

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF CARVER

FIRST JUDICIAL DISTRICT
CASE TYPE: PRODUCT LIABILITY

Linda Anderson, James Feser and
Judith Peskar,

Court File No. 10-CV-11-706
Hon. Richard G. Perkins

Plaintiffs,

v.

Simpson and Associates, Inc.,

Defendant.

**DEFENDANT'S MEMORANDUM OF
LAW IN SUPPORT OF ITS MOTION
TO DISMISS PLAINTIFFS'
COMPLAINT**

INTRODUCTION

In this product liability action, three individual plaintiffs contend that ASR™ hip replacement components implanted in them during hip replacement surgery were defectively designed and manufactured, causing them personal injury. Plaintiffs know, and even allege in their Complaint, that the ASR™ hip replacement components in question were designed and manufactured by DePuy International Limited of the United Kingdom (“DePuy”). Yet, for tactical reasons Plaintiffs have deliberately chosen not to sue DePuy, but instead name as the sole defendant Simpson and Associates, Inc. (“Simpson”), a distributor of the DePuy ASR™ devices allegedly implanted in Plaintiffs.

Plaintiffs’ Complaint against Simpson should be dismissed in its entirety. Inasmuch as Plaintiffs are fully aware of the correct identity of the manufacturer of the product that allegedly caused their injuries, Plaintiffs’ claims sounding in negligence, strict liability, and breach of implied warranty (Counts I through III) are barred by Minn. Stat. § 544.41. Plaintiffs’ claim for intentional misrepresentation (Count IV) has not been

pleaded with the degree of particularity required by Rule 9.02 of the Minnesota Rules of Civil Procedure and should be dismissed on that basis.

BACKGROUND

In general, each Plaintiff alleges that he or she was implanted with DePuy's ASR™ hip replacement components, that these components were defectively designed and manufactured, and that each Plaintiff was damaged by those defects. (*See generally* Complaint, ¶¶ 30-81). Particular allegations that DePuy's ASR™ components were defectively designed and manufactured, and defective when implanted in each of the Plaintiffs, include:

74. Each of the Plaintiffs to this action had ASR hip replacement components that were defective when implanted in their bodies and were subsequently recalled by the FDA.
75. In the instance of each of the Plaintiffs to this action, the ASR hip replacement cup failed to achieve proper bone ingrowth into the cup and thus failed to achieve proper fixation.
76. In the instance of each of the Plaintiffs to this action, the ASR hip replacement components generated excessive metal debris.

* * *

88. . . . [T]he ASR hip replacement components . . . contained defects that made them unreasonably dangerous beyond the expectations of the ordinary consumer, and . . . unfit for [their] intended use.

* * *

90. The ASR hip replacement components, for the reasons stated herein, were defective and unreasonably dangerous in design and manufacture.
91. . . . [T]he ASR hip replacement components . . . were in fact defective, unsafe and unreasonably dangerous.

92. As a direct and proximate cause of the nature of the ASR hip replacement components, Plaintiffs have suffered severe physical distress and injury

Plaintiffs admit that the ASR™ hip replacement components which they allege to have been defectively designed and manufactured were manufactured not by Simpson, but by DePuy. (Complaint, ¶ 11.) Nowhere in their Complaint do Plaintiffs allege that Simpson had any involvement whatsoever in the design or manufacture of the DePuy ASR™ devices at issue. What Plaintiffs do allege is that Simpson “used brochures and other printed literature to promote the ASR hip replacement components,” distributed that literature to orthopedic physicians in Minnesota, North Dakota, and South Dakota, and succeeded in increasing sales of DePuy’s ASR™ products in those states. (*Id.*, ¶¶ 12-17.) Plaintiffs further allege that Simpson distributed the particular DePuy ASR™ hip replacement components that they each received. (*Id.*, ¶ 7.) Plaintiffs’ claims against Simpson sound in negligence (Count I), strict liability (Count II), breach of implied warranty (Count III), and intentional misrepresentation (Count IV). (*Id.*, ¶¶ 82-105).

