

**EMANDA HARTZOG, Individually and)
as Next of Friend of JAHMIL PEREZ, a)
Minor,)**

ACTION FOR DAMAGES

v.

JURY TRIAL DEMANDED

Defendant.

BEFORE THE COURT is Plaintiff Emanda Hartzog's Motion to Amend the Complaint. Also before the Court is Defendant United Corporation's Motion to Strike Plaintiffs' Untimely Causes of Action. For the reasons stated below, both motions will be granted in part and denied in part.

Plaintiff Emanda Hartzog commenced this action in March 2004. (Compl. ¶, filed Mar. 2, 2004.) In January 2004, Plaintiff's son accidentally ingested sap from a plant Hartzog purchased at Defendant United Corporation's ("Plaza Extra") grocery store in Christiansted, St. Croix. *Id.* ¶¶ 4, 7-12, 14. Hartzog was unaware the plant could be harmful if ingested. *Id.* ¶ 6. She claims Plaza Extra advertised the plants as being safe for the home and failed to warn customers about the plant's poisonous properties. *Id.* ¶¶ 5-7. Hartzog seeks damages, including punitive damages, along with costs and fees. *Id.* ¶ 16 & p. 3.

Initially, Plaza Extra moved to dismissed in lieu of answering. (Mot. to Dismiss in Lieu of Answer, filed May 17, 2004.) Plaza Extra claimed that “Plaintiff [wa]s asking this Court to

create a legal duty of a retailer where clearly none exists at law.” *Id.* at 1-2. Plaza Extra challenged the sufficiency of Plaintiff’s negligence and negligent misrepresentation claims. *Id.* at 4-6. In opposition, Hartzog “claim[ed] that Defendant was negligent in selling dieffenbachia plants advertised as safe houseplants, without any warning of their highly dangerous, toxic and poisonous nature. (Pl. Br. in Opp’n to Def. Mot. to Dismiss in Lieu of Answer 2, filed June 14, 2004.) Hartzog argued that “the Complaint sufficiently alleges the negligent failure of Defendant to warn Plaintiff of the potential danger of the products it sold and the negligent misrepresentation of the ‘safe’ character of those products.” *Id.* at 3.

In May 2005, the Court denied Plaza Extra’s motion to dismiss. (Order, entered May 5, 2005.) Thereafter, Plaza Extra filed its Answer, denying liability, asserting various affirmative defenses, and objecting to punitive damages. (*See generally* Answer, filed May 12, 2005.) The parties commenced discovery. Neither party deposed the other until five years after this action commenced. (*See* Def. Summ. J. Mot., Ex. 2 (Hartzog Dep., Oct. 2, 2009.) & Ex. 5 (Hamed Dep., Oct. 8, 2009).) In October 2010, the Court entered an Amended Scheduling Order, setting this matter for calendar call on Monday, May 16, 2011. (Amend. Sch. Order 2, entered Oct. 6, 2010.) The Court also ordered that “any additional Motions, including Dispositive Motions and Daubert Motions . . . shall be filed by April 15, 2011.” *Id.* Plaza Extra moved to strike causes of action it argues were only raised during preparations of the joint final pretrial statement. Hartzog’s motion followed.

II. LEAVE TO AMEND COMPLAINT

A plaintiff may amend her complaint before trial “once as a matter of course within 21 days after serving it.” Fed. R. Civ. P. 15(a)(1). Leave of court is required. Courts grant leave freely “when justice so requires.” Fed. R. Civ. P. 15(a)(2). “Among the grounds that could

justify a denial of leave to amend are undue delay, bad faith, dilatory motive, prejudice, and futility.” *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir.1997). “The question of undue delay, as well as the question of bad faith, requires that we focus on the plaintiff[’s] motives for not amending [her] complaint to assert this claim earlier; the issue of prejudice requires that we focus on the effect on the defendant[.]” *Adams v. Gould, Inc.*, 739 F.2d 858, 868 (3d Cir. 1984). “[P]rejudice to the non-moving party is the touchstone for the denial of an amendment,” however. *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir. 1993) (quoting *Cornell & Co. v. Occupational Safety & Health Rev. Comm’n*, 573 F.2d 820, 823 (3d Cir. 1978)). “In the absence of substantial or undue prejudice, denial instead must be based on bad faith or dilatory motives, truly undue or unexplained delay, repeated failures to cure the deficiencies by amendments previously allowed, or futility of amendment.” *Id.* (citing *Heyl & Patterson Int’l, Inc. v. F.D. Rich Hous. of the V.I., Inc.*, 663 F.2d 419, 425 (3d Cir. 1981)).

