FILED
3rd JUDICIAL DISTRICT COURT
Dona Ana County
8/10/2023 2:52 PM
CLERK OF THE COURT
Josephina Gomez

**STATE OF NEW MEXICO**
**COUNTY OF DOÑA ANA**
**THIRD JUDICIAL DISTRICT COURT**

**STATE OF NEW MEXICO, EX. REL.**
**HECTOR BALDERAS, ATTORNEY GENERAL,**
**Plaintiffs,**

**v.**

**STERIGENICS U.S. LLC, ET. AL.,**
**Defendants.**

**NO. D-307-CV-2020-02629**
**Judge: Casey Fitch**

# MEMORANDUM ORDER GRANTING IN PART MOTION FOR SUMMARY JUDGMENT AND DIRECTING STATE TO FILE AMENDED COMPLAINT

Sterigenics[1] moves for summary judgment on the State's verified complaint and for sanctions under Rule 1-011, NMRA. Sterigenics maintains, as it has throughout the litigation, that the State does not—and never did—have evidence that Sterigenics' emissions of the known carcinogen ethylene oxide (EtO) at its facility in Santa Teresa, New Mexico caused the harm alleged in its pleading and otherwise cognizable in the State's capacity as *parens patriae*. Moreover, Sterigenics says, the State's misrepresentations about the information it did have at the time of filing suit are severe enough to warrant dismissal. The Court has considered the extensive filings of the parties along with record and held argument on the motion. The Court finds it unnecessary to reach the issue of sanctions under Rule 1-011 because it affords appropriate relief by granting summary judgment where warranted.[2/3]

[1] The Court calls all Defendants Sterigenics for ease of reference but recognizes that Sotera Health Holdings and Sotera Health Company seek dismissal on jurisdictional grounds. The Court does not consider these Defendants' participation in the motion for summary judgment a waiver of any challenge to personal jurisdiction.
[2] The Court does not intend to downplay the seriousness of the motion for Rule 1-011 sanctions. The representations at issue trouble the Court and present a close call. The sanctions the Court would have considered granting, however, would extend as far as what the Court rules on summary judgment. It is unnecessary to undertake the near impossible task of meaningfully analyzing counsel's subjective intent.
[3] As explained below, in terms of concrete types of recovery/harms alleged, the Court agrees that summary judgment is appropriate either as a pure matter of law—as is the case with decreased property values and monitoring

1. The State's recovery for decreased property values and monitoring costs are irreconcilable with its appointed role of *parens patrie*, requiring summary judgment. *See Martinez v. Allstate Ins. Co*., 1997-NMCA-100, ¶ 5 ("If . . . only a legal interpretation of the facts remains, summary judgment is the appropriate remedy.")(Citation omitted). *Parens patriae* confers a species of standing on the State to bring civil actions "to protect those quasi-sovereign interests such as health, comfort and welfare of the people . . ." *City of Albuquerque v. New Mexico Pub. Serv. Comm'n*, 1993-NMSC-021, ¶19 n. 8 (citation omitted). But the doctrine is not a substitute for class actions or private lawsuits to vindicate truly private interests. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982). In order to sue in *parens patriae*, "the State must articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party." *Id.*

Here, the State's claims for public nuisance (Counts I & II) and strict liability (Count III) assert, in part, that Sterigenics' EtO emissions caused "property values in the affected census tracks to decline." To the extent the State seeks to recover for a diminution in real estate values for homeowners in Santa Teresa, it may not. Value diminution is the quintessential private interest that local homeowners may bring individually or as part of a class. *See Satsky v. Paramount Communications, Inc.,* 7 F.3d 1464, 1470 (10th Cir. 1993) (explaining that "property damage, diminution of value to real estate, loss of income and other economic losses . . . involve injuries to purely private interests, which the State cannot raise in its . . . parens patriae

costs—or by failure to establish with record evidence a genuine issue of material fact for trial under Rule 1-056, NMRA and/or make a case that summary judgment is premature—as it concerns increased healthcare costs. The Court also determines that summary judgment is appropriate on Counts III (strict liability) and VI (violations of Unfair Practices Act). Taken together, these ruling might appear to grant summary judgment on the entirety of the complaint. And considering that increased healthcare costs, decreased property values, and monitoring costs appear to be the universe of concrete harms alleged that conclusion is not far off. Nonetheless, the Court finds that a liberal reading of the complaint suggests broader harms cognizable under the doctrine of *parens patriae* but will require the State to reformulate the complaint to eliminate causes of action dismissed herein and articulate what harms specifically it seeks to redress as well as the remedies sought.

capacity"). That property values may serve as a proxy for environmental damage generally is an arguable method of proof, the propriety of which is not before the Court. Because the complaint fairly can be read to seek monetary compensation for the alleged diminution of property values, summary judgment is appropriate.