Although not alleged in Plaintiff’s Complaint, there is no mystery as to why Plaintiffs have sued Simpson but not DePuy. This Court may take judicial notice of MDL 2197, a multi-district litigation pending in the Northern District of Ohio consolidating product liability actions against DePuy for injuries allegedly resulting from defects in DePuy’s ASR™ hip replacement components. *In re DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability Litig.*, 735 F. Supp. 2d 1378 (J.P.M.L. 2010) (initial transfer order). In a publicly-available press release, Plaintiffs’ Florida- and Missouri-based attorneys – identifying themselves as “the DePuy ASR Hip Recall Law

Firm Alliance” – proclaimed that they brought this case in Minnesota state court, against only a Minnesota-based defendant, because “[the Alliance] believes plaintiffs with a defective ASR hip implant should avoid the ‘class action-like’ MDL because the decisions that come out of an MDL may not result in a fair settlement.” See <http://www.prweb.com/releases/2011/5/prweb8360446.htm> (May 26, 2011).

ARGUMENT

I. Because Plaintiffs Know The Identity Of The Manufacturer Of The Products That Allegedly Caused Their Injuries But Have Chosen Not To Sue The Manufacturer, Plaintiffs’ Claims For Strict Liability, Negligence And Breach Of Implied Warranty Should Be Dismissed Pursuant To Minn. Stat. § 544.41

Minn. Stat. § 544.41 limits the circumstances under which a product liability plaintiff may sue a distributor or other non-manufacturer of an allegedly defective product. In pertinent part, the statute provides the following:

Subdivision 1. **Product liability; requirements.** In any product liability action based in whole or in part on strict liability in tort commenced or maintained against a defendant other than the manufacturer, that party shall upon answering or otherwise pleading file an affidavit certifying the correct identity of the manufacturer of the product allegedly causing injury, death or damage. . . .

Subd. 2. **Certifying defendant; dismissal of strict liability.** Once the plaintiff has filed a complaint against a manufacturer and the manufacturer has or is required to have answered or otherwise pleaded, the court shall order the dismissal of a strict liability in tort claim against the certifying defendant, provided the certifying defendant is not within the categories set forth in subdivision 3. Due diligence shall be exercised by the certifying defendant in providing the plaintiff with the correct identity of the manufacturer and due diligence shall be exercised by the plaintiff in filing a law suit and obtaining jurisdiction over the manufacturer. . . .

Subd. 3. **Dismissal order prohibited.** A court shall not enter a dismissal order relative to any certifying defendant even though full compliance with subdivision 1 has been made where the plaintiff can show one of the following:

(a) that the defendant has exercised some significant control over the design or manufacture of the product, or has provided instructions or warnings to the manufacturer relative to the alleged defect in the product which caused the injury, death or damage;

(b) that the defendant had actual knowledge of the defect in the product which caused the injury, death or damage; or

(c) that the defendant created the defect in the product which caused the injury, death or damage.

Procedurally, a motion to dismiss under Minn. Stat. § 544.41 “is comparable to a rule 12(b) motion to dismiss for failure to state a cause of action.” *In re Shigellosis Litig.*, 647 N.W.2d 1, 7 (Minn. Ct. App. 2002) (citing *Indeck Power Equip. Co. v. Jefferson Smurfit Corp.*, 881 F. Supp. 338, 342 (N.D. Ill. 1995)).

The Minnesota Legislature enacted section 544.41 to ameliorate the effects of product liability law upon passive distributors since these effects “can be harsh on a commercial seller who does not control the design or manufacture of the product and who does not know or have reason to know of the defect.” *In re Shigellosis Litig.*, *supra*, 647 N.W.2d at 6. “The seller’s-exception statute, Minn. Stat. § 544.41, tempers the harsh effect of strict liability as it applies to passive distributors, while ensuring that a person injured by a defective product can recover from a viable source.” *Id.*; *see also Landree v. University Medical Products USA, Inc.*, 2004 WL 413287, *2 (D. Minn., March. 1, 2004) (“The placement of liability on the manufacturer rather than the seller of an allegedly defective item reflects a legislative policy choice to avoid undue burden and expense.” (citing Restatement (Second) of Torts § 402 cmt. d.)).

While on its face § 544.41 applies only to strict liability claims, as a practical matter the statute requires dismissal of all product liability claims against a non-manufacturer defendant – *i.e.*, claims sounding in strict liability, negligence and breach of warranty – since, in Minnesota, these claims are merged into a single theory of strict product liability. *See Kladivo v. Sportsstuff, Inc.*, 2008 WL 4933951, at *4 (D. Minn., September 2, 2008); *Masepohl v. American Tobacco Co., Inc.*, 974 F. Supp. 1245, 1253 (D. Minn. 1997); *Nimeth v. Prest Equipment Co.*, 1993 WL 328767, *1 (Minn. Ct. App., August 31, 1993) (unpublished) (Exhibit 1 hereto); *Bilotta v. Kelley Co.*, 346 N.W.2d 616, 623 (Minn. 1984) (discussing merger of product liability claims into single unified theory); Steenson *et al.*, 27 Minnesota Practice Series, Products Liability Law § 8.13.

