵ *Id.* ¶ 13. The claims against Defendants other than Motorola and Intel are based upon their assumption of liabilities as successors in interest of J.B. Rodgers. *See id.* ¶¶ 14-20.

⁶ *Id.* ¶¶ 27, 29.

⁷ *Id.*

solvents (including toluene and acetone) and radio frequency and ionizing radiation.⁸

Plaintiffs filed their FAC on April 24, 2013, alleging, *inter alia*: Intel, Motorola and J.B. Rodgers knew and deliberately withheld from Andre that the substances to which he was exposed posed severe hazards to the offspring of workers having dermal or respiratory contact with them;⁹ Defendants failed to warn Andre of the dangers;¹⁰ Defendants failed to perform adequate testing and provide appropriate protection for Andre;¹¹ Defendants breached express warranties regarding the safety of the chemicals in use;¹² Defendants assumed a duty to protect Syerra from harm by falsely reassuring her parents that the chemicals present were harmless to their future offspring;¹³ and, Andre relied on these false assurances to Syerra's detriment.¹⁴ Plaintiffs assert claims of negligence (Count I), premises liability (Count II), strict liability (Count III) abnormally dangerous and ultra-hazardous activity (Count IV), willful and wanton misconduct (Count V), breach of an assumed duty (Count VI), vicarious liability (Count VII), and loss of consortium (Count VIII).¹⁵

⁸ *Id.* ¶¶ 23, 32.

⁹ *Id.* ¶¶ 33-38.

¹⁰ *Id.* ¶ 34.

¹¹ *Id.* ¶¶ 35-36.

¹² *Id.* ¶¶ 37-40.

¹³ *Id.* ¶ 41.

¹⁴ *Id.* ¶¶ 60-67.

¹⁵ *See id.* ¶¶ 92-146.

Notably, Plaintiffs expressly plead in the FAC that they “do not allege or assert that [Andre] sustained any injury” and in the event that he did, “that injury was not the cause of [Syerra’s] injury.”¹⁶ Specifically, Plaintiffs allege “only [Syerra] possesses a direct right of action as a consequence of her direct injuries which arose upon” her conception,¹⁷ and Parent Plaintiffs’ only cause of action is for loss of consortium.¹⁸ Plaintiffs do not allege that Mother Plaintiff was on Defendants’ premises before, during, or after Syerra’s conception. Plaintiffs do not allege that Syerra was ever present on Defendants’ premises while *in utero*.

III. DEFENDANTS’ ARGUMENTS

Defendants Intel and Motorola move to dismiss Plaintiffs’ case pursuant to Superior Court Civil Rule 12(b)(6).¹⁹ Initially, Defendants argue that Plaintiffs fail to establish a causal link between Defendants alleged tortious conduct and Syerra’s injuries.²⁰ Then, asserting 11 separate arguments, Defendants contend that each of Plaintiffs’ claims fail as a matter of law: (1) Syerra’s premises liability fails because she was never on Defendants’ premises;²¹ (2) Defendants did not have a

¹⁶ *Id.* ¶ 58.

¹⁷ *Id.* ¶ 50. Plaintiffs specifically allege that Syerra “suffered direct injuries that she sustained as a consequence of Defendants’ [negligence] and [Syerra’s injuries] are not derived from or secondary to injury suffered by her father. *Id.* ¶ 57.

¹⁸ *See id.* ¶¶ 145-46.

¹⁹ Defendants Foster Wheeler Biokinetics, Inc. and Biokinetics, Inc. and Kinetic Systems, Inc. have filed joinders. *See* Trans. ID 54097431, Trans. ID 54096637.

²⁰ Mot. 7-18.

²¹ *Id.* 9-10.

relationship with Syerra that would give rise to a duty;²² (3) Defendants did not assume a duty to the preconceived Syerra;²³ (4) Intel and Motorola cannot be vicariously liable for J.B. Rogers under Arizona law;²⁴ (5) Plaintiffs’ allegations are vague and conclusory;²⁵ (6) Arizona common law has not created nor recognized preconception torts;²⁶ (7) Applying Arizona law in a way to recognize a preconception tort would violate separation of powers and would “open a Pandora’s box of constitutional threats;”²⁷ (8) Plaintiffs fail to state a claim for strict liability because the allegedly hazardous chemicals were not used by a member of the consuming public, but in the context of employment;²⁸ (9) Plaintiffs’ “abnormally dangerous activity” claim fails because Syerra was never on the premises;²⁹ (10) Plaintiff Parents’ loss of consortium claim fails because Syerra’s claims fail;³⁰ and, (11) Plaintiffs’ allegations of “willful and wanton misconduct” cannot create a claim for punitive damages.³¹

While the parties presented a thorough argument on this motion, they focused much of their time on three specific issues: (1) whether preconception tort claims are cognizable under Arizona law; (2) whether Arizona law creates a duty

²² *Id.* 10-15.

²³ *Id.* 15-18.

²⁴ *Id.* 18-19.

²⁵ *Id.* 19-20.

²⁶ *Id.* 20-21.

²⁷ *Id.* 21-26.

²⁸ *Id.* 26-27.

²⁹ *Id.* 27-28.

³⁰ *Id.* 28.

³¹ *Id.*

between employers and the future children of independent contractors; and, (3) whether Plaintiffs allege a valid theory of causation. Following oral argument, the Court requested supplemental briefing on “take home exposures.”³² That briefing is complete and this matter is now ripe for decision.

The Court will address the three main arguments presented at oral argument, *seriatim*.

