IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Arianna Molina, by her Parents and Natural Guardians, Melissa Madrid and Jacob Molina and Melissa Madrid and Jacob Molina, individually,	)	
Plaintiffs,	)	
v.	)	C.A. No. N10C-12-267 JRJ
On Semiconductor Corporation and Semiconductor Components Industries d/b/a On Semiconductor,	)	
Defendant.	)	

Date Submitted: December 28, 2012
Date Decided: March 27, 2013
Date Corrected: August 2, 2013

OPINION

Upon Defendants On Semiconductor Corporation and Semiconductor Components Industries d/b/a On Semiconductor's Motion to Dismiss Plaintiffs' First Amended Complaint: **DENIED**

Steven J. Phillips, Esquire (*pro hac vice*) (argued), Phillips & Paolicelli, LLP, 380 Madison Avenue, 24th Floor, New York, New York, 10017, Aryeh Taub, Esquire, Levy, Phillips & Konigsberg, LLP, 800 Third Avenue, 11th Floor, New York, New York, 10022 (*pro hac vice*), J. Zachary Haupt, Esquire, Bifferato LLC, 800 North King Street, Plaza Level, Wilmington, Delaware, 19801. Attorneys for Plaintiffs.

Kevin J. Connors, Esquire, (argued), Marshall, Dennehey, Warner, Coleman & Goggin, 1220 North Market Street, 5th Floor, Wilmington, Delaware, 19801. Attorneys for Defendants.

Jurden, J.

I. INTRODUCTION

Before the Court is Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint pursuant to Super. Ct. Civ. R. 12(b)(6). Defendants move to dismiss on the following grounds: (1) there is no viable cause of action for preconception injury under Arizona law; (2) Plaintiffs have failed to plead the essential elements of duty and causation; and (3) Plaintiffs' claims are barred by the exclusivity provision of Arizona worker's compensation law. For the reasons that follow, Defendants' motion is **DENIED**.

II. BACKGROUND/FACTS

The minor plaintiff, Arianna Molina ("Arianna"), was born on September 11, 2003 with severe birth defects.[1] Arianna suffers from muscular dystrophy, is confined to a wheelchair, requires a tracheotomy and ventilator to breathe, and requires a feeding tube to eat.[2] Arianna's mother, Melissa Madrid ("Mother"), was employed by Defendants and worked at their semiconductor manufacturing and electrical measuring instrument manufacturing facilities located in Arizona from 1999 through 2003.[3]

During her employment with Defendants, Mother worked in and around "clean rooms" and elsewhere at Defendants' Phoenix, Arizona, facilities where

[1] First Amended Complaint ¶¶ 1, 33-34, *Molina v. On Semiconductor Corp.*, C.A. No. N10C-12-267 (Del. Super. Apr. 27, 2012) (Trans. ID 43942599) [hereinafter FAC].
[2] *Id.* ¶¶ 1, 34.
[3] *Id.* ¶¶ 5-6.

semiconductor wafers, microchips, and boards were being manufactured for use in computers.[4] According to Plaintiffs, Defendants designed, manufactured, distributed, sold, supplied, and installed allegedly hazardous and reproductively toxic chemicals or substances for use in Defendants' clean rooms and elsewhere, where the Defendants utilized them in the manufacturing process of semiconductor computer wafers, chips, and boards.[5] Further, according to Plaintiffs, Defendants not only failed to utilize proper measures to prevent their workers, particularly female workers of childbearing age and pregnant workers, from being exposed to these reproductively toxic chemicals and substances, but they also failed to warn their workers of the dangerous characteristics of the chemicals and substances and the health threats that they posed, failed to test and study the chemicals to fully appreciate their capacity to cause reproductive harm, made representations "incorrectly and untruthfully" that the chemicals and substances were safe and suitable for use, assured their workers, including Mother, that adequate protections were in place to prevent any harm to them or their future offspring, and concealed from Mother that contact with these chemicals and substances posed severe health hazards to her offspring.[6] Plaintiffs allege that Defendants knew or should have known that the chemicals to which Mother was allegedly exposed can cause

