ID# J-NLPMYJZE-WB2
EFILED IN OFFICE
CLERK OF STATE COURT
COBB COUNTY, GEORGIA
20-A-1645
JUN 15, 2022 04:05 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

AMENDED ORDER

The above-styled matter appeared before this Court for oral argument on January 10, 2022. All counsel agreed to appear via WebEx. All counsel appeared and presented argument to the Court. Pending before this Court are several motions, including:

- Defendants ConMed Corporation, ConMed Employee /Managers Justin Mills, Darius Askew, Erika Arnold, and Phillip Messner (hereinafter "ConMed Defendants")[1] Motion to Dismiss Plaintiffs' Third Amended Complaint filed October 15, 2021.
- Sterigenics U.S., LLC ("Sterigenics"), Sotera Health LLC ("Sotera Health"), and Sterigenics Employees / Managers Daryl Mosby, Donnie Wright, and Elbert Sabb's (collectively, "Sterigenics Defendants") Motion to Dismiss Plaintiffs' Third Amended Complaint filed October 15, 2021.

Having considered the pleadings, the Motions, the parties' briefs, and counsels' arguments and presentations at an oral hearing on January 10, 2022 via WebEx, as well as the parties' post-hearing submissions[2], the Court finds as follows:

I. FACTUAL BACKGROUND

Plaintiffs seek to recover for bodily injury, wrongful death, and punitive damages against the Defendants due to Plaintiffs' exposure to Ethylene Oxide ("EtO"), Ethylene Glycol ("EG"),

[1] Justin Mills, Darius Askew, Erika Arnold, and Phillip Messner shall collectively be referred to herein as the "Individual ConMed Defendants." ConMed Corporation ("ConMed") and the Individual ConMed Defendants shall collectively be referred to herein as "ConMed Defendants."

[2] On March 21, 2022, Plaintiffs submitted Notice of Supplemental Authority citing a recent Georgia Supreme Court opinion Maynard v. Snapchat, Inc. 870 S.E.2d 739 (decided March 15, 2022) as that case was previously cited by the Sterigenics Defendants. The Court has reviewed the supplemental briefs submitted and finds the analysis inapplicable to the case *sub judice*.

and Ethylene Chlorohydrin ("EC"). Plaintiffs allege this exposure occurred due to the off-gassing of these chemicals from cardboard packages and pallets of sterilized medical products that were wrapped in plastic and sent from Defendants Sotera Health/Sterigenics's facility in Cobb County to the facility where Plaintiffs worked at ConMed Corporation.

ConMed is a manufacturer and distributor of medical equipment. (3rd Am. Compl. ¶ 45.) ConMed operates a facility in Lithia Springs, Georgia, that distributes medical equipment. (Id.) The Individual ConMed Defendants are or were employees of ConMed. (3rd Am. Compl. ¶¶ 52, 59, 66, 73.) ConMed contracts with third parties, including Sterigenics U.S., LLC, to sterilize certain of its medical devices using Ethylene Oxide (EtO).

Plaintiffs filed suit against Defendants on May 19, 2020. According to the Third Amended Complaint, Plaintiffs allege that "[t]he safe process of EtO sterilization requires an appropriate amount of Ethylene Oxide for the particular device and its container, and a series of steps to aerate, remove poison from, and or disperse the poison from items being sterilized so that EtO off-gasses and the residual EtO remaining within devices and their packaging reaches acceptable limits." (Id. at ¶116.) Plaintiffs allege that the Sterigenics Defendants failed to ensure the packages and pallets delivered to Plaintiffs at the ConMed facility were safe and did not warn nor did they label the packages, pallets, or truckloads and this caused injury and harm to Plaintiffs. (Id. at ¶¶119-133.) Plaintiffs further allege that, after Plaintiffs were injured, the ConMed Defendants misrepresented the degree of Plaintiffs' exposure to EtO and fraudulently misled Plaintiffs, their healthcare providers, insurer personnel, third parties, the public, and OSHA employees regarding the severity of such exposure. Plaintiffs have asserted multiple claims against the Sotera Health/Sterigenics Defendants, including:

1. Negligence: ¶¶ 331-337;
2. Negligence Per Se: ¶¶ 338-341;

3. Strict / Ultrahazardous: ¶¶ 342-348;
4. Strict / Packaging Defect, Negligence: ¶¶ 349-356;
5. Strict / Failure to Warn, Negligence: ¶¶ 357-364;
6. Aiding and Abetting Tortious Conduct: ¶¶ 365-370;
7. Common Law Fraud, Fraudulent Inducement, Fraudulent Misrepresentation: ¶¶ 371-375;
8. Constructive Fraud, OCGA Violations and Commodities Fraud: ¶¶ 376-378;
9. Fraudulent Concealment and or Negligent / Intentional Misrepresentation: ¶¶ 379-384;
10. Res Ipsa Loquitor Negligence: ¶¶ 385-388;
11. Civil Battery: ¶¶ 389-395;
12 Intentional Infliction of Emotional Distress: ¶¶ 396-397;
13. Negligent Hiring, Retention, Training, and Supervision: ¶¶ 398-403;
14. Vicarious Liability, Actual, Apparent, Ostensible Agency, and Civil Conspiracy: ¶¶ 404-413;
15. Wrongful Death: ¶¶ 414-418;
16. Punitive Damages: ¶¶ 419-423;
26. Fraud Against ConMed Defendants and Sterigenics Defendants: ¶¶ 477-484.

At oral argument on January 10, 2022, Plaintiffs' counsel informed the Court that Plaintiffs withdrew their claims for Strict Ultra Hazardous Liability against the Sotera Health/Sterigenics Employee/Managers.[3] Plaintiffs' counsel also acknowledged that Civil Conspiracy is not separate count, as Georgia law does not recognize an independent tort of Civil Conspiracy. Therefore, any such claims are dismissed with prejudice.

Plaintiffs also asserted multiple claims against the ConMed Defendants, including:

17. Aiding and Abetting Tortious Conduct: ¶¶ 430-435;
18. Common Law Fraud, Fraudulent Inducement, Fraudulent Misrepresentation: ¶¶ 436-439;
19. Constructive Fraud, OCGA, and Commodity Fraud Violations: ¶¶ 440-444;
20. Fraudulent Concealment and or Negligent / Intentional Misrepresentation: ¶¶ 445-454;

[3] To the extent that Plaintiffs continue to assert a Ultrahazardous Strict Liability claim against Defendant Sterigenics U.S., this Court hereby dismisses said Count III for the reasons in this Court's ruling in *Kurt, et al. v. Sterigenics U.S. LLC, et al.* Case No. 20-A-3432 (Ga. State July 15, 2021) (dismissing standalone ultrahazardous/strict liability claim on the ground that "[t]here is no Georgia authority creating a common law strict liability claim").

21 Intentional Infliction of Emotional Distress: ¶¶ 455-457;
22. Punitive Damages: ¶¶ 458-462;
23. Ira Montgomery's Claims for Intentional Infliction of Emotional Distress: ¶¶ 463-465;
24. Ira Montgomery's Claim for Fraudulent False Swearing: ¶¶ 466-469;
25. Ira Montgomery's Claim for Defamation of Character: ¶¶ 470-475;
26. Fraud Against ConMed Defendants and Sterigenics ¶¶ 477-484.

At oral argument on January 10, 2022, Plaintiffs' counsel informed the Court that Plaintiffs withdraw their claims for Intentional Infliction of Emotional Distress brought by Ira Montgomery against the ConMed Defendants. Thus, the remaining Counts of the Third Amended Complaint will be addressed independently below.

II. MOTION TO DISMISS STANDARD

Both the Sterigenics Defendants and the ConMed Defendants have argued certain claims and parties should be dismissed for failure to state a claim. Pursuant to O.C.G.A. §9-11-12 (b)(6), a motion to dismiss for failure to state a claim is appropriate when the plaintiff's allegations of the complaint disclose with certainty that the plaintiff would not be entitled to relief under any state of provable facts asserted in support thereof and the movant establishes that the plaintiff could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought. In deciding such a motion, any doubts regarding the complaint must be construed in favor of the plaintiff/non-movant. Collins v. Athens Orthopedic Clinic, P.A. 307 Ga. 555, 837 S.E.2d 310 (2019).