IV. STANDARD

Delaware is a notice pleading jurisdiction.³³ Superior Court Civil Rule 8 requires that a complaint “contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which the party deems itself entitled.” A “pleading need not set into detail the facts upon which it is based as long as it gives the other party fair notice of what the claim is and the grounds upon which it rests. The details can be obtained through [...] discovery.”³⁴ “[A]ll pleadings shall be so construed as to do substantial justice.”³⁵

Superior Court Civil Rule 9(b) requires that circumstances constituting fraud and negligence be pleaded with particularity. That requirement in a toxic exposure

³² Trans. ID 53499641.

³³ *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005).

³⁴ *Delle Donne & Associates, LLP v. Miller Elevator Serv. Co.*, 840 A.2d 1244, 1252 (Del. 2004).

³⁵ Super. Ct. Civ. R. 8(f).

context is satisfied when defendants are given fair notice of claims and a well-directed sense of time, location, and general circumstances of exposure.³⁶

In deciding a motion to dismiss, the Court must accept well-pleaded allegations as true, and draw all reasonable inferences in the non-movant's favor.³⁷

Allegations are well-pleaded if they place the defendant on notice of the claim.³⁸

The Court will not grant a motion to dismiss “unless it appears to a certainty that the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof,”³⁹ however, the Court “will not consider conclusory allegations that lack specific supporting factual allegations,” nor will it “accept every strained interpretation of the allegations.”⁴⁰

V. DISCUSSION

A. Arizona Does Not Recognize Preconception Tort Claims⁴¹

According to Plaintiffs, Arizona case law permits preconception tort claims and, even if it does not, Arizona's Constitution guarantees Syerra's right to

³⁶ See *In Re Benzene Litig.*, 2007 WL 625054, at *7 (Del. Super. Feb. 26, 2007) (Slight, J.).

³⁷ *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

³⁸ See *Precision Air, Inc. v. Stand. Chlorine of Del., Inc.*, 654 A.2d 403, 406 (Del. 1995).

³⁹ *Klein v. Sunbeam Corp.*, 94 A.2d 385, 391 (Del. 1952).

⁴⁰ See *Nieves v. All Star Title, Inc.*, 2010 WL 4227057, at * 4 (Del. Super. Oct. 22, 2010), *aff'd*, 21 A.3d 597 (Del. 2011) (citations omitted).

⁴¹ For purposes of this motion, the parties assume Arizona law applies. While Plaintiffs faintly argue for application of Illinois law, the state with the most significant relationship to this litigation is clearly Arizona: Plaintiffs live in Arizona; the alleged exposures and injuries occurred in Arizona; and, Syerra was born in Arizona. See *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 40 (Del. 1991); Mot. 5; Pltfs.' Ans. Br. (“Ans.”), June 28, 2013, Trans. ID 53067054, at 34-35.

recovery for her alleged preconception harms.⁴² Plaintiffs argue that Defendants are attempting to strip Syerra of her constitutionally protected right to file a preconception tort claim.⁴³

1. Arizona Case Law Does Not Provide for Preconception Torts

Defendants point out that Plaintiffs do not allege Syerra was exposed to allegedly harmful chemicals and substances while *in utero*, and no Arizona court has ever permitted a preconception claim on behalf of a minor plaintiff who was not otherwise exposed *in utero* through the parent plaintiff.⁴⁴ Defendants further point out that the Arizona Legislature has abolished general negligence wrongful birth and wrongful life claims brought by or on behalf of children, including those born with birth defects.⁴⁵ Defendants note that unlike California, which passed a law explicitly changing its common law to enable fetal tort claims,⁴⁶ Arizona has never passed a fetal personhood amendment.⁴⁷

Plaintiffs counter by relying on this Court's decision in *Molina v. On Semiconductor Corp.*⁴⁸ Plaintiffs argue that *Molina*, in its interpretation of the

⁴² Ans. 7, 11.

⁴³ *Id.* at 1.

⁴⁴ *See* Reply 6.

⁴⁵ *Id.*; *See*, A.R.S. § 12-719 (2012).

⁴⁶ *See* Cal. Civ. Code Section 43.1.

⁴⁷ *See Snyder v. Michael's Stores Inc.*, 945 P.2d 781, 783 (Cal. 1997).

⁴⁸ 2013 Del. Super. LEXIS 115 (Del. Super. Mar. 27, 2013) (Jurden, J.), *modified*, 2013 WL 4528858 (Del. Super. Aug. 2, 2013).

Arizona Supreme Court’s *Kenyon v. Hammer*⁴⁹ opinion, recognized a child’s right to bring claims for injuries resulting from preconception harms.⁵⁰ But *Molina* is inapposite because it involved *in utero* exposure that occurred during the minor plaintiff’s gestation, while the pregnant mother worked and was directly exposed.⁵¹ And, *Kenyon* involved a review of Arizona’s statute of limitations as it applied to wrongful death and personal injury claims.⁵² *Kenyon* stands for the proposition that under Arizona’s constitutional anti-abrogation clause, a statute that “bars a cause of action before it could legitimately be brought abrogates rather than limits the cause of action and offends [the Arizona Constitution.]”⁵³ *Kenyon* and *Molina* are not helpful here.

Plaintiffs further rely on *Summerfield v. Superior Court*⁵⁴ and *Walker v. Mart*⁵⁵ to support their claim that Arizona case law creates a cause of action for preconception torts. In *Summerfield*,⁵⁶ an *en banc* Arizona Supreme Court determined the meaning of “person” as it relates to Arizona’s wrongful death

⁴⁹ 688 P.2d 961 (Ariz. 1984).

