

STATE OF MINNESOTA
COUNTY OF CARVER

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DISTRICT COURT
FIRST JUDICIAL DISTRICT
Court File No. 10-CV-11-706
CASE TYPE: Product Liability

Linda Anderson, James Feser and
Judith Peskar,

Plaintiffs,

v.

Simpson and Associates, Inc.,

Defendant.

**PLAINTIFFS' MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANT SIMPSON AND
ASSOCIATES, INC.'S MOTION TO
DISMISS PLAINTIFFS' COMPLAINT**

FACTUAL BACKGROUND

This lawsuit arises from the failure of a recalled DePuy ASR Hip System ("ASR") implanted in Plaintiffs' bodies. Plaintiff Linda Anderson's ASR was installed on March 29, 2007. Plaintiff James Feser underwent a resurfacing procedure on March 10, 2008, in which ASR components were implanted. The ASR components were not approved by the FDA for use in the resurfacing procedure. Plaintiff Judith Peskar's ASR was installed on May 21, 2009. All three ASRs failed, causing each plaintiff to undergo an additional revision surgery. As a result, each plaintiff sustained damages, including medical expenses, lost wages, pain and suffering, and emotional distress.

Plaintiffs contend Defendant Simpson and Associates, Inc. ("Simpson"), the exclusive distributor of the ASR in Minnesota, North Dakota and South Dakota, promoted, marketed, distributed, supplied, sold and serviced the ASR hip systems implanted in their bodies. Specifically, Plaintiffs contend Simpson sales representatives (1) educated Plaintiffs' orthopedic surgeons regarding the advantages of the ASR hip components as compared to competitors;

(2) answered any questions Plaintiffs' orthopedic surgeons had regarding the ASR components; (3) provided Plaintiffs' orthopedic surgeons information and training regarding the proper surgical technique to implant the ASR components; (4) provided Plaintiffs' orthopedic surgeons with information concerning the effectiveness of the ASR components; (5) provided Plaintiffs' orthopedic surgeons with the tools to be utilized to implant the components; and (6) sold the ASR components to Plaintiffs' orthopedic surgeons. Complaint, ¶ 8.

Plaintiffs also contend Simpson was active in promoting and selling the ASR components, utilizing brochures promoting the ASR. *Id.*, ¶ 12. Plaintiffs contend Simpson made representations that the components were of "large diameter, high performance metal-on-metal bearings designed and manufactured within fine tolerances to facilitate a state of fluid film lubrication" and "designed to reduce wear and provide high function for all patients". *Id.*, ¶ 13. Plaintiffs contend Simpson represented to the orthopedic community that the ASR components were "based on a strong clinical history and reduced wear compared to the traditional hip replacements". *Id.*, ¶ 14. Plaintiffs contend Simpson was aggressive in its promotion and sale of the ASR insomuch that it increased sales in its territory by 362%, generating millions of dollars in sales. *Id.*, ¶¶ 15-16. Plaintiffs further allege Simpson had actual knowledge that: (1) experts worldwide warned of the design failures of the ASR components and that they were defective; (2) the ASR cups were too thin and prone to deformation; (3) the clearance between the ASR cup and head was too small and could cause jamming of the components; (4) the treatment of the metal used for the ASR components rendered them prone to increased wear; and (5) there was a four-fold higher rate of revision of similar components reported in the Australian Joint Registry in 2005 (several years prior to installation of the ASR components in Plaintiffs). *Id.*, ¶¶ 18-22.