Additionally, the ConMed Defendants allege dismissal is appropriate as Plaintiffs claims are barred under the exclusive remedy provisions of the Georgia Workers' Compensation Act pursuant to O.C.G.A. §9-11-12(b)(1). "A motion pursuant to O.C.G.A. § 9–11–12(b)(1) asserts the defense of lack of jurisdiction over the subject matter." Douglas Cty. v. Hamilton State Bank, 340 Ga. App. 801, 801 (2017). When a defendant challenges a plaintiff's standing by bringing a

12(b)(1) motion, the plaintiff bears the burden to establish that jurisdiction exists." Id. This type of motion "can allege either a facial challenge, in which the court accepts as true the allegations on the face of the complaint or a factual challenge, which requires consideration of evidence beyond the face of the complaint." Id. The Court may consider exhibits attached to the Answer as well as matters outside the pleadings. *See* Savannah Hosp. Servs., LLC v. Scriven, 350 Ga. App. 195, 199 n.4 (2019) ("[I]n considering whether the trial court had jurisdiction, neither the trial court nor this Court is limited to the facts as set forth in the pleadings."). "[A] motion contesting the court's jurisdiction to consider the subject matter is not converted to a motion for summary judgment by the trial court's consideration of matters outside the pleadings." Id. ConMed Defendants have asserted a factual challenge to the Court's subject matter jurisdiction which requires this Court's consideration of evidence beyond the Third Amended Complaint, including the admissions made in Plaintiffs' workers' compensation filings.

As the ConMed Defendants have argued, this is not a class action lawsuit. Each of the 53 Plaintiffs have brought their ConMed-specific claims against not just ConMed, but also each of the Individual ConMed Defendants in their individual capacities. To avoid dismissal, each of the 53 Plaintiffs must be able to point to allegations in the Third Amended Complaint sufficient to support each of their claims. And each Plaintiff must do so with respect to each ConMed Defendant, including each of the Individual ConMed Defendants. *See, e.g.*, Hill v. Bd. Of Regents of the Univ. Sys. Of Georgia, 351 Ga. App. 455, 465 (2019) (affirming dismissal against entities against which plaintiff made no specific allegations and rejecting request to by plaintiff to replead "because she has not shown that any cause of action exists…despite having had three chances to plead them.").

The ConMed Defendants' Motion to Dismiss

The ConMed Defendants move this Court to dismiss Plaintiffs' claims based on the exclusive remedy provision of Georgia's Worker's Compensation Act. Plaintiffs contend that the Act does not apply to intentionally fraudulent conduct as they have pled, *citing* Potts v. UAP-GA. AG. CHEM., Inc., 270 Ga. 14, 506 S.E.2d 101 (1998) The ConMed Defendants concede that they are not moving to dismiss the claims of eight (8) of the Plaintiffs on workers' compensation grounds, and, further, that a ninth plaintiff, Tameca Montgomery, did not work for ConMed, thus her claims are not subject to the exclusive-remedy provision.

The ConMed Defendants also move this Court to dismiss Plaintiffs' claims based on OCGA §9-11-9(b), which states "In all averments of fraud or mistake, the circumstance constituting fraud or mistake shall be stated with particularity." Finally, the ConMed Defendants also move this Court to dismiss fifteen (15) of the Plaintiffs' claims on grounds that they are barred by the statute of limitations.

A) Plaintiffs' Allegations of Fraud and Workers' Compensation Application

It is undisputed that fifty-one (51) of the Plaintiffs in this lawsuit filed workers' compensation claims against ConMed and its temporary staffing agencies alleging they were injured by exposure to EtO. (See Exhibits A and E to ConMed Defendants' Answer to Third Amended Complaint.) As shown in Plaintiffs' worker's compensation claims, those Plaintiffs represented they were allegedly injured by purported EtO exposure while working at ConMed. Specifically, these fillings state that their alleged EtO exposure injuries occurred "out of and in the course of [their] employment" and/or that they suffered an "occupational disease."[4] (See id.; Answer to 3rd Am. Complaint, Exhibits A, E.)

---

[4] Under O.C.G.A. § 34–9–280(2), "Occupational disease" means, in part, those diseases which arise out of and in the course of the particular trade, occupation, process, or employment in which the employee is exposed to such disease.

Plaintiffs concede that they cannot seek to recover against the ConMed Defendants for a work-related injury caused by EtO exposure because of the exclusive remedy provision of the Workers' Compensation Act. (*See* Plaintiffs' Response in Opposition to Motion to Dismiss Third Amended Complaint, p. 21; O.C.G.A. §34-9-11). To avoid this preclusive effect, Plaintiffs allege that ConMed and its managers knowingly and with intent to deceive misstated and misrepresented the nature of Plaintiffs' exposures to EtO after the injuries had been sustained, not only to the Plaintiffs, but also to numerous health care providers, insurer personnel, third parties, the public, and regulators including OSHA.

Plaintiffs also claim that fraud occurred prior to Plaintiffs' exposure to EtO, when ConMed fraudulently induced Plaintiffs to accept and maintain employment with ConMed, and the fraud continued after Plaintiffs were exposed to and injured by EtO, EG, and EC. (See, id., ¶¶ 90-462). Plaintiffs argue that as a direct result of ConMed's alleged fraud, both prior to their exposure and subsequent to their exposure, Plaintiffs' medical providers did not provide Plaintiffs with appropriate care which resulted in new or aggravated injuries beyond workplace exposure. For illustration purposes, the Third Amended Complaint attached a chart detailing the location where each Plaintiff went for treatment and the intentional misrepresentations that deprived each Plaintiffs of appropriate medical treatment. ConMed Defendants' briefing has categorized the Plaintiffs they are moving to dismiss[5] into four categories based on the allegations of fraud:

- **28 Failure to Notify Plaintiffs**: who do not allege that any ConMed Defendants made affirmative fraudulent statements to third parties regarding their exposure to EtO, but instead, claim they were not informed about the existence of EtO.[6]

---

[5] ConMed did not move to dismiss Raypheal Davis, Kwamina Ewusie, Chad James, Michael McClusky, John Okrah, Kiara Wells, and Percy Zimmerman. ConMed moved to dismiss Torwanda Brown on statute of limitations grounds and moved to dismiss Tameca Montgomery based upon failure to state a claim.

[6] The 28 Failure to Notify Plaintiffs are E. Attah, R. Boyd, I. Chandler, I. Dixon, S. Gaines, N. Jackson, P. Johnson, S. Johnson, J. Lark, M. Lee, L. Lozier, F. Martinez, C. McGhee, B. McMichen, I. Montgomery, D. Ntiamoah-Anim, J. Pharms, C. Pullman, L.C. Ricks, C. Royster, K. Rush, Q. Snelling, L. Stem, S. Swain, R. Veal, J. Williams, T. Williams, and L. Zanders-Bates. See Motion to Dismiss, pp. 22-23.

- **4 Paramedic Plaintiffs**: who allege that ConMed Defendants failed to inform paramedics about these four Plaintiffs' EtO exposure at the ConMed facility, during work hours and while working at the facility.[7]

- **3 Skype Plaintiffs**: who allege that the ConMed Defendants made affirmative fraudulent statements during Skype meetings between these Plaintiffs and a medical provider, while the Plaintiffs were at the ConMed Facility and on the clock during work hours.[8]

- **9 Unsubstantiated Assumption Plaintiffs**: who allege they had the "impression" that two ConMed managers (Defendants Justin Mills and Erika Arnold) made some sort of fraudulent statements to their medical providers.[9]

Plaintiffs have not challenged these categorizations or any specific Plaintiff's inclusion in any category in their initial briefing, at oral argument, or in their post-hearing briefing. Having reviewed the allegations in the Third Amended Complaint, the Court finds that these four categories provide a useful framework for analyzing Plaintiffs' claims and ConMed Defendants' Motion to Dismiss.