[4] *Id.* ¶ 12.
[5] *See Id.* ¶ 13; *See also* ¶ 10 where Plaintiffs allege that these hazardous and reproductively toxic chemicals were "manufactured, designed, sold, or distributed" by Defendants.
[6] *Id.* ¶¶ 18-24.

reproductive hazards, including spontaneous abortions, stillbirths, malformations, birth defects, early childhood cancers, and other neurological, developmental, and degenerative conditions.[7]

Plaintiffs allege that as a consequence of Mother's employment, Mother was exposed, and Arianna was exposed *in utero*, to these reproductively harmful chemicals and substances which caused physical injury to Arianna.[8] Plaintiffs assert claims of: (1) negligence, (2) premises liability, (3) strict liability, (4) abnormally dangerous/ultra hazardous activity, (5) willful, wanton, and intentional conduct, (6) breach of an assumed duty, and (7) loss of consortium.[9]

III. STANDARD OF REVIEW

On a 12(b)(6) motion to dismiss, the Court must accept every well-pled allegation as true and draw all reasonable inferences in the non-movant's favor.[10] Allegations are well-pled if they place a defendant on notice of the claim at issue.[11] Dismissal should be denied unless "it appears to a certainty that the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof."[12]

---

[7] *See id.* ¶¶ 17-24. Plaintiffs allege that Defendants' corporate policies regarding health and safety, including reproductive health and safety, expressly, directly, and impliedly recognized the danger of potential injury to the offspring of their workers and undertook to protect those workers from such harm.
[8] *Id.* ¶ 32. These chemicals included, *inter alia*, arsenic compounds, organic solvents and mercury. *Id.* ¶ 9.
[9] *Id.* ¶¶ 61-106.
[10] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).
[11] *Precision Air, Inc. v. Standard Chlorine of Del., Inc.*, 654 A.2d 403, 406 (Del. 1995).
[12] *Klein v. Sunbeam Corp.*, 94 A.2d 385, 391 (Del. 1952).

IV. CHOICE OF LAW

Defendants maintain that Arizona substantive law governs this action, but Plaintiffs argue that choice of law is "premature" because there has been no fact discovery.[13] Plaintiffs allege in the FAC that Arianna and her parents reside in Arizona, Mother was employed by Defendants in Arizona at the time Arianna was conceived, Mother worked for Defendants in Arizona from 1999 until her 38th week of her pregnancy with Arianna in 2003, Mother and Arianna's exposures occurred in Arizona, and Arianna was born in Arizona. The Court disagrees that choice of law is premature. Based on the well-pled allegations in Plaintiffs' FAC, there is little question that Arizona substantive law applies to Plaintiffs' claims.[14]

V. DISCUSSION

A. Does Arizona Law Impose a Duty on Employers to the Unborn Children of Employees?

Defendants argue that under Arizona law employers owe no duty to the unborn children of their employees.[15] While Plaintiffs acknowledge that no Arizona court has addressed this issue directly, they point to the Arizona

[13] Plaintiffs' Opposition to Defendants On Semiconductor and Semiconductor Component Industries' Motion to Dismiss at 10, *Molina v. On Semiconductor Corp.*, No. N10C-12-267 (Del. Super. Aug. 6, 2012) (Trans. ID 45747125) [hereinafter Pl. Opp.].

[14] *See* FAC ¶¶ 1, 2, 5-9, 12, 14, 36, 76, and 77; *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 46-47 (Del. 1991).

[15] Opening Brief of Defendants, On Semiconductor Corporation and Semiconductor Components Industries d/b/a On Semiconductor, in Support of Their Motion to Dismiss Plaintiffs' First Amended Complaint at 5, *Molina v. On Semiconductor Corp.*, No. N10C-12-267 (Del. Super. June 20, 2012) (Trans. ID 44924213) [hereinafter Defs.' Op. Br.] (incorporating by reference Opening Brief of Defendants Freescale Semiconductor, Inc., Motorola Solutions, Inc., Air Products and Chemicals, Inc., and On Semiconductor Corporation and Semiconductor Components Industries, LLC d/b/a/ On Semiconductor In Support of Their Motion to Dismiss, *Smith v. Freescale Semiconductor, Inc., et al.*, No. N10C-07-273 (Del. Super. June 15, 2012) (Trans. ID 44846146) [hereinafter *Smith* Op. Br.]).