Plaintiffs also allege that Simpson failed to warn Plaintiffs and their orthopedic surgeons that the orthopedic community and independent experts were indicating the ASR components were defective. *Id.*, ¶ 23. Plaintiffs allege Simpson's sales representatives specifically responded to the allegations of the known failures, claiming the ASR components were not defective and continued to promote and argue that the ASR components were effective. *Id.*, ¶ 23. Plaintiffs contend Simpson had actual knowledge of the problems with the design of the ASR components based on complaints by orthopedic surgeons and were aware of excessive failures necessitating revisions of ASR components and, in fact, participated in revision surgeries of ASR components, but failed to convey this information to Plaintiffs' orthopedic surgeons. *Id.*, ¶¶ 24-25. Based upon these allegations, Plaintiffs have made claims against Simpson for negligence, strict liability, breach of implied warranty and intentional misrepresentation. Defendant Simpson seeks to dismiss Plaintiffs' negligence, strict liability and breach of warranty claims pursuant to Minn. Stat. § 544.41 and Plaintiffs' misrepresentation claims pursuant to Minn. R. Civ. P., Rule 9.02. As discussed in great detail below, Plaintiffs have adequately pled claims for negligence, strict liability, breach of implied warranty and misrepresentation, and request the Court deny Simpson's motion to dismiss.

LEGAL ARGUMENT

- I. **Plaintiffs' Claims for Strict Liability, Negligence and Breach of Implied Warranty are Not Barred Pursuant to Minn. Stat. § 544.41.**
 - A. **Section 544.41 Only Applies to Strict Liability Claims and Does Not Apply to Plaintiffs' Claims of Negligence or Breach of Warranty.**

The tort theory of strict liability developed from strong public policy considerations to protect consumers from harm caused by defective products and to impose the cost of defective

products on the maker, who presumably profits from the product. *See, In Re Shigellosis Litigation*, 647 N.W.2d 1, 6 (Minn. Ct. App. 2002), citing *McCormick v. Hanksraft Co.* 278 Minn. 322, 338, 154 N.W.2d 488, 500 (1967). A key rationale for strict liability in tort is a “risk bearing economic” theory in which merchants and manufacturers have the capacity to distribute their losses among the many purchasers of the product. *Id.*, citing *W. Page Keeton and Dan B. Dobbs, Prosser and Keeton on the Law of Torts*, § 98 at 692-93 (5th Ed. 1984). The effect of these strict liability principles 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. *Id.*, citing *Marcon v. Kmart Corp.*, 573 N.W.2d 728, 730-31 (Minn. Ct. App. 1998) (holding a commercial seller with no causal fault responsible, under strict liability principles, for all causal fault of the manufacturer).

The legislature in the state of Minnesota adopted a sellers exception statute, set forth in Minn. Stat. § 544.41 which provides in relevant part:

Subsection 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. The commencement of a product liability action based in whole or part on strict liability in tort against a certifying defendant shall toll the applicable statute of limitation relative to the defendant for purposes of asserting a strict liability in tort cause of action.

Subd. 2. Certifying the 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.

(Emphasis added.)

The sellers exception statute tempers the harsh affect of strict liability as it applies to passive sellers while ensuring that a person injured by a defective product can recover from a viable source. “The sellers exception statute permits dismissal of *strict liability claims* against a seller of a defective product who certifies the correct identity of the manufacturer but only after a complaint is filed against the manufacturer.” *In Re Shigellosis*, 647 N.W.2d 15 at 6. (Emphasis added.)

The plain language of § 544.41, only applies to Plaintiffs’ strict liability claims against Simpson. Minnesota courts have routinely held that § 544.41 does not apply to negligence and breach of warranty claims against a seller. A seller may have independent fault under negligence principles if the seller breached a duty to the injured party. *In Re Shigellosis*, 647 N.W.2d at 8, citing *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 729-30 (Minn. 1990) (holding evidence supported finding of negligence against seller who failed to inspect grab bar on tractor it sold); *Erickson v. America Honda Motor Co.*, 455 N.W.2d 74, 77-78 (Minn. Ct. App. 1990) (holding evidence supported finding of negligence against a dealer who sold an all-terrain vehicle without providing a safety brochure and video and without showing location of owner’s manual). A seller may also be liable in negligence for failure to discover a product defect if the seller knows, or has reason to know, the product is dangerous. *In Re Shigellosis*, 647 N.W.2d at 9, citing *Gorath v. Rockwell Int’l, Inc.*, 441 N.W.2d 128, 131-32 (Minn. Ct. App. 1989). It is appropriate for the negligence of the seller to be compared with the negligence and/or strict liability of a

manufacturer. *In Re Shigellosis*, 647 N.W.2d at 9, citing *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377, 393-94 (Minn. 1977) (noting ordinary negligence may be compared with strict liability of the manufacturer).