When an injury "arises out of and in the course of employment," the employee's exclusive remedy against the employer or the employee's co-workers is for workers' compensation benefits. O.C.G.A. §34–9–11(a), Rheem Mfg. Co. v. Butts, 292 Ga. App. 523, 524 (2008). If the willful act of a third person is directed against an employee for reasons personal to such employee, then there is not a covered injury and, consequently, no tort immunity. OCGA §§ 34–9–1(4), 34–9–11(a); Hennly v. Richardson, 264 Ga. 355, 356(1), 444 S.E.2d 317 (1994). Whether an injury is compensable or only a non-compensable occurrence due to "reasons personal to" the employee is dependent upon whether the injury arose out of and in the course of the employment. Id at 356. An injury arises 'in the course of' employment when it occurs within the period of the employment, at a place where the employee may be in performance of his or her duties and while they are fulfilling or doing something incidental to those duties. Id. at 355.

---

[7] The 4 Paramedic Plaintiffs are E. Alexander, D. Nesbitt, D. Osbie, and T. Townsend. See Motion to Dismiss, pp. 24-25.
[8] The 3 Skype Plaintiffs are Z. Alexander, W. Brooks, and A. Pittman. See Motion to Dismiss, pp. 25-26.
[9] The 9 Unsubstantiated Assumption Plaintiffs are L. Cappell, S. Christian, G. Edwards, S. Gordon, M. Hutchins, J. Jenkins, P. Kimball, L. King and C. March. See Motion to Dismiss, pp. 26-27.

An injury arises "out of" the employment when a reasonable person, after considering the circumstances of the employment, would perceive a causal connection between the conditions under which the employee must work and the resulting injury. Id.

As stated *infra*, Plaintiffs argue dismissal should not be granted based on the holding in the Potts v. UAP-GA. AG. CHEM., Inc. In Potts, an employee became ill after using cleaning chemicals for his employer. Id. at 14. During stays at two hospitals, the employee was treated for chemical poisoning and other possible conditions. Id. One doctor, as part of the explanation for his decision to discontinue the employee's treatment for chemical poisoning, stated that the employer's branch manager had affirmatively represented to the doctor that that the employee "could not possibly have been exposed to any chemicals," which the branch manager knew to be untrue. Id. The survivors of the deceased employee brought claims against the employer and its branch manager for fraud and intentional infliction of emotional distress for their conduct after the work injury occurred but during his treatment. The lower court entered judgment for the employer and the branch manager based on the Act's Exclusive Remedy Provision. The Court of Appeals affirmed. Id. The Georgia Supreme Court granted *certiorari*. The certified question posed was:

> [W]hether the intentional torts allegedly committed off the worksite and at a time when LeBlanc [the employee] was not engaged in any work activity can be considered to have arisen "out of and in the course of" his employment such that the exclusive remedy provision of O.C.G.A. § 34-9-11 applies. Id.

The Court held that the Exclusive Remedy Provision did not apply under these factual circumstances, where the employer made an affirmative fraudulent statement to a medical provider after employment ended resulting in a change to the worker's care and treatment. Id. at

15.[10] The Court held that the "Act provides an employee with no reasonable remedy for the employer's or co-employee's fraud or intentional infliction of emotional distress which does not arise 'in the course of' employment."

Contrary to Plaintiffs argument, the Potts decision did not create a broad fraud exception to the Exclusive Remedy Provision, or otherwise alter Georgia's workers' compensation system. *See* Betts, 246 Ga. App. 873, 875 (2000) (decided two years after Potts and reiterating that "the exclusivity provisions of the Workers' Compensation Act bar claims grounded on an intentional tort, which indirectly but essentially seek redress based on current or future physical injury arising from the alleged exposure to" harmful work-related radiation or chemicals). Georgia law provides a common law cause of action for fraud and other intentional torts committed by an employer or co-employee where the tortious "act is not an accident arising out of and in the course of employment and where a reasonable remedy for such conduct is not provided by the Workers' Compensation Act." Griggs v. All–Steel Bldgs., *supra* at 257, 433 S.E.2d 89.

Thus, the focus of the analysis is whether there is a remedy covered by the Workers' Compensation Acct and whether the compensable injury is one arising out of and in the course of their employment.

1) The 28 Failure to Notify Plaintiffs' Claims

The 28 Failure to Notify Plaintiffs' Claims do not fall under the narrow Potts exception because they fail to allege any affirmative statements made to their medical providers or anyone else that resulted in a change in their treatment. Plaintiffs contend these Plaintiffs' claims

[10] Plaintiffs secondarily rely on Griggs v. All-Steel Bldgs., Inc., 209 Ga. App. 253, 433 S.E.2d 89 (1993), an earlier Court of Appeals decision, which recognized there may be a basis for a fraud-based exception to the exclusive remedy rule of the Workers' Compensation Act. The narrow fact-based holding in Potts, however, is controlling here because it is a Georgia Supreme Court case decided five years after Griggs.

survive because ConMed failed to inform them about their exposure EtO.[11] But Potts did not create an exception to the Exclusive Remedy Provision based on an employer's failure to inform an employee about a potential hazard in the workplace. Rather, the narrow exception created by Potts relates to a situation where the employer intentionally misinformed an injured former employee's treating physician about the employee's exposure to hazardous chemicals in the workplace. No Georgia court has extended the reasoning in Potts to allegations of fraud by omission. On the contrary, in Johnson v. Hames Contracting, Inc., the Georgia Court of Appeals found that a plaintiff's allegations that his employer "fraudulently and intentionally failed to inform him that he would be exposed to asbestos" while at work were insufficient to avoid the Act's Exclusive Remedy Provision. Johnson v. Hames Contracting, Inc., 208 Ga. App. 664, 667 (1993). Thus, the focus remains on whether the injury is compensable within the Act.

In sum, contrary to Plaintiffs' claim, Potts does not create a broad fraud-based exception to the Exclusive Remedy Provision, as urged by Plaintiffs. Because "any enlargement of benefits and remedies" under the Act must come from the General Assembly, the effect of Potts is limited to the specific question raised to the Supreme Court in that case, and to the unique factual situation the Court addressed. Reilly v. Alcan Aluminum Corp., 272 Ga. 279, 280, 528 S.E.2d 238, 240–41 (2000).

Plaintiffs also argue that affirmative misstatements were made to many of the Plaintiffs on April 26, 2019 as to the EtO levels in the ConMed facility, while those Plaintiffs were at work. Even if Plaintiffs were correct and ConMed did misrepresent the EtO level at the facility, these allegations that are like others barred by the Exclusive Remedy Provision. *Compare* Zaytzeff v. Safety-Kleen Corp., 222 Ga. App. 48, 50–51, 473 S.E.2d565, 568 (1996) (allegations

[11] In the Opposition, Plaintiffs assert that paragraphs 190-251 of the Complaint "provide highly detailed information about ConMed's fraudulent statements to outside third parties...." Opposition, pp. 9 and 11. Nowhere in those 61 paragraphs do Plaintiffs allege affirmative fraudulent statements by any of the ConMed Defendants.

of tortious conduct in requiring plaintiff to clean up a toxic spill without proper protective equipment "directly related to [defendant's] business," and alleged injuries arising therefrom were therefore barred by the Exclusive Remedy Provision because they arose out of and in the course of employment) and Betts v. Medcross Imaging Center, Inc., 246 Ga. App. 873 (2000) (explaining that plaintiffs' injuries arose out of and in the course of their employment, because their employment "placed them in a working environment where they were susceptible to at least some exposure to radiation," and that "[t]o fulfill their duties, [plaintiffs] were required to be physically present at the Norcross clinic, which they claim resulted in excessive radiation exposure.") with Potts, 270 Ga. at 16 ("The record shows that the alleged fraud did not occur during the period of LeBlanc's employment, the hospital clearly was not a place where he performed employment duties, and he was not fulfilling or doing anything incidental to his employment duties.").

Accordingly, the 28 Failure to Notify Plaintiffs' claims, which are based on alleged fraud by omission or failure to notify, are dismissed as barred by the Exclusive Remedy Provision of Georgia's Workers' Compensation statute.