Simpson submits that, as applied to this case, Minn. Stat. § 544.41 requires this Court to dismiss Counts I (negligence), II (strict liability), and III (breach of implied warranty) at the Rule 12 stage. As shown by the accompanying affidavit of Richard Simpson (“Simpson Aff.”), Simpson has satisfied the requirements of subd. 1 of the statute by filing an affidavit identifying DePuy as the manufacturer of the ASR™ hip replacement components that allegedly caused Plaintiffs’ injuries.

Simpson acknowledges that, under subd. 2, a non-manufacturer that has filed the affidavit required under subd. 1 may normally not be dismissed until the plaintiff has actually sued the correct manufacturer, and the manufacturer has answered. However, subd. 2 also requires that the plaintiff, upon learning of the correct manufacturer’s identity, “exercise due diligence” in commencing an action against the manufacturer. In this regard, it is undisputed that Plaintiffs knew the correct identity of the manufacturer –

DePuy – before commencing this action, but deliberately chose not to sue it, even though DePuy is amenable to suit in Minnesota and hardly insolvent.

Reading between the lines of Plaintiffs’ counsel’s press release, the reason Plaintiffs have not sued DePuy is clear – had Plaintiffs sued *both* DePuy and Simpson, DePuy could have removed the case to federal court, and from there to MDL 2197, inasmuch because Minn. Stat. § 544.41 allows the court to disregard Simpson’s citizenship for purposes of determining whether diversity jurisdiction exists. *See, e.g., Block v. Toyota Motor Corp.*, 2010 WL 5422555 (D. Minn., December 23, 2010), *reconsideration denied*, 2011 WL 795756 (D. Minn., February 28, 2011) (suit against Japanese manufacturer and non-diverse dealership properly removed to federal court; dealership’s citizenship disregarded under Minn. Stat. § 544.41); *Leedahl v. Rayco Mfg., Inc.*, 2006 WL 1662959 (D. Minn., May 15, 2006) (citizenship of non-diverse retailer may be disregarded, and action against co-defendant manufacturer may be removed to federal court, in conformity with Minn. Stat. §544.41). To avoid that result, Simpson submits, Plaintiffs have no intention of adding DePuy as a defendant until more than one year has elapsed after the commencement of this action, when the case cannot be removed to federal court based upon diversity jurisdiction. 28 U.S.C. § 1446(b).¹

Under these particular circumstances, and in conformity with the clear legislative purpose that non-manufacturers not responsible for a product defect should not have to

¹ Notably, in jurisdictions that do not have a statutory or common-law counterpart to Minn. Stat. § 544.41, the same out-of-state attorneys representing Plaintiffs in this case have not hesitated to sue *both* DePuy and a non-diverse distributor in a single complaint. *See, e.g., Malkmus v. DePuy Orthopaedics, Inc. and TRP & Associates, LLC*, U.S.D.C., E.D. Wis., Case No. 2:11-cv-00365 (available on ECF).

incur the burden of defending a lawsuit where the correct manufacturer is known, Simpson submits that its right to a dismissal under Minn. Stat. § 544.41 should not be deferred until Plaintiffs add DePuy as a defendant to this case a year from now.

Finally, Simpson submits that Plaintiffs have not carried, and cannot carry, their burden under § 544.41, subd. 3 to demonstrate why Simpson should not be dismissed. As an initial matter, subd. 3 requires Plaintiffs to “*show*” that one of the three circumstances enumerated in subd. 3(a)-(c) exists. *See, e.g., Kladivo, supra*, 2008 WL 4933951, at *3 (“Nor has Kladivo *demonstrated* that Bell is a non-passive seller of the allegedly defective product, such that dismissal would be precluded pursuant to the exceptions of § 544. 41, subd. 3.”) (emphasis added). Mere allegations, Simpson submits, do not suffice; had the Legislature intended that plaintiffs could keep a non-manufacturer in the case simply by *alleging* the non-manufacturer’s independent wrongdoing – which would substantially undercut the legislative purpose in enacting Minn. Stat. § 544.41 in the first place, *i.e.*, avoiding undue burden and expense on distributors and other non-manufacturers of products – the Legislature would have so specified in the statute.

