

FILED DISTRICT COURT
Third Judicial District

JUL 29 2011

SALT LAKE COUNTY

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

<p>LEANN C. BRIMLEY, Plaintiff, vs. S.C. PHIPPEN MEDICAL, LLC; STEVEN C. PHIPPEN dba S.C. PHIPPEN MEDICAL, LLC; DePUY ORTHOPAEDICS, INC.; DePUY INC.; DePUY INTERNATIONAL, LTD.; JOHNSON & JOHNSON INTERNATIONAL; JOHNSON & JOHNSON; and DOES 1-50, Defendants.</p>	<p>COMPLAINT (Jury Trial Demand) Civil No. <u>110916349</u> Judge <u>Kennedy</u></p>
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Plaintiff LeAnn C. Brimley, by and through her counsel: David M. Kono and Eric G. Goodrich of Bennett Tueller Johnson & Deere; Brian S. Franciskato of the Nash & Franciskato Law Firm; and Altom M. Maglio of the Maglio Christopher & Toale, PA¹, hereby complains against defendants S.C. Phippen Medical, LLC; Steven C. Phippen dba S.C. Phippen Medical, LLC; DePuy Orthopaedics, Inc.; DePuy Inc.; DePuy International, Ltd.; Johnson & Johnson; Johnson & Johnson International; and Does 1-50, and alleges as follows:

1. This is an action for damages relating to defendants' development, testing, assembling, manufacture, packaging, labeling, preparing, distribution, marketing, supplying, and/or selling the defective product sold under the name "Depuy ASR Acetabular Hip System" (hereinafter "DePuy ASR Hip").

DESCRIPTION OF THE PARTIES

2. Plaintiff LeAnn C. Brimley ("Plaintiff" or "Brimley") is an individual residing in Utah County, Utah.

3. Defendant S.C. Phippen Medical, LLC ("S.C. Phippen"), is a limited liability company with its principal place of business in Salt Lake County, Utah.

4. Defendant Steven C. Phippen dba S.C. Phippen Medical, LLC ("Phippen"), is, upon information and belief, an individual residing in Salt Lake County, Utah. Phippen is the owner of S.C. Phippen, and has at times relevant to this action operated a sole proprietorship under the name of S.C. Phippen Medical, LLC. S.C. Phippen and Phippen are collectively referred to herein as "Phippen Medical."

¹ A motion will be made to this Court to admit Brian S. Franciskato and Altom M. Maglio *pro hac vice*.

5. Defendant DePuy Orthopaedics, Inc. (“DePuy Orthopaedics”), is an Indiana corporation doing business in the State of Utah.

6. DePuy Orthopaedics is a wholly owned subsidiary of DePuy Inc., which in turn is a subsidiary of Johnson & Johnson International (“J&J International”), which is in turn a subsidiary of Johnson & Johnson (“J&J”).

7. Upon information and belief, Defendant DePuy Inc. is a Delaware corporation doing business in the State of Utah.

8. As DePuy Orthopaedics’s parent company, DePuy Inc. was involved in the business of designing, licensing, manufacturing, distributing, selling, marketing and introducing into interstate commerce, either directly or indirectly, through third parties or related entities, numerous orthopedic products, including the components of the DePuy ASR Hip, as well as monitoring and reporting adverse events, and having a role in the decision process and response of the Defendants, if any, related to these adverse events.

9. Defendant DePuy International, Ltd. (hereinafter “DePuy International”) is a foreign corporation with its principal place of business located at St. Anthony’s Road, Leeds, LS11 8DT, England, and doing business in the State of Utah.

10. At all times relevant, DePuy International was engaged in the business of designing, licensing, manufacturing, distributing, selling, marketing and introducing into interstate commerce, either directly or indirectly, through third parties or related entities, numerous orthopedic products, including the components of the DePuy ASR Hip, as well as

monitoring and reporting adverse events throughout the world, and having a role in the decision-making process and response of the Defendants, if any, related to these adverse events.

11. DePuy International is a subsidiary of Johnson & Johnson.

12. Upon information and belief, Defendant J&J International is a New Jersey corporation doing business in the State of Utah.

13. As one of DePuy Orthopaedics's parent companies, J&J International was involved in the business of designing, licensing, manufacturing, distributing, selling, marketing and introducing into interstate commerce, either directly or indirectly, through third parties or related entities, numerous orthopedic products, including the components of the DePuy ASR Hip, as well as monitoring and reporting adverse events, and having a role in the decision process and response of the defendants, if any, related to these adverse events.

14. Upon information and belief, Defendant J&J is a New Jersey corporation doing business in the State of Utah.

15. As DePuy Orthopaedics's most senior parent company, J&J was involved in the business of designing, licensing, manufacturing, distributing, selling, marketing and introducing into interstate commerce, either directly or indirectly, through third parties or related entities, numerous orthopedic products, including the components of the DePuy ASR Hip, as well as monitoring and reporting adverse events, and having a role in the decision process and response of the defendants, if any, related to these adverse events.

16. Defendants DePuy Orthopaedics, DePuy Inc., DePuy International, J&J International, and J&J are collectively referred to herein as "DePuy" or the "DePuy Defendants."

17. At all times relevant to this action, the DePuy Defendants, either directly or through their agents, developed, designed, manufactured, promoted, marketed, tested, labeled, distributed, sold and/or profited from the sale of the defective and recalled DePuy ASR Hip devised, through interstate commerce and in the State of Utah.

18. Upon information and belief, each of the DePuy Defendants was the agent or employee of the other and was acting at all times within the course and scope of such agency and employment and contributed to and caused the breaches and other liabilities alleged in this Complaint and is legally responsible for the damages alleged herein. In all instances where it is alleged that any of the DePuy Defendants had knowledge of certain facts or events, they obtained such knowledge either directly or through each other or their agents, including by and through their officers, directors, and managing agents. At all times herein mentioned, the DePuy Defendants, and each of them, were acting as agents and employees of each of the other, and at all times herein mentioned, were acting within the scope, purpose, and authority of that agency and employment and with the full knowledge, permission, and consent of each of the other DePuy Defendants.