In terms of the monitoring costs, the Court understands the State's expert(s) undertook pre-suit air quality sampling pursuit and continue to do so. Prospectively, it appears the State would like the case to result in a monitoring program. As for the latter, Sterigenics disputes the availability of such a program as a remedy. Sterigenics is correct that costs associated with medical monitoring is not abatement of a nuisance or, as such, necessarily a cognizable form of recovery in *parens patriae*.[4] In terms of the former, the Court concludes that expenditures for monitoring the air to date are litigation costs. If at all, those costs might be recoverable following judgment under Rule 1-054, NMRA.

2. The State has not presented a jury question that would permit recovery of healthcare costs or a sufficient basis for to delay ruling on summary judgment. Since this case's inception, the State has claimed increased healthcare costs as a result of Sterigenics' EtO emissions. From what the Court can discern of the record, there is no evidence of those costs. Despite maintaining New Mexico's Medicaid records, and knowing Medicaid provides healthcare to over forty-percent of New Mexicans, the State has not documented for example an increase in billing arising from treatment of cancer EtO exposure is known to cause for the zip codes the State knows to have increased levels of EtO in Dona Ana County.[5]

[4] A medical monitoring fund might have a place in a resolution of the case as the State suggested during argument and the Court may revisit the issue later.

[5] The Court does not ignore a spreadsheet the State produced that shows prescriptions in the arguable affected areas and other records showing enrollment numbers. These documents by themselves do not speak to any causal relationship between EtO emission and healthcare expenditures. At best, they speak to enrollment and expenditure and nothing more.

With time, the State might well utilize its experts to pinpoint the exact distance fugitive emissions from the Santa Teresa facility travel, the quantity of EtO in the air in Dona Ana county, the increased risk of cancer at the given levels, the baseline rate of cancers associated with EtO exposure in the County, upward deviations from the baseline, the number of individuals in the identified area on public healthcare assistance, prevalence of billing codes associated with treatment of cancers associated with EtO exposure, increases in billings over time, and ultimately an estimate of treatment costs. *See* Rule 1-056(F), NMRA. But the State represented it had already incurred costs Sterigenics caused *at* the time it filed its verified pleading. Although the Court can appreciate HIPAA concerns in providing unfettered access to the State's Medicaid database, the Court cannot discern a cognizable justification for the State's inability to show its cards years after it initiated suit. The Court declines to delay proceedings on summary judgment years after basic information should have been available.

3. Counts III (strict liability) and VI (violations of the Unfair Practices Act) do not survive summary judgment. The State's theory of strict liability does not rest on any cognizable "ultra-hazardous" activity. Emissions of toxic substances, to be fair, can be dangerous to human health, and EtO is a known carcinogen. But in this case, it is undisputed that Sterigenics may emit at least some EtO under various permits. To impose liability without regard to fault here is thus contrary to the doctrine's purpose in New Mexico law. *See Rodriguez v. Del Sol Shopping Ctr. Assocs*., L.P., 2014-NMSC-014, ¶ 14 (identifying "activities that are 'inherently dangerous' . . . in which harm is merely a foreseeable consequence of negligence, and activities that are 'ultrahazardous,' in which the potential for harm cannot be eliminated by the highest degree of care") (citation omitted).

Some factors[6] under the Restatement of Torts (Second) Section 520, which New Mexico courts apply in examining strict liability claims, *see Apodaca v. AAA Gas Co.*, 2003-NMCA-085, ¶ 21, may support a finding of ultrahazardous activity. But typically, the ability to reduce the risk to reasonable levels is controlling because the "inability to eliminate the risks by taking precautions . . . distinguishes strict liability from negligence." *Id.* at ¶23. Here, the relevant state and federal agencies allow for some emission of EtO and there must exist an ability to reduce emissions to levels these agencies consider safe for human health. Whether Sterigenics did take precautions is a different question and a subject for trial, but not under a theory of strict liability.

The State's Unfair Practices Act claim similarly does not withstand summary judgment. Here, the State has not sued Sterigenics on behalf of consumers that have been misled by Sterigenics' claims of environmental stewardship. *See Gandydancer, LLC v. Rock House CGM, LLC*, 2019-NMSC-021, ¶ 24 ("The Legislature intended the UPA to serve as remedial legislation for consumer protection."). Instead, the State has sued Sterigenics for broad environmental/human-health harm as *parens patriae*, which may not include the private interests of consumers that purchase Sterigenics' sterilization services. Certainly, New Mexico's attorney general is authorized to enforce the Unfair Practices Act, *see* NMSA 1978, § 57-12-8, but this provision does not remedy what the New Mexico Court Supreme Court portrayed as a "zone of interest" issue. *See Gandydanceer*, 2019-NMSC-021. No matter what the theory, the State cannot tether the harm here to consumer protection, the Act's zone of interest. In any event, the State offers no evidence that Sterigenics' representations caused the environmental harms here.

