

State of Minnesota
Carver County

District Court
First District

Court File Number: **10-CV-11-706**

Case Type: Product Liability

Notice of Filing of Order

SHEILA ANN BJORKLUND
IDS CENTER SUITE 2000
80 S EIGHTH STREET
MINNEAPOLIS MN 55402

Linda Anderson, James Feser, Judith Peskar vs Simpson and Associates, Inc

You are notified that an order was filed on this date.

Dated: August 19, 2011

Vicky L. Carlson
Court Administrator
Carver County District Court
604 East Fourth Street
Chaska Minnesota 55318
952-361-1420

cc: SCOTT ALLEN SMITH

A true and correct copy of this notice has been served by mail upon the parties herein at the last known address of each, pursuant to Minnesota Rules of Civil Procedure, Rule 77.04.

LEWIS & CLARK, P.C.
KING & STAGGERBERG, P.A.
AUG 22 2011



STATE OF MINNESOTA

COUNTY OF CARVER

FILED RH
AUG 19 2011

DISTRICT COURT

FIRST JUDICIAL DISTRICT

CARVER COUNTY COURTS

Linda Anderson, James Feser and,
Judith Peskar,

Court File No. 10-CV-11-706

Plaintiffs,

-vs-

ORDER AND ORDER BLOCKING

Simpson and Associates,

Defendant.

The above-entitled matter came on for hearing before the Honorable Janet L. Barke Cain on July 28, 2011, at the Carver County Courthouse, Chaska, Minnesota.

Plaintiffs were represented by Sheila A. Bjorklund, Esq. and Brian S. Franciskato, Esq. Defendant was represented by Scott A. Smith, Esq.

Defendant brought this matter as a Rule 12 motion to dismiss all of the four (4) counts contained in the Complaint in this matter: 1) Negligence; 2) Strict Liability; 3) Breach of Implied Warranty; and 4) Intentional Misrepresentation. The Court took this matter under advisement following hearing.

Now, therefore, based upon the evidence submitted by the parties, arguments of counsel, and the file and proceedings herein,

IT IS HEREBY ORDERED:

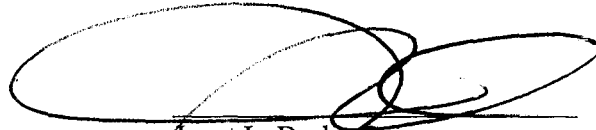
- 1) Defendant's motion to dismiss Counts I-IV of the Complaint is **denied**. Those claims may proceed according to a scheduling Order submitted by the parties and approved by the Court.
- 2) The parties are reminded that they are required to submit this matter to ADR prior to Trial.

3) This case shall be **BLOCKED** to the undersigned Judge.

4) The attached memorandum is incorporated by reference and contains the Court's Findings of Fact and Conclusions of Law.

BY THE COURT:

Dated: 8/11, 2011.


Janet L. Barke Cam
Judge of District Court

A

MEMORANDUM

FACTUAL BACKGROUND:

The Court will not go into great detail regarding the facts in this matter – for the most part, the Court must accept as true the facts contained in the Complaint since this is a motion to dismiss. Plaintiffs are individuals who each had hip replacement surgery using components (called ASR components) manufactured by DePuy International, Ltd. of the United Kingdom. Defendant, a Minnesota corporation in Chanhassen, MN, promoted, marketed, distributed, supplied, sold and serviced the DePuy hip replacement components used in all three Plaintiffs' surgeries. The ASR components were eventually recalled by the FDA, and Plaintiffs assert they all needed revision surgery to address various issues caused by the defective ASR components.

Plaintiffs assert there were numerous independent warnings of possible defects regarding the ASR components from orthopedic experts and journals prior to their respective surgeries, that Defendant was aware of the warnings and possible defects, and that Defendant through its employees and agents argued that the independent experts were mistaken. Plaintiffs assert Defendant was aware of the problems with the design of the ASR components prior to their surgeries, both from complaints by orthopedic surgeons, and by actual knowledge of revision surgeries necessitated by failed or defective ASR components. Plaintiffs assert Defendant through its employees and agents failed to convey this information to the orthopedic surgeons.