19. At all times relevant to this action, Phippen Medical acted as distributor of the DePuy ASR Hip at issue in this matter, promoting, marketing, selling, distributing, and servicing the product for the DePuy Defendants in the State of Utah.

20. Phippen Medical sold the DePuy ASR Hip and the individual components comprising the DePuy ASR Hip at issue in this matter by placing the products for sale in the

stream of commerce and delivering the products for implantation into the body of Plaintiff and others similarly situated.

21. In its role as distributor of the product at issue in this matter, Phippen Medical utilized sales representatives who were responsible for educating Plaintiff's orthopedic surgeon regarding claimed advantages of the product, answering any questions Plaintiff's orthopedic surgeon had regarding the product, assisting Plaintiff's orthopedic surgeon at surgery regarding the product, and selling the product to Plaintiff's orthopedic surgeon.

22. The directors, managers, and sales representatives of Phippen Medical received training and education from DePuy including orthopedic and surgical training, product design rationale for the DePuy ASR Hip, surgical technique tips for demonstrating and implanting the DePuy ASR Hip, training in the use of the tools used to implant the DePuy ASR Hip, training in selecting the hip replacement components to mate with the DePuy ASR Hip cup, and training on how to sell to orthopedic surgeons including training on the advantages of the DePuy ASR Hip over its major competitors.

23. Phippen Medical provided information to Plaintiff's orthopedic surgeon including but not limited to: the advantages of the DePuy ASR Hip compared to its competitors, information regarding the design rationale for the DePuy ASR Hip, surgical techniques on how to implant the DePuy ASR Hip and demonstrations on how to implant the DePuy ASR Hip, and the components that could best be mated with the DePuy ASR Hip cup, including providing a variety of scenarios involving the various instrumentation used in implanting a DePuy ASR Hip.

24. In their roles as sales representatives for the DePuy ASR Hip in this matter, the sales representatives of Phippen Medical were responsible for answering any questions or concerns Plaintiff's orthopedic surgeon had regarding the DePuy ASR Hip.

25. The above information was provided by Phippen Medical to Plaintiff's orthopedic surgeon and was intended for the purpose of convincing and inducing Plaintiff's orthopedic surgeon to use the DePuy ASR Hip instead of one of the competing hip replacements.

26. Plaintiff's orthopedic surgeon, nurses and hospital staff relied on information and assistance from Phippen Medical during Plaintiff's surgical procedure in implanting the DePuy ASR Hip.

27. The true names and capacities, whether individual, corporate, associate, or otherwise, of defendants named herein as Does 1-50, are unknown to Plaintiff, who therefore sues said defendants by fictitious names until such time as she becomes aware of such persons' true identities through discovery in this action.

28. Plaintiff is informed and believes and based thereupon alleges that each of the defendants designated herein as Does 1-50 took part in and participated with the named defendants in all matters referred to herein and were in some manner responsible for the injuries and losses suffered by Plaintiff.

29. At all times alleged herein, use of the collective term "Defendant(s)" refers to all named Defendants as well as Defendants Does 1-50, inclusive.

30. At all times alleged herein, each of the Defendants was the agent and employee of every other Defendant in doing the acts herein alleged, and was, at all time, acting within the

purpose and scope of said agency and employment and all said acts and conduct were ratified and approved by said Defendants.

JURISDICTION AND VENUE

31. This Court has subject matter jurisdiction over this action pursuant to Utah Code section 78A-5-102.

32. This Court has personal jurisdiction over Defendants in that they conduct business in the State of Utah.

33. Venue properly lies in this Court pursuant to Utah Code section 78B-3-307.

GENERAL ALLEGATIONS

34. In 2005, DePuy began selling nationally, and Phippen Medical began selling in Utah, the DePuy ASR Hip for use in total hip replacement surgeries.

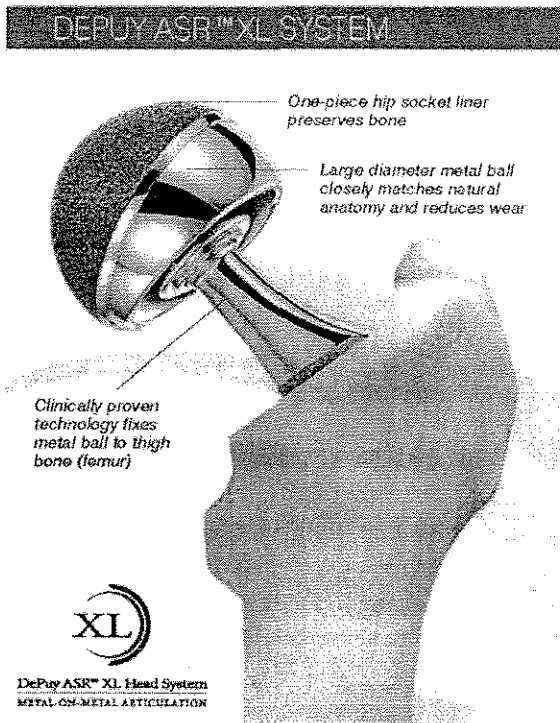
35. At that time DePuy began an intensive national campaign to promote the use of ASR Hips by orthopedic surgeon, and Phippen Medical began a corresponding campaign in Utah.

36. DePuy produced brochures and other printed literature and Phippen Medical disseminated the literature to the orthopedic community in Utah.