[6]They are: (a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes. *Apodaca*, 2003-NMCA-085, ¶21.

4. Counts I and II (common law and statutory public nuisance), and Count IV (negligence) of the State's verified complaint survive summary judgment. The Court agreed with Sterigenics and, as previously discussed, has precluded the State from obtaining healthcare costs, diminution in property value, and monitoring costs (as such). The Court has also dismissed Counts III (strict liability) and VI (UPA violaton). What remains a jury question is whether Sterigenics' emissions have caused harms cognizable under the *parens patriae* doctrine. As *parens patriae*, the State may sue Sterigenics for, broadly speaking, harming the environment and public health by its EtO emissions. And during oral argument, Sterigenics appeared to agree that a degradation of public health/welfare generally, degradation of air quality generally, and environmental harm generally fell within the *parens patriae* ambit. It would be hard not to as "the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain"—"whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air." *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 604 (citation omitted).

The record contains evidence of these cognizable harms and causation sufficient to withstand judgment as a matter of law. In the light most favorable to the State: (1) there is a single facility that emits EtO in the community; (2) EtO has benefits as a sterilization agent, but is carcenoginic; (3) beyond EtO emissions from permitted channels, EtO escapes from the facility and travels into the community; (4) in the area surrounding the facility, EtO levels are many times above what is safe for humans; and (5) humans exposed to EtO at the levels near the facility have an increased likelihood of developing cancer. While the record does not support specific causation of increased healthcare and other costs or identify individuals with cancer

from EtO exposure, there remain genuine issues of material fact that Sterigenics has harmed air quality and impacted environmental and public health through its conduct.

The Court understands Sterigenics to focus on its lawful authority to emit EtO by virtue of permits it possesses. And to be fair, a claim for nuisance appears to include an element that the offending conduct take place without "lawful authority." *See* NMSA 1978, §30-8-1 (providing that "[a] public nuisance consists of knowingly creating, performing or maintaining anything affecting any number of citizens without lawful authority which is . . . injurious to public health"). Sterigenics' problem is that on-the-ground witnesses have confirmed fugitive emissions enter the community calling into question whether its conduct is lawful. Viewing the facts in the light most favorable to the State, compliance with a permit does not excuse such fugitive emissions. Even if the Court could agree with Sterigenics that fugitive emissions no matter how egregious fall within its existing permits, Sterigenics moved for summary judgment on the State's claims, not on an affirmative defense.

The distinction is critical because, as Sterigenics knows from its interlude in federal court, New Mexico courts treat the lawful authority justification as an affirmative defense. *New Mexico v. Serigenics U.S. LLC*, 2021 WL 1391298, *3 (D.N.M. April 13, 2021) (examining New Mexico cases and determining that "one could reasonably conclude that the 'without lawful authority' language in the public nuisance statute can provide the basis for a defense and is not an element of a public nuisance claim"). Here, Sterigenics has not moved for summary judgment on its affirmative defense, and the Court declines to read its motion as seeking that relief. Otherwise, the Court concludes the record supports all essential elements of a public nuisance and negligence claim. Viewed in the light most favorable to the State, Sterigenics emits EtO into

the local community at levels that risk harming human health, degrade the environment, and damage air quality. It had a duty not to.

5. For the above reasons, the Court enters summary judgment in Sterigenics' favor as it concerns the State's recovery for decreased property values, increased healthcare costs, and medical monitoring along with Count III for strict liability and Count VI for violation of the Unfair Practices Act. Considering theses rulings and recognizing that the complaint is not a model of clarity with respect to the harms it alleges and remedies it seeks, the Court directs the State to file an amended complaint removing those matters on which the Court entered judgment and providing additional clarity. The amended complaint shall also omit any count for temporary restraining order/preliminary injunction.

**IT IS THEREFORE ORDERED** that Sterigenics' motion for summary judgment is **GRANTED in part** as stated above.

**IT IS FURTHER ORDERED** that the State file an amended complaint as directed above on or before September 12, 2023.

**IT IS FURTHER ORDERED** that the parties shall meet and confer and provide a joint scheduling report on or before September 12, 2023.

Casey Fitch
District Judge, Division V

**CERTIFICATE OF SERVICE**

I, hereby certify that I mailed/delivered a copy of the foregoing document to all parties on the date of filing.

Nicole R. Vasquez
TCAA