IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

CHRISTOPHER PETERS, by his father and next friend GRADY PETERS, and GRADY PETERS and ROSETTA PETERS, individually,	)	
Plaintiffs,	)	
v.	)	C.A. No. 10C-06-043 JRJ
TEXAS INSTRUMENTS INCORPORATED,	)	
Defendant.	)	

ORDER

AND NOW, this day 7th of May, 2012, the Court having duly considered Plaintiffs' Motion for Reargument, and Defendant's opposition thereto, **IT APPEARS THAT**:

1. On September 30, 2011, the Court granted Texas Instruments Incorporated's ("T.I.") Motion to Dismiss.[1] On October 7, 2011, Plaintiffs filed a Motion for Reargument pursuant to Superior Court Civil Rule 59(e).[2] For the following reasons, Plaintiffs' Motion is **DENIED**.
2. Plaintiffs' Motion for Reargument must be denied because Plaintiffs revisit arguments already decided and present new arguments not

[1] *Peters v. Texas Instruments, Inc.*, 2011 WL 4686518 (Del. Super.).
[2] Plaintiffs' Motion for Reargument ("Mot. for Reargument") (Trans. ID.No. 40260820).

previously raised. The Court will only grant a motion for reargument when it "has overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision."[3] It is well settled that a motion for reargument is not an opportunity for a party to revisit arguments already decided by the Court or to present new arguments not previously raised.[4]

3. Plaintiffs' Motion begins by claiming that the Court "overlooked important matters that would have changed the outcome of its decision, and that Christopher Peters should not be left without a remedy."[5] However, Plaintiffs quickly acknowledge that they "failed to provide certain favorable authority" to the Court.[6] The Court did not overlook or misinterpret the law or facts, rather, as Plaintiffs readily admit, they did not provide what they deem to be "favorable authority" until after the Court granted T.I.'s Motion to Dismiss. And even if the Court were to consider Plaintiffs' new "favorable authority," contrary to Plaintiffs' contention, it would not change the outcome. Plaintiffs' reliance on

[3] *State Farm Fire and Cas. Co. v. Middleby Corp.*, 2011 WL 2462661, at *2 (Del. Super.) (citing *Kennedy v. Invacare Corp.*, 2006 WL 488590, at *1 (Del. Super.)).
[4] *Id*. (citing *Plummer v. Sherman*, 2004 WL 63414, at *2 & n. 7 (Del. Super.)); *see also Hennegan v. Cardiology Consultants, P.A..*, 2008 WL 4512678, at *1 (Del. Super.) (other citations omitted)).
[5] Mot. for Reargument at 1.
[6] *Id*.

Witty v. Am. Gen. Capital Distrib., Inc.[7] is misplaced. In *Witty*, a pregnant plaintiff tripped and fell over a cord which allegedly fatally injured her unborn child.[8] The plaintiff brought claims individually and in her representative capacity for her unborn child's physical pain and mental anguish, and individual claims for her own mental anguish, property damage, and loss of companionship.[9] The defendant moved for summary judgment, arguing that: (1) the plaintiff applied for and received worker's compensation benefits; and (2) the plaintiff's baby was not alive at the time of its birth, and thus, the plaintiff did not have a valid cause of action in Texas.[10] The trial court granted the defendant's motion, but the Court of Appeals reversed.[11] Plaintiffs rely on the following *dictum* as "favorable authority" under Texas law:

> We have not been referred to any case involving the precise issue presented here, i.e., whether the Workers' Compensation Act bars an employee's common law action for emotional distress and a statutory recovery for loss of society and companionship and for mental anguish, resulting from an injury to a third party victim. *Certainly, the act would not constitute a bar to a claim asserted by the third party victim, even though both the employee and the victim were injured together as the result of the same negligent act in a single transaction.*[12]

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[7] 697 S.W.2d 636 (Tex. App. 1985), *rev'd in part*, 727 S.W.2d 503 (Tex. 1987).
[8] *Id*. at 638.
[9] *Id*.
[10] *Id*.
[11] *Id*. at 640. (holding that the plaintiff's injuries did not "derive from the injuries that she, herself, sustained in the fall, but instead, those claims relate entirely to the injury and loss of her child.").
[12] *Id*. at 641. (emphasis added).