37. DePuy produced and Phippen Medical disseminated literature stating:

The DePuy ASR™ Articular Replacement System and the DePuy ASR™ XL Head System large diameter, high performance metal-on-metal bearings are designed and manufactured within fine tolerances to facilitate a state of fluid film lubrication. The system is available for use in conjunction with all DePuy stems, cemented and cementless, designed to reduce wear and provide high function for all patients.

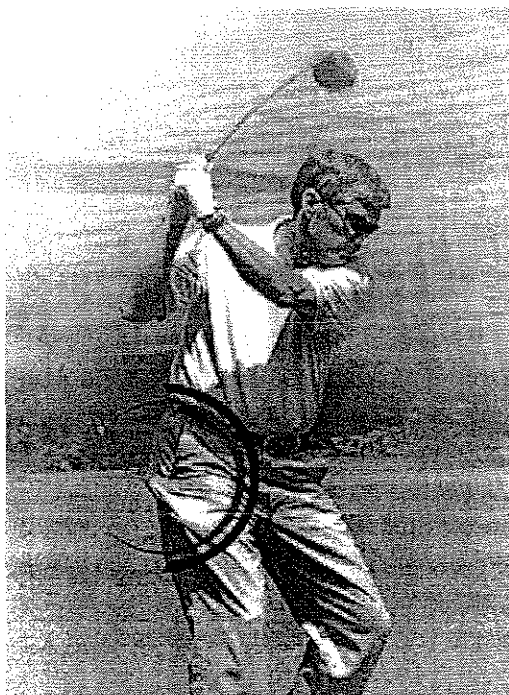
38. In a 2006 patient brochure, titled *DePuy ASR™ XL Head System: Metal on Metal Articulation: High Performance Hip Replacement*, Defendants touted the advantages of the ASR Hip, including reduced wear:



39. The 2006 patient brochure contains the following chart stating that the DePuy ASR Hip is “based on a strong clinical history” and “reduces wear compared to traditional hip replacement”:

Benefits¹	Hip Resurfacing	The ASR™ XL System
Preserves Bone in the Hip Socket	YES	YES
Provides Excellent Range of Motion	YES	YES
Reduces Wear Compared to Traditional Hip Replacement	YES	YES
Provides Ball Diameters that Closely Match Natural Anatomy	YES	YES
Allows Surgeon to Adjust Leg Length and Offset	NO	YES
Involves a Relatively Small Surgical Incision	NO	YES
Based on Strong Clinical History	NO	YES

40. The 2006 patient brochure contains photographs of the following three individuals engaged in demanding athletic activities with the DePuy ASR Hip logo superimposed over one of each of their hips, implying that each has a DePuy ASR Hip implanted in that hip. They include a man with the DePuy ASR logo superimposed over his right hip taking a very aggressive golf swing:



a man with a DePuy ASR logo superimposed over his right hip playing Frisbee with a dog on a loose sand beach:



and a young woman with the DePuy ASR logo superimposed over her left hip jogging on a loose sand beach:



Warnings from Independent Orthopedic Experts

41. The same year DePuy began selling the DePuy ASR Hip in the United States, independent experts from around the world were warning the design of the DePuy ASR Hip was flawed.

42. Orthopedic experts warned the DePuy ASR Hip cup was too thin and thus prone to deformation.

43. Orthopedic experts warned the clearance between the DePuy ASR Hip cup and head was too small and in some patients could lead to jamming of components.

44. Orthopedic experts warned the treatment of the metal used for the DePuy ASR Hip cup and head was prone to increased wear.

45. By 2005, the DePuy ASR Hip was shown to have a four-fold higher rate of revision than a similar cup in the Australian Joint Registry.

46. DePuy countered these warnings concerning the defective nature of the DePuy ASR Hip with a host of arguments and continued to heavily promote its ASR Hip for the next four years by and through Phippen Medical.

47. DePuy disseminated its arguments responding to the warnings about the ASR Hip through their distributors, including Phippen Medical.

48. The employees and agents of Phippen Medical were aware of the problems with the design of the ASR Hip, and also aware of excessive failures necessitating revision of the DePuy ASR Hip, but failed to convey this information to the Plaintiff's orthopedic surgeon and instead continued to strongly promote the DePuy ASR Hip.

Suspension and Recall

49. From 2005 to 2009, hundreds of complaints of failure of DePuy ASR Hips were made by orthopedic surgeon and hospitals to DePuy and the United States Food and Drug Administration.

50. Independent studies began to show numerous problems with the DePuy ASR Hip including failure of the cup to achieve proper fixation due to the lack of bony ingrowth into the back of the cup, significant metal debris in patients with DePuy ASR Hips, the formation of pseudotumors in patients with DePuy ASR Hips, and hip fractures.

51. In late 2009, DePuy, citing decreased sales, stated that it was phasing out sales of the DePuy ASR Hip.

52. In early 2010, DePuy sent letters to orthopedic surgeon warning of high failure rates with the DePuy ASR Hip.

53. Finally, on August 24, 2010, DePuy announced that it was recalling the DePuy ASR Hip, noting in the Recall Notice that reasons for high failure rates included “component loosening, component malalignment, infection, fracture of the bone, dislocation, metal sensitivity and pain.”

Plaintiff’s Experience with the DePuy ASR Hip

54. On July 7, 2007, Brimley underwent a total hip replacement of her left hip performed by orthopedic surgeon E. Marc Mariani, M.D., at St. Mark’s Hospital, in Salt Lake City, Utah.

55. During the surgery, Dr. Mariani installed a DePuy ASR Hip into Brimley’s body.

56. Brimley subsequently developed pain and discomfort in her hip and groin area.

57. Over a period of more than one year, Brimley continued to report complaints of pain and discomfort. Dr. Mariani treated Brimley for pain and a suspected case of trochanteric bursitis, and otherwise continued to monitor the situation.

