

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

Plaintiffs,

**DEFENDANT’S REPLY
MEMORANDUM OF LAW
IN SUPPORT OF ITS
MOTION TO DISMISS**

v.

Simpson and Associates, Inc.,

Defendant.

INTRODUCTION

Plaintiffs’ arguments in opposition to Simpson & Associates, Inc.’s (“Simpson’s”) motion to dismiss are without merit. Minn. Stat. § 544.41 was intended by the Legislature to apply to situations exactly like what Plaintiffs have pled here – a product was allegedly defectively designed or manufactured, the correct identity of the manufacturer is known, the manufacturer is financially viable and amenable to suit, and the distributor neither bears control over nor has actual knowledge of the alleged defects. Under the facts as alleged by Plaintiffs, Minn. Stat. § 544.41 bars their strict liability, implied warranty and negligence claims against Simpson, and this Court should so hold. And despite Plaintiffs’ pleas to the contrary, the allegations in their Complaint wholly fail to apprise Simpson of the particular facts upon which they base their misrepresentation claims, particularly as to the element of individual reliance. Boilerplate, generalized allegations of reliance do not satisfy Rule 9.02; Plaintiffs offer nothing more.

Plaintiffs' apparent determination to force the not-yet-sued manufacturer of the ASR™ hip replacement components, DePuy International Limited of the United Kingdom ("DePuy"), to defend against Plaintiffs' claims in state court in no way justifies holding Simpson as a litigation hostage for twelve months over a product Simpson neither designed nor manufactured. Simpson respectfully submits that it is entitled to the dismissal of Plaintiffs' claims against it and asks the Court to so hold.

REPLY ARGUMENT

I. Minn. Stat. § 544.41 Is Applicable To Plaintiffs' Negligence And Implied Warranty Claims, Not Just Their Strict Liability Claim

Plaintiffs initially argue that Minn. Stat. § 544.41 has no applicability to their negligence (Count I) and breach of implied warranty (Count III) claims. (Plaintiffs' Memorandum in Opposition ("Opp. Memo.") at 4-8.) This is incorrect.

In personal injury actions under Minnesota law, claims for breach of implied warranty are preempted by, and merged into, strict liability claims. *Continental Ins. Co. v. Loctite Corp.*, 352 N.W.2d 460, 463 (Minn. Ct. App. 1984) ("[o]nce strict liability is the broader theory of recovery, as here, warranty of fitness has been pre-empted"); *Forslund v. Stryker Corp.*, 2010 U.S. Dist. LEXIS 104227,*23 (D. Minn., September 30, 2010) ("[b]ecause Forslund's complaint alleges strict products liability claims and personal injury, Forslund's claim for breach of implied warranty of merchantability is preempted"; court dismissed breach of implied warranty of merchantability claim with prejudice at the Rule 12 stage); *Masepohl v. American Tobacco Co., Inc.*, 974 F. Supp. 1245, 1253 (D. Minn. 1997) ("[b]ecause Masepohl's Complaint asserts personal injuries

to himself and other members of the class, his implied warranty claim is preempted by his strict products liability claim”); *Kladivo v. Sportsstuff, Inc.*, 2008 U.S. Dist. LEXIS 67267, *13-14 (D. Minn., September 2, 2008) (same); *In re Levaquin Products Liability Litigation*, 2010 U.S. Dist. LEXIS 143389, *21 (D. Minn., November 8, 2010) (“[u]nder Minnesota law, ‘[s]trict products liability has effectively preempted implied warranty claims where personal injury is involved’”). For these reasons, as the Minnesota Court of Appeals determined in *Nimeth v. Prest Equip. Co.*, 1993 WL 328767, *1 (Minn. Ct. App. 1993) (unpublished, Exhibit 1 to Simpson’s original memorandum), Minn. Stat. § 544.41 applies to Plaintiffs’ implied warranty claims as well as its strict liability claims.¹

The only case cited by Plaintiffs to the contrary is *Tabish v. Target Corp.*, 2007 WL 1862095 (D. Minn., June 26, 2007), attached as Exhibit 1 to the Affidavit of Sheila A. Bjorklund. Notably, *Tabish* makes no mention of the Minnesota Court of Appeals’ contrary holdings in *Nimeth* and *Continental Ins. Co.*, unlike the other federal court decisions in *Forslund*, *Masepohl*, *Kladivo* and *In re Levaquin* which on their face are firmly grounded in Minnesota state court precedent. Accordingly, *Tabish* presents neither controlling nor persuasive authority and should be disregarded by the Court.