2) *The Paramedic Plaintiffs' Allegations*

Four Plaintiffs have asserted specific allegations regarding a failure to notify paramedics about EtO exposure: Essence Alexander (¶249-251; 482(d)), Darnell Nesbitt (¶215-219; 482(d)), Demario Osbie (¶227-228; 482(d)) and Teresa Townsend (¶220-222; 482(d)) (collectively the "Paramedic Plaintiffs"). Three of these Plaintiffs (Alexander, Nesbitt and Osbie) allege that (1) they became ill while working at the Lithia Springs facility, (2) ConMed managers called an ambulance to the facility to assist them, and (3) either an unnamed HR Manager or Defendant Arnold committed fraud by omission by failing to tell the paramedics about supposedly unsafe EtO levels at the facility. Plaintiff Teresa Townsend makes a similar claim, alleging that

Defendant Arnold or unspecified "ConMed Managers" failed to inform her sister of EtO exposure when the sister came to the Lithia Springs facility to pick Ms. Townsend up to take her to a hospital. Third Amended Complaint ¶¶220-222; 482(d).

On their face, these allegations clearly place the Plaintiffs at the work site when the alleged injuries occurred and when the alleged omissions occurred. Thus, even if true, the allegations do not involve affirmative fraudulent statements made outside of the work environment and, as such, do not fall within the narrow Potts exception discussed above. On the contrary, Plaintiffs' allegations fall within the scope of the Exclusive Remedy Provision of the Georgia Workers' Compensation statute. *Compare* Potts, 270 Ga. at 15. *See also* Johnson, 208 Ga. App. at 667. Accordingly, as with the Failure to Notify Plaintiffs discussed above, the Paramedic Plaintiffs' claims are dismissed.

3) The Skype Plaintiffs' Allegations

The Third Amended Complaint alleges that the three Skype Plaintiffs (Zenobia Alexander, William Brooks, and Alexandria Pittman):

> volunteered to talk with [an unnamed "third party, out-of-State private"] physician using their 'break time,' but, if they chose to do so, those Plaintiffs who video-conferenced with the out-of-State physician had to be accompanied by a ConMed consultant, an industrial hygienist who falsely reassured the Plaintiffs and the out-of-State Skype doctor that the Plaintiffs had nothing to worry about regarding exposure to Ethylene Oxide in the facility.

(Third Amended Complaint ¶ 260.) As with the Paramedic Plaintiffs, the Skype Plaintiffs' allegations unambiguously place them at work at the Lithia Springs facility when the alleged actions occurred. None of these allegations fall under the Potts exception because any supposed "fraud" clearly occurred "in the course of" and "arising out of" Plaintiffs' employment with ConMed, thus depriving this Court of jurisdiction due to the Exclusive Remedy Provision. See Frett v. State Farm Employees Workers' Compensation, 309 Ga. 44, 46, 844 S.E.2d 749, 752

(2020) (injury sustained while on lunch break arose out of and in the course of employment). As such, these claims also must be dismissed. The Court finds that Plaintiffs seeking medical treatment is outside the scope employment. However, the underlying injuries occurred at the job site and in the course of their employment. At best there was only allegations of fraud by omission which is not within the Potts exception.

4) The 9 Unsubstantiated Assumption Plaintiffs' Allegations

The nine Unsubstantiated Assumption Plaintiffs (Linda Cappell, Shanard Christian, Gloria Edwards, Stephanie Gordon, Marquita Hutchins, Jair Jenkins, Porsche Kimball, Luquietta King and Crystal March) allege that they assume that ConMed Defendants must have made fraudulent statements to their medical providers because it was "each and every one of their impressions" that "the providers made comments that repeated and regurgitated precisely the comments made by Erika Arnold and Justin Mills." Third Amended Complaint ¶ 482(q). But it is not enough to assume fraud. Rather, under Georgia's heightened pleading standard, Plaintiffs must plead fraud with particularly. O.C.G.A. § 9–11–9(b); Dockens v. Runkle Consulting, Inc., 285 Ga. App. 896, 900 (2007) ("It is well settled that a general allegation of fraud amounts to nothing—it is necessary that the complainant show, by specifications, wherein the fraud consists. Issuable facts must be charged."). Plaintiffs' assumption that ConMed Defendants made fraudulent statements to their medical providers is far from a particular allegation of intentional fraud outside the workplace sufficient to fall within the narrow holding in Potts. Simply put, Potts did not create an exception to the Exclusive Remedy Provision based on an employee's assumption that her employer had made fraudulent statements to her medical providers. Furthermore, the Plaintiffs here cannot satisfy their heightened pleading standard based solely on their unsubstantiated assumptions. Accordingly, the Unsubstantiated Assumption Plaintiffs have failed to state a claim.

For all of the reasons set forth above, the Court lacks jurisdiction over the 28 Failure to Notify Plaintiffs' claims, the 4 Paramedic Plaintiffs' claims, the 3 Skype Plaintiffs' claims and the 9 Unsubstantiated Assumption Plaintiffs' claims because their exclusive remedy is under the Workers' Compensation Act, and all of their claims, against each of the ConMed Defendants, must therefore be dismissed with prejudice. See O.C.G.A. § 9–11–12(h)(3) ("Whenever it appears, by [the] suggestion of the parties or otherwise, that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").[12]

B) Statute of Limitations

ConMed moves to dismiss[13] the claims of 15 of the Plaintiffs[14] on the separate and independent basis that their claims are time-barred because the last day any of them worked at the ConMed facility was more than two years before this lawsuit was filed. See O.C.G.A. § 9-3-33. Plaintiffs do not dispute that many of them never even worked at ConMed at the same time as the Individual ConMed Defendants. However, Plaintiffs argues that any period of limitation was tolled until disclosure of the EtO exposure at the April 26, 2019 meeting wherein ConMed employees were informed of the facility's high levels of EtO. Moreover, Plaintiffs argue any issue regarding a tolling period is subject to jury determination.

Under Georgia's discovery or accrual rule, a "cause of action does not accrue so as to cause the statute of limitations to run until a plaintiff discovers or with reasonable diligence

[12] ConMed Defendants did not move to dismiss the claims of the eight Plaintiffs not identified in the sections above based on the Exclusive Remedy Provision (Brown, Davis, Ewusie, James, McClusky, Okrah, Wells and Zimmerman), noting that those Plaintiffs' claims mimic the factual allegations in Potts. However, as discussed below, Plaintiff T. Brown's claims is dismissed for separate reasons.

[13] This motion to dismiss for failure to state a claim cannot be granted unless: (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought. *Stendahl v. Cobb County*, 284 Ga. 525, 525 (1), 668 S.E.2d 723 (2008) (citation and punctuation omitted). In deciding a motion to dismiss, we construe the pleadings in the light most favorable to the plaintiff and resolve all doubts in the plaintiff's favor. See id.

[14] These 15 Plaintiffs are: T. Brown - last day worked 7/1/15, I. Chandler – last day worked 6/10/16, S. Gaines – last day worked 4/25/14, N. Jackson – last day worked 6/8/10 – died 7/8/13, J. Lark – last day worked 9/26/16, M. Lee – last day worked 4/24/15, J. McGhee – last day worked 5/13/16, T. Montgomery – believed to have last worked as contractor in 2016, D. Nesbitt – last worked 11/5/14, D. Osbie – last worked 9/25/13, J. Pharms – last worked 3/2/09 – died 5/22/2015, L. Ricks – last worked 3/13/14, L. Stem – last day worked 6/23/17, J. Williams – last worked 3/2/09 – died 12/17/14 and T. Williams – last worked 3/16/17 (collectively, the "Time-barred Plaintiffs"). The dates of employment were attached to the ConMed Defendants' Answer, and Plaintiffs have not disputed the employment dates contained therein.

should have discovered that he was injured." Ballew v. A. H. Robins Co., 688 F.2d 1325, 1327 (11th Cir. 1982). Thus, a cause of action will not accrue until the "plaintiff knew or through the exercise of reasonable diligence should have discovered the causal connection between the injury and the alleged negligent conduct of the defendant." *Id.* Georgia courts and federal courts applying Georgia law have often stated that this discovery rule applies in "continuing tort" cases. *See id.* The "continuing tort" label is shorthand for cases, like the case *sub judice*, involving "bodily injury which develop only over an extended period of time." Corp. of Mercer Univ. v. Nat'l Gypsum Co., 258 Ga. 365, 368 S.E.2d 732, 733 (1988).