58. After a visit on October 21, 2009, Dr. Mariani noted that Brimley was “getting progressively worse,” and was walking with a limp and having groin pain. At that point, Dr. Mariani definitively concluded that “we need to pursue . . . surgical intervention and replace this cup for her.”

59. On November 3, 2009, Brimley underwent revision surgery under the care of Dr. Mariani.

60. During this surgery, Dr. Mariani noted the presence of inflammatory synovium and “obvious necrotic tissue associated with the metallic debris of the [DePuy ASR Hip].”

61. Dr. Mariani further discovered that the acetabular component of the DePuy ASR Hip was “grossly loose.”

62. Following the surgery to remove the DePuy ASR Hip, Brimley began a long and painful rehabilitation process.

63. Approximately one year after her first revision surgery, Brimley’s second hip implant also failed, requiring that Brimley undergo yet another painful revision surgery, which was performed by Dr. Mariani on November 4, 2010.

64. Brimley still suffers from pain and discomfort as a result of her failed DePuy ASR Hip and has suffered permanent injuries.

Effect on Plaintiff

65. Plaintiff had a DePuy ASR Hip that was designed, manufactured, labeled, distributed, and sold by DePuy.

66. Plaintiff’s DePuy ASR Hip was distributed by Phippen Medical.

67. Phippen Medical was responsible for educating the orthopedic surgeon regarding the DePuy ASR Hip, answering any questions that the orthopedic surgeon had regarding the DePuy ASR Hip, and convincing Plaintiff’s orthopedic surgeon to purchase the DePuy ASR Hip.

68. The DePuy ASR Hip failed to achieve proper bone ingrowth into the cup and thus failed to achieve proper fixation.

69. The DePuy ASR Hip generated excessive metal debris.

70. The recognition that the DePuy ASR Hip had failed was delayed by the failure of Defendants to convey to Plaintiff's orthopedic surgeon the warnings regarding the product made by independent orthopedic experts and information regarding other failures of DePuy ASR Hips.

71. As a result of this significant delay in the recognition that the DePuy ASR Hip had failed, Plaintiff needlessly suffered pain and damage to the bones and surrounding tissue of her hips.

72. If the DePuy ASR Hip had performed satisfactorily during its expected life, Brimley would not have had to undergo additional surgical procedures at all, much less two revision surgeries.

73. The failure of the DePuy ASR Hip implanted in the body of Plaintiff was a direct result of the defective design of the DePuy ASR Hip warned of by orthopedic experts in 2005, and of which Phippen Medical and the DePuy Defendants were aware at the time Phippen Medical sold the DePuy ASR Hip to Plaintiff.

FIRST CAUSE OF ACTION

(Negligence—Phippen Medical)

74. Plaintiff re-alleges and incorporates by reference all paragraphs above as if fully set forth herein.

75. Phippen Medical as the seller and distributor of the DePuy ASR Hip owed a duty to Plaintiff to exercise reasonable care in the selling, marketing, advertising and distribution of the device to insure that it was fit for its intended use.

76. Phippen Medical, as the seller and distributor of the DePuy ASR Hip, by and through its owners, managers and sales representatives, owed a duty to Plaintiff to inform her orthopedic surgeon in a timely manner of the significant problems being experienced with the product and to warn of any risks and dangers of the product.

77. Phippen Medical, as the seller and distributor of the DePuy ASR Hip, by and through its owners, managers and sales representatives, owed a duty to Plaintiff to provide accurate information to Plaintiff's orthopedic surgeon.

78. Phippen Medical, in breach of the duties described above, negligently and carelessly provided incomplete and inaccurate information regarding the DePuy ASR Hip to Plaintiff's orthopedic surgeon.

79. Phippen Medical, in breach of the duties described above, negligently and carelessly sold, marketed, advertised, supported and distributed the DePuy ASR Hip implanted in Plaintiff.

80. As a direct and proximate result of the conduct of Phippen Medical, the DePuy ASR Hip was unfit for its intended use and Plaintiff needlessly suffered pain and weakness.

81. As a direct and proximate cause of the negligence and carelessness of Phippen Medical, Plaintiff has suffered severe physical pain, distress and injury; emotional distress and injury; incurred medical and other expenses; suffered shame, humiliation and the inability to lead a normal life; and has suffered loss of enjoyment of life.

82. The injuries and losses of Plaintiff are permanent in nature and Plaintiff will continue to suffer such losses in the future.

SECOND CAUSE OF ACTION

(Strict Liability—Design Defect—Phippen Medical)

83. Plaintiff re-alleges and incorporates by reference all paragraphs above as if fully set forth herein.

84. At the time that Phippen Medical distributed, advertised, marketed and sold the DePuy ASR Hip, it contained a defect that made it unreasonably dangerous and unfit for its intended use.

85. The DePuy ASR Hip distributed, advertised, marketed and sold by Phippen Medical was defective in design or formulation in that, when it left the hands of Phippen Medical, the foreseeable risk of harm grossly exceeded the benefits associated with the design or formulation of the DePuy ASR Hip

86. The DePuy ASR Hips were expected to and did reach Plaintiff without substantial change in their condition as manufactured, created, designed, tested, labeled, packaged, supplied, marketed, sold, advertised, warned and otherwise distributed.

87. Plaintiff used the DePuy ASR Hip in a manner for which it was intended or in a reasonably foreseeable manner.

88. The DePuy ASR Hip caused increased risk of serious personal injury and harm upon use, and therefore constitutes a product unreasonably dangerous for normal use due to its defective design, defective manufacture and Phippen Medical's misrepresentations and inadequate facts disclosed to Plaintiff and/or Plaintiff's orthopedic surgeon.