Similarly, breach of implied warranty claims are not barred by § 544.41. In interpreting § 544.41, the United States District Court for the District Court of Minnesota concluded § 544.41 requires dismissal only of strict liability claims, holding that plaintiff's claims asserting breach of implied warranty were not governed by the statute. *Tabish v. Target Corp.*, 2007 WL 1862095 (D. Minn. 2007) at p. 2, Exhibit 1 to Affidavit of Sheila A. Bjorklund.¹

B. **Section 544.41 Does Not Require a Merger of Plaintiffs' Claims of Negligence and Breach of Implied Warranty Into Strict Liability at This Time.**

Even though it is clear under Minnesota law that § 544.41 does not apply to Plaintiffs' claims of negligence and breach of implied warranty, Simpson argues that these claims are merged into a single theory of strict product liability. (Def. Br. at 6.) Plaintiffs' properly pled negligence and breach of implied warranty claims do not merge with their strict liability claims at this early stage in the litigation. Although Minnesota law may merge strict liability, negligence and breach of implied warranty theories under a single products liability theory, it is not a proper determination for a motion to dismiss. *Forslund v. Stryker Corp.*, 2010 WL 3905854, at * 4 (D. Minn. Sept. 30, 2010) (holding that plaintiff "does not need to decide at this stage of the litigation whether he will pursue his strict liability claims or negligence claims."), Ex. 2, Bjorklund Aff.

¹In accord with Minn. Stat. § 480A.08(3) unpublished opinions cited by Plaintiffs herein are attached to the Affidavit of Sheila A. Bjorklund.

The court in *Bilotta v. Kelly Co.*, 346 N.W.2d 616, (Minn. 1984) found that in order to assure the broadest theory of recovery at trial, the court could submit both “a design-defect or failure-to-warn case to a jury on a single theory of products liability.” *Bilotta*, 346 N.W.2d at 622. (finding that the “[s]ubmission of a single theory of recovery may avoid the confusion” of a jury in determining liability, and merely submit strict liability, the “broader theory of recovery” instead of “negligence” which requires knowledge). Although Plaintiffs may ultimately have to choose between their negligence, implied warranty of merchantability or strict liability claims to submit to the jury after a factual record has been established, it is not proper at this early stage of the litigation to determine which of Plaintiffs’ claims is a more viable path to submit to a jury. Plaintiffs will have to “plead and prove at trial either or both theories” and then determine which theory to submit to the jury. *Hauenstein v. Loctite Corp.*, 347 N.W.2d 272, 275 (Minn. 1984) (“The plaintiff can plead and prove at trial either or both theories, but by the time the parties rest, the plaintiff must announce whether the case will be submitted to the jury on negligence or strict liability.”). Thus, the decision of “[w]hether strict liability or negligence [or breach of implied warranty] affords a plaintiff the broader theory of recovery will depend largely on the scope of evidence admitted by the trial court and on the jury instructions given under each theory.” *Bilotta*, 346 N.W.2d at 622.

Defendant Simpson attempts to support its proposition that Plaintiffs’ implied warranty and negligence theories are pre-empted at this early stage of the litigation and should be dismissed because they are redundant and merge with Plaintiffs’ strict liability claim by citing to a list of inapposite cases. (Def. Br. at 6.) The majority of the cases Simpson cites to in an attempt to support its motion to dismiss are all based on either summary judgment or post-jury

verdict appeals after a factual record had been established. (Def. Br. at 6) (citing *Kladivo v. Sportsstuff, Inc.*, 2008 WL 4933951 at *4 (D. Minn. Sep. 2, 2008) (affirming summary judgment after parties had developed a factual record through discovery); *Nimeth v. Prest Equip. Co.*, 1993 WL 328767 (Minn. Ct. App. Aug. 31, 1993) (affirming summary judgment); *Bilotta*, 1346 N.W.2d 616 (discovery merger of product liability claims into unified theory after evidence is presented at a jury trial).