The Third Amended Complaint sufficiently places Defendants on notice that the claims are for alleged long-term exposure to unsafe amounts of EtO. Plaintiffs allege that they were not informed of the existence of EtO and its elevated levels at their ConMed workplace until April 26, 2019 or thereafter. TAC, ¶255. Therefore, the date of an alleged appropriate warning or discovery of the fraud is no earlier than April 26, 2019. This lawsuit was first filed with this Court on May 19, 2020. Thus, all claims pending are within the Statute of Limitations for tort claims.

Here, Plaintiffs have sufficiently alleged both fraudulent misrepresentation and concealment to toll the limitation period for alleging Defendants subsequent disclosure of high EtO exposure. Viewing these allegations in the light most favorable to Plaintiffs, the Court finds that Plaintiffs may introduce evidence sufficient to support tolling the statute of limitations. Thus, the Court finds that Plaintiffs' claims are not subject to dismissal based on the statute of limitations. The Plaintiffs claims against Defendant ConMed are not barred by the statute of limitations.

However, in addition to suing ConMed, these 15 Plaintiffs also brought claims against each Individual ConMed Defendant. Plaintiffs do not dispute that many of them did not work at ConMed at the same time as the Individual ConMed Defendants. None of these 15 Plaintiffs' employment overlapped with Defendant Askew, whose first day with ConMed was September 2, 2019. Defendant Messner's employment, which began February 6, 2017, overlapped only with Thophles Williams (whose last date of employment with ConMed was March 16, 2017) and Leisa Stem (whose last date of employment with ConMed was June 23, 2017)). And Defendant Arnold's employment, which began on August 10, 2015, did not overlap with the following nine (9) Plaintiffs' employment (last date in parentheses): James Williams (March 2, 2009), Nickleaus Jackson (June 8, 2010), Jefonti Pharms (June 1, 2012), Demario Osbie (September 25, 2013), L.C. Ricks (March 13, 2014), Sasha Gaines (April 25, 2014), Darnell Nesbitt (November 5, 2014), Monique Lee (April 25, 2015), and Torwanda Brown (July 1, 2015).

Therefore, the claims against the following Individual ConMed Defendants are dismissed as their employment did not overlap with Plaintiffs and thus the Individual ConMed Defendants could not have engaged in alleged fraud with respect to those Plaintiffs. This specifically applies to the following claims: (i) all of the Time-barred Plaintiffs' claims against Defendant Askew are dismissed with prejudice; (ii) all of the Time-barred Plaintiffs' claims against Defendant Messner, other than Thophles Williams and Leisa Stem, are dismissed with prejudice; and (iii) all of the Time-barred Plaintiffs' claims against Defendant Arnold, other than Justin Lark, Irish Chandler, Jeffrey McGhee, Tameca Montgomery, Lisa Stem and Thophles Williams, are dismissed with prejudice.

C) Plaintiff Tameca Montgomery's Claim is Dismissed with Prejudice

ConMed Defendants moved to dismiss Plaintiff Tameca Montgomery's claims on the additional ground that the Third Amended Complaint contains no allegations specific to support her claims. The Third Amended Complaint states only that she was not employed by ConMed and worked as a contractor. Third Amended Complaint ¶ 288, n.13. Because she has not alleged any facts whatsoever to support her claims, her claims are dismissed.

D) Plaintiff Ira Montgomery's Claims

Plaintiff Ira Montgomery ("Plaintiff Montgomery"), the former facilities manager at the Lithia Springs ConMed facility, also seeks to recover against all ConMed Defendants for intentional infliction of emotional distress (Count 23),[15] defamation of character and defamation *per se* (Count 24), and abuse of process (Count 25). These claims all purportedly arise out of ConMed's reporting to local law enforcement Plaintiff Montgomery's alleged theft from ConMed, and ConMed's subsequent decision to assert counterclaims against Plaintiff Montgomery in its Answer to Plaintiffs' First Amended Complaint. *See* Motion to Dismiss, pp. 29-31.

As an initial matter, Plaintiff Montgomery did not, at oral argument or in any of the briefing, dispute that his Additional Claims against the Individual ConMed Defendants fail as a matter of law, given that the counterclaims that are the focus of his allegations were asserted by ConMed alone. Accordingly, Plaintiff Montgomery's claims against the Individual ConMed Defendants are hereby dismissed with prejudice.

As to Plaintiff Montgomery's additional claims against ConMed itself for defamation and abuse of process, in the light most favorable for the non-movant and resolve all doubts in

[15] Plaintiffs' counsel indicated at oral argument they would be dismissing this claim, though they have yet to file a formal dismissal as the Court requested at oral argument.

Plaintiffs' favor, the Court finds a motion to dismiss to be inappropriate as it cannot be said that Plaintiffs cannot possibly introduce evidence establishing their claims. The Court **DENIES** ConMed's Motion to Dismiss on these grounds.

Finally, the ConMed Defendants argue that Plaintiffs' claim for punitive damages must fail because Plaintiffs' substantive claims should be dismissed. However, because the substantive claims have not been dismissed, the Court declines to dismiss the claims for punitive damages.

The Sterigenics Defendants' Motion to Dismiss

The Sterigenics Defendants move this Court to dismiss Plaintiffs' claims on several grounds: that there is no legal duty "to the world" nor is there a legal duty to another company's employees; that FDA regulation of medical devices preempts claims against EtO sterilizers; that Plaintiffs' claims are barred by statute of limitations, Plaintiffs have fail to plead intent, failed to meet the heightened pleading standard for fraud claims; and the Third Amended Complaint fails to state a claim for aiding and abetting, intentional infliction of emotional distress, Res Ipsa Loquitor liability, strict liability, ultrahazardous liability, negligence per se, and punitive damages.

As stated *infra*, Defendant ConMed is a medical device manufacturer that employs Plaintiffs at its distribution facility in Cobb County, Georgia (the "ConMed Facility") and Plaintiffs allege occupational exposure to EtO while working at the ConMed Facility. (*See id.* ¶¶ 1, 89, 91, 129, Exhibit for Third Amended Complaint 287. Plaintiffs do not allege that they were exposed to EtO at Sterigenics' facility or that Sterigenics had control over the ConMed Facility or ConMed's products stored at the ConMed Facility. (*Id.* at ¶¶ 1, 117, 129, 190). It is

undisputed that ConMed delivered it's assembled, packaged and palletized loads of various medical products to the Sterigenics U.S. Facility for contract sterilization processing pursuant to ConMed's processing specifications from preconditioning through aeration and as required by the U.S. Food and Drug Administration ("FDA") regulations and standards. (*See* TAC ¶¶ 350, 358 (alleging that Sterigenics U.S. sterilized ConMed's medical products "according to the specifications of the manufacturer, ConMed"); *see also* Sterigenics U.S.'s Answer and Affirmative Defenses to Plaintiffs TAC ("Sterigenics U.S. Answer") at ¶ 1).

The Sterigenics Defendants argue the sterilization process for a particular medical device, such as the contract sterilization of ConMed's products, is subject to federal law and regulations promulgated by FDA.[16] In particular, the Sterigenics Defendants cited to the FDA's specific requirements for medical product sterilization and contract sterilizers and that, according to the Sterigenics Defendants, within this regulatory framework there is no discretion to deviate from ConMed's specifications with the FDA.

Plaintiffs do not allege that Sterigenics determined the process by which the medical equipment was sterilized or how or when ConMed's sterilized medical devices would leave the Sterigenics facility or be delivered to the ConMed Facility. Plaintiffs allege that while ConMed

---

[16] These requirements include but are not limited to:

- Before a medical device can be distributed for use, FDA reviews the sterilization method utilized for a particular medical device to ensure the sterilization method is validated and consistent with internationally recognized standards relating to medical device sterilization. (*See* Sterigenics U.S. Mot. **Ex. A**, at 1–2; **Ex. B** at 6).
- **21 C.F.R. § 820.3(o)**, which imposes certain quality system regulations and expressly applies to "those who perform the functions of contract sterilization."
- **21 C.F.R. § 820.70(a)**, which requires that a medical device "conform to its specifications."
- **21 C.F.R. § 801.150(e)**, which requires written agreements between manufacturers and contract sterilizers that "state[] in detail the sterilization process, the gaseous mixture or other media, the equipment, and the testing method of quality controls to be used by the contract sterilizers to assure that the device will be brought into full complaints with the Federal Food, Drug and Cosmetic Act;" failure to satisfy these requirements will render the medical
- **21 U.S.C. § 321(m)**, which specifically includes as part of medical device labeling a devices' "containers or wrappers."

is responsible for the release and transportation of each load to and from the Sterigenics facility, Defendant Sterigenics deviated from the ConMed process and committed separate violations.

