

CAUSE NO. DC-11-02459

MARY BANKS and
BETTY COLSTON,

Plaintiffs

vs.

DEPUY ORTHOPAEDICS, INC., KELLY
ORTHOPAEDIC SALES, LP, and KOS
MANAGEMENT COMPANY, LLC

Defendants

IN THE DISTRICT COURT OF

DALLAS COUNTY, TEXAS

298TH JUDICIAL DISTRICT

**DEFENDANT DEPUY ORTHOPAEDICS, INC.'S ANSWER AND DEFENSES
TO PLAINTIFFS' ORIGINAL PETITION WITH ATTACHED DISCOVERY**

Defendant DePuy Orthopaedics, Inc. ("Defendant") hereby files its Answer to Plaintiffs' Original Petition with attached discovery ("Petition").

GENERAL DENIAL

Defendant asserts a general denial as is authorized by Rule 92 of the Texas Rules of Civil Procedure, and respectfully requests that Plaintiffs be required to prove their charges and allegations against it by a preponderance of the evidence as is required by the Constitution and laws of the State of Texas.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

1. Plaintiffs knowingly and voluntarily assumed any and all risks associated with the use of the products at issue in this case, and such assumption of the risks bars in whole or in part the damages Plaintiffs seek to recover herein.

SECOND AFFIRMATIVE DEFENSE

2. At all times mentioned herein, Plaintiffs were negligent, careless, and at fault, and conducted themselves so as to contribute substantially to their alleged injuries and damages.

Said negligence, carelessness, and fault of Plaintiffs bar in whole or in part the damages which Plaintiffs seek to recover herein.

THIRD AFFIRMATIVE DEFENSE

3. Plaintiffs' alleged injuries and damages attributable to the use of the products at issue in this case, if any, were not legally caused by the products at issue, but instead were legally caused by intervening and superseding causes or circumstances.

FOURTH AFFIRMATIVE DEFENSE

4. Plaintiffs' alleged damages, if any, are barred in whole or in part by Plaintiffs' failure to mitigate such damages.

FIFTH AFFIRMATIVE DEFENSE

5. Plaintiffs' causes of action are barred by the applicable statutes of limitation, statutes of repose, and doctrine of laches.

SIXTH AFFIRMATIVE DEFENSE

6. At the time of sale or delivery, the products conformed to the state-of-the-art for such products at that time.

SEVENTH AFFIRMATIVE DEFENSE

7. Plaintiffs' claims should be diminished in whole or in part in the amount paid to Plaintiffs by any party or non-party with whom Plaintiffs have settled or may settle.

EIGHTH AFFIRMATIVE DEFENSE

8. Plaintiffs' damages, if any, are barred or limited by the payments received from collateral sources.

NINTH AFFIRMATIVE DEFENSE

9. Plaintiffs' causes of action are barred by the learned intermediary doctrine.

TENTH AFFIRMATIVE DEFENSE

10. Plaintiffs' claims are barred by the doctrines of informed consent, release, and waiver.

ELEVENTH AFFIRMATIVE DEFENSE

11. Defendant is entitled to, and claims the benefits of, all defenses and presumptions set forth in or arising from any rule of law or statute in any state whose law is deemed to apply in this case.

TWELFTH AFFIRMATIVE DEFENSE

12. Plaintiffs' claims should be dismissed, reduced, offset, or barred in accordance with the principles of comparative negligence.

THIRTEENTH AFFIRMATIVE DEFENSE

13. The injuries and damages claimed by Plaintiffs, if any, were caused in whole or in part by the acts or omissions of persons over whom Defendant had no control or right of control.

FOURTEENTH AFFIRMATIVE DEFENSE

14. Plaintiffs' claims are barred by the equitable doctrine of estoppel.

FIFTEENTH AFFIRMATIVE DEFENSE

15. Upon information and belief, if the injuries were caused by DePuy Orthopaedics, Inc.'s products, which is denied, the injuries are the result of an idiosyncratic reaction to the product.

SIXTEENTH AFFIRMATIVE DEFENSE

16. Plaintiffs' alleged injuries are a result of pre-existing and/or unrelated medical conditions for which Defendant is not responsible.

SEVENTEENTH AFFIRMATIVE DEFENSE

17. To the extent Plaintiffs' claims are based on alleged misrepresentations or omissions made to the FDA, such claims are barred pursuant to *Buckman Co. v. Plaintiff's Legal Comm.*, 531 U.S. 341 (2001).

EIGHTEENTH AFFIRMATIVE DEFENSE

18. If DePuy Orthopaedics, Inc.'s products are unsafe in any way, they are unavoidably unsafe. Plaintiffs' purported action is, therefore, barred by Comment k of § 402A of the Restatement (Second) of Torts and/or other applicable law.

NINETEENTH AFFIRMATIVE DEFENSE

19. Defendant did not make to Plaintiffs nor did it breach any express or implied warranties and/or breach any warranties created by law. To the extent that Plaintiffs relied on any theory of breach of warranty, such claims are barred by applicable law, and for lack of privity with Defendant and/or failure of Plaintiffs, or Plaintiffs' representatives, to give timely notice to Defendant of any alleged breach of warranty. Defendant further specifically pleads as to any breach of warranty claim all affirmative defenses under the Uniform Commercial Code existing and which may arise in the future.

TWENTIETH AFFIRMATIVE DEFENSE

20. Plaintiffs have failed to plead allegations of fraud or deception with the particularity required by the Federal Rules of Civil Procedure.

TWENTY-FIRST AFFIRMATIVE DEFENSE

21. Plaintiffs' claims are barred, in whole or in part, by Texas's Products Liability Act, and Defendant is entitled to and does assert all defenses and presumptions available under Chapter 82 of the Texas Civil Practice and Remedies Code.

TWENTY-SECOND AFFIRMATIVE DEFENSE

22. Defendant reserves its right to raise such further and additional defenses as may be available upon the facts to be developed in discovery and under other applicable substance of law.

JURY DEMAND

Defendant requests a trial by jury on all issues so triable.

Respectfully submitted,

SHOOK, HARDY & BACON L.L.P.

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