⁵⁰ 2013 Del. Super. LEXIS 115, at *9. Plaintiffs specifically rely on the sentence: “In so holding, the Arizona Supreme Court recognized the right of a child to sue for injury or death caused by tortious conduct that occurred years *prior to conception*.” (emphasis in original). The Court eliminated that sentence in its modified opinion. *See* 2013 WL 4528858, at *3 (Del. Super. Aug. 2, 2013).

⁵¹ 2013 Del. Super. LEXIS 115, at *3-4.

⁵² 688 P.2d at 963.

⁵³ *Id.* at 967.

⁵⁴ 698 P.2d 712 (Ariz. 1985) (en banc).

⁵⁵ 790 P.2d 735 (Ariz. 1990) (en banc) (holding that a claim for wrongful life is not cognizable in Arizona).

⁵⁶ While both *Summerfield* and *Walker* are *en banc* decisions from the Arizona Supreme Court, the Court will only examine *Summerfield* as it is more comparable to the case at bar.

statute.⁵⁷ After snaking through bases in common law, the *Summerfield* court determined that, “it is the ability of a fetus to sustain life independently of the mother’s body that should determine when tort law should recognize it as a ‘person’ whose loss is compensable to the survivors.”⁵⁸ *Summerfield* has been consistently followed in Arizona.⁵⁹

In 2005, the Arizona Court of Appeals reviewed *Summerfield* in a case involving “three-day-old eight-cell pre-embryos.”⁶⁰ In *Jeter v. Mayo Clinic Arizona*, the appeals court affirmed the trial court’s dismissal of a wrongful death claim on the basis that a “cryopreserved, three-day-old eight-cell pre-embryo is not a ‘person’ for whose loss or destruction [can be] recovered under Arizona’s wrongful death statutes as interpreted in *Summerfield*.”⁶¹ The *Jeter* plaintiffs asked the Arizona Court of Appeals to expand the definition of “person” in furtherance of “the development of the common-law attributes of wrongful death actions, especially when the Legislature has not ‘occupied the field so fully as to preclude judicial development.’”⁶² The *Jeter* court declined to expand the definition as a

⁵⁷ *Summerfield*, 698 P.2d at 719.

⁵⁸ *Id.* at 722 (finding viability a “less arbitrary and more logical” delineation in determining when a loss to the survivors occurs).

⁵⁹ See *Jeter v. Mayo Clinic Arizona*, 121 P.3d 1256 (Ariz. Ct. App. 2005).

⁶⁰ *Id.*

⁶¹ *Id.* at 1261.

⁶² *Id.* at 1265.

matter of judicial restraint, finding that “such a decision [] is best left to the Legislature.”⁶³

Contrary to Plaintiffs’ argument here, *Summerfield* and its progeny suggest that Arizona is unwilling to allow someone to sue for injuries they sustained long before becoming a viable fetus.⁶⁴ While this Court determined in *Molina* that Arizona law would recognize a tort claim based on *in utero* exposure, the Court cannot hold, given the lack of any Arizona case law recognizing a preconception tort, that Arizona would recognize such a claim on the facts alleged here.⁶⁵

Notably, all the cases submitted by Plaintiffs in support of their argument involve a *mother’s* exposure or medical condition known to affect a pregnancy.⁶⁶ While this important difference was not mentioned in the parties’ briefs, the Court notes it because these cases indicate a causal link between a mother’s pre or post-conception exposures and the resulting defects to a viable fetus.⁶⁷ Plaintiffs are asking this Court to create a preconception tort cause of action based upon the

⁶³ *Id.*

⁶⁴ *See Jeter*, 121 P.3d at 1267 (noting that cryopreserved embryos, while fertilized, still “only have a remote potential to become viable”).

⁶⁵ As noted by Defendants, the cases cited by Plaintiffs here and relied upon by the Court in *Molina* do not recognize a preconception tort. *See* Ans. 7-1; Reply 6-9. And, from what this Court can glean from the available Arizona cases, when the issue arises before an Arizona court, it will most likely leave the creation of such a cause of action to the state’s legislature. *See Jeter*, 1221 P.3d at 1270.

⁶⁶ *Molina*, 2013 WL 4528858, at *1 (Del. Super. Aug. 2, 2013) (*in-utero* exposure during mother’s employment allegedly resulted in severe birth defects); *Myers v. Hoffman-La Roche*, 170 P.3d 254 (Ariz. Ct. App. 2007) (mother’s use of Acutane during first eight weeks of pregnancy allegedly resulted in daughter’s severe birth defects), ordered depublished, 183 P.3d 544 (Ariz. 2008); *Walker*, 790 P.2d 735 (Ariz. 1990) (doctor failed to diagnose mother’s German measles during first trimester, resulting in minor plaintiff’s severe birth defects); *Summerfield*, 698 P.2d 712 (Ariz. 1985) (mother’s undiagnosed diabetes resulted in stillbirth); *Kenyon*, 688 P.2d 961 (Ariz. 1984) (doctor failed to administer RhoGAM after first child’s birth, resulting in second child’s stillbirth).

⁶⁷ *Id.*

alleged reproductively harmful exposure to a potential father’s sperm.⁶⁸ Plaintiffs’ case does not involve an *in utero*, gestating fetus, or even a “three-day-old eight-cell pre-embryo” – it involves exposure to sperm.⁶⁹ Plaintiffs are not simply asking the Court to expand a definition like the plaintiffs sought in *Jeter*. Rather, Plaintiffs are asking the Court leap from one cause of action – permitting a child’s claim for wrongful exposures while in its mother’s womb – to a factually inapposite one, arising at some nebulous time before a person is even conceived.⁷⁰ Not only would allowing the claims here cause a wake of potentially endless litigation⁷¹ and unintentional ramifications, it would require complicated scientific evidence, which may or may not be available.