Plaintiffs brought suit against Defendant for negligence (Count I), strict liability (Count II), breach of implied warranty (Count III), and intentional misrepresentation (Count IV). Defendant seeks to dismiss all claims in this matter pursuant to Rule 12. In particular, Defendant seeks dismissal of Counts I-III based on the argument that all three Counts are barred by the Minnesota distributor's

statute, Minn. Stat. § 544.41. Defendant seeks dismissal of Count IV arguing that it has not been pled with specificity as required by Rule 9.02.

LEGAL ANALYSIS:

In considering whether to grant a motion to dismiss for failure to state a claim, the court must accept all of the allegations of the Complaint as true and must draw all plausible inferences from the allegations in a manner favorable to the plaintiff. St. James Capital v. Pallet Recycling, 589 N.W.2d 511, 514 (Minn.Ct.App. 1999); Oakridge Holdings, Inc. v. Brukman, 528 N.W.2d 274 (Minn.Ct.App. 1995). In ruling on a motion to dismiss, the court must assume that the plaintiff has the ability to prove their claims. Doyle v. Kuch, 611 N.W.2d 28 (Minn.Ct.App. 2000). A Rule 12.02¹ motion to dismiss must be denied “if it is possible on any evidence which might be produced, consistent with the pleader’s theory, to grant the relief demanded.” Martens v. Minn. Min. & Mfg. Co., 616 N.W.2d 732, 739-40 (Minn. 2000). Only the facts alleged in the Complaint are considered, those facts must be accepted as true, and all reasonable inferences in favor of the nonmoving party must be made. Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550, 553 (Minn. 2003). “The showing a plaintiff must make in order to survive a motion to dismiss under Minn. R. Civ. P. 12.02(e) is minimal. The plaintiff need only allege sufficient facts to state a claim.” Noske v. Friedberg, 670 N.W.2d 740 (Minn. 2003).

The general standard of review is that to survive a Rule 12 motion to dismiss, a plaintiff must set forth in the Complaint a legally sufficient claim for relief. Wiegand v. Walser, 683 N.W.2d 807 (Minn. 2004). The facts set forth in the Complaint must be accepted as true and the plaintiff is entitled to have the benefit of all reasonable inferences favoring it. Pullar v. Independent School Dist. No. 701, 582 N.W.2d 273, 275-76 (Minn. 1998). A dismissal will be affirmed only if it appears to a certainty that a plaintiff can produce no facts consistent with the Complaint to support granting the relief

¹ Defendant is essentially arguing both a Rule 12.02 (e) motion to dismiss for failure to state a cause of action.

requested. Elzie v. Commissioner of Public Safety, 298 N.W.2d 29, 32, (Minn. 1988). Dismissal of a Complaint for failure to state a claim is only proper if there are no facts consistent with the pleading that supported the relief demanded. Brakke v. Hirers, 374 N.W.2d 553, 555 (Minn.Ct.App. 1985).

Because dismissals for failure to state a cause of action are generally disfavored, a reviewing court will not uphold such a dismissal if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded. Jacobson v. Bd. Of Trustees, 627 N.W.2d 106 (Minn.Ct.App. 2001); In re Milk Purchaser Anti-Trust Litigation; 588 N.W.2d 772, 775 (Minn.Ct.App. 1999).

Defendant seeks to dismiss Counts I-III of the Complaint based on the argument that all three Counts are barred by the Minnesota distributor's statute, Minn. Stat. § 544.41. Defendant's motion regarding Counts I and III (negligence and breach of implied warranty) can be dismissed outright. Minn. Stat. § 544.41 deals with strict liability claims, and Defendant's argument that Counts I and III merge with the strict liability claim (Count II) at this stage of the proceeding is without merit. It is true that at some future stage Plaintiffs may be required to merge their theories of recovery into one claim. However, Plaintiffs may move all theories forward provided they can survive a motion to dismiss until the case is presented to the jury. See Bilotta v. Kelly Co., 346 N.W.2d 616, 622 (Minn. 1984); In re Shigellosis Litig., 647 N.W.2d 1, 8 (Minn.Ct.App. 2002); Schweich v. Ziegler, Inc., 463 N.W.2d 722, 729-30 (Minn. 1990); Hauenstein v. Loctite Corp., 347 N.W.2d 272, 275 (Minn. 1984); Marcon v. Kmart Corp., 573 N.W.2d 728, 731 (Minn.Ct.App. 1998)².