Preliminarily, the Court notes that Hartzog seeks leave in part to correct the caption to reflect Amanda Hartzog as Emanda Hartzog. (Amend Mot. 1.) Amendments correcting the caption are of no concern and will be granted. Plaintiff also seeks leave to “set out in detail the causes of action plead [sic]” *Id.* That is not as straight-forward and therefore warrants additional discussion below.

This is Hartzog’s first motion to amend her Complaint. It comes seven years after commencing this action. Her initial Complaint did not expressly plead any cause of action by name. The word “count” does not appear. (*See generally* Compl.) Since “[p]leadings must be construed so as to do justice,” the Court construes Hartzog’s Complaint broadly. Fed. R. Civ. P. 8(e). In the initial Complaint, Hartzog appears to have alleged three causes of action. Individually, and on behalf of her son, Hartzog alleged negligence. (*See* Compl. ¶ 13.)

Individually, and on behalf of her son, Hartzog alleged negligent misrepresentation in marketing “the plants [as] safe for household use.” *Id.* Lastly, on her own behalf, Hartzog alleged negligent infliction of emotional distress. *Id.* ¶ 14 (“Plaintiff Amanda Hartzog, suffered extreme emotional distress, physical injuries, mental anguish, pain and suffering and loss of enjoyment of life . . .”).

In her proposed First Amended Complaint, Hartzog seeks leave to “ensure that the causes of action conform to the evidence now known, and so that Plaintiffs’ previously well plead causes of action may conform to the Restatement (Third) of Torts: Product Liability” (Amend Mot. 2.) Plaintiffs now seek to plead eight causes of action against Plaza Extra. *Id.* at Ex. (draft first amended complaint) (hereinafter “First Amend. Compl.”). In Count I, Hartzog alleges sale of a dangerous chattel. *Id.* at 3. In Count II, Plaintiffs allege failure to warn. *Id.* In Count III, Plaintiffs appear to allege product defect. *Id.* at 4. All three are premised on strict liability. In Count IV, Plaintiffs’ allege negligence. *Id.* In Count V, Plaintiffs allege negligent misrepresentation. *Id.* In Count VI, Plaintiffs plead failure to warn in negligence. *Id.* at 4-5. In Count VII, Plaintiffs allege breach of implied warranty of fitness for use. *Id.* at 5. In Count VIII, Plaintiffs allege, in the alternative, intentional and negligent infliction of emotional distress. *Id.*

In opposition, Plaza Extra asserts that Hartzog “adds entirely new causes of action that were previously only pled in the mind of Plaintiffs’ counsel.” (Def. Opp’n to Pl Mot. for Leave to File First Amend. Compl. 1, filed Sept. 2, 2011.) Plaza Extra argues that “the claim of Negligent Infliction of Emotional Distress and the claim alleged in Count III of the [First] Amended Complaint” should be denied as futile. *Id.* All other claims should be denied as unduly delayed. *Id.* Each will be examined below.

a. Undue Delay

“[D]elay alone is an insufficient ground to deny leave to amend.” *Cureton v. Nat’l Coll. Athl. Ass’n*, 252 F.3d 267, 273 (3d Cir. 2001) (citation omitted). “The passage of time, without more, does not require that a motion to amend a complaint be denied; however, at some point, the delay will become ‘undue,’ placing an unwarranted burden on the court, or will become ‘prejudicial,’ placing an unfair burden on the opposing party.” *Adams*, 739 F.2d at 868. “Thus, while bearing in mind the liberal pleading philosophy of the federal rules, the question of undue delay requires that we focus on the movant’s reasons for not amending sooner.” *Cureton*, 252 F.3d at 273 (citation omitted). “Delay may become undue when a movant has had previous opportunities to amend a complaint.” *Id.* (citation omitted). “When a party fails to take advantage of previous opportunities to amend, without adequate explanation, leave to amend is properly denied.” *Arthur v. Maersk, Inc.*, 434 F.3d 196, 204 (3d Cir. 2006).