2. The Arizona Constitution Does Not Guarantee Preconception Tort Claims

Plaintiffs claim that if Arizona case law does not permit a preconception tort cause of action, then one is recognized under the Arizona Constitution and the

⁶⁸ It is important to note that sperm, unlike an egg, is regenerative. In one month, a male’s testes can produce 12 billion sperm, with approximately 60 to 200 million per ejaculation. *See* University of Pennsylvania Online Medical Encyclopedia, at www.pennmedicine.org/encyclopedia/em_DisplayAnimation.aspx?gcid=000120&ptid=17. The *Jeter* court noted that the cryopreserved embryos, while fertilized, still “only have a remote potential to become viable.” *Jeter*, 121 P.3d at 1267.

⁶⁹ “Sperm must be differentiated from other genetic materials such as embryos, pre-implantation embryos (or pre-embryos), and zygotes” which are various forms of fertilized eggs produced from both male and female contributions. *See* Harvey L. Fiser, J.D., Paula K. Garrett, Ph.D., *Life Begins at Ejaculation: Legislating Sperm as the Potential to Create Life and the Effects on Contracts for Artificial Insemination*, 21 AM. U.J. GENDER SOC. POL’Y & L. 39, 43-44 (2012). As will be discussed, Plaintiffs’ FAC does not allege that father’s sperm was altered, only exposed. Plaintiffs make the “alteration” argument only in their response to Defendants’ Motion to Dismiss and at oral argument. *See* C. Plaintiffs Fail to Allege Causation, n. 121-24, *infra*.

⁷⁰ There are several cases and articles discussing sperm’s categorization in the legal context. *See, e.g., Donovan v. Idant Laboratories*, 625 F.Supp.2d 256 (E.D. Pa. 2009) (sperm as a defective product); *Life Begins at Ejaculation*, 21 AM. U.J. GENDER SOC. POL’Y & L. 39, 47-51; Suriya E.P. Jayanti, *Guarantors of Our Genes: Are Egg Donors Liable for Latent Genetic Disease?*, 58 Am. U. L. Rev. 405, 428-29 (2008).

⁷¹ *See* Mot. 2-3; Reply 3 (“This Court need not – and should not – be dragged down this slippery slope, which rests squarely within the legislative domain and threatens a Pandora’s box of unforeseen consequences.”).

state's evolving common law. Plaintiffs maintain that Syerra's right to seek relief from Defendants is guaranteed by Article 18, § 6 of the Arizona Constitution, which states, "[t]he right of action to recover damages for injuries shall never be abrogated."⁷² Article 18, § 6 applies to those rights that existed at or evolved from common law.⁷³ But preconception torts did not exist at common law, and Plaintiffs have failed to establish that such claims evolved from rights that existed at common law.⁷⁴ The Arizona courts have not recognized a preconception tort claim and there is no statute creating a cause of action for preconception torts.⁷⁵ The Court is not persuaded that the Arizona Constitution affords Syerra the right to seek relief from Defendants when she was never on the Defendants' premises (and thus never exposed to the allegedly harmful chemicals at her father's worksite) and was not in existence when Defendants' allegedly wrongful conduct occurred.

B. Plaintiffs Fail to Allege a Duty Owed to a Preconceived Minor

Plaintiffs argue that even if Arizona law does not explicitly recognize preconception claims, the general duty law of Arizona imposes a duty on

⁷² See Ans. 11.

⁷³ *Cronin v. Sheldon*, 991 P.2d 231, 238 (Ariz. 1999) (en banc) ("[A]rticle 18, § 6 prevents abrogation of all common law actions for negligence, intentional torts, strict liability, defamation, and other actions in tort which trace origins to the common law.").

⁷⁴ See *Kilmer v. Hicks*, 529 P.2d 706, 707 (Ariz. 1974) ("At common law an unborn fetus is not a person") (internal citation dating to 1648), *overruled on other grounds*, *Summerfield*, 698 P.2d 712 (Ariz. 1985); *Snyder*, 945 P.2d at 783 (noting that California law "gives a child the right to maintain an action in tort for *in utero* injuries wrongfully or negligently caused by another, a right that did not exist at common law"). Other than citing to case law for the proposition that common law evolves, Plaintiffs do not offer case law recognizing that the evolution has expanded to preconception torts. Ans. 13-14.

⁷⁵ See *supra*, 1. Arizona's Case Law Does Not Provide for Preconception Torts.

Defendants to the preconceived Syerra. According to Plaintiffs, under Arizona law, Defendants owed a duty to Syerra based on: (1) foreseeability of the harm, (2) a “sufficient relationship” between Defendants and Syerra, (3) a voluntarily assumed duty to Syerra, and (4) Arizona public policy.⁷⁶ Plaintiffs urge the Court to hold that under Arizona law, an employer owes a duty to the preconceived children of independent contractors working on its premises. According to Plaintiffs, to hold otherwise would give “employers [...] license to expose male workers to known reproductively hazardous substances and face no recourse under Arizona law when birth defects foreseeably result.”⁷⁷ Defendants maintain that the common law duty to avoid creating an unreasonable risk of foreseeable harm to others does not create a duty between Defendants and the preconceived minor Plaintiff.⁷⁸ According to Defendants, if they owed a general duty to not cause an unreasonable risk of foreseeable harm, that duty was owed to Andre, not his then potential and unknown future offspring.⁷⁹

1. No Duty Based on Foreseeability

Plaintiffs argue that Defendants owe a duty to Syerra based on the foreseeable harm Defendants’ conduct created.⁸⁰ On this point, both parties cite to

⁷⁶ Ans. 16-23.