Moreover, Plaintiffs’ Complaint fails to even allege facts that would, if proven, invoke any of the exceptions to dismissal set forth in subd. 3(a)-(c). Plaintiffs do not allege that Simpson exercised any significant control over the design or manufacture of DePuy’s ASR™ hip replacement components, and in fact Simpson played no role whatsoever in the design or manufacture of DePuy’s ASR™ devices and did not create any alleged design or manufacturing defect claimed by Plaintiffs to exist therein.

(Simpson Aff., ¶¶ 3, 5, 8.) Similarly, Plaintiffs do not allege that Simpson provided any instructions or warnings to DePuy relative to any alleged defect in DePuy's ASR™ hip replacement components, and in fact none was provided. (*Id.*, ¶ 6.) In the same vein, while Plaintiffs allege that Simpson was aware of “the problems with the design of the ASR hip replacement components based upon complaints of orthopedic surgeons” and of “excessive failures necessitating revision of ASR hip replacement components” but “failed to convey this information to the Plaintiffs’ orthopedic surgeons” (Complaint, ¶¶ 24-25), it is beyond dispute that Simpson, as the distributor, had no authority to alter or amend in any manner the DePuy warnings or other written information that accompanied the ASR™ devices. (*Id.*, ¶ 6.)

For these reasons, Counts I, II, and III of Plaintiffs’ Complaint are barred by Minn. Stat. § 544.41, and this Court should so hold.

II. Plaintiff’s Intentional Misrepresentation Allegations Do Not Satisfy Rule 9.02

Count IV of Plaintiffs’ Complaint sounds in intentional misrepresentation and, under Minnesota law, must be pleaded “with particularity.” Minn. R. Civ. P. 9.02; *Juster Steel v. Carlson Cos.*, 366 N.W.2d 616, 618 (Minn. Ct. App. 1985) (misrepresentation claims sound in fraud within the meaning of Rule 9.02). Thus, a misrepresentation plaintiff must allege “the who, what, when, where, and how: the first paragraph of any newspaper story.” *Great Plains Trust Co. v. Union Pac. R.R.*, 492 F.3d 986, 995 (8th Cir.2007) (quoting *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir.1990)).

Under Minnesota law, the elements to a claim for intentional misrepresentation consist of each of the following:

- a false representation regarding a past or present fact;
- the fact was material and susceptible of knowledge;
- the representer knew it was false or asserted it as his or her own knowledge without knowing whether it was true or false;
- the representer intended to induce the claimant to act or justify the claimant in acting;
- the claimant was induced to act or justified in acting in reliance on the representation;
- the claimant suffered damages; and,
- the representation was the proximate cause of the damages.

Martens v. Minnesota Min. & Mfg. Co., 616 N.W.2d 732, 747 (Minn. 2000). Each of these elements, under Minnesota law, must be pleaded “with particularity;” general, boilerplate allegations do not suffice. *Schumacher v. Schumacher*, 627 N.W.2d 725, 730 (Minn. Ct. App. 2001); *Stubblefield v. Gruenberg*, 426 N.W.2d 912, 914-15 (Minn. Ct. App. 1988).

Plaintiffs’ claims for intentional misrepresentation, as pleaded, plainly fail to satisfy these authorities. Count IV of the Complaint, standing alone (Complaint, ¶¶ 100-105), merely recites the elements of the cause of action without offering a single supporting fact. Moreover, for many of the boilerplate allegations found in Count IV, no particularized factual support can be found anywhere in the Complaint. For instance, nowhere do Plaintiffs allege with particularity a single, specific false representation of fact made to any of the individual Plaintiffs, or to their physicians. To the contrary, although Plaintiffs allege that Simpson disseminated certain literature or other information “to the orthopedic community in Minnesota, South Dakota and North

Dakota” (*e.g.*, Complaint, ¶¶ 12-14), nowhere do Plaintiffs allege specific facts showing that any of them, or their physicians, saw or relied on that information; that it was false; or, that Simpson or its representatives knew such information to be false.²

Most notably absent from Plaintiffs’ Complaint are specific facts showing that any Plaintiff, or his or her physician, *relied* on any representation allegedly made by Simpson. Plaintiffs allege only that “Plaintiffs and their surgeons, nurses, and hospital staff relied upon information from Defendant in selecting, purchasing, implanting and servicing the hip replacement components,” without any further specifics. (Complaint, ¶ 9.) The only other allegation of reliance appears in paragraph 104, where Plaintiffs contend that “Plaintiff[s] and their agents were induced to act in reliance on Defendant’s misrepresentations,” again without more.