89. The DePuy ASR Hip manufactured and/or supplied by Phippen Medical was defective due to:
- a. defective design or formulation in that when it left the hands of Phippen Medical, the foreseeable risks exceeded the benefits associated with the design or formulation;
 - b. defective marketing in that Phippen Medical made inappropriate, misleading, inaccurate and incomplete representations about the DePuy ASR Hip in advertisements, brochures, pamphlets and direct information provided to Plaintiff's orthopedic surgeon. These deceptive marketing representations were made in order to induce sales and increase profits;
 - c. defective design or formulation in that when the DePuy ASR Hip left the hands of Phippen Medical, it was unreasonably dangerous, it was more dangerous than an ordinary consumer would expect and more dangerous than other competitive hip replacements;
 - d. inadequate warnings or instructions because Phippen Medical knew or should have known that the ASR Hip created a risk of dangerous side effects and other related conditions and diseases;
 - e. inadequate pre-marketing testing which, if conducted properly, would have revealed the serious problems with the DePuy ASR Hip, prior to its first sale; and/or

f. inadequate post-marketing warning or instruction because, after Phippen Medical knew or should have known of the risks of dangerous side effects or other related conditions and diseases, Phippen Medical failed to provide adequate warnings to users or consumers of the product and continued to promote the DePuy ASR Hip.

90. Phippen Medical, therefore, is strictly liable to Plaintiff.

91. The product reached Plaintiff without substantial change in the condition in which it was sold.

92. As a direct and proximate cause of the defective conditions of the DePuy ASR Hip, Plaintiff has suffered severe physical pain, distress and injury; emotional distress and injury; incurred medical and other expenses; suffered shame, humiliation and the inability to lead a normal life; and has suffered loss of enjoyment of life.

93. The injuries and losses of Plaintiff are permanent in nature and Plaintiff will continue to suffer such losses in the future.

THIRD CAUSE OF ACTION

(Strict Liability—Failure to Warn—Phippen Medical)

94. Plaintiff re-alleges and incorporates by reference all paragraphs above as if fully set forth herein.

95. The DePuy ASR Hip was defective at the time of its manufacture, development, production, testing, inspection, endorsement, prescription, sale, marketing and distribution, in that, and not by way of limitation, said product and its warnings, instructions and directions

failed to warn of the dangerous propensities of said product, which risks were known or reasonably scientifically knowable to Phippen Medical.

96. Phippen Medical, knew or should have known of the defective condition, characteristics and risks associated with the DePuy ASR Hip, as previously set forth herein.

97. At all times herein mentioned, the DePuy ASR Hip was defective, and Phippen Medical knew that the product was to be used by the user without inspection for defects therein.

98. Moreover, Plaintiff neither knew, nor had reason to know at the time of the use of the DePuy ASR Hip, of the existence of the aforementioned defects.

99. As a result of Phippen Medical's failure to warn of the defective condition of the DePuy ASR Hip, Plaintiff suffered injuries and damages as alleged herein.

FOURTH CAUSE OF ACTION

(Breach of Implied Warranty—Phippen Medical)

100. Plaintiff re-alleges and incorporates by reference all paragraphs above as if fully set forth herein.

101. Phippen Medical sold and distributed the DePuy ASR Hip at issue in this case.

102. Phippen Medical impliedly warranted to Plaintiff and Plaintiff's orthopedic surgeon that the DePuy ASR Hip was reasonably fit and safe for its intended use as a hip joint replacement system and was of marketable quality throughout.

103. Plaintiff was a foreseeable user of the DePuy ASR Hip.

104. Plaintiff was and is unskilled in the research, design and manufacture of the DePuy ASR Hip and reasonably relied entirely on the skill, judgment and implied warranty of Phippen Medical in using the DePuy ASR Hip.

105. Plaintiff purchased the DePuy ASR Hip from Phippen Medical as distributor for DePuy.

106. The DePuy ASR Hip was neither safe for its intended use nor of merchantable quality, as warranted by Phippen Medical, in that it had dangerous propensities when put to its intended use and would cause severe injuries to the user.

107. The DePuy ASR Hip failed while being used for its intended purpose, causing injury to Plaintiff.

108. As a direct and proximate cause of this breach of warranty, Plaintiff has suffered severe physical pain, distress and injury; emotional distress and injury; incurred medical and other expenses; suffered shame, humiliation and the inability to lead a normal life; and has suffered loss of enjoyment of life.

109. The injuries and losses of Plaintiff are permanent in nature and Plaintiff will continue to suffer such losses in the future.

FIFTH CAUSE OF ACTION

(Breach of Express Warranty—Phippen Medical)

110. Plaintiff re-alleges and incorporates by reference all paragraphs above as if fully set forth herein.

111. Phippen Medical sold and distributed the DePuy ASR Hip at issue in this case.

112. Phippen Medical expressly warranted by affirmation, promise, description, and sample that the DePuy ASR Hip was reasonably fit for extended, safe use as a hip joint replacement system.

113. The above representations made by Phippen Medical were meant to directly or indirectly induce persons such as Plaintiff and the orthopedic surgeon of Plaintiff to purchase the DePuy ASR Hip.

114. Plaintiff was a foreseeable user of the DePuy ASR Hip.

115. Plaintiff relied on the skill, judgment, representations and foregoing express warranties of Phippen Medical.

116. Plaintiff purchased the DePuy ASR Hip from Phippen Medical as distributor for DePuy.

117. The warranties and representations made by Phippen Medical were false in that the DePuy ASR Hip was not safe and was unfit for the uses for which it was intended.

118. The DePuy ASR Hip failed while being used for its intended purpose, causing injury to Plaintiff.

119. As a direct and proximate cause of this breach of warranty, Plaintiff has suffered severe physical pain, distress and injury; emotional distress and injury; incurred medical and other expenses; suffered shame, humiliation and the inability to lead a normal life; and has suffered loss of enjoyment of life.

120. The injuries and losses of Plaintiff are permanent in nature and Plaintiff will continue to suffer such losses in the future.