Here, Hartzog waited seven years to seek leave to amend her Complaint. As noted above, depositions concluded in 2009. Plaza Extra moved for summary judgment in February 2010. (See Def. Mot. Summ. J., filed Feb. 25, 2010.) Moreover, her motion comes approximately a week before trial. Hartzog claims, however, that her motion seeks only to clarify causes of action already plead in the original Complaint. The Court will discuss that assertion in further detail below. Given the length of the delay, the Court finds that this factor weighs heavily in favor of denying leave to amend.

b. Bad Faith / Dilatory Motive

In its Motion to Strike, Plaza Extra claims that by putting forth new causes of action in the joint final pretrial order, “Plaintiffs’ attempt[ed] to amend their pleadings . . . [which] goes against the purpose behind Federal Rule of Civil Procedure 16. . . . With trial less than a month

away, Plaintiffs should not be permitted to present evidence of causes of action that have not previously been pled” (Mot. to Strike 2.) In opposition, Plaintiffs allege they were “merely attempting to clarify the issues for trial” (Pl. Opp’n to Def. Mot. to Strike Pl. Untimely Causes of Action 2, filed Aug. 30, 2011.) Plaza Extra counters that “[a]fter [its] motion brought the deficiency in their pleadings to their attention, Plaintiffs saw an opportunity to correct that deficiency when the Court advised that it would apply the Restatement (Third) of Torts: Products Liability in the August 26, 2011 Pretrial conference.” (Def. Reply to Pl Opp’n to Def. Mot. to Strike Pl. Untimely Causes of Action 1, filed Sept. 2, 2011.) Plaza Extra claims that “Plaintiffs’ attempt to amend their pleadings on the eve of trial violates the spirit of fair notice of pleadings and discovery.” *Id.*

Here, the motions, oppositions, and replies of both parties come well after the deadline set by the Court in its Amended Scheduling Order. Nonetheless, the parties are proceeding to trial as scheduled. Therefore, the Court does not find dilatory motives in either party’s motions. Plaza Extra does appear to allege bad faith on the part of Plaintiffs, claiming they are attempting to capitalize on the Court’s ruling on summary judgment. (*See generally* Mem. Op., entered Sept. 6, 2011.) Plaza Extra also objects vociferously on the basis of delay. “[D]elay can itself be evidence of bad faith justifying denial of leave to amend” *Adams*, 739 F.2d at 868. But without more, the Court cannot conclude Plaintiffs are acting in bad faith here. Moreover, Plaza Extra has not addressed this factor nor pointed to any evidence of bad faith. Accordingly, the Court finds that neither the factors of bad faith nor dilatory motive are present here.

c. Futility

Futility refers to the complaint, even after amendment, failing to state a claim upon which relief could be granted. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d at 1434. Pursuant to Rule 8(a), a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief; and a demand for the relief sought” Fed. R. Civ. P. 8(a) (applicable via Super. Ct. R. 7).

As noted in part above, in their initial Complaint Plaintiffs alleged:

- (1) that Defendant advertised the plants as safe to purchase (Compl. ¶ 5.);
- (2) that the plants “contained no warnings as to their dangerous condition or the fact that they were highly toxic and poisonous” (*Id.*);
- (3) that Plaintiff Hartzog was unaware of the plant’s dangerousness (*Id.* ¶ 6);
- (4) that Plaintiff Perez took ill when he ingested sap from the plant (*Id.* ¶ 9);
- (5) that Plaintiff Hartzog “watched her young son endure each of these symptoms” (*Id.* ¶ 10);
- (6) that Defendant “failed to warn the Plaintiff of the dangerous propensity of the plants” (*Id.* ¶ 13);
- (7) that Defendant “misrepresent[ed] that the plants were safe for household use” (*Id.*);
- (8) that Plaintiff Perez “suffered physical injuries, medical expenses; pain and suffering; mental anguish and loss of enjoyment of life” (*Id.*);
- (9) that Plaintiff Hartzog “suffered extreme emotional distress, physical injuries, mental anguish, pain and suffering and loss of enjoyment of life” (*Id.* ¶ 14);
- (10) that “the actions of the Defendant were done with . . . reckless disregard” (*Id.* ¶ 16);