The Texas Supreme Court reversed the Court of Appeals' decision, holding that the mother's claims for mental anguish were inextricably entwined with her own injuries, and thus barred by the Texas Workers' Compensation Act. Plaintiffs rely on *Witty* because Texas Supreme Court opted not to address the Court of Appeals' statement that a third party victim's claim, *i.e.* a child, would not be barred.[13] What Plaintiffs overlook, however, is that it was not necessary for the Texas Supreme Court to do so. In *Witty*, the child was stillborn, and the Texas Supreme Court reaffirmed that under Texas law a stillborn fetus does not have a cause of action.[14] Plaintiffs also fail to appreciate that the Court of Appeals' statement with respect to a "third party victim" reaffirms this Court's September 30, 2011 holding.[15] Similar to the cases discussed by this Court in that opinion, the child in *Witty* was *in utero*. Christopher Peters was not. His injuries are legally dependent on his father's injuries. In other words, Christopher's claim requires him to establish that his father, Grady Peters, suffered an injury, insult, or damage to his sperm.[16] Plaintiffs attempt to couch their argument as a new argument using *dictum* from *Witty*, but it is the same argument the Court has already

[13] *See Witty*, 727 S.W.2d 503, at 506.
[14] *Id*. at 505-06.
[15] *See Peters*, 2011 WL 4686518 (Del. Super).
[16] If, hypothetically, Christopher's mother worked at T.I. while pregnant with Christopher, because Christopher was physically present at T.I., he would have potentially had a cause of action outside of the Texas Workers' Compensation Act.

considered and rejected.[17] Either way, the Court will not revisit arguments previously raised or hear new arguments.[18]

4. Plaintiffs argue that Grady Peters does not have a compensable injury, and thus, the Texas Workers' Compensation bar does not apply.[19] This argument fails for two reasons. First, this is the first time Plaintiffs have raised this argument despite full briefing and oral argument. Second, under Texas law, the primary purpose of the Workers' Compensation Act is to "relieve employees injured on the job of the burden of proving their employer's negligence and to provide them prompt remuneration for their on-the-job injuries."[20] That said, the Texas Courts have "liberally construed the Act in the employee's favor."[21] Injuries that occur "in the course and scope of employment" are compensable under the Act.[22] To be "compensable", a workplace injury must cause "impairment,

[17] Plaintiffs also attempt to recast their Complaint in their Motion for Reargument. Plaintiffs attached the affidavit of Cynthia F. Bearer, M.D., Ph.D., who allegedly states that "plaintiffs do not allege injury to the structures of Mr. Peters' body. Rather, the alleged sperm damage is damage it a discrete entity, which survives and functions outside of and independently of Mr. Peters' body. From a scientific perspective, this is a direct injury to the child, and not derivative of an injury to his father." Mot. for Reargument at 3. Even when the Court reviews a complaint in a light most favorable to the non-moving party, in this case Plaintiffs, and draws all reasonable inferences in their favor, the Court cannot ignore the plain words of Plaintiffs Complaint. Plaintiffs state in their First Amended Complaint: "Grady Peters sustained an insult to his reproductive system as a result of his employment at TI that caused injuries to Plaintiff Christopher Peters." Plaintiffs' First Amended Complaint ("Pl.'s Am. Comp.") (Trans. ID. No. 33786387) at ¶ 27. If this allegation is inaccurate, Plaintiffs should have raised that argument when they responded to T.I.'s Motion to Dismiss. Plaintiffs should have moved to amend their complaint – again – earlier in the process. It is simply too late to raise this argument now. Also, the Court will not consider affidavits when reviewing a Motion for Reargument. *See* n. 34 and 35 *infra*.

[18] *State Farm Fire and Cas. Co.*, 2011 WL 2462661, at *2. (citing *Plummer*, 2004 WL 63414, at *2 & n. 7); *see also Hennegan* 2008 WL 4512678, at *1 (other citations omitted)).

[19] Mot. for Reargument at 2.

[20] *Payne v. Galen Hosp. Corp.*, 28 S.W.3d 15, 17 (Tex. 2000).

[21] *Id*. (citing *Albertson's Inc. v. Sinclair*, 984 S.W.2d 958, 961 (Tex. 1999); *Lujan v. Houston Gen. Ins. Co.*, 756 S.W.2d 295, 297 (Tex. 1988)).

[22] *Id*. (citing TEX. LAB.CODE § 401.011(10)).

disability, illness, or death . . . ."[23] Injury is defined as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm."[24] The phrase "physical structure of the body" refers to the *entire body*.[25] A two-pronged test determines which injuries are compensable. The Court determines whether the injury: "(1) occurred in the course and scope of employment; and (2) arose from employment."[26] Thus, contrary to Plaintiffs' argument that the Texas Workers' Compensation Act only compensates for lost earning capacity,[27] Grady Peters' injuries are within the Texas Workers' Compensation Act. Furthermore, the Act does not specifically mention incapacity as a requirement to recover for injuries sustained during the course of employment.[28]