⁷⁷ *Id.* 7.

⁷⁸ Mot. 12.

⁷⁹ *Id.*

⁸⁰ Ans. 16.

the Arizona Supreme Court’s *en banc* decision in *Gipson v. Kasey*.⁸¹ In *Gipson*, the Arizona Supreme Court expressly rejected the proposition that duty could be created based on foreseeability, stating “[w]e now expressly hold that foreseeability is not a factor to be considered by courts when making determinations of duty.”⁸² The *Gipson* court reasoned that duty is a threshold legal issue for the court and determining duty based on foreseeability undermines a jury’s fact-finding role.⁸³ According to *Gipson*, “duties of care may arise from special relationships based on contract, family relations, or conduct undertaken by the defendant.”⁸⁴ When determining duty based on a relationship, the *Gipson* court cautioned that the determination is made prior to considering case-specific facts “because a fact-specific discussion of duty conflates the issue with the concepts of breach and causation.”⁸⁵ Apart from a relationship, Arizona may recognize a duty based on public policy.⁸⁶ *Gipson* reiterated that Arizona recognizes “every person is under a duty to avoid creating situations which pose an unreasonable risk of harm to others.”⁸⁷

Because it is clear under Arizona law that there cannot be a duty imposed based on foreseeability of the harm, the Court moves onto the parties’ relationship.

⁸¹ 150 P.3d 228 (Ariz. 2007).

⁸² *Id.* at 231.

⁸³ *Id.*

⁸⁴ *Id.* at 232.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 233, n. 4 (quoting *Ontiveros v. Borak*, 667 P.2d 200 (Ariz. 1983)).

2. No Duty Based on a Relationship

Plaintiffs argue that a duty can arise under Arizona law based on the relationship between the parties, and that the FAC properly alleges Defendants and Syerra had a “sufficient relationship” to create such a duty.⁸⁸ Plaintiffs argue that, “as alleged in the FAC, each of these Defendants was under an obligation to investigate the reproductive hazards to which their workers were exposed.”⁸⁹ But Plaintiffs offer no Arizona case law in support of this argument.

Further, Plaintiffs’ allegations in the FAC only support the argument that a relationship existed between Defendants and *Andre*, not between Defendants and Syerra. Syerra’s mother did not work for Defendants and was never on the premises while pregnant with Syerra. Moreover, Andre was an independent contractor and *not* an employee of Intel or Motorola, thereby causing any relationship between Defendants and Syerra to be even further attenuated.

None of the cases cited by Plaintiffs involve the finding of a sufficient relationship between a preconceived child and a party in Defendants’ position.⁹⁰ Rather, the cases upon which Plaintiffs rely involve direct contact between the parties and a more significant relationship than that alleged by Plaintiffs in their

⁸⁸ Ans. 16-17.

⁸⁹ Ans. 17.

⁹⁰ Ans. 16-17 (citing *Gipson*, 150 P.3d at 232; *Stanley v. McCarver*, 92 P.3d 849, 854 (Ariz. 2004); *Ritchie v. Krasner*, 211 P.3d 1272, 1277-78 (Ariz. Ct. App. 2009)).

FAC.⁹¹ While the Plaintiffs may have alleged a “sufficient” relationship with Andre to justify the existence of a duty owed to him, they have failed to plead a sufficient relationship between Defendants and Syerra to impose a duty on Defendants under Arizona law.

3. No Voluntarily Assumed Duty

Plaintiffs argue that because Defendants represented to their workers “that they were undertaking to protect their future offspring from any reproductive harm,” and Andre relied on those representations, “those allegations [] support liability to Syerra on the assumption of duty theory even if no duty otherwise existed.”⁹² But the cases Plaintiffs cite in support of this argument are factually distinguishable.

Plaintiffs rely on *Thompson v. Sun City Community Hospital*⁹³ in which the Arizona Supreme Court adopted the Restatement (Second) of Torts § 323, explaining:

One who undertakes to render services to another which he should recognize as necessary for the protection of the other’s person ... is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if ... his failure to exercise such care increases the risk of such harm.⁹⁴

⁹¹ See, e.g., *Ritchie*, 211 P.3d at 1277-78 (“Even absent a formal doctor-patient relationship, a doctor conducting an Independent Medical Examination [...] owes a duty of reasonable care to his or her patient.”).

⁹² Ans. at 19.

⁹³ 688 P.2d 605, 609-11 (Ariz. 1984)

⁹⁴ Ans. 17-18 (quoting *Thompson*, 688 P.2d at 616).

In *Thompson*, the minor plaintiff was injured after being pinned against a wall by a vehicle.⁹⁵ Although the minor plaintiff had a 14-inch laceration on his thigh and bone was visible, the treating surgeons determined the minor plaintiff would be transferred to another hospital for financial reasons.⁹⁶ Almost twelve hours after the accident, medical staff at the second hospital realized that a bone fragment had blocked the flow of blood in the minor's leg, resulting in permanent injury.⁹⁷ The *Thompson* plaintiffs' claims were based on an "increased chance of harm" after the initial hospital refused to admit the minor based on his family's likely inability to pay.⁹⁸ In adopting § 323 of the Restatement (Second) in *Thompson*, the Arizona Supreme Court explicitly discussed the Restatement's applicability on the narrow causation issues of the case, and limited its application to situations which were factually similar.⁹⁹ Plaintiffs here do not allege nor argue that Defendants increased Sierra's risk of harm, so *Thompson* and Arizona's adoption of Restatement (Second) Torts § 323 is unhelpful.¹⁰⁰

⁹⁵ *Thompson v. Sun City Cmty. Hosp., Inc.*, 688 P.2d 647, 650 (Ariz. Ct. App. 1983), *reversed in part*, 688 P.2d 605.