The Minnesota Supreme Court has made it abundantly clear that a plaintiff is entitled to plead and prove at trial both his strict liability and negligence claims and is only required to announce whether the case will be submitted on negligence or strict liability at the time the parties rest. *Hauenstein*, 347 N.W.2d at 275. See also, *Marcon v. Kmart Corp.*, 573 N.W.2d 728, 731 (Minn. Ct. App. 1998) (in which the court when analyzing both strict liability and negligence claims under Minn. Stat. § 544.41 concluded that the plaintiff could plead and prove both negligent and strict liability failure to warn, but would only be permitted to submit the case to a jury on one of the claims). In sum, Plaintiffs' negligence and breach of implied warranty claims do not merge with the strict liability claims at this stage of the litigation, and as such, Plaintiffs may plead all three theories of recovery in their Complaint. *Hauenstein*, 347 N.W.2d at 275.

C. **Plaintiffs Have Adequately Pled a Cause of Action for Strict Liability Pursuant to Minn. Stat. § 544.41 in That Simpson Had Actual Knowledge of the Defect in the ASR Hip System That Caused Injury to Plaintiffs.**

The Court can only order dismissal of a strict liability in tort claim against the certifying defendant if the certifying defendant is not within the categories set forth in Subdivision 3 of

Minn. Stat. § 544.41. Subdivision 3 provides in relevant part that the Court shall not dismiss a certifying defendant where the plaintiff can show . . .

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

In this case, Plaintiffs have alleged the following defects of the ASR Hip Systems:

- The ASR components were defective in that they were too thin and prone to deformation; Plaintiffs’ Complaint ¶ 19.
- The clearance between the ASR cup and head was too small and could lead to jamming of the components; *Id.*, ¶ 20.
- The treatment of the metal used for the ASR components rendered them prone to increased wear; *Id.*, ¶ 21.
- By 2005, the ASR components were shown to have a four-fold higher rate of revision compared to similar components in Australia; *Id.*, ¶ 22.
- The ASR components failed to achieve proper fixation due to lack of boney ingrowth into the back of the cup; *Id.*, ¶ 27.
- The ASR components had a tendency to fracture resulting from loose ASR components; *Id.*, ¶ 27.
- The ASR components created significant metal debris in patients; and, *Id.*, ¶ 27.
- The ASR components caused formation of pseudo tumors in patients. *Id.*, ¶ 27.

Plaintiffs contend Simpson had actual knowledge of the above-referenced defects at the time it promoted, marketed, sold, distributed and serviced the ASR components installed in Plaintiffs’ bodies. Specifically, Plaintiffs alleged as follows:

- Simpson, through its employees and agents, was aware of the problems with the design of the ASR components based upon complaints of orthopedic surgeons; *Id.*, ¶ 24.
- When questioned by members of the orthopedic community about independent expert warnings that the ASR components were defective, Simpson’s sales representatives were instructed how to argue that the independent experts were mistaken and to continue to heavily promote the ASR components; *Id.*, ¶ 23.
- Simpson was additionally aware of excessive failures necessitating revision of ASR components due to revision surgeries in which Simpson’s sales representatives participated, but failed to convey this information to Plaintiffs’ orthopedic surgeons. *Id.*, ¶ 25.

In sum, Plaintiffs have adequately pled strict liability against Simpson because of its actual knowledge of the defects, an exception to the innocent seller statute set forth in Subdivision 3 of Minn. Stat. § 544.41, and accordingly Plaintiffs' claims for strict liability should not be dismissed.

D. Simpson's Motion to Dismiss is Premature Because Plaintiffs Have Not Had an Opportunity for Discovery.

Plaintiffs have not yet been given the opportunity to conduct discovery to confirm the existence and to determine the extent of Simpson's actual knowledge of the ASR components. As noted above, Plaintiffs contend Simpson had actual knowledge of the defect. Unfortunately, at this time, Plaintiffs have not had the opportunity to develop a factual record demonstrating that dismissal is not appropriate pursuant to Subdivision 3 of § 544.41.²