SIXTH CAUSE OF ACTION

(Truth in Advertising—Utah Code Ann. § 13-11a-1 *et seq.*—Phippen Medical)

121. Plaintiff re-alleges and incorporates by reference all paragraphs above as if fully set forth herein.

122. Phippen Medical constitutes a “person” within the meaning of Utah Code section 13-11a-2(7).

123. Phippen Medical has engaged in deceptive trade practices as described above by representing that the DePuy ASR Hip had characteristics, benefits, and/or qualities that it does not have and/or by representing that the DePuy ASR Hip was of a particular standard, quality, or grade when, in fact, the product was not of that standard, quality, or grade. These actions meet the definition of “deceptive trade practices” set forth in Utah Code section 13-11a-3.

124. Plaintiff, as an injured party, may sue and recover damages sustained as a result of Phippen Medical’s unlawful acts.

125. Plaintiff, as an injured party, is entitled to an award of costs and reasonable attorneys’ fees incurred in enforcing its rights.

SEVENTH CAUSE OF ACTION

(Utah Consumer Sales Practices Act—Utah Code Ann. § 13-11-1 *et seq.*—Phippen Medical)

126. Plaintiff re-alleges and incorporates by reference all paragraphs above as if fully set forth herein.

127. Phippen Medical constitutes a “supplier” within the meaning of Utah Code section 13-11-3(6).

128. The sale and promotion of the DePuy ASR Hip by Phippen Medical constitutes a “consumer transaction” within the meaning of Utah Code section 13-11-3(2)(a).

129. Phippen Medical has engaged in deceptive acts and practices as described above by knowingly and intentionally representing that the DePuy ASR Hip had approval, performance characteristics, uses, or benefits which it did not have; and indicating that the DePuy ASR Hip was of a particular standard, quality, or grade when, in fact, the product was not of that standard, quality, or grade. These actions meet the definition of a “deceptive act or practice of a supplier in connection with a consumer transaction” as set forth in Utah Code section 13-11-4(1) and -(2).

130. Plaintiff has suffered loss as a result of Phippen Medical’s violation of the Utah Consumer Sales Practices Act, and is therefore entitled to recover damages sustained as a result of Phippen Medical’s unlawful acts.

131. Plaintiff, as an injured party, is entitled to an award of costs and reasonable attorneys’ fees incurred in enforcing its rights.

EIGHTH CAUSE OF ACTION

(Fraud by Concealment—Phippen Medical)

132. Plaintiff re-alleges and incorporates by reference all paragraphs above as if fully set forth herein.

133. Phippen Medical, from the time that the DePuy ASR Hip was first manufactured, marketed, distributed and sold, and up to the present, willfully deceived Plaintiff by concealing from Plaintiff, Plaintiff’s orthopedic surgeon and the general public, the true material facts concerning the DePuy ASR Hip, which Phippen Medical had a duty to disclose.

134. Phippen Medical conducted a sales and marketing campaign to promote the sale of the DePuy ASR Hip and willfully deceived Plaintiff, Plaintiff's orthopedic surgeon and the general public as to the health risks and consequences of the use of the DePuy ASR Hip.

135. Phippen Medical was aware of the foregoing, and that the DePuy ASR Hip was not safe, fit, or effective for human use, was hazardous to health, and had a substantial propensity to cause serious injuries to users, including but not limited to the injuries suffered by Plaintiff as delineated herein.

136. Phippen Medical intentionally concealed and suppressed the true facts concerning the DePuy ASR Hip with the intent to defraud Plaintiff, in that Phippen Medical knew that Plaintiff's orthopedic surgeon would not recommend and prescribe the DePuy ASR Hip, and Plaintiff would not have used the DePuy ASR Hip, if they were aware of the true facts concerning the dangers of the DePuy ASR Hip.

137. At all times herein mentioned, neither Plaintiff nor her physician was aware of the facts set forth, and had they been aware of said facts, they would not have acted as they did, that is, reasonably would not have relied upon said misrepresentations of safety and efficacy and utilized the DePuy ASR Hip.

138. As a direct and proximate cause of Phippen Medical's concealment of material facts as set forth above, Plaintiff has suffered severe physical pain, distress and injury; emotional distress and injury; incurred medical and other expenses; suffered shame, humiliation and the inability to lead a normal life; and has suffered loss of enjoyment of life.

139. The injuries and losses of Plaintiff are permanent in nature and Plaintiff will continue to suffer such losses in the future.

NINTH CAUSE OF ACTION

(Negligent Misrepresentation—Phippen Medical)

140. Plaintiff re-alleges and incorporates by reference all paragraphs above as if fully set forth herein.

141. Phippen Medical, from the time that the DePuy ASR Hip was first manufactured, marketed, sold and distributed, and up to the present, represented and markets the DePuy ASR Hip as being safe and effective.

142. After Phippen Medical became aware of the numerous risks associated with the DePuy ASR Hip, however, Phippen Medical failed to communicate to Plaintiff, Plaintiff's medical providers, or the general public that the DePuy ASR Hip was not safe, fit, or effective for human use, was hazardous to health, and had a substantial propensity to cause serious injuries to users, including but not limited to the injuries suffered by Plaintiff as delineated herein.

143. Phippen Medical conducted a sales and marketing campaign to promote the sale of the DePuy ASR Hip and willfully deceived Plaintiff, Plaintiff's orthopedic surgeon and the general public as to the health risks and consequences of the use of the DePuy ASR Hip.

144. Phippen Medical made the foregoing and below representations without any reasonable grounds for believing them to be true, when it knew or reasonably should have known of the falsity of such misrepresentations, including but not limited to:

- a. The DePuy ASR Hip is designed to reduce wear and provide higher function for all patients;
- b. The DePuy ASR Hip is clinically proven to reduce wear;
- c. The DePuy ASR Hip is based on a strong clinical history and reduces wear compared to the traditional hip replacement; and
- d. The DePuy ASR Hip is designed to be installed in younger and more active patients and will last longer.