Constitution and decisions of the Arizona Supreme Court which expressly recognize that tortious conduct preceding conception can give rise to an actionable negligence claim, and note that unlike the minor plaintiff in *Smith v. Freescale Semiconductor, Inc.*, Arianna was exposed *in utero*.[16]

The text of the Arizona Constitution is "broad" and "unambiguous" and contains a specific clause expressly prohibiting abrogation of the right to recover damages.[17] As illustrated below, the Arizona Supreme Court has consistently held that the right to bring a tort claim is a fundamental right and has struck down laws that interfere with that fundamental right.

In *Kenyon v. Hammer*,[18] the Arizona Supreme Court allowed a wrongful death claim on behalf of a stillborn child where the wrongful conduct causing the injury occurred years before the child's conception. As a result of an erroneous entry in the mother's chart, the mother's doctor failed to administer RhoGAM to the mother during the birth of her first child. Based on the mother's blood type, the administration of RhoGAM was necessary to protect the mother's future offspring from serious injury or death. Five years later, the mother became pregnant again. The earlier failure to receive RhoGAM resulted in her second

---

[16] *See* Pl. Opp. at 1, 2, 4, 10.

[17] ARIZ. CONST. art. XVIII, § 6 provides "[t]he right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation, except that a crime victim is not subject to a claim for damages by a person who is harmed while the person is attempting to engage in, engaging in, or fleeing after having engaged in or attempted to engage in conduct that is classified as a felony offense"; *Hazine v. Montgomery Elevator Co.*, 861 P.2d 625, 628 (Ariz. 1993).

[18] 688 P.2d 961 (Ariz. 1984).

child being stillborn. The parents brought a wrongful death claim on behalf of their stillborn child against the doctor, vicariously, for his nurse's negligence five years prior to their second child's conception. The lower courts dismissed the action on statute of limitations grounds. The Arizona Supreme Court reversed and allowed the action to proceed, noting that the right to bring and pursue the action was a "fundamental right" guaranteed by the Arizona Constitution, and, therefore, a limitations period that effectively abrogated that right was unconstitutional.[19]

In *Walker v. Mart*,[20] the issue was whether Arizona recognized a cause of action for wrongful life. There, a mother-to-be contracted German measles (Rubella) in her first trimester. Her doctor failed to inform her of the resulting risks to her unborn child. Had the mother been informed of the risks, she would have aborted the fetus. The child was born with Rubella Syndrome, marked in her case by severe birth defects. The mother brought a claim for "wrongful birth," and a claim for "wrongful life" on behalf of the child alleging that but for the doctor's negligence, mother would have terminated the pregnancy.[21]

Noting that Arizona law allows parents who establish that a doctor's negligence prevented them from exercising their right to terminate a pregnancy, to bring a "wrongful birth" claim,[22] the Arizona Supreme Court focused on whether a

[19] *Id.* at 975, 975-79.
[20] 790 P.2d 735 (Ariz. 1990).
[21] *Id.* at 736-37.
[22] *Id.* at 737.

child born under the circumstances in *Walker* could bring a claim for "wrongful life." The Court in *Walker* held that such a claim sounded in negligence, and therefore analyzed the child's claim under traditional principles of Arizona negligence law.[23] The Court in *Walker* held that if the attending physicians had been negligent in rendering prenatal care and thereby injured the child *in utero*, the child could bring a tort claim for damages caused by the doctors' negligence.[24] The *Walker* Court expressly held that the duty owed to the parents "inures derivatively" to the child who was *in utero* when the wrongful conduct occurred.[25]