Plaintiffs' claims against Sotera Health as corporate parent of Sterigenics, and against Sterigenics and Sterigenics Managers, are for injuring Plaintiffs with high levels of EtO, EG, and EC delivered to the Plaintiffs' workplace in unmarked trucks within unlabeled packages. These chemicals were allegedly trapped in plastic wrapping on pallets, resulting in substantial off-gassing in the warehouse location where Plaintiffs worked. Plaintiffs allege Sotera Health exercises significant control over Sterigenics such that these entities are intermingled to such an extent that they are inseparable and indistinguishable. (Third Amended Complaint, ¶104.) Plaintiffs further allege Sterigenics/Sotera Health used too much gas, did not properly aerate the packages, and did not warn those who would reasonably be harmed by the gas, i.e., the Plaintiffs. (Third Amended Complaint, ¶¶ 89-90.) In addition, the Third Amended Complaint alleges that Sterigenics and Sotera Health and their Managers helped ConMed commit fraud in hiding Plaintiffs' exposure to EtO. Plaintiffs allege that the Sotera Health / Sterigenics Defendants not only have a legal duty not to injure foreseeable victims, but to at least warn Plaintiffs, since Plaintiffs were foreseeable victims, the danger of exposure was great, and Plaintiffs had no knowledge of their exposure to EtO.

A) Sterigenics Legal Duty to Plaintiffs

"The existence of a legal duty," which can arise by statute or be imposed by decisional law, "is a question of law for the court." Rasnick v. Krishna Hospitality, Inc., 289 Ga. 565, 566-567, 713 S.E.2d 835 (2011). While Plaintiffs put forth a variety of purported duties owed to them by the Sterigenics Defendants, they are all addressed by resolving the issue of whether the

Sterigenics Defendants owed a duty to protect Plaintiffs from occupational exposure to EtO at the ConMed Facility. For several reasons, the Court finds that they do not.

First, the Supreme Court of Georgia has held that there is no general legal duty to all the world not to subject others to an unreasonable risk of harm. Dep't of Labor v. McConnell, 205 Ga. 812, 828 S.E.2d 352, 358 (2019). Moreover, contrary to Plaintiffs' position, whether or not any Sterigenics Defendant was alleged to be "on notice" of the purported risks associated with Plaintiffs' alleged EtO exposure is of absolutely no relevance to the question of whether a duty is owed to Plaintiffs because "our Supreme Court has rejected the argument that 'mere foreseeability' served as a basis to extend common law tort duty." Rasnick v. Krishna Hosp., Inc., 302 Ga. App. 260, 265, 690 S.E.2d 670 (2010). Therefore, Plaintiffs' allegations that the Sterigenics Defendants have a general duty to the world to perform its sterilization processing in a certain way is not a cognizable legal duty owed to Plaintiffs under Georgia law.

Second, "there is no duty to control the conduct of third persons to prevent them from causing physical harm to others." Ihesiaba v. Pelletier, 214 Ga. App. 721, 448 S.E.2d 920, 922 (1994). Nor does Georgia law recognize a legal duty on behalf of a third party to ensure that an employer's workplace is safe just because the third party provided services to the employer pursuant to a contractual agreement. Georgia law is clear that it is the employer's responsibility to ensure that the workplace is safe, and that employees are aware of any unusual conditions that exist. "Under Georgia statutory and common law, an employer owes a duty to his employee to furnish a reasonably safe place to work and to exercise ordinary care and diligence to keep it safe." CSX Transp., Inc. v. Williams, 278 Ga. 888, 608 S.E.2d 208, 208 (2005); *see also* Church v. SMS Enterprises, 368 S.E.2d 554, 555 (1988) ("It is the duty of the employer to provide its employees with a safe workplace and to warn them of any unusual conditions that may exist, or

of any conditions of which employees may have no knowledge."). While the Sterigenics Defendants have a duty to provide a safe workplace for its employees, that duty does not extend to the Plaintiffs, who are ConMed's employees' working at the ConMed Facility in Lithia Springs.

The Court is unpersuaded that Plaintiffs' caselaw supports the imposition of any legal duty on the Sterigenics Defendants to warn or take action to protect its customer's employees in connection with a service performed on its customer's products pursuant to the customer's specifications involving risks about which the customer was allegedly aware. Gutierrez v. Hilti, Inc. 349 Ga. App. 752, 824 S.E.2d 391 (2019). Plaintiffs' citation to Restatement (Second) of Torts § 388 is also misplaced. Section 388 is inapplicable for several reasons, including that no Sterigenics Defendant "supplie[d]...a chattel" or had any reason to believe that ConMed would not "realize [the alleged] dangerous condition [of its own products]" as required for Section 388 to apply. *See* Restat 2d of Torts, § 388. This is particularly true given that the products were sterilized according to ConMed's specifications, and Plaintiffs allege that ConMed was aware of the purported risks of their sterilized products and failed to warn its employees.

Third, Plaintiffs' citation to and reliance on O.C.G.A. § 51-1-6 is misplaced. (Third Amended Complaint ¶ 337) O.C.G.A. § 51-1-6 "does not create a cause of action, of course; it simply authorizes the recovery of damages for a breach of a legal duty." City of Buford v. Ward, 443 S.E.2d 279, 283 (1994); *see also* St. Mary's Hosp., 421 S.E.2d at 736. Here, no Georgia statutory or common law cited by the Third Amended Complaint imposes a duty on the Sterigenics U.S. Defendants owed to Plaintiffs.

Fourth, Plaintiffs also improperly rely on regulations promulgated under the Georgia Air Quality Act applicable to the Sterigenics U.S. Facility's EtO emissions, which do not provide an action for private recovery. (Third Amended Complaint ¶ 341 (citing Ga. Comp. R. & Regs.

391-3-1-.02(2)(a)(l)); *see also* Satterfield v. J.M. Huber Corp., 888 F. Supp. 1567, 1571 (N.D. Ga. 1995) (the "Georgia Clean Air Acts do not provide for an action for private recovery."). Even if Plaintiffs had alleged injuries resulting from exposure to EtO emissions from the Sterigenics U.S. Facility, those regulations cannot form a basis of any duty owed to them.

Fifth, O.C.G.A. § 34-9-11.1 does not impose a legal duty on any Sterigenics Defendant or create a cause of action for any plaintiff. (*See* Pls.' Brief at 1). Rather, O.C.G.A. § 34-9-11.1(a) merely states that claims against a third party are not barred by the exclusive remedy provision; it does not create a cause of action against all third parties. Indeed, the statutory language itself requires "circumstances creating a legal liability against some person other than the employer." O.C.G.A. § 34-9-11. Importantly, as the Georgia Supreme Court has recognized, this statute "does not grant any new substantive rights to injured employees or change the immunity from tort liability provided in § 34-9-11." Warden v. Hoar Constr. Co., 269 Ga. 715, 507 S.E.2d 428, 430 (1998).

Sixth, the Sterigenics Defendants cannot be liable to Plaintiffs under any product liability theory because they did not manufacture a product and ConMed's sterilized medical products stored at the ConMed Facility were not in the stream of commerce. As the Georgia Supreme Court held in Monroe v. Savannah Elec. & Power Co., 267 Ga. 26, 471 S.E.2d 854 (1996), "the relinquishment of control over [the product] and/or the marketable condition of that [product] are essential factors in determining whether the [product was] placed in the stream of commerce by the manufacturer for purposes of strict liability."; *see also* Smith v. Chemtura Corp., 297 Ga. App. 287, 676 S.E.2d 756, 761 (2009) (products stored and placed at a warehouse were not "placed in the stream of commerce" for purposes of § 51-1-11(b)(1)). No relinquishment of control by ConMed occurred here and Plaintiffs concede that they are not the purchasers or

consumers of ConMed's sterilized medical devices and that the products were not in the stream of commerce at the time of their alleged injury.