Plaintiffs’ negligence claims fall victim to the same analysis. Though Plaintiffs contend that Count I of their Complaint is premised upon “independent” allegations of negligence against Simpson, the *sine qua non* of their negligence claim remains their

¹ As *Continental Ins. Co. v. Loctite Corp.*, *Forslund*, *Masepohl* and the other authorities recited above illustrate, Plaintiffs’ implied warranty claims are preempted and subject to dismissal regardless of the applicability of Minn. Stat. § 544.41.

charge that DePuy's ASR™ hip replacement components were defectively designed and manufactured and caused harm to Plaintiffs. As such, Plaintiffs' negligence claims are similarly merged into their strict liability claims. *See, e.g., Bilotta v. Kelley Co., Inc.*, 346 N.W.2d 616, 624 (Minn. 1984) (merging strict liability, negligence, and implied warranty remedies into a single products liability theory); *Westbrock v. Marshalltown Mfg. Co.*, 473 N.W.2d 352, 356 (Minn. Ct. App. 1991) (recognizing merger of theories in *Bilotta*); *Forslund, supra*, at *4. And if, as in *Masepohl, supra*, 974 F. Supp. at 1254, claims that cigarette distributors "aggressively promoted and sold cigarettes to adults and received money from the Tobacco Companies through various wholesaler/distributor associations to promote and lobby on behalf of tobacco products" were held to be insufficient to establish a distributor's independent wrongdoing under Minn. Stat. § 544.41, Plaintiffs' allegations of Simpson's "independent" wrongdoing in this case certainly fare no better.

Finally, Plaintiffs' contention that they may plead and prove both strict liability and negligence claims at trial and only choose one or the other when they rest (Opp. Memo. at 8) in no way alters the conclusion that the claims are merged, as *Bilotta*, *Westbrock* and *Forslund* all hold. When Plaintiffs must abandon one or the other is irrelevant; if merged, *Nimeth* requires the application of Minn. Stat. § 544.41 to both.

II. Plaintiffs Have Not Pled Sufficient Facts To Support Any Claim That Simpson Had "Actual Knowledge" Of Any Alleged Defect Within The Meaning Of Minn. Stat. § 544.41, Subd. 3(b) And Are Therefore Not Entitled To Discovery Regarding Any Such Claim

Plaintiffs next argue that, even if Simpson were otherwise entitled to dismissal under Minn. Stat. § 544.41, subd. 2, Plaintiffs have adequately pled that Simpson

possessed actual knowledge of the defects, thus invoking the exception found at Minn. Stat. § 544.41, subd. 3(b). (Opp. Memo. at 8-10.)² This argument misapplies the plain language of subd. 3(b).

To invoke subd. 3(b), Plaintiffs must plead and prove that Simpson “had *actual knowledge of the defect in the product* which caused the injury, death or damage.” (Emphasis added.) “Actual” knowledge or notice, according to the Minnesota appellate courts and the Legislature, requires more than constructive or imputed knowledge or “reason to know” of a fact. *See, e.g., In re Petition of Willmus*, 568 N.W.2d 722, 726 (Minn. Ct. App. 1997), *rev. den.* (Minn., October 21, 1997); *Comstock & Davis, Inc. v. G.D.S. & Assoc., Inc.*, 481 N.W.2d 82, 84 (Minn. Ct. App. 1992) (“generalized knowledge of [a fact] . . . is insufficient to satisfy the actual knowledge standard”);³ Minn. Stat. §§ 302A.011, subd. 15, and 322B.03, subd. 26 (“a person ‘knows’ or has ‘knowledge’ of a fact when the person has actual knowledge of it. A person does not ‘know’ or have ‘knowledge’ of a fact merely because the person has reason to know of the fact”); Minn. Stat. § 323A.0102(a)-(b) (distinguishing between “actual knowledge” of

² The only subd. 3 exception relied upon by Plaintiffs in their materials in opposition is subd. 3(b). Plaintiffs make no claim that Simpson exercised significant control over the design or manufacture of DePuy’s ASR™ hip replacement components (subd. 3(a)), provided instructions or warnings to DePuy relative to any alleged design or manufacturing defect (*id.*), or created any design or manufacturing defect (subd. 3(c)).