145. Phippen Medical failed to disclose information concerning the DePuy ASR Hip which was known at the time of the purchase by Plaintiff and was used to induce Plaintiff's orthopedic surgeon and Plaintiff into purchasing the DePuy ASR Hip, including but not limited to:

- a. Failing to disclose that independent experts from around the world were warning that the design of the DePuy ASR Hip was flawed;
- b. Failing to disclose that orthopedic experts were warning that the DePuy ASR Hip cup was too thin and prone to deformation;
- c. Failing to disclose that the clearance between the DePuy ASR Hip cup and head was too small and patients could experience jamming of the components;
- d. Failing to disclose that the treatment of the metal used for the DePuy ASR Hip cup was prone to increased wear and caused excessive metal debris;

- e. Failing to disclose that the DePuy ASR Hip cup failed to obtain bony ingrowth and became loose; and
- f. Failing to disclose that by 2005, the DePuy ASR Hip cup was shown, in Australia, to have a four-fold higher rate of revision than similar cups of competitors.

146. These representations and omissions were made directly by Phippen Medical, by sales representatives and other authorized agents of Phippen Medical and in publications and other written materials directed to physicians, medical patients and the public, with the intention of inducing reliance and the prescription, purchase and use of the DePuy ASR Hip, even though Phippen Medical knew or reasonably should have known that such representations and omissions were false and misleading.

147. The foregoing representations and omissions by Phippen Medical were in fact false, in that the DePuy ASR Hip was not safe, fit, or effective for human use, was hazardous to health, and had a substantial propensity to cause serious injuries to users, including but not limited to the injuries suffered by Plaintiff as delineated herein.

148. The foregoing representations and omissions by Phippen Medical were made with the intention of inducing reliance and the prescription, purchase and use of the DePuy ASR Hip.

149. In reliance on the misrepresentations and omissions by Phippen Medical, Plaintiff was induced to purchase and use the DePuy ASR Hip.

150. If Plaintiff had known of the true facts and the facts concealed by Phippen Medical, Plaintiff and/or Plaintiff's orthopedic surgeon would not have used the DePuy ASR Hip.

151. The reliance of Plaintiff and/or Plaintiff's orthopedic surgeon upon Phippen Medical's misrepresentations and omissions was justified because such misrepresentations and omissions were made and conducted by individuals and entities that were in a position to know the true facts.

152. As a direct and proximate cause of Phippen Medical's concealment of material facts as set forth above, Plaintiff has suffered severe physical pain, distress and injury; emotional distress and injury; incurred medical and other expenses; suffered shame, humiliation and the inability to lead a normal life; and has suffered loss of enjoyment of life.

153. The injuries and losses of Plaintiff are permanent in nature and Plaintiff will continue to suffer such losses in the future.

TENTH CAUSE OF ACTION:

(Negligence—DePuy Defendants)

154. Plaintiff re-alleges and incorporates by reference all paragraphs above as if fully set forth herein.

155. DePuy, as the manufacturer of the DePuy ASR Hip owed a duty to Plaintiff to exercise reasonable care in the design, manufacture, testing, researching, assembling, labeling, producing, selling and distribution of the device to insure it was fit for its intended use.

156. DePuy, as the manufacturer of the DePuy ASR Hip, owed a duty to Plaintiff to inform her orthopedic surgeon in a timely manner of the significant problems being experienced with the product and to warn of any risks and dangers of the product.

157. DePuy, in breach of the duties described above, negligently and carelessly designed, manufactured, tested, researched, assembled, produced, labeled, sold and distributed the DePuy ASR Hip implanted in Plaintiff and failed to adequately test and warn of the risks and dangers of the DePuy ASR Hip.

158. As a direct and proximate result of the conduct of DePuy, the DePuy ASR Hip was unfit for its intended use and Plaintiff needlessly suffered pain and weakness.

159. As a direct and proximate cause of the negligence and carelessness of DePuy, Plaintiff has suffered severe physical pain, distress and injury; emotional distress and injury; incurred medical and other expenses; suffered shame, humiliation and the inability to lead a normal life; and has suffered loss of enjoyment of life.

160. The injuries and losses of Plaintiff are permanent in nature and Plaintiff will continue to suffer such losses in the future.

ELEVENTH CAUSE OF ACTION

(Strict Liability—Design Defect—DePuy Defendants)

161. Plaintiff re-alleges and incorporates by reference all paragraphs above as if fully set forth herein.

162. At the time DePuy manufactured, developed, researched, produced, tested, assembled, labeled, distributed, marketed and sold the DePuy ASR Hip, it contained a defect that made it unreasonably dangerous and unfit for its intended use.

163. The DePuy ASR Hip manufactured by DePuy was defective in design or formulation in that, when it left the hands of DePuy, the foreseeable risk of harm grossly exceeded the benefits associated with the design or formulation of the DePuy ASR Hip.

164. The DePuy ASR Hips were expected to and did reach Plaintiff without substantial change in their condition as manufactured, created, designed, tested, labeled, packaged, supplied, marketed, sold, advertised, warned and otherwise distributed.

165. Plaintiff used the DePuy ASR Hip in a manner for which it was intended or in a reasonably foreseeable manner.

166. The DePuy ASR Hip caused increased risk of serious personal injury and harm upon use, and therefore constitutes a product unreasonably dangerous for normal use due to its defective design, defective manufacture and DePuy's misrepresentations and inadequate facts disclosed to Plaintiff.