In their Motion to Dismiss, Plaintiffs assert that the Restatement (Second) of Torts is the law governing Count I: sale of a dangerous chattel. (Amend. Mot. 2. *See* First Amend. Compl. ¶ 18.) As the Court explained in its Memorandum Opinion, however, Plaintiffs cannot reach Plaza Extra through Section 388 of the Restatement (Second). (*See generally* Mem. Op.) Therefore, the Court finds futility as to the proposed Count I.

Regarding the remaining counts, Hartzog does not cite the governing law. Plaintiffs merely point the Court to the Restatement (Third) of Torts: Products Liability. But that source does not govern every remaining count. Therefore, the Court must discover the governing law.

In Count II, Plaintiffs allege failure to warn / strict liability. Under the Restatement (Third) of Torts: Products Liability,

A product . . . is defective because of inadequate instructions or warnings when the foreseeable risk of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller . . . or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

Restatement (Third) of Torts: Products Liability § 2(c) (1998). In their original Complaint, Plaintiffs clearly alleged Plaza Extra's failure to warn. Plaintiffs alleged that the plant "contained no warnings" and that "Defendant's failure to warn the Plaintiff" caused injury to Hartzog and Perez. (Compl. ¶¶ 5, 13, & 14.) Therefore, the Court finds no futility as to the proposed Count II.

In Count III, Plaintiffs allege that "[t]he plant sold as a house plant was poisonous and therefore defective." (First Amend. Compl. ¶ 28.) Under the Restatement (Third), however, there is no general defective product liability. A product becomes defective when it contains a manufacturing defect, a design defect, or inadequate warnings. See Restatement (Third) of Torts: Products Liability § 2(a)-(c). Plaza Extra asserts that Count III "does not state a cause of action at all. . . . Even if a product is poisonous, it is not rendered defective for being so." (Def. Reply to Pl. Opp'n to Def. Mot. to Strike Untimely Causes of Action 3.) The Court agrees. Plaintiffs cannot reasonably claim that the houseplant was defectively *designed*. They would have had to join a higher power to bring that cause of action. They have also not alleged that the houseplant was defectively manufactured. None of the depositions, motions, or pleadings challenges the plant's packaging. Thus, the only cause of action in product liability

here is for failure to warn. Accordingly, Count III is duplicative of Count II and the Court, therefore, finds futility as to this count.

In Count IV, Hartzog alleges negligence. “The elements of a negligence cause of action are duty, breach of duty, causation and damages.” *Mill Harbour Condominium Owners Ass’n v. Marshall*, 53 V.I. 581, 586 (2010) (citation omitted). “A person acts negligently if the person does not exercise reasonable care under all circumstances.” Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 3 (2010). Factors considered in determining liability are the foreseeable likelihood of harm, the foreseeable severity of harm, and precautions taken to reduce or eliminate the harm. *Id.* Neither the initial Complaint nor the First Amended Complaint explicitly pleads the duty Plaza Extra owed. Nonetheless, the initial Complaint did plead breach of a duty, causation, and damages as to both Hartzog and Perez. Hartzog’s initial Complaint also alleged Plaza Extra’s “other negligent acts and omissions” caused their damages. (Compl. ¶ 13.) Liberally construed, Plaza Extra had knowledge of this cause of action. Therefore, the Court declines to find futility as to Count IV.