If the Plaintiffs cannot produce evidence showing one of the circumstances outlined in Subdivision 3 of Minn. Stat. § 544.41, the Court may then dismiss the strict liability claims against the certifying Defendant. After the case is dismissed, the only way to have it reinstated is if Plaintiffs move to vacate the order of dismissal and reinstate the Defendant pursuant to Subdivision 2 of § 544.41 by showing: (1) that the manufacturer no longer exists or cannot be subject to the jurisdiction of the courts of this state; (2) that the manufacturer is unable to satisfy any judgment as determined by the court; or (3) that the court determines the manufacturer would be unable to satisfy a reasonable settlement or other agreement with plaintiff. Minn. Stat. § 544.41 subd. 2(c)-(e). As written, if a defendant is dismissed and thereafter plaintiff discovers

²Notably, the primary case discussed by the parties in *In Re Shigellosis*, 647 N.W.2d at 1, addressed a motion to dismiss by an allegedly passive seller at the summary judgment stage **after** the parties developed the factual record.

defendant had actual knowledge of the defect (an exception set forth in Subdivision 3), plaintiff would not be entitled to move to vacate the order of dismissal and reinstate the certifying defendant, even though the defendant had actual knowledge of the defect.

In analyzing the discrepancy set forth in Subdivisions 2 and 3 of Minn. Stat. § 544.41, the United States District Court for the District Court of Minnesota agreed it would be premature to dismiss Plaintiffs' strict liability claims without the availability of discovery, stating:

The Seller's Exception Statute places on the plaintiff the burden of establishing exceptions to dismissal under subdivision 3 and reinstatement requirements under subdivision 2. Zimmer's motion to dismiss prior to the commencement of discovery, which could produce evidence establishing that subdivision 3's exceptions apply, creates an unfair burden on plaintiffs. Moreover, granting the motion as (sic) this stage may defeat the purpose of the Seller's Exception Statute. Zimmer conceded at the hearing that if the Court dismisses the strict liability claims against Zimmer now, plaintiffs likely have no statutory avenue to request reinstatement of those claims if plaintiffs (a) can later demonstrate that one of the subdivision 3 exceptions applies, but (b) are unable to demonstrate that the subdivision 2 requirements could be met. Dismissal could therefore allow a non-passive seller to escape liability under the Seller's Exception Statute. *Cf. In Re Shigellosis*, 647 N.W.2d at 6.

See, Murrell v. Zimmer, Inc., 2010 WL 1050309 at *3 (D. Minn.), Ex. 3, Bjorklund Aff.

In *Murrell*, the Court decided to deny defendant's motion to dismiss pursuant to Minn. Stat. § 544.41, concluding that defendant would not be unfairly prejudiced if the Court denied the motion with leave to allow defendant to renew. *Id.* at *4. The Court specifically noted that the plaintiffs' had asserted negligence claims against the defendant and the defendant would remain in the case regardless of the Court's disposition on the motion to dismiss, therefore, there was no prejudice to the defendant. *Id.* The Court concluded the defendant could renew its motion after discovery and after plaintiffs had the opportunity to meet their burden under the statute. *Id.*

E. Dismissal of Plaintiffs' Strict Liability Claims is Not Proper Because the Manufacturer is Not a Party at This Time.

“The plain language of the Seller’s Exception Statute requires that the identified manufacturer *be served with process* prior to dismissal of strict liability claims against the passive seller.” *In Re Shigellosis* at 7. The statute further requires that, “Before dismissal, the manufacturer must have responded or have the obligation to respond. Dismissal is not appropriate if the plaintiff’s action cannot reach a manufacturer or the manufacturer is insolvent.” *Id.*