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[23] *Barnes v. United Parcel Serv., Inc.*, 2012 WL 112252, at *3 (App. Ct. 2012) (other citations omitted).
[24] *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 609 (Tex. 1999) (citing TEX. LAB.CODE § 401.011(26)).
[25] *Id*. at 610. (other citations omitted).
[26] *Id*. at *2. (citing *State Office of Risk Mgmt. v. Martinez*, 300 S.W.3d 9, 12 n. 6 (Tex.App. 2009)).
[27] Mot. for Reargument at 2.
[28] *See* Texas Labor Code §§ 406.031, 406.032 which state:

> 406.031. LIABILITY FOR COMPENSATION.
>
> (a) An insurance carrier is liable for compensation for an employee's injury without regard to fault or negligence if:
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> (1) at the time of injury, the employee is subject to this subtitle; and
> (2) the injury arises out of and in the course and scope of employment.
>
> (b) If an injury is an occupational disease, the employer in whose employ the employee was last injuriously exposed to the hazards of the disease is considered to be the employer of the employee under this subtitle.

5. Next, Plaintiffs argue that they adequately pled intentional acts on the part of T.I., which are outside of the Act, and thus their claim must withstand T.I.'s Motion to Dismiss.[29] According to Plaintiffs, T.I. assumed a duty by intentionally misleading T.I. employees to believe their unborn children would not be harmed by the chemicals used at T.I.,[30] and T.I.'s "affirmative conduct" creates a duty that otherwise is not recognized under Texas law (preconception tort liability).[31] As the Court noted in its September 30, 2011 Opinion, Texas law does not recognize preconception tort liability in this context.[32] Any changes to

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n. 28 continued . . .

406.032. EXCEPTIONS.

An insurance carrier is not liable for compensation if:

(1) the injury:

(A) occurred while the employee was in a state of intoxication;
(B) was caused by the employee's wilful attempt to injure himself or to unlawfully injure another person;
(C) arose out of an act of a third person intended to injure the employee because of a personal reason and not directed at the employee as an employee or because of the employment;
(D) arose out of voluntary participation in an off-duty recreational, social, or athletic activity that did not constitute part of the employee's work-related duties, unless the activity is a reasonable expectancy of or is expressly or impliedly required by the employment; or
(E) arose out of an act of God, unless the employment exposes the employee to a greater risk of injury from an act of God than ordinarily applies to the general public; or

(2) the employee's horseplay was a producing cause of the injury.

[29] *Id*. at 3.
[30] Mot. for Reargument at 4.
[31] *Id*. Plaintiffs use the terms "Good Samaritan" and assumption of risk/duty interchangeably. Plaintiffs' Letter Responding to the Court's Questions ("Pl.'s Letter") (Trans. ID. No. 41773528) at 10.
[32] *Peters*, 2011 WL 4686518, at *6-7.

Texas law appropriately lie within the province of the Texas Legislature, not this Court.

6. Plaintiffs argue that they have "discovered that TI had the obligation to obtain from Grady Peters a knowing waiver of his statutory right to opt out of the Act in order to pursue common law remedies."[33] Plaintiffs failed to raise this argument earlier, admitting that "[p]rior to this motion, Plaintiffs did not address the issue of whether Mr. Peters was given the option to waive coverage under Workers Compensation . . . ."[34] The Court will not consider Plaintiffs' new argument.[35]

7. Finally, the Court notes that "a motion for reargument properly seeks only a re-examination of the facts at the time of the decision,"[36] and therefore, "affidavits may not be submitted in support of a motion for reargument."[37] Accordingly, the Court will not consider the affidavits submitted by Plaintiffs in support of their Motion for Reargument.

WHEREFORE, Plaintiffs' Motion for Reargument is **DENIED**.

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[33] Mot. for Reargument at 4.
[34] Pl.'s Letter at 7.
[35] Assuming *arguendo* the Court were to entertain Plaintiffs' new argument, the outcome would be the same. "Texas state courts have uniformly ruled that workers' compensation coverage and the exclusivity provision under the law as amended do not hinge on whether notice has been provided to the employee." *Graham v. AMS Const. Co., Inc.*, 2009 WL 1058728, at *2-3 (Tex. App. 2009) (other citations omitted). Consequently, Plaintiffs argument lacks merit.
[36] *Pevar Co. v. Hawthorne*, 2010 WL 1367755, at *2 (Del. Super.) (citing *Maldonado v. Flynn*, 1980 WL 272822, at *3 (Del.Ch.)).
[37] *Id*. (citing *Santora, Starr & Baffone, P.A. v. Lewis*, 1995 WL 562158, at *2 (Del.Super.) (Rule 59(e) "does not provide for new evidence in the form of affidavits not before the Court in the original motion.") (citing *Miles, Inc. v. Cookson America, Inc.*, 677 A.2d 505, 506 (Del.Ch.1995))).

IT IS SO ORDERED.

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Jan R. Jurden, Judge