Confronted with similar generalized, boilerplate allegations of reliance in *In re Mirapex Products Liability Litigation*, 246 F.R.D. 668, 672 (D. Minn. 2007), the court held, in language equally appropriate here, the following:

² The closest any of the Plaintiffs comes to such an allegation is in ¶¶ 32-33 of the Complaint, where plaintiff Linda Anderson alleges generally that her physician “explained . . . information about the ASR hip replacement components based upon the information previously conveyed to him by Defendant’s sales representatives” and that “based upon the information originally provided by Defendant,” Ms. Anderson agreed to a right total hip replacement. These allegations provide none of the “newspaper story” – they say nothing about the specific information allegedly conveyed, when it was conveyed, by whom, whether it was false, and whether the sales representative allegedly communicating the information knew it was false. Though Plaintiff James Feser alleges that one or more Simpson employees allegedly marketed ASR™ hip replacement components for an unapproved use (Complaint, ¶¶ 49-50), again no specific facts are alleged as to who made such representations, when they were made, or that they were known to be false by the maker. Plaintiff Judith Peskar offers no specific facts at all indicating that either she or her physician heard, saw, or relied upon any representation allegedly made by Simpson.

Plaintiffs merely allege they took Mirapex when they, or their doctors, reasonably relied on defendants' false representations denying any link between Mirapex and compulsive gambling. *Specific statements or omissions are not cited, nor is the person who relied upon them, or whether the relying party was the prescribing physician or the plaintiff.*

These discrepancies force defendants to conjecture as to whether any particular statements, omissions, or representations were relied upon. Defendants cannot tell – among other things – the specific representations, whether they were heard, seen, or relied on at all. Absent compliance with Rule 9(b), defendants cannot be expected to know the precise nature of the fraud to which they must respond.

(Emphasis added.) Similarly, in *Riley v. Cordis Corp.*, 625 F. Supp. 2d 769, 786-87 (D. Minn. 2009), involving, *inter alia*, claims for misrepresentation against a medical device manufacturer, though the plaintiff had pled some specifics regarding the content of allegedly false representations, the court found that “[plaintiff] has not alleged, with specificity, who made the representations, when the representations were made, to whom the representations were made, or how [plaintiff] (or his physician) relied on the representations” and granted the defendant’s Rule 9(b) motion.

As in *In re Mirapex, supra*, Plaintiffs’ allegations of misrepresentation “force Defendant to conjecture as to whether any particular statements, omissions, or representations were relied upon.” If the point of Rule 9.02 is to provide defendants with “the precise nature of the fraud to which they must respond,” Count IV of Plaintiffs’ Complaint falls well short of the mark and should be dismissed.

CONCLUSION

For the foregoing reasons, Simpson respectfully submits that this action should be dismissed in its entirety.

Dated June 15, 2011

NILAN JOHNSON LEWIS PA

By: 

Tracy J. Van Steenburgh – Reg. No.141173

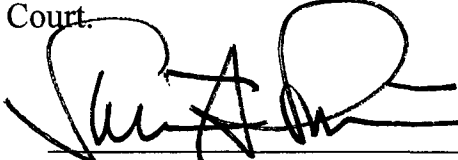
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Attorneys for Defendant

ACKNOWLEDGEMENT

The above-signed hereby acknowledges that, pursuant to Minn. Stat. §549.211, costs, disbursements and reasonable attorney fees and other sanctions may be awarded to the opposing party or parties in this litigation if the Court should find the above-signed acted in bad faith, asserted a claim or defense that is frivolous and costly to the other party, asserted an unfounded position solely to delay the ordinary course of proceedings or to harass, or committed a fraud upon the Court.



Scott A. Smith

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF CARVER

FIRST JUDICIAL DISTRICT
CASE TYPE: PRODUCT LIABILITY

Linda Anderson, James Feser and
Judith Peskar,

Court File No. 10-CV-11-706
Hon. Richard G. Perkins

Plaintiffs,

v.

Simpson and Associates, Inc.,

Defendant.

**AFFIDAVIT OF RICHARD SIMPSON
IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS COMPLAINT**

STATE OF MINNESOTA)
) SS.
COUNTY OF CARVER)

Richard Simpson, being first duly sworn upon his oath, hereby deposes and states the following:

1. I am an adult witness legally competent to testify as to the matters set forth below, which are based upon my personal knowledge and/or my review of records maintained by Simpson & Associates, Inc. ("Simpson") in the ordinary course of its business. I am the principal of Simpson and a custodian of those records.