In Count V, Hartzog alleges negligent misrepresentation. Negligent misrepresentation may be actionable on two alternate grounds based on the harm alleged. Negligent misrepresentation resulting in physical harm is actionable under Section 311 of the Restatement (Second) of Torts. Restatement (Second) of Torts § 311 (1965). Negligent misrepresentation resulting in pecuniary loss is actionable under Section 552. Restatement (Second) of Torts § 552 (1977).¹ Here, Section 311 would govern Perez’s claim as he alleged physical harm. Section 552 would govern Hartzog’s claim as she incurred the financial losses of treatment for

¹ According to the Third Restatement of Torts, Sections 311 and 552 of the Second Restatement of Torts remain unchanged. See Restatement (Third) of Torts: Liability for Physical and Emotional Harm 645-48 (2010) (table reflecting sections superseded and omitting sections 311 and 552.)

Perez's claims. To prevail on a cause of action for negligent misrepresentation under either section, false information must be supplied. In their initial Complaint, Hartzog clearly plead that "[t]he plants were advertised as safe to purchase and as houseplants plants safe for the house" (Compl. ¶ 5.) But as the Court noted in its Memorandum Opinion, neither party disputes that Plaza Extra failed to give any information to Hartzog regarding the houseplants. (Mem. Op. 31-32.) Before a party may be held liable for a negligent misrepresentation, there must first be a representation. Here, there was none. Hartzog does not dispute that either. (*See, e.g.*, Pl. Resp. to Def. Stmt of Undisputed Facts in Supp. of Summ. J. 6, filed Mar. 18, 2010 ("Emanda Hartzog never saw any advertisements, either print or television, for the plants sold at Plaza Extra in 2003. **Plaintiff's Response:** This fact is not in dispute.") (citations omitted). For that reason, the Court granted summary judgment to Plaza Extra on this count. Accordingly, the Court finds futility as to Count V.

In Count VI, Hartzog alleges negligent failure to warn. "A defendant whose conduct creates a risk of physical or emotional harm can fail to exercise reasonable care by failing to warn of the danger if the defendant knows or has reason to know of that risk and that those encountering the risk will be unaware of it. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 18 (2010). As noted above regarding Count II, Hartzog adequately pleaded failure to warn in her initial Complaint. In the Memorandum Opinion denying Plaza Extra's summary judgment motion, however, the Court determined that Hartzog could not survive summary judgment if Section 388 of the Restatement (Second) of Torts, as argued there, because neither party disputed Plaza Extra lacked knowledge or a reason to know that the plant was dangerous. (*See* Mem. Op. 6-7.) In the Memorandum Opinion, the Court held that, absent legislative action, courts must apply the latest version of the restatements approved by

the American Law Institute. *See generally id.* That holding applies here as does the outcome were Section 388 to still apply. Hartzog cannot prevail on a cause of action for negligent failure to warn, whether under Section 388 as discussed in the Memorandum Opinion, or under Section 18 because she cannot show that Plaza Extra knew or had reason to know of the risk presented by dieffenbachia. Accordingly, the Court finds futility as to Count VI.

In Count VII, Plaintiffs alleged that “Defendant as a merchant breached its implied warranty of fitness for use.” (First Amend. Compl. ¶ 43.) Breach of the implied warranty of fitness for particular purpose requires that “(1) The seller must have reason to know the buyer's particular purpose. (2) The seller must have reason to know that the buyer is relying on the seller's skill or judgment to furnish appropriate goods. (3) The buyer must, in fact, rely upon the seller's skill or judgment.” *Gumbs v. Int'l Harvester, Inc.*, 718 F.2d 88, 92 (3d Cir. 1983) (quoting J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code 358 (2d ed. 1980)). (Cf. Pl. Opp'n to Def. Mot. to Strike Pl. Untimely Causes of Action 16.) In support of leave to amend to plead this count, “Plaintiff contends that the plants were advertised as safe, that Plaza Extra misrepresented that the plants sold to Plaintiffs were safe for use as a household plant when, in fact they were not” (Pl Opp'n to Def. Mot. to Strike 16.) Nowhere in Plaintiffs' initial Complaint or in their filings regarding the Motion to Amend or Motion to Strike have Plaintiffs alleged that Plaza Extra knew Plaintiff Hartzog's “particular purpose” in purchasing houseplants. The “[s]eller's knowledge of the intended use of a product is a necessary element of the implied warranty” *Gumbs*, 718 F.2d at 93 (citing V.I. Code Ann. tit. 11A, § 2-135). As Plaza Extra point out, “there were no facts pled in the Original Complaint regarding Plaintiffs' particular purpose or Plaintiffs relying on [Defendant's] specialized skill or judgment with respects to houseplants” (Def. Reply to Pl. Opp'n to