In *Myers v. Hoffman-La Roche, Inc.*,[26] a child, through her mother, sued the manufacturer of Accutane for injuries she allegedly sustained as a result of her mother's use of Accutane while pregnant. The Arizona Court of Appeals held in *Myers* that the child's claims were not barred by the wrongful life doctrine because she sued not for "wrongful life," but rather, for damages she sustained *in utero*, as a result of defendants' tortious acts.[27] The Court in *Myers* expressly recognized that a child allegedly injured *in utero* by tortious conduct of another may bring a claim under Arizona law.[28]

---

[23] *Id.* at 738-39.
[24] *Id.* at 739.
[25] *Id.*
[26] 170 P.3d 254 (Ariz. Ct. App. 2007).
[27] *Id.* at 256.
[28] *Id.* The Defendants argue that by depublishing the *Myers* decision, the Arizona Supreme Court limited any expansion of *Walker*. The Court is not prepared to make such a leap, given that the depublication was without an explanation or statement of disagreement by the Arizona Supreme Court. The Court notes, for example, that when the Arizona Supreme Court depublished a Court of Appeals decision in *Dewey v. Arnold*, 1992 Ariz. App. LEXIS 137 (Ariz. Ct. App. May 11, 1992), the Arizona Supreme Court provided an explanation. It stated: "Court of

In *Summerfield v. Superior Court*,[29] at issue was whether the parents of a viable fetus, who was stillborn as a result of alleged medical malpractice, could bring an action for wrongful death against the doctor whose negligence allegedly caused the death. The trial court granted defendants' motion to dismiss, holding that no such common law right existed and a viable fetus was not a "person" under Arizona law. Vacating the trial court's decision, the Arizona Supreme Court held that under Arizona law the defendant owed a duty to the mother and the fetus. According to the Arizona Supreme Court in *Summerfield*:

> The majority rule, which now recognizes that a death action will lie under the circumstances present here, acknowledges that the common law has evolved to the point that the word "person" does usually include a fetus capable of extrauterine life. The majority also recognizes that the common law now holds that *if the fetus survives it may recover for injuries sustained in the womb*. The common law now also permits a death action if the infant survives birth and then dies from injuries sustained in the womb.[30]

The Arizona Supreme Court's decision in *Summerfield* was premised in part on:

> Evidence of an overall legislative policy of compensation and protection [which] militates in favor of construing the wrongful death statute to give parents a remedy when their viable child is negligently killed . . . such a narrow construction of "person" would also run contrary to *an*

Appeals Opinion to be depublished . . . because this Court disagrees with the analysis by the Court of Appeals."). Moreover, although a depublished opinion is not binding on the Arizona courts, the courts are "allowed to adopt the analysis of depublished opinions . . . ." *See* Michael A. Berch, *Analysis of Arizona's Depublication Rule and Practice*, 32 ARIZ. ST. L.J. 175, 200 (2000). Finally, even if this Court ignores *Myers*, it cannot ignore the Arizona Constitution and the reasoning and holdings in the other cases discussed herein.

[29] 698 P.2d 712 (Ariz. 1985).

[30] *Id.* at 722 (emphasis added).

> *apparent legislative objective of providing protection for the fetus*. It seems preferable . . . to construe the statute in light of the evil(s) it was designed to remedy.[31]

The Defendants' argument that they owe no duty to Arianna under Arizona law fails. Based upon the Arizona Constitution and the relevant case law, the Court finds that under the circumstances presented here,[32] Arianna has a "fundamental" right to bring a claim for her alleged injuries.

B. Have Plaintiffs Adequately Pled a Breach of Assumed Duty?

Because the Court finds that Defendants owed a duty to Arianna, it need not reach this question.