Defendant correctly asserts that the Minnesota distributor's statute, Minn. Stat. § 544.41, applies to Plaintiffs' strict liability claim (Count II). Minn. Stat. § 544.41 limits the circumstances under which a product liability plaintiff may sue a distributor or other non-manufacturer of an

² In Marcon, the appellate court, when analyzing both strict liability and negligence claims under Minn. Stat. § 544.41, concluded plaintiff could plead and prove both negligence and strict liability failure to warn, but would only be permitted to submit the case to a jury on one of the claims.

allegedly defective product. The rationale behind the statute is clear: it would be unfair to force a passive distributor, who is merely selling a manufactured product, and who has no substantive or actual knowledge of an alleged product defect, to bear the burden of defending against a strict liability claim intended primarily for the manufacturer. See In re Shigellosis Litig., at 6; McCormick v. Hanksraft Co., 278 Minn. 322, 338, 154 N.W.2d 488, 500 (1967); Marcon at 730-31.

Minn. Stat. § 544.41 effectively acts to dismiss passive sellers from a strict liability claim where the manufacturer is known and a complaint has been filed against the manufacturer. However, dismissal is not appropriate if the defendant falls within one of three exceptions to the statute. For the purpose of this motion, Subd. 3(b) of Minn. Stat. § 544.41 is the only exception at issue: "A court shall not enter a dismissal order relative to a certifying defendant ... where the plaintiff can show ... (b) that the defendant had actual knowledge of the defect in the product which caused injury, death or damage..."

This Court finds that, for purposes of a Rule 12 motion to dismiss only, Plaintiffs have sufficiently pled that Defendant had actual knowledge of the defect(s) associated with the ASR components, and that the defects caused injury to Plaintiffs³. Plaintiffs pled in their Complaint numerous independent warnings of possible defects with ASR components from orthopedic experts and journals prior to Plaintiffs' respective surgeries. The Defendant was aware of the warnings and possible defects, and Defendant, through its employees and agents, argued the independent experts were mistaken. Plaintiffs assert Defendant was aware of the problems with the design of the ASR components prior to Plaintiffs' surgeries because of complaints from orthopedic surgeons, and actual knowledge of revision surgeries necessitated by failed or defective ASR components. Plaintiffs assert Defendant, through its employees and agents, failed to convey this information to the orthopedic

³ The Court would further note that this is only the Rule 12 stage of the proceedings. Should discovery continue and Defendant finds it appropriate to bring a summary judgment motion because they assert, after discovery, Plaintiff can make no showing of actual knowledge of defect for summary judgment purposes, Defendant is not precluded from doing so.

surgeons, and that Plaintiffs and their surgeons (and staff) relied on information provided (or omitted) by Defendant. For Rule 12 purposes, Plaintiffs have met their burden allowing the strict liability claim to go forward at this stage.

Finally, Defendant seeks dismissal of Count IV (intentional misrepresentation) arguing that it has not been pled with specificity as required by Rule 9.02. However, a review of the entire Complaint would show that Plaintiffs have pled the necessary elements of misrepresentation adequately for Rule 12 purposes. The elements of fraudulent misrepresentation are that defendant made a representation that was false, having to do with a past or present material fact, susceptible of knowledge, that defendant knew to be false, with intent to induce the other party to act, and the person was induced to act, in reliance on the representation. The plaintiff must suffer damages attributable to the misrepresentation. M.H. v. Caritas Family Servs., 488 N.W.2d 282, 289 (Minn. 1992). A misrepresentation can be either an affirmative false statement, or the concealment of facts that render other disclosed facts misleading. Id.

Here, Plaintiffs have adequately pled Defendant both made representations that were false regarding the ASR components, and omitted crucial facts regarding known defects to the ASR components that render other statements made by Defendant misleading. Plaintiffs assert Defendant knew the statements were false regarding the ASR components (or intentionally concealed other facts), devised selling strategies arguably intended to mislead surgeons, staff and patients (or at least minimize important known concerns regarding the ASR components), intended for the surgeons, staff and patients to rely on the false statements or crucial omissions, and surgeons, staff and patients did in fact rely on the false statements or crucial omissions. Plaintiffs have also asserted that they suffered damages due to the fact that the ASR components used in their surgeries needed to either be removed

or revised, and they relied on the representations or omissions when deciding on what components would be used in their hip replacement surgeries.

Plaintiffs have met their burden for Rule 12 purposes allowing all of their claims to move forward. The completion of discovery on these issues should shed greater light on the sufficiency of these claims.

J.B.C.