

JAN 24, 2023 01:29 PM


Robin C. Bishop, Clerk of State Court
Cobb County, Georgia

IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

ESSENCE ALEXANDER, et.al.,

Plaintiffs,

v.

STERIGENICS U.S. LLC, et. al.

Defendants,

CIVIL ACTION FILE NO:
20-A-1645-6

ORDER

The above-styled matter has pending before this Court Plaintiffs' Motion for Reconsideration of Strict Liability Failure to Warn Claim Against the Sterigenics Defendants and Defendants Sterigenics U.S. LLC, Soterra Health LLC, and Daryl Mosby, Elbert Sabb, and Donnie Wright (hereinafter "Sterigenics Defendants") Motion for Clarification of this Court's June 15, 2022 Amended Order. Counsel requested and this Court held oral argument on November 3, 2022. After review of the pleadings and argument presented, the Court finds as follows:

I. Sterigenics Defendants Motion for Clarification

This Court entered an Order on June 15, 2022 addressing the Sterigenics Defendants Motion to Dismiss Plaintiffs' Third Amended Complaint. The Sterigenics Defendants argue the Plaintiffs' Third Amended Complaint is dismissed in its entirety and in the alternative, if not dismissal entirely, there is a dispute regarding which claims remain. Plaintiffs do not dispute the Court's Order dismissed several negligence counts, including: Negligence, Negligence *per se*, Strict/Ultrahazardous, Strict/Packaging Defect Negligence. Plaintiffs have sought reconsideration of their strict/failure to warn negligence claim which the Court will address

supra.

In review of the language within the Court’s order, the Court held that Plaintiffs did not identify any cognizable legal duty to support a negligence claim. (Order at 26, “Accordingly, Plaintiffs do not identify any cognizable legal duty that the Sterigenics Defendants owed to Plaintiffs and breached, and their Third Amended Complaint as to the Sterigenics Defendants is **DISMISSED** with prejudice.”). The Sterigenics Defendants argue that all negligence claims are therefore dismissed including Plaintiffs’ claims of *res ipsa loquitor* negligence (Count 10) and negligence hiring, retention, training and supervision (Count 13). In error and upon further review, the Court finds these claims cannot proceed based on this Court’s finding that there was no legal duty pled and thus the finding that no negligence claims can proceed. Moreover, the Court held that Plaintiffs did not allege that Sterigenics had control over the ConMed facility or ConMed’s products stored at the ConMed facility. Such a ruling is inconsistent with any exclusive control element within *res ipsa loquitor*. (Order 19, 22).

Additionally, the Court held that:

To the extent that Plaintiffs allege the Sterigenics Defendants could or should have deviated from the contract sterilization process those state law claims are preempted under the doctrine of conflict/impossibility preemption, and those claims are DISMISSED with prejudice.
In addition to being preempted and the absence of any legal duty—both of which independently support the dismissal of all of Plaintiffs’ claims (emphasis added)—Plaintiffs’ causes of action also individually fail for the below separate reasons. (Order at 28).

This language was in error. The Court did not dismiss all of Plaintiffs’ claims in their entirety. While the Court held that federal preemption was applicable, certain state law claims remain. To clarify, Plaintiffs’ fraud-based claims (Count 7, 8, 9 and 26) and intentional tort claims (Counts 11, Civil Battery and 12, Intentional Infliction of Emotional Distress) remain pending and are not dismissed. While the Sterigenics Defendants argue Plaintiffs’ fraud-based claims are largely based on allegations that they should have sterilized ConMed’s devices differently or either warned or taken action to protect ConMed’s employees, the Court finds

additional sufficient grounds were pled. (Order at 29). Therefore, as the intentional tort claims and fraud-based claims remain, any derivative claims also remain, i.e., vicarious liability, wrongful death, and punitive damages. The Court held and Plaintiffs do not dispute that they conceded previously there is not a separate cause of action for civil conspiracy or aiding and abetting. (Order at 30). Therefore, count 6 Aiding and Abetting Tortious Conduct is dismissed.