⁹⁶ *Thompson*, 688 P.2d at 650-51.

⁹⁷ *Id.* at 651.

⁹⁸ *Id.* at 653.

⁹⁹ *Thompson*, 688 P.2d at 616 ("We must remember further, that we are dealing with the limited class of cases in which defendant undertook to protect plaintiff from a particular harm and negligently interrupted the chain of events, thus increasing the risk of that harm") ("We caution that this rule fits only in those situations where the courts traditionally have allowed juries to deal more loosely with causation – the cases where the duty breached was one imposed to prevent the type of harm which plaintiff ultimately sustained.").

¹⁰⁰ The other case that Plaintiffs cite in support, *Lloyd v. State Farm Mut. Auto. Ins. Co.*, 943 P.2d 729 (Ariz. Ct. App. 1996) is similarly inapposite because it involves an insurer's allegedly assumed duty to defend. *Lloyd*, 943 P.2d at 731-32.

Plaintiffs rely on *Hamman v. County of Maricopa*¹⁰¹ for the proposition that Arizona has also adopted the Restatement (Second) of Torts § 311 and, therefore, “one who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information.”¹⁰² In *Hamman*, however, the Arizona Supreme Court determined the negligent representation claim arose specifically from the psychiatrist advising a mother that her son, who suffered from schizophrenia and psychosis, was “harmless,” when only a few days after that representation, her son violently attacked his step-father.¹⁰³

In *Hamman*, unlike here, there were specific allegations regarding the false representations.¹⁰⁴ Here, Plaintiffs’ only allegation regarding a false representation is that Defendants “expressly and consciously assumed a duty” to Syerra by representing to their employees, contractors and other workers that they were undertaking to protect their employees’, contractors’ and other workers’ future offspring from any reproductive harm.¹⁰⁵ While Plaintiffs allege that Defendants expressly and consciously assumed a duty to their workers, they do not allege that in doing so they assumed a duty to Syerra. Nor do they allege any specific false

¹⁰¹ 775 P.2d 1122 (Ariz. 1989) (en banc).

¹⁰² Ans. at 18 (quoting *Hamman*, 775 P.2d at 1125).

¹⁰³ *Hammond*, 775 P.2d at 1125.

¹⁰⁴ *Id.*

¹⁰⁵ See FAC at ¶ 60.

representation made by Defendants. Even under the liberal pleading standard in Delaware, the FAC fails to adequately plead that Defendants voluntarily assumed a duty *to Syerra* by a gratuitous and voluntary undertaking.

4. No Duty Based on Public Policy

Plaintiffs allege that Arizona’s public policy requires the Court hold that employers owe a duty to their subcontractors’ future children.¹⁰⁶ Plaintiffs maintain that for the benefit of those “future children,” Arizona’s constitutional anti-abrogation provision, Article 18, § 6, reflects the policy that the ability to seek redress is a fundamental right.¹⁰⁷ Plaintiffs, however, are unable to point to any policy in Arizona that suggests employers owe a duty to the future unknown children of subcontractors working on their premises. The Plaintiffs ask this Court to recognize a cause of action which has never been recognized in or by the state of Arizona. It is best left to the Arizona Legislature, not this Court, to decide whether an employer in Arizona owes a duty to unconceived offspring of all persons who perform services at its facilities or on its premises.¹⁰⁸

Plaintiffs assert in their “foreseeability” argument that a duty exists because, “in general, every person is under a duty to avoid creating situations which pose an

¹⁰⁶ Ans. 20.

¹⁰⁷ *Id.*

¹⁰⁸ *See Gipson*, 150 P.3d 228, 232-34. Because the Court has determined that preconception tort claims have no common law basis or support in Arizona case law, this Court is not going to create a duty that belongs in the hands of Arizona’s Legislature.

unreasonable risk of harm to others.”¹⁰⁹ That general duty is considered Arizona public policy.¹¹⁰ Although Arizona’s public policy “is better served by imposing a duty in such circumstances to help future harm,” Arizona does not require one owe a duty to everyone at all times.¹¹¹ If the Arizona Legislature and courts are not willing to grant a fertilized egg the same rights as a “person” under the state’s wrongful death statute (as discussed *supra*), then that same reasoning leads to the conclusion here that Arizona would not broaden the definition of “others” under Arizona’s broad public policy to include sperm.

C. Plaintiffs Fail to Allege Causation

Defendants argue that Plaintiffs’ allegations “defeat their own theory of causation.”¹¹² According to Defendants, because Plaintiffs expressly allege that Syerra’s father did *not* sustain any injury – but if he did sustain an injury, that injury was *not* the cause of Syerra’s injuries – Plaintiffs have negated causation as a matter of law by affirmatively denying the only possible causal link between Syerra and chemical exposure at Defendants’ facilities.¹¹³ In support of this argument, Defendants rely on *Peters v. Texas Instruments, Inc.*¹¹⁴

¹⁰⁹ Ans. at 16 (quoting *Nunez*, 271 P.3d at 1108) (internal citations omitted).

¹¹⁰ See *Gipson*, 150 P.3d at 233, n. 4.