In the case at hand, Plaintiffs contend Simpson had actual knowledge of the defects of the ASR components and, more importantly, intentionally sold, marketed and promoted the ASR hip system, making misrepresentations to Plaintiffs’ orthopedic surgeons, and is, therefore, directly liable for its own negligence and misrepresentations which caused damages to Plaintiffs. If the Court does not agree with Plaintiffs at this time, and if the Court refuses to allow Plaintiffs the opportunity to conduct discovery regarding this issue, it is still improper to dismiss Simpson at this time. Instead, the Court should allow Plaintiffs the opportunity to amend their Complaint and add a claim of strict liability against the identified manufacturers, prior to the Court’s dismissal of Plaintiffs’ strict liability claims against Simpson. Because the manufacturer has not been joined in this litigation, dismissal of Plaintiffs’ strict liability claims against Simpson, at this time, would be inappropriate. *In Re Shigellosis*, 647 N.W.2d at 8; *see also, Szanto v. Target Corporation*, 2010 WL 346297 at *9 (Minn. Ct. App. February 2, 2010) (holding dismissal is proper on a strict liability claim only after a complaint is filed against the manufacturer), *Ex. 4, Bjorklund Aff.*

II. PLAINTIFFS' CLAIMS FOR MISREPRESENTATION SHOULD NOT BE DISMISSED

A. Plaintiff's Misrepresentation Claim Meets the Requirements of Rule 9.02.

Defendant Simpson selectively cites to part of Plaintiffs' Complaint and, more importantly, selectively ignores many allegations in order to claim the misrepresentation claim was not pled with sufficient particularity. A review of the entire Complaint shows that Plaintiffs alleged all of the necessary elements of misrepresentation with sufficient particularity so that Simpson can respond to the Complaint.

The elements of a fraudulent misrepresentation are well known and require Plaintiffs to demonstrate that defendant made [1] a representation, [2] that was false, [3] having to do with a past or present fact, [4] that is material, [5] and susceptible of knowledge, [6] that the defendant knew to be false, [7] with the intent to induce the other person to act, [8] and the person was induced to act, [9] in reliance on the representation, [10] that the plaintiff suffered damages, [11] that were attributable to the misrepresentation. *M.H. v. Caritas Family Servs.*, 488 N.W.2d 282, 289 (Minn. 1992) (citations omitted). A misrepresentation can be made by either an affirmative false statement or concealing or not disclosing facts that render other disclosed facts misleading. *Id.* In this case, Plaintiffs have made allegations that Simpson made material factual misrepresentations both directly and by omission.

1. Plaintiffs Have Specifically Alleged a False Representation Regarding a Past or Present Fact.

Defendant Simpson claims Plaintiffs did not aver a "single specific false representation" made to Plaintiffs or their physicians. This is simply not accurate. Plaintiffs stated that Simpson disseminated literature to the orthopedic community in the form of printed literature and

brochures. Complaint at ¶¶ 12-13. Plaintiffs directly quoted the false statements from the literature that the ASR components were “based on a strong clinical history” and would “reduce wear compared to traditional hip replacement.” *Id.* at ¶ 14. Plaintiffs then alleged that these statements were false as Plaintiffs claim that orthopedic experts actually warned that the metal used in the ASR components “rendered them prone to increase wear”. *Id.* at ¶ 21. Additionally, these components were failing at a four-fold higher rate than similar components. *Id.* at ¶ 22. Obviously, if Simpson’s literature proclaims the ASR components will reduce wear compared to other hip replacement options, when, in fact, the opposite is true, then the statement is false. Moreover, Plaintiffs allege Simpson knew the statements were false because Simpson was warned by the orthopedic community and had actual knowledge of the higher failure rate for the ASR components. Complaint at ¶¶ 18-25. Additionally, Plaintiffs claimed misrepresentation by omission as Simpson did not tell Plaintiffs’ orthopedic surgeons of the excessive failure rate of the ASR product and the increased need for revision surgeries, even though Simpson’s sales representatives participated in the revision surgeries. *Id.* at ¶ 25.

2. Plaintiffs Have Specifically Alleged Reliance on the False Representations.

Defendant Simpson’s claim that Plaintiffs did not sufficiently allege reliance is completely undermined by Simpson’s citation (in a footnote) to Plaintiffs’ allegations of reliance. As Simpson notes in footnote 2 of its Memorandum of Law in support of its Motion to Dismiss, Plaintiffs alleged that Linda Anderson’s orthopedic surgeon, Dr. Edgerton, conveyed the same information to her that was provided in Simpson’s literature. *Id.* at ¶ 32. Relying on the false

representations in Simpson's literature, plaintiff Anderson agreed to have a hip replacement with the ASR components. *Id.* at ¶ 33.