Def. Mot. to Strike Untimely Causes of Action 4.) The Court agrees. Plaintiffs did not allege a cause of action for breach of the implied warranty of fitness for particular purpose in their initial Complaint. Even if the Court were to allow this cause of action now, the Court finds that Plaintiffs could not meet the pleading requirements. Accordingly, the Court finds futility as to Count VII.

In Count VII, Plaintiffs plead intentional, and in the alternative, negligent infliction of emotional distress. (First Amend. Compl. ¶¶ 47, 48.) They do not state, however, which cause of action is plead as to Hartzog and which as to Perez. In order to plead a cause of action for intentional infliction of emotional distress, the plaintiff must allege that the defendant's "extreme and outrageous conduct intentionally or recklessly cause[d] severe emotional distress" Restatement (Second) of Torts § 46(1) (1965).² The conduct must be "so outrageous in character, and 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." *Id.* § 46 cmt. d. The defendant must desire to inflict severe emotional distress or know that it is substantially certain to result. *Id.* § 46 cmt. i. Alternatively, the defendant may be liable where he acts recklessly. *Id.* Reckless conduct requires that "the actor must know, or have reason to know, the facts which recreate the risk. *Id.* § 500 cmt. a. Regarding her son, Hartzog alleged in their initial Complaint that Plaza Extra's actions caused Perez to "suffer[] physical injuries, medical expenses, pain and suffering, mental anguish and loss of enjoyment of life." (Compl. ¶ 13.) As to Hartzog, Plaintiffs alleged that she "suffered extreme emotional distress, physical injuries,

² Revisions to the Restatement (Second) of Torts regarding intentional or negligent infliction of emotional distress have not yet been approved by the American Law Institute. Title 1, section 4 directs that courts apply approved restatements. Therefore, this portion of the Restatement (Second) is employed here as the current restatement of the law applicable to intentional and negligent infliction of emotional distress claims. V.I. Code Ann. tit. 1, § 4 (1995).

mental anguish, pain and suffering and loss of enjoyment of life” *Id.* ¶ 14. They alleged also that “the actions of Defendant were done with . . . a reckless disregard for the rights and interests of the Plaintiffs” *Id.* ¶ 16. While Plaintiffs adequately alleged the element of severe emotional distress as to Hartzog in their initial Complaint, they only alleged Perez suffered mental anguish, not severe emotion distress. “Emotion distress passes under various names, such as mental suffering, mental anguish It is only where it is extreme that the liability arises.” Restatement (Second) of Torts § 45 cmt. j. That notwithstanding, Plaintiffs also did not allege in their initial Complaint that Plaza Extra desired to inflict emotional distress upon them. Thus, they would have had alleged Plaza Extra’s recklessness. That they *did*. But, at this point, we’re past the point of simply pleading the elements. To grant leave to amend at this late hour, the Court must be satisfied that the amendment is not futile. Here, Plaintiffs have not shown in any of their motions, briefs, or pleadings, that Plaza Extra knew or had reason to know that the plant Hartzog purchased was toxic. Knowledge is necessary, and as noted above, that fact is not in dispute. Therefore, the Court finds futility as to Count VII in so far as it alleges intention infliction of emotional distress as to Perez and as to Hartzog.

Also in Count VIII, Plaintiffs alleged negligent infliction of emotional distress.³ In order to plead a cause of action for negligent infliction of emotional distress, the plaintiff must allege that

- (1) the defendant's negligence placed the plaintiff in danger for h[er] own safety—in other words . . . in the “zone of danger” when the accident occurred;
- (2) the plaintiff suffered bodily harm as a result of emotional disturbance; and

³ The parties have only argued this cause of action as to Plaintiff Hartzog. Accordingly, the Court constrains its analysis as well.