C. Does the Arizona Worker's Compensation Exclusivity Provision Preclude Arianna's Claims?

As the defendants in *Peters*[33] argued, Defendants here maintain that workers' compensation benefits are the exclusive remedy available to Plaintiffs. This argument fails. First, *Peters* was decided under Texas law, not Arizona law, and thus is not controlling here. Second, unlike the minor plaintiff's claims in *Peters*, Arianna's claims involve *in utero* exposure.[34] Arianna, unlike the child in *Peters*, was directly exposed to chemicals during her gestation. Third, the Arizona Worker's Compensation laws do not and cannot preclude Arianna's claims. Not only does Defendants' construction of the Arizona Worker's Compensation Law

[31] *Id.* at 721 (emphasis added).
[32] i.e. the well-pled facts contained in the First Amended Complaint. [Trans. ID 43942599]
[33] *Peters v. Texas Instruments Incorporated*, 2011 WL 4686518 (Del. Super. Sept. 30, 2011).
[34] *See* Pl. Opp. at 13-14; s*ee also Peters*, 2011 WL 4686518.

violate the Arizona Constitution,[35] but Arianna was never an employee of Defendants, and the fact that her mother was an employee does not convert Arianna's personal injury claims for *in utero* exposure into a derivative claim under Arizona law.

As noted above, the Arizona Constitution guarantees an individual's fundamental right to bring a common law tort action.[36] This right may not be abrogated by statute unless constitutionally authorized.[37] Thus, before the Arizona legislature could even create the Arizona Worker's Compensation Law, it had to amend the Arizona Constitution. That amendment, Article 18, § 8, authorized the Arizona legislature to:

> enact a workmen's compensation law . . . by which compensation shall be required to be paid to any such workman, in case of his injury and to his dependents, as defined by law, in case of his death, by his employer . . . *provided that it shall be optional with any employee engaged in any such private employment to settle for such compensation, or to retain the right to sue said employer* . . . .[38]

According to the Supreme Court of Arizona, the intent of "unique constitutional provisions" such as this "was to enact a 'different and more advanced' policy . . . 'which made it possible to enforce in court a claim for personal injury or death

[35] *See* ARIZ. CONST. art. XVIII §§ 6 and 8; Pl. Opp. at 15-22.
[36] ARIZ. CONST. art. XVIII, § 6.
[37] *Kenyon v. Hammer*, 688 P.2d 961 at 976 (Ariz. 1984).
[38] Emphasis added.

without the necessity of overcoming practically insurmountable defenses.'"[39] Under the Arizona Constitution, a covered employee may choose between worker's compensation and the tort system. When an injury falls within the scope of the Worker's Compensation Law, the Constitution allows abrogation of the injured worker's tort recovery only if the worker elected to accept worker's compensation.[40] Arianna is not an employee and thus obviously never had the ability to choose between accepting worker's compensation or pursuing a tort recovery. It would be unconstitutional to deprive Arianna of her tort claim under the circumstances presented here. Arianna's constitutional, fundamental right to bring an action for personal injuries cannot be abrogated by the Arizona Worker's Compensation Law Exclusivity Provision.[41]

D. Have Plaintiffs Adequately Pled Causation?

Plaintiffs allege, *inter alia*, in the FAC that during Mother's employment, Arianna was wrongfully exposed *in utero* to reproductively hazardous chemicals.[42] Plaintiffs further allege that those exposures proximately cause injury to Arianna.[43]

---

[39] *Barrio v. San Manuel Div. Hosp*., 692 P.2d 280, 285 (Ariz. 1984) (quoting *Indus. Comm'n v. Crisman*, 199 P. 390, 395 (Ariz. 1921) (McAlister, J. concurring)).
[40] *Stoecker v. Brush Wellman*, 984 P.2d 534, 536 (Ariz. 1999).
[41] The Court also holds that the Exclusivity Provision cannot apply to Arianna's claim because that statute provides a right to recover compensation for injuries sustained by *an employee*. The Exclusivity Provision does not encompass the children of an employee. *See* A.R.S. § 23-1022(A) ("The right to recover compensation pursuant to this chapter for injuries sustained by an employee or for the death of an employee is the exclusive remedy against the employer or any co-employee acting in the scope of his employment . . . .").
[42] *See, e.g.*, FAC ¶¶ 7-10, 14, 17, 27, and 32.
[43] FAC ¶ 32.