Plaintiff James Feser also specifically alleged reliance on the false representation. Plaintiff Feser was undergoing a hip resurfacing procedure and discussed in great detail the procedure with his orthopedic surgeon, Timothy J. Bopp, M.D. *Id.* at ¶ 48. Despite the fact that the ASR components were not approved for use in resurfacing procedures in the United States, Simpson aggressively marketed the device for just that use to plaintiff's physician, Dr. Bopp, representing it was permissible to use in a resurfacing procedure. *Id.* at ¶ 49. Simpson failed to inform Dr. Bopp that the ASR components were not approved for a resurfacing procedure in the United States. *Id.* at ¶ 50. This omission of a material fact constitutes a fraudulent misrepresentation. *M.H. v. Caritas Family Servs.*, 488 N.W.2. at 289. Plaintiffs relied on these misrepresentations. Complaint at ¶ 104.

Plaintiff Judith Peskar underwent a total hip arthroplasty of her right hip on May 21, 2009. *Id.* at ¶ 63. At that time, Simpson was well aware of defects and failures of the DePuy ASR Hip System. *Id.* at ¶¶ 23-25. Defendant Simpson, however, failed to convey this information to Plaintiffs' orthopedic surgeons. *Id.* at ¶ 25. Dr. Saterbak, plaintiff Peskar's orthopedic surgeon, chose to implant ASR components in her body. *Id.* at ¶ 64.

Given this information, it is difficult to understand how Simpson can claim the "newspaper story" elements are missing. Who made the false statements? Defendant Simpson did in its literature and representations to Plaintiffs' orthopedic surgeons. What was false about the representations? That the ASR components would reduce wear compared to other hip replacement alternatives. When was this? The statements were made to Plaintiffs' orthopedic

surgeons prior to their surgeries. *Id.* at ¶ 33. Where and how were the representations made? The statements were made in the literature provided to Plaintiffs' orthopedic surgeons and verbal communications with Plaintiffs' orthopedic surgeons and in the failures to warn and to communicate the known defects. *Id.* at ¶¶ 8, 13-14, 32.

Since Simpson was forced to show how Plaintiffs alleged reliance, albeit in a footnote, it is surprising that Simpson would then claim there were no specific allegations of reliance. (Def. Mem. of Law at 11.) Reliance was specifically alleged in Plaintiffs' Complaint. *Id.* at ¶ 9, ¶ 33. Plaintiffs' orthopedic surgeons relied on Simpson's statements concerning the durability of the ASR components in choosing which hip replacement device to use. Furthermore, it is specifically alleged that both Plaintiffs Anderson and Feser relied on the information from Simpson about the ASR components in deciding to have ASR products implanted in their body.

Plaintiffs' orthopedic surgeons chose the ASR components over other devices based on Simpson's statements about the nature of the product. Plaintiffs decided to have hip replacement surgery utilizing the ASR components based on the representations Simpson made about that product. The use of the ASR Hip System, over other products, is the most obvious form of reliance that can be shown.

B. Plaintiffs Should be Allowed to Amend Their Complaint to Set Forth With Greater Specificity Their Elements of Misrepresentation.

If the Court believes that Plaintiffs have not adequately pled their misrepresentation claim, then Plaintiffs request leave to amend the Complaint in order to remedy any pleading defect. This request is not, as Simpson peremptorily suggested, a request for discovery on the

allegations of misrepresentations, but rather a request to address Simpson's concerns that it does not know the specifics of the allegations being asserted in the misrepresentation count.

CONCLUSION

Defendant Simpson's Motion to Dismiss should be denied. Minn. Stat. § 544.41 does not apply to Plaintiffs' claims for negligence and breach of warranty. Moreover, Plaintiffs have adequately pled that Simpson had actual knowledge of the product defect and exception to the innocent seller statute set forth in Minn. Stat. § 544.41. Finally, Plaintiffs have adequately pled with specificity their claims of misrepresentation against Simpson.

Dated: July 19, 2011

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