Seventh, Occupational Safety and Health Association ("OSHA") regulations do not impose a duty on any Sterigenics Defendant to ensure that ConMed's workplace is safe. Here, the Sterigenics Defendants have no employment relationship with Plaintiffs and no control over or involvement in Plaintiffs' workplace. As Georgia courts have recognized, "OSHA imposes a duty of care only between an employer and its employees." Bruce v. Ga.-Pacific, LLC, 326 Ga. App. 595, 757 S.E.2d 192, 196 (2014). Furthermore, "OSHA regulates obligations between an employer and its employees," and is only intended to benefit an employer's employees. *See* Dupree v. Keller Indus., 199 Ga. App. 138, 404 S.E.2d 291, 295 (1991) ("Since plaintiffs were not [defendant's] employees and thus were not persons who were intended to be benefitted by OSHA . . ."). Plaintiffs have not alleged that they are or were the employees of Sterigenics U.S. or Sotera Health. Therefore, no legal duty under OSHA arises with respect to any Sterigenics Defendants.

Furthermore, there is no requirement for the Sterigenics U.S. Defendants to provide material safety data sheets under OSHA's Hazard Communication Standard (29 C.F.R. § 1910.1200) for ConMed's medical products that Sterigenics U.S. sterilizes pursuant to ConMed's specifications. Rather, OSHA's Hazard Communication Standards apply only to chemical manufacturers and importers. *See* 29 C.F.R. § 1910.1200 (b)(1) ("This section requires chemical manufacturers or importers to classify the hazards of chemicals which they produce or import, and all employers to provide information to their employees about the hazardous chemicals to which they are exposed…"). The Sterigenics U.S. Defendants neither manufacture nor sell EtO such that § 1910.1200 is implicated. Moreover, OSHA regulations explicitly state

that the Hazard Communication Standards do not require labeling of chemicals used in a "medical or veterinary device or product" that is subject to FDA labeling requirements like ConMed's sterilized medical products. 21 C.F.R. § 1910.1200(B)(5)(iii)).

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.

Because the Sterigenics Defendants do not owe a legal duty to Plaintiffs under the facts alleged, none of Plaintiffs' negligence claims survive, and it is not necessary to address the other grounds of dismissal raised in briefing. Nonetheless, this Court will address the Sterigenics Defendants' additional arguments in turn.

B) Preemption by Federal Law or Impossibility

The doctrine of preemption, which is based on the Supremacy Clause of the United States Constitution, provides that a state law is invalid to the extent it conflicts with federal legislation. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992). Federal law preempts or supersedes state law under three circumstances: "First, when acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms." Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985). Second, "[w]hen Congress intends federal law to 'occupy the field,' state law in that area is preempted." Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000). Finally, "state law is naturally preempted to the extent of any conflict with a federal statute," either because "it is impossible for a private party to comply with both state and federal law" or because "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id. As to the third type of preemption, commonly

referred to as "conflict" or "impossibility" preemption, "[e]ven when Congress has neither expressly preempted state law nor occupied the field, state law is preempted when it actually conflicts with federal law." Thomas v. Bank of Am. Corp., 711 S.E.2d 371, 374 (Ga. App. 2011). If a claim is preempted by federal law, it must be dismissed. *See, e.g., id.* at 784.
The Supremacy Clause establishes that federal law "shall be the supreme Law of the Land...any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2. As interpreted and applied by the U.S. Supreme Court, where state and federal law "directly conflict," state law must give way and is preempted by federal law. PLIVA, Inc. v. Mensing, 564 U.S. 604, 617–18 (2011).

The U.S. Supreme Court has explained that "state and federal law conflict where it is impossible for a private party to comply with both state and federal requirements." Id. at 618. "The question for 'impossibility' is whether the private party could independently do under federal law what state law requires of it." Id. at 620. If a party "cannot satisfy its...duties" under a state law "without the Federal Government's special permission and assistance, which is dependent on the exercise of judgment by the federal agency, that party cannot independently satisfy those state duties for pre-emption purposes," and the state law is preempted. Id. at 623–24. For example, in PLIVA, the Supreme Court found that plaintiff's state law failure to warn claims were preempted when an action brought against a manufacturer of a generic drug because federal law "demanded that generic drug labels be the same at all times as the corresponding brand-name drug labels" and "prevented the [generic drug manufacturer] from independently changing their generic drugs' safety labels." Id. at 617, 619.

Plaintiffs allege that the EtO sterilization of ConMed's products by Sterigenics U.S. was generally unsafe for ConMed's workers and suggest that a different sterilization process should

have been utilized to reduce residual EtO. (*See e.g.*, TAC ¶¶ 116, 122, 186, 345). Indeed, Plaintiffs allege that "Defendants' breached their duty…[by] using EtO as part of its sterilization process when safer alternatives could accomplish the same……" (*Id.* ¶336(c)). As Plaintiffs further concede, Sterigenics U.S.'s sterilization of ConMed's products was conducted "according to the specifications of the manufacturer, ConMed." (*Id.* ¶350).

Accepting Plaintiffs' allegations as true, Plaintiffs attempt to impose a state law duty to utilize a different sterilization procedure than the FDA-approved and validated sterilization process as required by ConMed's contract specifications. ConMed delivered it's assembled, packaged and palletized loads of various medical products to Sterigenics U.S.'s facility for contract sterilization processing pursuant to ConMed's detailed and FDA-approved EtO processing specifications for each step from preconditioning through aeration. Stated simply, it would be impossible for Sterigenics U.S. to both comply with federal law and do what Plaintiffs' purported state law claim would require of it (*i.e.*, deviate from the FDA-approved and validated sterilization process) without FDA's review of the potential changes and permission. *See* PLIVA, 564 U.S. at 620, 623–24.

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—Plaintiffs' causes of action also individually fail for the below separate reasons

C) Plaintiffs Sufficiently Alleged Fraud Claims

Plaintiffs' fraud-based claims must satisfy the heightened pleading standard. Indeed, it is well established that,

> O.C.G.A. § 9-11-9 (b) requires that all allegations of fraud must be made with particularity and not averred generally. Notice pleading is the rule in Georgia, and under O.C.G.A. § 9-11-9 (b), allegations of fraud must be pled with particularity. It is well settled that a general allegation of fraud amounts to nothing — it is necessary that the complainant show, by specifications, wherein the fraud consists. Issuable facts must be charged.

Dixon v. Branch Banking & Tr. Co., 824 S.E.2d 760, 766 (2019). The Third Amended Complaint makes sufficiently factually detailed allegations of fraud against the Sterigenics Defendants and the Sterigenics Managers, as these entities allegedly conspired with each other and with ConMed to defraud Plaintiffs before, during, and after the time in which Plaintiffs were exposed to EtO. (See, e.g., Third Amend. Complaint at ¶90-140, 372-378, 477-481). Plaintiffs also allege the EtO sterilization process was sped up by Sterigenics Managers Mosby, Sabb, and Sterigienics-John Doe Defendants, by using too much EtO and or by skipping or cutting short the aeration stage which resulted in soaking wet packages and higher levels of EtO, EG, and EC than allowed. (Third Amended Complaint, ¶155-166.) Plaintiffs allege this was intentional and was done in conjunction with ConMed. These allegations are sufficient to state Plaintiffs' claims for fraud against Sotera Health, Sterigenics, and the Sterigenics Managers.

D) *Statute of Limitations*

See findings *infra* regarding statute of limitations for ConMed Defendants and the individual Defendants. The same analysis is applicable.

E) *Intentional Torts*

The Third Amended Complaint alleges that the Sterigenics Defendants committed civil battery and intentional infliction of emotional distress.[17] (Count XI and XIII). Sterigenics

[17] To prevail in action for emotional distress, a plaintiff must demonstrate that:

argues Plaintiffs have failed to sufficiently allege any intentional exposure of EtO to Plaintiffs. Moreover, Defendants argue Plaintiffs have failed to properly allege a claim for civil battery as Plaintiffs have not alleged a direct contact but merely the contact with ConMed's medical devices constitutes an unlawful touching by Sterigenics.