¹¹¹ *Id.* at 232-33 (internal quotations omitted).

¹¹² See Mot. 7.

¹¹³ See *id.* 7-8.

¹¹⁴ 2011 WL 4686518, at *1 (Del. Super. Sept. 30, 2011) (Jurden, J.) (applying Texas law), *aff’d*, 58 A.3d 414 (Del. 2013).

Similar to the case *sub judice*, the father plaintiff in *Peters* claimed that as a proximate result of his exposure to toxic substances prior to and at the time of his son's conception, his son was born with severe birth defects. In *Peters*, this Court determined that the viability of the son's claim depended on the validity of the father's claim because the minor plaintiff was never exposed at his father's workplace.¹¹⁵ Here, as in *Peters*, the minor plaintiff was never exposed at the father's workplace. But unlike in *Peters*, Plaintiffs here *specifically deny* that Syerra's father sustained any injury, and allege that even if he did, that injury did not cause Syerra's injuries.¹¹⁶ Thus, the question is, by so pleading, have Plaintiffs negated causation as a matter of law?

Plaintiffs argue that failing to allege injury to Andre does not, *ipso facto*, negate causation because although Andre's "exposure to genotoxic chemicals altered the genetic make-up of his sperm [...], such a change, itself, is not a compensable 'injury' under Arizona law."¹¹⁷ According to Plaintiffs, their allegations "reflect the reality that injury became realized only after conception, manifesting an injury to Syerra as she developed *in utero*, not [to] her father."¹¹⁸ Relying on *DeStories v. City of Phoenix*,¹¹⁹ Plaintiffs argue that "exposure alone is

¹¹⁵ 2011 WL 4686518 at *6.

¹¹⁶ FAC ¶ 58.

¹¹⁷ Ans. 29.

¹¹⁸ *Id.*

¹¹⁹ 744 P.2d 705 (Ariz. Ct. App. 1987).

‘not an actionable injury . . . meaning it was not legally cognizable, until at least one evil effect of the exposure became manifest.’”¹²⁰

First, while Plaintiffs claim that they have “alleged...[Andre’s] exposure to genotoxic chemicals altered the genetic make-up of his sperm. FAC ¶¶ 49-50,” this allegation appears nowhere in paragraph 49 or 50 of the FAC.¹²¹ Contrary to the argument presented by Plaintiffs in their briefing and during the hearing on this motion, the FAC does *not* allege that Andre suffered injuries that were simply not detectable. Rather, it alleges that he did *not* sustain “*any injury at all*,”¹²² but if he did suffer an injury, it “was not the cause of [Syerra’s] injury.”¹²³ Although Plaintiffs argue now that Andre’s exposure altered the genetic make-up of his

¹²⁰ Ans. 29 (quoting *DeStories*, 744 P.2d at 710-11).

¹²¹ Paragraph 49 of the FAC states:

Plaintiff Andre Rodriguez was wrongfully exposed to reproductively harmful chemicals and substances as a result of his work as a sheet metal apprentice in clean rooms at Intel and Motorola facilities. These exposures proximately caused physical injuries to Syerra Rodriguez. Plaintiffs do not alleged [*sic*] direct injuries or causes of action by the Parent Plaintiffs. Rather, the Parent Plaintiffs’ claims are dependent upon, and derivative of, the direct claims by their daughter against Defendant. Plaintiffs specifically allege that the above-described exposures directly and proximately caused Syerra Rodriguez’s injuries and damages as described herein, and that the Parent Plaintiffs’ consortium claim and damages are NOT separate or independent of their daughter Syerra Rodriguez’s claims, injuries, and damages, but are wholly derivative of her direct claims, injuries and damages.

Paragraph 50 of the FAC States:

Plaintiffs allege that only the Infant Plaintiff possesses a direct right of action as a consequence of her direct injuries which arose upon conception of the injured Infant Plaintiff. The claims asserted by the Parent Plaintiffs are derivative of the Infant Plaintiff’s injuries and right of action. Any exposure by Andre Rodriguez, as described herein, that contributed to, caused or resulted in the injuries to the Infant Plaintiff did not result in manifest damage to the Parent Plaintiffs until their child was born with injuries caused by the exposures described herein, at which time the Parent Plaintiffs’ claims and causes of action arose as derivative of the Infant Plaintiff’s claims and causes of action. The Plaintiffs allege that the Parent Plaintiff did not have any causes of action prior to, or independent of, the manifestation of injuries at the birth of the Infant Plaintiff.

¹²² FAC ¶ 58 (emphasis added).

¹²³ *See Id.*

sperm, even though that alteration itself allegedly is not a compensable injury under Arizona law, they did not plead this in their FAC.¹²⁴

Second, Plaintiffs' assertion that the genetic changes or alterations to Andre's reproductive system (which are not pleaded in the FAC) do not constitute a compensable injury under Arizona law, is incorrect. While exposure alone is not an actionable or legally cognizable injury under Arizona law, Andre claims more than just exposure. He claims exposure that altered the genetic make-up of his sperm, which proximately caused Syerra's injuries.¹²⁵ That exposure became a legally cognizable injury when it caused "an identifiable, fully developed, present medical condition" and "at least one evil effect" of the exposure became manifest.¹²⁶ According to the allegations in the FAC, the "evil effect" of the exposure became manifest when Syerra was born.¹²⁷ Unlike the plaintiffs in *DeStories*, Plaintiffs here have alleged "a physical harm or medically identifiable

¹²⁴ As Defendants correctly point out, "[n]owhere in Plaintiffs' 37-page FAC is there a single mention of this new 'genetic make-up' theory." Mot. 4.