Under Arizona Law, foreseeability determines whether a defendant proximately caused injury to a plaintiff.[44] Plaintiffs' allegations are sufficient to plead causation under Arizona law.[45]

E. Have Plaintiffs Adequately Pled a Claim for Strict Liability?

Defendants seek dismissal of Plaintiffs' strict liability claim, arguing that Plaintiffs failed to allege Defendants were in a chain of distribution resulting in a sale of the product to the consuming public and that Defendants placed the allegedly hazardous chemicals Mother worked with into the stream of commerce.[46] But Plaintiffs *have* alleged that Defendants "distributed, sold, [and] supplied" the hazardous toxic chemicals for use in Defendants' clean rooms "*and elsewhere* . . . ."[47] Moreover, the cases upon which Defendants rely do not support dismissal of Plaintiffs' strict liability claim at this stage.[48] Plaintiffs have pled a strict liability claim sufficient to withstand a motion to dismiss.[49]

F. Have Plaintiffs Adequately Pled a Claim for Abnormally/Ultrahazardous Activity?

Arizona follows the Restatement (Second) of Torts § 519 and § 520 with respect to strict liability for abnormally dangerous activity. Section 520 provides:

[44] *Gipson v. Kasey*, 150 P.3d 228, 231 (Ariz. 2007).
[45] *See, e.g.*, FAC ¶ 63 ("Defendants breached that duty [to warn] . . . those who would reasonably and foreseeably . . . be harmed by" the chemicals and substances at issue.); FAC ¶¶ 62, 64-70.
[46] Plaintiffs allege in the FAC that Defendants "manufactured, designed, sold or distributed . . . reproductively toxic chemicals and substances." FAC ¶ 10.
[47] *See id.* ¶ 13 (emphasis added). *See also* FAC ¶ 10 ("Upon information and belief, at all relevant times, the aforementioned reproductively toxic chemicals and substance were manufactured, designed, sold or distributed by Defendants.").
[48] *See Smith* Op. Br. at 32.
[49] *See, e.g.*, FAC ¶¶ 10, 13, 17, and 81-83.

> In determining whether an activity is abnormally dangerous, the following factors are to be considered: (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.

The Comment to Section 520 expressly provides that it is not necessary that each of these factors be present, "especially if others weigh heavily."[50] Plaintiffs allege in the FAC: the high risk of injury presented by exposure to these chemicals; the likelihood that resulting harm from exposure will be significant; the chemicals to which Mother and Arianna were exposed are highly toxic (and thus, drawing a rational inference, are not a matter of common usage); and the activities causing exposure were abnormally dangerous.[51] Plaintiffs have sufficiently pled a claim for abnormally dangerous/ultrahazardous activity under Arizona law.

G. Have Plaintiffs Adequately Pled a CERCLA Claim?

[50] Restatement (Second) of Torts § 520 cmt. f (1965) ("For an activity to be abnormally dangerous, not only must it create a danger of physical harm to others but the danger must be an abnormal one. In general, abnormal dangers arise from activities that are in themselves unusual, or from unusual risks created by more usual activities under particular circumstances. In determining whether the danger is abnormal, the factors listed in Clauses (a) to (f) of this Section are all to be considered, and are all of importance. Any one of them is not necessarily sufficient of itself in a particular case, and ordinarily several of them will be required for strict liability. On the other hand, it is not necessary that each of them be present, especially if others weigh heavily. Because of the interplay of these various factors, it is not possible to reduce abnormally dangerous activities to any definition. The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care. In other words, are its dangers and inappropriateness for the locality so great that, despite any usefulness it may have for the community, it should be required as a matter of law to pay for any harm it causes, without the need of a finding of negligence.").

[51] *See* FAC ¶¶ 77-82, 120-24, 70-83, and 114-117.