2. Simpson is located in Chanhassen, Minnesota and, at the time of the events described in the Complaint in this case, was a non-manufacturer distributor of certain medical devices and components as set forth below.

3. I have reviewed the Complaint in this case, which alleges that the Plaintiffs experienced injury on account of "ASR hip replacement components." Simpson has

never designed or manufactured ASR™ hip replacement components and did not design or manufacture the ASR™ hip replacement components which, according to the Complaint, were allegedly implanted into each of the Plaintiffs.

4. If, as alleged, the ASR™ hip replacement components allegedly implanted into each of the Plaintiffs were distributed by Simpson, the correct identity of the entity responsible for the design and manufacture of those ASR™ hip replacement components in the United States is DePuy Orthopaedics, Inc., an Indiana corporation located in Warsaw, Indiana. The correct identity of the actual manufacturer of those ASR™ hip replacement components, to the best of my knowledge, is DePuy International Limited, a British concern based in Leeds, England, United Kingdom.

5. Simpson has never exercised any control over the design or manufacture of ASR™ hip replacement components.

6. Simpson has neither provided instructions or warnings to DePuy Orthopaedics or DePuy International relative to any alleged defect in ASR™ hip replacement components, nor has Simpson ever had any authority to add to, revise or alter in any way the instructions and warnings that accompanied the product.

7. Simpson has no actual knowledge of any alleged defect in the ASR™ hip replacement components which were allegedly implanted in the individual Plaintiffs.

8. Simpson did not create any alleged defect in the ASR™ hip replacement components which were allegedly implanted in the individual Plaintiffs.

FURTHER AFFIANT SAYETH NOT.

Dated June 14, 2011

By: *J. Richard Simpson*
Richard Simpson

Subscribed and sworn to before
me this 14th day of June, 2011.

Carol Jean Wochnick
Notary Public



STATE OF MINNESOTA
COUNTY OF CARVER

DISTRICT COURT
FIRST JUDICIAL DISTRICT
CASE TYPE: PRODUCT LIABILITY

Linda Anderson, James Feser and
Judith Peskar,

Court File No. 10-CV-11-706
Hon. Richard G. Perkins

Plaintiffs,

v.

**CERTIFICATE OF
REPRESENTATION AND PARTIES**

Simpson and Associates, Inc.,

Defendant.

This certificate must be filed pursuant to Rule 104 of the General Rules of Practice for the District Courts, which states: "A party filing a civil case shall, at the time of filing, notify the court administrator in writing of the name, address, and telephone number of all counsel and unrepresented parties, if known. If that information is not then known to the filing party, it shall be provided to the court administrator in writing by the filing party within seven days of learning it. Any party impleading additional parties shall provide the same information to the court administrator. The court administrator shall, upon receipt of the completed certificate, notify all parties or their lawyers, if represented by counsel, of the date of filing the action and file number assigned."

LIST ALL ATTORNEYS/PRO SE PARTIES INVOLVED IN THIS CASE.

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Dated June 15, 2011

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STATE OF MINNESOTA
COUNTY OF CARVER

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Linda Anderson, James Feser and
Judith Peskar,

Court File No. 10-CV-11-706
Hon. Richard G. Perkins

Plaintiffs,

(PROPOSED) ORDER

v.

Simpson and Associates, Inc.,

Defendant.

This matter came on for hearing before the undersigned on July 28, 2011, upon the Motion to Dismiss Plaintiffs' Complaint filed by Defendant Simpson and Associates, Inc. All parties were present by and through their respective counsel of record.

Based upon the aforesaid Motion, all memoranda, affidavits and other materials submitted in support thereof and in opposition thereto, and the arguments of counsel, and being duly informed in the premises, the Court hereby ORDERS as follows:

1. Defendant's Motion to Dismiss Plaintiffs' Complaint is hereby GRANTED.
2. Plaintiffs' Complaint is hereby DISMISSED.

DATED: _____

Richard G. Perkins
Judge, First Judicial District
State of Minnesota

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF CARVER

FIRST JUDICIAL DISTRICT
CASE TYPE: PRODUCT LIABILITY

Linda Anderson, James Feser and
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Court File No. 10-CV-11-706
Hon. Richard G. Perkins

Plaintiffs,

v.

Simpson and Associates, Inc.,

Defendant.