³ Other jurisdictions agree; *e.g., Travis v. Dreis & Krump Mfg. Co.*, 453 Mich. 149, 551 N.W.2d 132, 143 (Mich. 1996) (“[b]ecause the Legislature was careful to use the term ‘actual knowledge,’ and not the less specific word ‘knowledge,’ we determine that the Legislature meant that constructive, implied, or imputed knowledge is not enough”); *Roberts Constr. Co. v. Brown*, 272 Ala. 440, 131 So. 2d 710, 712 (Ala. 1961) (“‘[a]ctual knowledge’ means positive, in contrast to imputed or inferred, knowledge of a fact”).

a fact and “reason to know it exists;” the latter is not “actual knowledge”). In construing the phrase “actual knowledge” as found in Minn. Stat. § 544.41, subd. 3(b), the Court may properly consider these authorities. *In re Butler*, 552 N.W.2d 226, 231 (Minn. 1996) (“[w]here the words of a law are not explicit, the intent of the legislature may be ascertained by considering other laws upon the same or similar subjects”).

The high bar established by the “actual knowledge” requirement found in Minn. Stat. § 544.41, subd. 3(b) is illustrated by *Masepohl v. American Tobacco Co., Inc.*, 974 F. Supp. 1245 (D. Minn. 1997). In that case, plaintiff sued several non-resident cigarette manufacturers and three Minnesota cigarette distributors in state court for injuries purportedly caused by cigarette smoking. After the manufacturers removed the action to federal court based upon plaintiff’s fraudulent joinder of the distributors under Minn. Stat. § 544.41, plaintiff moved for remand claiming, *inter alia*, that the distributors had actual knowledge of the defects in cigarettes, thus preventing the distributors’ dismissal under subd. 3(b). 974 F. Supp. at 1254. Despite the well-known hazards of cigarette smoking, the court found that subd. 3 was inapplicable and that the distributors were fraudulently joined and denied plaintiff’s motion for remand. *Id.*

Illinois’ counterpart to Minn. Stat. § 544.41, 735 ILCS 5/2-621, also bars dismissal of a non-manufacturer defendant shown to possess “actual knowledge” of a claimed defect in the product. In *Brobbeey v. Enterprise Leasing Co. of Chicago*, 404 Ill. App. 3d 420, 935 N.E.2d 1084 (2010), *app. denied* (Ill., January 26, 2011) plaintiffs, injured when a rented GMC van was involved in a rollover accident, sued both the rental

car company and the van's manufacturer. Seeking to keep the rental car company in the case, plaintiffs argued that the rental company had actual notice of problems with the van's steering before renting it to plaintiffs, thus invoking the Illinois equivalent of subd. 3(b). Even accepting that charge as true, the Illinois Court of Appeals held that such did not amount to "actual knowledge" of a design or manufacturing defect in the van:

In order for Enterprise to incur strict liability for the manufacturing defect, plaintiffs had to demonstrate that Enterprise had knowledge of that defect. Plaintiffs' claim that they made Enterprise generally aware of a problem with shaking or steering prior to the accident fails to meet that test. Here, while the accident occurred in January 2003, the recall was in April 2004. Moreover, it is undisputed that, although plaintiffs insist they complained of the steering and wobbling, Enterprise did not know of the manufacturing defect until the recall bulletin a year after the accident occurred. Thus, . . . the court therefore correctly found that Enterprise was not put on actual notice of the dangerous condition until it was notified after the recall regarding the problematic situation.

Brobbey, 935 N.E.2d at 1092-93 (emphasis added).

Against this backdrop, any claim that Plaintiffs properly pled Simpson's "actual knowledge" of alleged design and manufacturing defects in the ASR™ hip replacement components (Opp. Memo. at 9) fails. In paragraphs 24 and 25 of their Complaint,⁴

⁴ Paragraphs 24 and 25 provide the following:

24. Defendant, through its employees and agents, was also aware of the problems with the design of the ASR hip replacement components based upon complaints of orthopedic surgeons.
25. Defendant was additionally aware of excessive failures necessitating revision of ASR hip replacement components due to revision surgeries in which Defendant's sales representatives participated, but failed to convey this information to the Plaintiffs' orthopedic surgeons.