II. Plaintiffs' Motion for Reconsideration Regarding Claim for Strict Liability for Failure to Warn (Count 5)

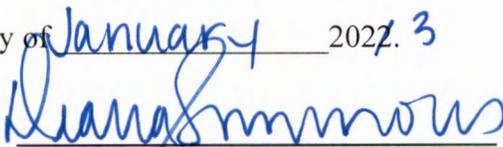
On July 13, 2022, Plaintiffs filed a Motion for Reconsideration based on an issued opinion in Carson v. Monsanto Co., 39 F. 4th 1334, (11th Circuit July 12, 2022). Plaintiffs' Motion for Reconsideration does not seek reconsideration of the Court's holdings with respect to (1) no duty; (2) no basis to impose products liability theories; or (3) no basis to impose strict liability. Instead, Plaintiffs argue this Court should reverse its order dismissing Plaintiffs' strict liability failure to warn claim based upon the *Carson* ruling which involved express preemption and interpreting a statutory provision within the Federal Insecticide, Fungicide and Rodenticide Act (hereinafter "FIFRA"). Accordingly, given that Plaintiffs' do not challenge three of the four grounds under which the Court's Order dismissed Count V, the Court **DENIES** Plaintiffs' Motion for Reconsideration on this ground alone and maintains that Count V is **DISMISSED** in accordance with the holdings set forth above.

The Court has reviewed the *Carson* opinion and the prior Order. The Court is unpersuaded that the *Carson* ruling would alter its prior ruling. While the Court need not address Plaintiffs' preemption argument to deny their Motion for Reconsideration, *Carson v. Monsanto* in no way impacts this Court's ruling because—in addition to not being binding on this Court—that decision involves a different type of preemption, a different federal statutory scheme, and different claims brought against a product manufacturer.

The Court finds the *Carson* ruling involves the EPA's regulations and FIFRA's label requirements for pesticides was not raised in this case. Most notably however, is that the *Carson* cases addresses a different type of preemption. Although Plaintiffs argue *Carson's* FIFRA's express preemption analysis is applicable, this Court's Order addressing conflict/impossibility preemption and FDA medical sterilization processes does not rely on FIFRA's express preemption statutory provision. Additionally, the Sterigenics Defendants have not argued that FIFRA's express preemption provision applies. Moreover, the Court held that Plaintiffs strict liability/failure to warn claims were dismissed pursuant to O.C.G.A. §51-1-11 regardless of any preemption argument. (Order at 23, 24, 25-26). Therefore, the Court **DENIES** Plaintiffs' Motion for Reconsideration.

The Parties are directed to meet and confer regarding a proposed Scheduling Order and shall submit a proposed Order within thirty (30) days.

SO ORDERED, this the 24 day of January 2023.


DIANA M. SIMMONS, JUDGE
COBB STATE COURT

CERTIFICATE OF SERVICE

This is to certify that I have this date served copies of the within and foregoing Order by mailing same (through the Cobb County Mail System, and/or through the PeachCourt Electronic Filing Portal) to the parties in this case as follows:

Brendan Krasinski, Esq
Lucase Pryzymusinski, Esq.
DLA Piper, LLP
1201 W. Peachtree Street NE
Suite 2900
Atlanta GA 30309
Brendan.krasinski@us.dlapiper.com

Danielle Morrison, Esq.
1650 Market Street
Suite 5000
Philadelphia PA 19103
Danielle.morrison@us.dlapiper.com

Lori G. Cohen, Esq.
Sean P. Jessee, Esq.
Sydney Fairchild, Esq.
Chelsea Dease, Esq.
GREENBERG TRAURIG, LLP
Terminus 200 - Suite 2500
3333 Piedmont Road NE
Atlanta, Georgia 30305
cohenl@gtlaw.com
jessees@gtlaw.com
fairchildsy@gtlaw.com
deasec@gtlaw.com

Marty Heller
Cheryl Pinarchick
Corey Goerd, Esq.
J.Micah Dickie, Esq.
FISHER PHILLIPS
1075 Peachtree Street, NE, Suite 3500
Atlanta, Georgia 30309
(404) 231-1400
MHeller@FisherPhillips.com
CPinarchick@FisherPhillips.com
cgoerd@fisherphillips.com
mdickie@fisherphillips.com

Eric J. Hertz, Esq.
Jesse Van Sant, Esq.
ERIC J. HERTZ, P.C.
8300 Dunwoody Place, Suite 210
Atlanta, Georgia 30350
hertz@hertz-law.com
jesse@hertz-law.com

Jeffrey E. Gewirtz, Esq.
PO Box 105603 #19204
Atlanta, Georgia 30348
jgewirtz@protonmail.com

Houston Smith, Esq.
Mark Link, Esq.
LINK & SMITH, PC
2142 Vista Dale Court
Tucker, Georgia 30084
smith@linksmithpc.com
Link@linksmithpc.com

Kevin G. Moore, Esq.
MOORE INJURY LAW, LLC
5805 State Bridge Road, Suite G368
Johns Creek, Georgia 30097
km@mooreinjurylaw.org

This 24th day of January, 2023.

Carrie A. Bricker

Carrie A. Bricker
Judicial Assistant to Judge Diana Simmons
State Court of Cobb County
(770) 528-1731