The Court will not address Defendants' arguments on this point because Plaintiffs assert no CERCLA claim.[52]

H. Have Plaintiffs Adequately Pled a Premises Liability Claim?

Defendants argue Plaintiffs' premises liability claim is barred by the Exclusivity Provision of the Arizona Worker's Compensation Law. The Court disagrees.[53] Defendants argue (again) that they owed no duty to Arianna. Again, the Court disagrees.[54] Under Arizona law, the particular duty of care owed by a possessor of land to an entrant on its land is determined by the entrant's status as an invitee, licensee, or trespasser.[55] Plaintiffs allege that Arianna's mother was on the Defendants' premises because she worked for them.[56] That is indisputably a "purpose directly . . . connected" with the Defendants' "business dealings."[57] Under Arizona law, that makes her a "business visitor."[58] The fact that Arianna's mother continued to work for Defendants while she was pregnant with Arianna benefited the Defendants. Defendants impliedly "invited" Arianna to remain on their premises "for a purpose directly or indirectly connected with business dealings" with them. Arianna was on Defendants' premises as a business

[52] Pl. Opp. at 26 n.6 ("Plaintiffs have not asserted a claim under CERCLA . . . .").
[53] *See supra* § V.C. (pp. 11-13).
[54] *See supra* § V.A. (pp. 5-10).
[55] *See Woodty v. Weston's Lamplighter Motels*, 830 P.2d 477, 480 (Ariz. Ct. App. 1992).
[56] FAC at ¶¶ 5, 6, 76, 77.
[57] Restatement (Second) of Torts § 332(3) (1965) ("Invitee Defined").
[58] *See Nicoletti v. Westcor*, 639 P.2d 330, 332-33 (Ariz. 1982). Arizona follows the Restatement (Second) of Torts with regard to premises liability. "A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." Restatement (Second) of Torts § 332(3) (1965) ("Invitee Defined").

visitor/invitee and, therefore, as Plaintiffs correctly allege, Defendants owed her a duty to make the premises reasonably safe. Plaintiffs have adequately pled a claim for premises liability under Arizona law.[59]

I. Have Plaintiffs Adequately Pled an Independently Viable Claim for Willful, Wanton and Intentional Conduct?

Defendants argue that Plaintiffs' allegations of willful and wanton conduct do not assert an independent cause of action, and their allegations of intentional conduct fail for lack of specificity. The Court finds the Plaintiffs have adequately pled willful and wanton conduct on the part of the Defendants.[60] With respect to Defendants' claim that Plaintiffs' allegations of intentional conduct lack the requisite specificity argument, the Court agrees. However, given the procedural history of this case,[61] the Court will grant Plaintiffs leave to amend their intentional tort claims.

J. Have Plaintiffs Pled a Viable Claim for Loss of Consortium?

Under Arizona law, parents may maintain a cause of action for loss of their child's consortium when the child suffers a severe, permanent and disabling injury rendering the child unable to exchange love, affection, care, comfort,

[59] *See* FAC ¶¶ 75-78.
[60] Under Arizona law, willful and wanton conduct is a claim for "aggravated negligence." *DeElena v. S. Pac. Co*., 592 P.2d 759, 762 (Ariz. 1979). This claim provides a basis for potential recovery of punitive damages. *See Linthicum v. Nationwide Life Ins. Co*., 723 P.2d 675, 679 (Ariz. 1986).
[61] *See* Pl. Opp. at 26, n.14.

companionship and society in a normally gratifying way.[62] Plaintiffs have adequately pled a claim for loss of consortium.[63]

VII. CONCLUSION

For the reasons discussed above, Defendants' Motion to Dismiss is **DENIED** and the Court hereby grants Plaintiffs leave to amend their intentional tort claims. Plaintiffs Second Amended Complaint shall be filed within 20 days of the date of this opinion.

IT IS SO ORDERED.

Jan R. Jurden, Judge

[62] *Pierce v. Casas Adobes Baptist Church*, 782 P.2d 1162, 1166 (Ariz. 1989).
[63] *See* FAC ¶¶ 105-06.