Plaintiffs allege merely that Simpson was “aware of” “problems” and “excessive failures” with DePuy’s ASR™ components based upon complaints of orthopedic surgeons and participation in revision surgeries. At most, these allegations suggest that Simpson may have had imputed knowledge of some problem with the devices; they do not, however, properly allege that Simpson “had actual knowledge of the defect in the product which caused the injury, death or damage” within the meaning of the legal authorities recited above. Moreover, paragraph 23⁵ contains no allegation of Simpson’s knowledge, actual or constructive, of any purported defect but simply charges that Simpson’s sales representatives received instructions as to how to promote DePuy’s ASR™ components to physicians who might have concerns about them. Paragraphs 23-25 simply fail to meet the high standard of pleading and proof required by Minn. Stat. § 544.41, subd. 3(b) – that Simpson possessed “actual,” not merely implied or constructive, knowledge of a specific design or manufacturing defect in DePuy’s ASR™ components.

Having failed to plead a legally-sufficient claim of Simpson’s “actual knowledge” within the meaning of subd. 3(b), Plaintiffs’ plea for discovery to investigate Simpson’s knowledge of any alleged defects in the ASR™ components (Opp. Memo. at 10-11) must fall on deaf ears. As noted in Simpson’s original Memorandum at 5, a motion to dismiss

⁵ Paragraph 23 provides:

23. When questioned by members of the orthopedic community about independent expert warnings that the ASR hip replacement components were defective, Defendant’s sales representatives were instructed how to argue that the independent experts were mistaken and to continue to heavily promote the ASR hip replacement components.

under Minn. Stat. 544.41 is comparable to a Rule 12 motion for failing to state a cause of action. *In re Shigellosis Litigation*, 647 N.W.2d 1, 7 (Minn. Ct. App. 2002), *rev. den.* (Minn., August 20, 2002). Where a plaintiff fails to sufficiently plead a claim upon which relief can be granted, plaintiff may not resort to discovery to shore up the complaint's deficiencies. *See, e.g., United States ex rel. Roop v. Hypoguard USA, Inc.*, 2007 U.S. Dist. LEXIS 71080, *9 (D. Minn., September 24, 2007), *aff'd*, 559 F.3d 818 (8th Cir. 2009) (“[t]he purpose of discovery is not to cure deficiencies in a facially inadequate Complaint”).

III. Inasmuch As Plaintiffs Have Chosen Not To Add DePuy For Tactical Reasons, The Court Is Not Prohibited From Dismissing Simpson Until, If Ever, Plaintiffs Add DePuy As A Defendant

On page 12 of their Memorandum in Opposition, Plaintiffs argue that, under the plain language of Minn. Stat. § 544.41, subd. 2, the Court may not dismiss their claims against Simpson until Plaintiffs formally implead DePuy. This argument also fails.

“The evident purpose of [Minn. Stat. § 544.41] is to ensure the manufacturer *can be joined* in the lawsuit before the passive sellers are dismissed from strict-liability claims.” *In re Shigellosis Litig., supra*, 647 N.W.2d at 7 (emphasis added). That purpose has long been met here. Plaintiffs concede that, even before commencing this action, they knew the correct identity of the manufacturer of the ASR™ hip replacement components involved in this case – DePuy – and *could* have sued DePuy when they originally commenced this case. Further, Plaintiffs nowhere deny Simpson’s claim (original Memorandum at 7) that their strategy was and remains to commence this action

against Simpson in state court, keep it alive for one year after commencing it, and *only then* add DePuy as an additional defendant so that DePuy cannot remove this case to federal court (thereby transferring it to MDL 2197) by virtue of 28 U.S.C. 1446(b). Indeed, Plaintiffs' Informational Statement, filed with the Court on or about July 1, 2011, proposes a deadline for joining DePuy to this action of May 1, 2012 – not surprisingly, a date more than one year after this action was commenced on April 26, 2011. Plaintiffs have no legitimate need for another nine months to add DePuy to this case.

The “due diligence” requirement of Minn. Stat. § 544.41, subd. 2 serves a purpose of its own – to ameliorate the harshness of requiring a non-manufacturer to incur the effort and expense of defending against product liability claims once the manufacturer is known. *In re Shigellosis Litig.* at 6. Allowing Plaintiffs to manipulate when they choose to implead the manufacturer for their own tactical reasons runs directly counter to the “due diligence” requirement, and this Court has the authority to dismiss Simpson now upon these facts. *See, e.g., Cherry v. Siemens Medical Systems, Inc.*, 206 Ill. App. 3d 1055, 565 N.E.2d 215, 218 (1990), *app. denied*, 137 Ill.2d 663 (1991) (under Illinois' essentially-identical statute, *held* that where plaintiff knew identity of correct manufacturer but chose not to serve it with process due to cost of service, distributor's dismissal was not premature).