Plaintiffs have alleged that Sterigenics intentionally caused or set into motion events that caused EtO to come into contact with Plaintiffs. Plaintiffs also alleged such intentional EtO contact was extreme and outrageous and such conduct caused severe emotional distress. Construing the pleadings in favor of Plaintiffs, Plaintiffs have sufficiently pled that Defendant Sterigenics committed civil battery and intentional infliction of emotional distress.

F) Aiding/Abetting Tortious Conduct

Plaintiffs alleges the Sterigenics Defendants acted jointly and in concert with others to commit negligent and fraudulent acts against Plaintiffs causing them harm. Georgia law does not recognize "aiding and abetting tortious conduct" or "civil conspiracy" as a separate cause of action from the underlying tort. *See,* Siavage v. Gandy, 350 Ga. App 562, 829 S.E.2d 787, 789 (2019) ("we find no significant distinction between aiding and abetting fraud as a separate tort and committing the tort of fraud as a joint tortfeasor"). Plaintiffs conceded at oral argument there is not a separate cause of action for civil conspiracy or aiding and abetting.

Where it is sought to impose civil liability for a conspiracy, the conspiracy of itself furnishes no cause of action. Savannah College of Art & Design v. Sch. of Visual Arts, 464 S.E.2d 895, 896 (1995); *see also* Peterson v. Aaron's, Inc., 108 F. Supp. 3d 1352, 1358 (N.D. Ga. 2015) ("the aiding and abetting argument is a means by which Aaron's Inc. may be found jointly liable for the invasion of privacy claim asserted against Aspen Way. The Plaintiffs need not

(1) the conduct giving rise to the claim was intentional or reckless; (2) the conduct was extreme and outrageous; (3) the conduct caused emotional distress; and (4) the emotional distress was severe. The defendant's conduct must be so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Blue View Corp. v. Bell, 298 Ga. App. 277, 679 S.E.2d 739 (2009).

establish an independent aiding and abetting claim."). The gist of the action, if a cause of action exists, is not the conspiracy alleged, but the tort committed against the plaintiff and the resulting damage. Cook v. Robinson, 116 S.E.2d 742, 745 (1960). However, to the extent that Plaintiffs have alleged the Defendants have acted in concert and may be liable jointly for other tort claims asserted, Plaintiffs have sufficiently pled such claims.

G) Res Ipsa Loquitor

Plaintiffs allege their exposure to EtO would not have occurred at the ConMed warehouse had the Sterigenics Defendants not sent it there in a form that caused foreseeable injury to Plaintiffs. (See Third Amend. Complaint at ¶¶ ¶¶ 385-388, ¶¶ 105-140, 167-179.) The Sterigenics Defendants argue that Plaintiffs cannot establish an essential element of res ipsa loquitor in that the Sterigenics Defendants did not have exclusive control over ConMed's sterilized medical devices or facility. The Sterigenics Defendants argue if any party had control at the ConMed facility, it was only ConMed and its agents and Sterigenics exercised no control of the ConMed facility when any EtO exposure occurred. Thus, the Sterigenics Defendants argue any *res ipsa loquitor* claim should be dismissed.

Plaintiffs allege the Sterigenics Defendants and its employees and managers had exclusive control over the EtO present in the shipments given to ConMed and that ConMed did not add any EtO. Thus, Plaintiffs allege if Sterigenics had properly aerated the sterilized shipments, then the dangerous levels of EtO present in the shipments as given to ConMed would not have existed.

The application of *res ipsa loquitur* is authorized, then, when "(1) the injury is of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not

have been due to any voluntary action or contribution on the part of the plaintiff." Family Thrift, Inc. v. Birthrong, 336 Ga. App. 601, 785 S.E.2d 547 (2016).

Plaintiffs have alleged that the Sterigenics Defendants had exclusive control over ConMed's sterilized medical devices, albeit for a limited period, where they concede that Sterigenics sterilized ConMed's medical equipment "according to the specifications of the manufacturer, ConMed." (Third Amended Complaint ¶ 358). Furthermore, upon completion of the contract sterilization services, ConMed was responsible for dictating how and when its sterilized medical equipment would be transported back to the ConMed Facility where Plaintiffs allege, they were injured. However, as stated previously Plaintiffs allege the Sterigenics Defendants exceeded the contractual protocols which delivered excessive EtO to ConMed.

Therefore, Plaintiffs' claim for *res ipsa loquitor* negligence is sufficiently pled.

H) Strict Liability

The Sterigenics Defendants argue that Plaintiffs' strict liability claim fails because they are not alleging injury from a sold product and Sterigenics is not a manufacturer under O.C.G.A. §§ 51-1-11 and 51-1-11.1. O.C.G.A §51-1-11 provides for strict liability when:

> The manufacturer of any personal property sold as new property directly or through a dealer or any other person shall be liable in tort, irrespective of privity, to any natural person who may use, consume, or reasonably be affected by the property and who suffers injury to his person or property because the property when sold by the manufacturer was not merchantable and reasonably suited to the use intended, and its condition when sold is the proximate cause of the injury sustained.

O.C.G.A. §51-1-11. Under Georgia law, an entity may be considered a manufacturer for purposes of strict liability if the entity satisfies one of three alternative definitions:

> a) an actual manufacturer or designer of the product; or
> b) a manufacturer of a component part which [failed and] caused the plaintiff injury, or
> c) an assembler of component parts who then sells the item as a single product under its own trade name.

Morgan v. Mar-Bel, Inc., 614 F.Supp. 438, 440 (N.D.Ga. 1985). Plaintiffs have alleged Sterigenics is processor under category b) or c).

Also, Plaintiffs allege they qualify as persons "reasonably affected by the property who suffer injury." Defendants, however, argue that strict liability is precluded because Plaintiffs are alleging injury at their workplace from products their employer ConMed was preparing to distribute, not from a product that was sold or one over which ConMed had yet relinquished control. *See* Monroe v. Savannah Elec. & Power Co., 471 S.E.2d 854, 857 (Ga. 1996).

Plaintiffs are alleging injury at their workplace from products their employer ConMed was preparing to distribute, not from a product that was sold or one over which ConMed had yet relinquished control. Therefore, strict liability does not apply, and Plaintiffs' strict liability claims are **DISMISSED** as to the Sterigenics Defendants.

I) Negligence Per Se

To establish negligence per se, "it is necessary to examine the purposes of the legislation and decide (1) whether the injured person falls within the class of persons it was intended to protect and (2) whether the harm complained of was the harm it was intended to guard against." Rockefeller v. Kaiser Foundation Health Plan of Ga., 251 Ga. App. 699, 702 (2001).

Sterigenics Defendants allege Plaintiffs have failed to identify any statutory duty owed to them to support a negligence *per se* claim. Plaintiffs allege that they have been injured by violations both of OSHA EtO Standards and the Restatement (Second) of Torts section 389 and these violations caused injury. For the reasons set forth *infra*, the Court finds such claims cannot proceed.

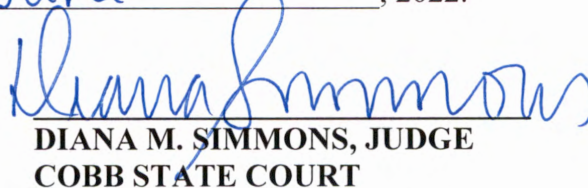
Because Plaintiffs' do not identify any additional statutory duty owed to them by any Sterigenics Defendants their negligence *per* se claim is **DISMISSED** with prejudice.

J) Punitive Damages and other Derivative Claims

The Sterigenics Defendants argue that Plaintiffs' punitive damages, negligent hiring, retention, training and supervision, vicarious liability, and wrongful death claims fail because the substantive claims fail. The Court has not dismissed all of Plaintiffs' substantive claims, and, therefore, will not dismiss Plaintiffs' the derivative claims as pled. No additional grounds for dismissal were asserted.

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 13 day of June, 2022.



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:

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 Goerdt, 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
cgoerdt@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 15th day of June, 2022.

Carrie A. Bricker

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