- (3) The plaintiff is a member of the injured third party's immediate family.

Cohler v. United States, 49 V.I. 1057, 1062 (D.V.I. 2008) (quoting Restatement (Second) of Torts §§ 436(2)-(3) & 436A (1965)). Plaza Extra argues that Hartzog “cannot prove that she was in the ‘zone of danger’ or that she suffered the type of ‘emotional’ distress sufficient to sustain [this] claim” (Def. Mot. to Strike Untimely Causes of Action 3.) In opposition, Plaintiffs allege that they have “already satisfied each of these three elements. [Hartzog] has suffered physical, bodily harm . . . debilitating ‘migraine headaches’ . . . sharp stomach pains; and blurred vision.” (Pl. Opp’n to Def. Mot. to Strike Pl. Untimely Causes of Action 12.) They also argue that “[t]he Zone of Danger requirement does not require that the Plaintiff claiming emotional injuries from seeing her immediate family member physically injured, must have also suffered the same physical injuries from the same harm.” (Pl. Reply to Def. Opp’n to Pl. Mot. to Amend 6, filed Sept. 6, 2011.) Rather, “[i]t only requires that Plaintiff suffered emotional injuries from witnessing a relative be physically harmed in some relative proximity to the plaintiff.” *Id.* The Court finds that Plaintiffs adequately plead this cause of action as to Hartzog in their initial Complaint. Given the unique circumstances involved here regarding the plant and Hartzog’s actions after discovering her son’s injuries, the Court cannot find Count VIII futile at this time. A reasonably jury could find Hartzog was or was not within the zone of danger and also could find that her bodily harm was or was not sufficient.

Based on the foregoing allegations, the Court finds futility as to Count I (sale of dangerous chattel), Count III (defective product), Count V (negligent misrepresentation), Count VI (failure to warn / negligence), Count VII (breach of implied warranty of fitness for particular use), and Count VIII (intentional infliction of emotional distress). The Court does

not find futility as to Count II (failure to warn / products liability), Count IV (negligence), and Count VIII (negligent infliction of emotional distress).

d. Prejudice

Lastly, the Court must examine any prejudice to Plaza Extra. “The issue of prejudice requires that we focus on the hardship to the defendants if the amendment were permitted.” *Cureton*, 252 F.3d at 273 (citation omitted). “[W]hether allowing an amendment would result in additional discovery, cost, and preparation to defend against new facts or new theories” are all factors the court must consider. *Id.*

As discussed above, Plaza Extra cannot allege prejudice as to Plaintiffs’ proposed Count II (failure to warn / product liability), Count IV (negligence), or Count VII (negligent infliction of emotional distress). While Plaza Extra did stridently object to the propriety of Count VIII, Plaintiffs did allege negligence and severe emotion distress in their initial Complaint. Therefore, the Court declines to find prejudice as to those counts.

III. CONCLUSION

While the Court does not find bad motive or dilatory tactics, clearly Plaintiffs’ Motion to Amend is untimely. Trial is slated to commence today. “[A]ll of the facts were available to plaintiff before she amended her complaint (and most were known before she filed her original complaint), and she had numerous opportunities to correct any deficiencies.” *USX Corp. v. Barnhart*, 395 F.3d 161, 169 (3d Cir. 2004) (citing *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir. 1993)).

Accordingly, the Court finds futility weighs heavily in favor of denying leave to amend the Complaint to plead Counts I, III, V, VI, VII, and one cause within Count VIII. Given that both parties have vehemently debated negligence, failure to warn, and negligent infliction of

emotional distress, the Court finds no prejudice to Plaza Extra on those counts. An appropriate order follows.

DONE AND SO ORDERED this 7th day of September, 2011.



DARRYL DEAN DONOHUE, SR.
Presiding Judge of the Superior Court

ATTEST:

VENETIA H. VELAZQUEZ, Esq.

Clerk of the Court

By: 

Court Clerk Supervisor

Dated: 9/7/11