¹²⁵ In their Answering Brief, Plaintiffs claim "...Syerra's father did not sustain a legally cognizable injury when the genetic material in his sperm was altered...the...injury became realized only after conception, manifesting in injury to Syerra as she developed *in utero*, not her father." Ans. 29.

¹²⁶ *DeStories* 744 P.2d at 709-11 (quoting *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 412 (5th Cir.), *cert. denied*, 478 U.S. 1022 (1986)).

¹²⁷ See FAC ¶ 50. ("Any exposure by Andre Rodriguez [...] that [...] caused [...] the injuries to the Infant Plaintiff *did not result in manifest damage to the Parent Plaintiffs until their child was born with injuries* caused by the exposures described herein....") (emphasis added).

effect from their exposure” sufficient to establish a legally cognizable injury to *Andre* under Arizona law.¹²⁸

Plaintiffs’ argument on this point is further undermined by the Arizona Supreme Court’s decision in *Kenyon v. Hammer*.¹²⁹ The plaintiff in *Kenyon* suffered an injury when her “physical condition changed for the worse because her ability to bear other children was significantly impaired.”¹³⁰ As the Arizona Court of Appeals later noted in *DeStories*, the parent plaintiff’s claim in *Kenyon* was based on an “identifiable, fully developed, present medical condition.”¹³¹ The Arizona Supreme Court in *Kenyon* found that even though plaintiff had no physical symptom or abnormality “which could have alerted even the most careful individual,” and the injury was “undiscovered and undiscoverable,” the plaintiff was injured when the doctor failed to administer RhoGAM within seventy-two hours of the birth of her first child.¹³²

Moreover, in *Molina*, this Court held that the plaintiffs had sufficiently pleaded causation because they alleged that during the plaintiff mother’s employment, the minor plaintiff was wrongly exposed *in utero* to reproductive

¹²⁸ See *DeStories*, 744 P.2d at 710 (“in the instant case Plaintiffs adduced no evidence tending to establish the existence of any physical harm or medically identifiable effect from their exposure to asbestos....”).

¹²⁹ 688 P.2d 961 (Ariz. 1984).

¹³⁰ *Id.* at 967.

¹³¹ *DeStories*, 744 P.2d at 709.

¹³² See *Kenyon*, 688 P.2d at 967. Although it was undisputed that the Kenyons did not know of the injury and did not become aware of it until the birth of their *second* child over five years after the first, the defendant nonetheless argued that Mrs. Kenyon’s injury was *not* an undiscoverable injury. The Arizona Supreme Court disagreed.

hazardous chemicals, and those exposures proximately caused the injuries to the minor plaintiff.¹³³ In *Molina*, there was *direct* exposure while the minor plaintiff was *in utero*. Here, there was no direct exposure. Unlike the minor plaintiff in *Molina*, Syerra was never in her father's workplace. Plaintiffs allege Syerra's personal injuries "were caused or contributed to by Plaintiff Andre Rodriguez's exposures," but go on to state that they do not allege direct injuries or causes of action by the parent Plaintiffs.¹³⁴

In the end, without alleging injury to Andre, Plaintiffs fail to allege the vehicle by and through which Defendants' negligent use of reproductively harmful chemicals caused Syerra's severe birth defects. But for injury to Syerra's father, Syerra, who was never at her father's workplace and suffered no direct exposure, could not have been injured by Defendants. The Court agrees with Defendants that by expressly pleading that Andre suffered no injury, or if he did it was not a cause of injury to his daughter, Plaintiffs have negated causation.

D. Plaintiffs' Remaining Claims Fail

Plaintiffs' failure to allege causation has created a domino effect for their remaining claims. Plaintiffs' strict liability claims fail for lack of causation

¹³³ *Molina*, 2013 WL 4528858, at *6.

¹³⁴ FAC ¶ 49.

between Defendants' use of chemicals and Syerra's birth defects.¹³⁵ Additionally, as the parties do not contest that Syerra was never on Defendants' premises *in utero* or otherwise, Plaintiffs' premises liability claim fails.¹³⁶ Lastly, because Syerra's claims fail, so does Plaintiff Parents' loss of consortium claim.

VI. CONCLUSION

As discussed above, Syerra has failed to allege cognizable claims under Arizona law, failed to allege a legally cognizable duty Defendants owed her preconception, and failed to adequately allege a theory of causation. Consequently, Defendants' Motion to Dismiss is **GRANTED**.

IT IS SO ORDERED.

Jan R. Jurden, Judge

cc: Prothonotary

¹³⁵ See *Menendez v. Paddock Pool Const. Co.*, 836 P.2d 968, 971-72 (Ariz. Ct. App. 1991) (“To invoke [strict liability], a plaintiff must make a prima facie showing that a product is defective and unreasonably dangerous, the defect existed at the time it left defendant’s control, and the *defect is the proximate cause* of plaintiff’s injury [...]”) (emphasis added).

¹³⁶ See *Wickham v. Hopkins*, 250 P.3d 245, 248 (Ariz. Ct. App. 2011) (“the duty owed by a landowner to an entrant on the property is determined by the status of the entrant as an invitee, licensee, or trespasser”); *Callender v. MCO Properties*, 885 P.2d 123, 130-31 (Ariz. Ct. App. 1994) (affirming judgment for campground because plaintiff was injured while on the adjacent lake, and therefore “[t]here simply was no relationship between [plaintiff] and the campground that would have imposed a duty of care”); *cf. Molina*, 2013 WL 4528858, at *7 (minor plaintiff exposed *in utero*).