**NOTICE OF MOTION
AND MOTION TO DISMISS
PLAINTIFFS' COMPLAINT**

TO: Plaintiffs above-named and their attorneys, Sheila A. Bjorklund, Lommen, Abdo, Cole, King & Stageberg, P.A., 2000 IDS Center, 80 South 8th Street, Minneapolis, MN 55402; Altom M. Maglio, Maglio Christopher & Toale, PA, 1751 Mound Street, Second Floor, Sarasota, FL 34236; and Brian Franciskato, Nash & Franciskato Law Firm, 2300 Main Street, Kansas City, MO 64108:

PLEASE TAKE NOTICE that on the 28th day of July, 2011 at 8:30 a.m., before the Honorable Richard G. Perkins, Judge of the District Court, First Judicial District, Carver County Justice Center, 604 East Fourth Street, Chaska, Minnesota 55318, Defendant Simpson and Associates, Inc. will move the Court for entry of an order dismissing all of Plaintiffs' claims against it, upon the following grounds:

1. Counts I, II and III of Plaintiffs' Complaint are barred by the Minnesota distributor's statute, Minn. Stat. § 544.41; and,
2. Count IV of Plaintiffs' Complaint has not been pled with specificity, as required by Rule 9.02 of the Minnesota Rules of Civil Procedure.

This Motion is subject to the briefing schedule set forth in Rule 115.03 of the General Rules of Practice for the District Courts.

This Motion is supported by the accompanying Affidavit of Richard Simpson, an accompanying Memorandum of Law, and accompanying Exhibit, all prior pleadings and other documents filed with the Court in this matter, and the arguments of counsel.

Dated June 15, 2011

NILAN JOHNSON LEWIS PA

By: 

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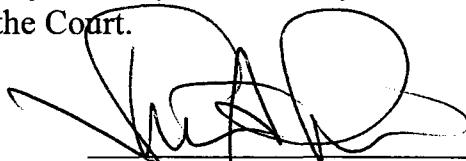
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Inc.*

ACKNOWLEDGEMENT

The above-signed hereby acknowledges that, pursuant to Minn. Stat. §549.211, costs, disbursements and reasonable attorney fees and other sanctions may be awarded to the opposing party or parties in this litigation if the Court should find the above-signed acted in bad faith, asserted a claim or defense that is frivolous and costly to the other party, asserted an unfounded position solely to delay the ordinary course of proceedings or to harass, or committed a fraud upon the Court.



Scott A. Smith

STATE OF MINNESOTA

DISTRICT COURT

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FIRST JUDICIAL DISTRICT
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Linda Anderson, James Feser and
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Court File No. 10-CV-11-706
Hon. Richard G. Perkins

Plaintiffs,

v.

**DEFENDANT'S EXHIBITS IN
SUPPORT OF MOTION TO DISMISS
PLAINTIFFS' COMPLAINT**

Simpson and Associates, Inc.,

Defendant.

Attached hereto as Exhibit 1 is a true and correct copy of the unpublished opinion of the Minnesota Court of Appeals in *Nimeth v. Prest Equipment Co.*, 1993 WL 328767 (Minn. Ct. App., Aug. 31, 1993).

Dated June 15, 2011

NILAN JOHNSON LEWIS RA

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*Attorneys for Defendant Simpson and Associates,
Inc.*

Not Reported in N.W.2d, 1993 WL 328767 (Minn.App.)
(Cite as: 1993 WL 328767 (Minn.App.))

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480A.08(3).

Court of Appeals of Minnesota.
Donna M. NIMETH, Appellant,
v.

PREST EQUIPMENT COMPANY, et al., Respondents.

No. C1-93-685.
Aug. 31, 1993.

Appeal from District Court, Ramsey County; Joanne M. Smith, Judge.
Andrew P. Engebretson, St. Paul, for appellant.

Roger H. Gross, Elliot L. Olsen, Minnetonka, for respondent.

Considered and decided by FORSBERG, P.J., and PARKER and KLAPHAKE, JJ.

UNPUBLISHED OPINION
FORSBERG, Judge.

*1 In this products liability action, appellant Donna Nimeth argues the trial court erred in granting summary judgment to respondent Prest Equipment Co. She claims she has viable claims for breach of an implied warranty and negligence. We affirm.

DECISION

On appeal from summary judgment, the reviewing court must determine if there are genuine issues of material fact and whether the trial court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn.1990). The evidence must be viewed in a light most favorable to the nonmoving party. *Clough v. Ertz*, 442 N.W.2d 798, 801 (Minn.App.1989).