IV. Plaintiffs' Misrepresentation Claim Fails To Satisfy Rule 9.02

Finally, Plaintiffs offer several arguments suggesting that their misrepresentation claims (Count IV of the Complaint) were pled with the requisite particularity in

conformity with Rule 9.02. (Opp. Memo. at 13-16.) None of Plaintiffs' arguments alters the conclusion that Plaintiffs have not satisfied that rule.

First, Simpson stands by its claim that Plaintiffs have failed to aver with particularity any false representation made to, and relied upon by, the three individual orthopedic surgeons who allegedly prescribed DePuy's ASR™ hip replacement components for the three Plaintiffs' use. Though Plaintiffs allege in paragraphs 12-14 of their Complaint that Simpson provided brochures, literature and other information generally "to the orthopedic community in Minnesota, South Dakota and North Dakota," they do not claim that Plaintiffs' three surgeons, *in fact*, ever read, saw or were otherwise aware of any of those items. Absent particularized allegations that what Simpson disseminated was actually read by or known and relied upon by Plaintiffs' orthopedic surgeons, Rule 9.02 is not satisfied. *See, e.g., In re Mirapex Products Liability Litigation*, 246 F.R.D. 668 (D. Minn. 2007) (although the court agreed that defendants' public statements regarding the safety of their prescription drug could form the basis of a fraud claim, without particular allegations that plaintiffs or their physicians actually knew or heard those statements or relied upon them, fraud claim was inadequately plead).

Second, Plaintiffs' claim that each of them "specifically alleged reliance on the false representations" and did so in paragraphs 9 and 33 of their Complaint (Opp. Memo. at 14, 16) misses the point. Rule 9.02 requires that a plaintiff claiming misrepresentation must plead, not just "specific allegations of reliance" (*id.* at 16), but the *particular circumstances* upon which the claim of individual reliance is based. Paragraphs 9 and 33

of the Complaint fail the “particular circumstances” test; in paragraph 9, Plaintiffs allege merely that “Plaintiffs and their surgeons, nurses, and hospital staff relied on information from Defendant in selecting, purchasing, implanting, and servicing the hip replacement components,” without more, and in paragraph 33 Plaintiffs assert that, “based upon the information originally provided by Defendant,” plaintiff Linda Anderson agreed to undergo a hip replacement utilizing DePuy’s ASR™ components. Neither charge, nor the other allegations of reliance discussed in Simpson’s original memorandum at 11 and fn.2, are supported by the factual particularity required by Rule 9.02.

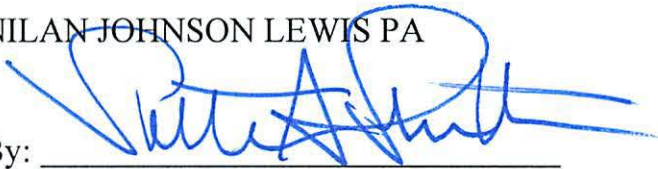
Lastly, Plaintiffs’ claim that individual reliance can be shown simply from the fact that each individual Plaintiff received ASR™ hip replacement components (Opp. Memo. at 16) fails logic. The mere fact of purchase of a product, stock shares, etc., without more, in no way establishes what *actually* caused the purchaser to buy it, or what information the purchaser *actually* relied upon in doing so. By Plaintiffs’ argument, the Court may *presume* a purchaser’s reliance upon *any* advertisement, public statement, information, or other representation provided by the seller, merely because the purchaser bought the item. In Minnesota, however, that is not the law. *See, e.g., In re Digi Int’l, Inc. Securities Litigation*, 6 F. Supp. 2d 1089, 1104 (D. Minn. 1998), *aff’d*, 14 Fed. Appx. 714 (8th Cir. 2001) (under Minnesota law, actual reliance in common-law fraud and misrepresentation claims must be proven by evidence and cannot be presumed).

CONCLUSION

For the foregoing reasons, as well as those set forth in its original memorandum of law, Simpson respectfully submits that Plaintiffs' claims against it should be dismissed in their entirety.

Dated July 25, 2011

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