1. Minn.Stat. § 544.41 (1992) provides that in

certain circumstances a nonmanufacturing defendant may be dismissed from a products liability action based on strict liability.

Subdivision 1. In any product liability action based in whole or in part on strict liability in tort commenced or maintained against a defendant other than the manufacturer, that party shall upon answering or otherwise pleading file an affidavit certifying the correct identity of the manufacturer of the product allegedly causing injury, death or damage. * * *

Subd. 2. Once the plaintiff has filed a complaint against a manufacturer and the manufacturer has or is required to have answered or otherwise pleaded, the court shall order the dismissal of a strict liability in tort claim against the certifying defendant [nonmanufacturer], provided the certifying defendant is not within the categories set forth in subdivision 3.

Subd. 3. A court shall not enter a dismissal order relative to any certifying defendant even though full compliance with subdivision 1 has been made where the plaintiff can show one of the following:

(a) That the defendant has exercised some significant control over the design or manufacture of the product, or has provided instructions or warnings to the manufacturer relative to the alleged defect in the product which caused the injury, death or damage;

(b) That the defendant had actual knowledge of the defect in the product which caused the injury, death or damage; or

(c) That the defendant created the defect in the product which caused the injury, death or damage.

Nimeth made no showing that Prest fits within any of the three exceptions listed in subdivision 3, and consequently the trial court granted summary judgment on her strict liability claims. Because Minn.Stat. § 544.41 appears only to provide for dismissal of the strict liability claim, Nimeth contends the trial court erred by dismissing her breach of implied warranty claims. We disagree. Strict liability has effectively preempted implied warranty claims where personal

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injury is involved. Continental Ins. Co. v. Loctite Corp., 352 N.W.2d 460, 463 (Minn.App.1984), *pet. for rev. denied* (Minn. Nov. 8, 1984); *see also* Goblirsch v. Western Land Roller Co., 310 Minn. 471, 476, 246 N.W.2d 687, 690 (1976) (no error or prejudice to plaintiff where trial court refused to submit the case to the jury on express and implied warranty theories when court instructed jury on the more favorable strict liability theory; court reasoned implied warranty instruction would have been redundant and possibly confusing).

*2 Moreover, even if strict liability has not preempted implied warranty claims in personal injury actions, we believe Nimeth's claim must nevertheless fail. In order to prevail on an implied warranty claim, a party must prove (a) the existence of a warranty (b) a breach, and (c) a causal link between the breach and the alleged harm. Peterson v. Bendix Home Sys., Inc., 318 N.W.2d 50, 52-3 (Minn.1982). Nimeth has failed to set forth any evidence to support her contention that Prest breached a duty to her. There is no record evidence that the floor matting was defective. Conspicuously absent from the record is any affidavit from an expert indicating a deficiency with the floor mat.

To support her claim, Nimeth merely relies on her allegations that the floor mat lacked slip-proof material. In order to withstand a summary judgment motion, a party cannot rely on mere general statements of fact, but must demonstrate at the time the motion is made there are genuine issues of fact in dispute. Hunt v. IBM Mid America Employees Fed. Credit Union, 384 N.W.2d 853, 855 (Minn.1986). Because Nimeth has failed to set forth evidence to support her defective floor mat theory, we conclude the trial court correctly granted Prest's summary judgment motion.

2. Nimeth also argues the trial court erred in granting summary judgment on her claim of negligent merchandising. We disagree.

Initially, we note that we are unaware of any Minnesota case recognizing a cause of action for negligent merchandising, and Nimeth has failed to cite any precedent for her position. Moreover, it is well settled that sellers have no duty to inspect the products they sell unless they know or have reason to know that the products are dangerous.

A seller of a chattel manufactured by a third

person, who neither knows nor has reason to know that it is, or is likely to be, dangerous, is not liable in an action for negligence for harm caused by the dangerous character or condition of the chattel because of his failure to discover the danger by an inspection or test of the chattel before selling it.

Gorath v. Rockwell Intern., Inc., 441 N.W.2d 128, 132 (Minn.App.1989), *pet. for rev. denied* (Minn. July 27, 1989) (quoting Restatement (Second) of Torts, § 402 (1965)).

There is no evidence that Prest was aware of any defect in the Seventh Heaven Fatigue mat. Accordingly, the trial court properly granted summary judgment on Nimeth's negligent merchandising claim.

Affirmed.

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