167. The DePuy ASR Hip manufactured and/or supplied by DePuy was defective due to:

- a. defective design or formulation in that when it left the hands of DePuy and/or suppliers, the foreseeable risks exceeded the benefits associated with the design or formulation;

- b. defective marketing in that DePuy made inappropriate, misleading, inaccurate and incomplete representations about the DePuy ASR Hip in advertisements, brochures, pamphlets and direct information provided to Plaintiff's orthopedic surgeon. These deceptive marketing representations were made in order to induce sales and increase profits;
- c. defective design or formulation in that when the DePuy ASR Hip left the hands of the manufacturer or suppliers, it was unreasonably dangerous, it was more dangerous than an ordinary consumer would expect and more dangerous than other competitive hip replacements;
- d. inadequate warnings or instructions because DePuy knew or should have known that the ASR Hip created a risk of dangerous side effects and other related conditions and diseases;
- e. inadequate pre-marketing testing which, if conducted properly, would have revealed the serious problems with the DePuy ASR Hip, prior to its first sale; and/or
- f. inadequate post-marketing warning or instruction because, after DePuy knew or should have known of the risks of dangerous side effects or other related conditions and diseases, DePuy failed to provide adequate warnings to users or consumers of the product and continued to promote the DePuy ASR Hip.

168. DePuy, therefore, is strictly liable to Plaintiff.

169. The product reached Plaintiff without substantial change in the condition in which it was sold.

170. As a direct and proximate cause of the defective conditions of the DePuy ASR Hip, Plaintiff has suffered severe physical pain, distress and injury; emotional distress and injury; incurred medical and other expenses; suffered shame, humiliation and the inability to lead a normal life; and has suffered loss of enjoyment of life.

171. The injuries and losses of Plaintiff are permanent in nature and Plaintiff will continue to suffer such losses in the future.

TWELFTH CAUSE OF ACTION

(Strict Liability—Failure to Warn—DePuy Defendants)

172. Plaintiff re-alleges and incorporates by reference all paragraphs above as if fully set forth herein.

173. The DePuy ASR Hip was defective at the time of its manufacture, development, production, testing, inspection, endorsement, prescription, sale and distribution, in that, and not by way of limitation, said product and its warnings, instructions and directions failed to warn of the dangerous propensities of said product, which risks were known or reasonably scientifically knowable to DePuy.

174. DePuy, knew or should have known of the defective condition, characteristics and risks associated with the DePuy ASR Hip, as previously set forth herein.

175. At all times herein mentioned, the DePuy ASR Hip was defective, and DePuy knew that the product was to be used by the user without inspection for defects therein.

176. Moreover, Plaintiff neither knew, nor had reason to know at the time of the use of the DePuy ASR Hip, of the existence of the aforementioned defects.

177. As a result of DePuy's failure to warn of the defective condition of the DePuy ASR Hip, Plaintiff suffered injuries and damages as alleged herein.

THIRTEENTH CAUSE OF ACTION

(Breach of Implied Warranty—DePuy Defendants)

178. Plaintiff re-alleges and incorporates by reference all paragraphs above as if fully set forth herein.

179. DePuy designed, manufactured, labeled, distributed and sold the DePuy ASR Hip at issue in this case.

180. DePuy impliedly warranted to Plaintiff and Plaintiff's orthopedic surgeon that the DePuy ASR Hip was reasonably fit and safe for its intended use as a hip joint replacement system and was of marketable quality throughout.

181. Plaintiff was a foreseeable user of the DePuy ASR Hip.

182. Plaintiff was and is unskilled in the research, design and manufacture of the DePuy ASR Hip and reasonably relied entirely on the skill, judgment and implied warranty of DePuy in using the DePuy ASR Hip.

183. Plaintiff purchased the DePuy ASR Hip from Phippen Medical as distributor for DePuy.

184. The DePuy ASR Hip was neither safe for its intended use nor of merchantable quality, as warranted by DePuy, in that it had dangerous propensities when put to its intended use and would cause severe injuries to the user.

185. The DePuy ASR Hip failed while being used for its intended purpose, causing injury to Plaintiff.

186. As a direct and proximate cause of this breach of warranty, Plaintiff has suffered severe physical pain, distress and injury; emotional distress and injury; incurred medical and other expenses; suffered shame, humiliation and the inability to lead a normal life; and has suffered loss of enjoyment of life.

187. The injuries and losses of Plaintiff are permanent in nature and Plaintiff will continue to suffer such losses in the future.

FOURTEENTH CAUSE OF ACTION

(Breach of Express Warranty—DePuy Defendants)

188. Plaintiff re-alleges and incorporates by reference all paragraphs above as if fully set forth herein.

189. DePuy designed, manufactured, labeled, and distributed the DePuy ASR Hip at issue in this case.

190. DePuy expressly warranted by affirmation, promise, description, and sample that the DePuy ASR Hip was reasonably fit for extended, safe use as a hip joint replacement system.

191. The above representations made by DePuy were meant to directly or indirectly induce persons such as Plaintiff and the orthopedic surgeon of Plaintiff to purchase the DePuy ASR Hip.

192. Plaintiff was a foreseeable user of the DePuy ASR Hip.

193. Plaintiff relied on the skill, judgment, representations and foregoing express warranties of DePuy.

194. Plaintiff purchased the DePuy ASR Hip from Phippen Medical as distributor for DePuy.

195. The warranties and representations made by DePuy were false in that the DePuy ASR Hip was not safe and was unfit for the uses for which it was intended.

196. The DePuy ASR Hip failed while being used for its intended purpose, causing injury to Plaintiff.

197. As a direct and proximate cause of this breach of warranty, Plaintiff has suffered severe physical pain, distress and injury; emotional distress and injury; incurred medical and other expenses; suffered shame, humiliation and the inability to lead a normal life; and has suffered loss of enjoyment of life.

198. The injuries and losses of Plaintiff are permanent in nature and Plaintiff will continue to suffer such losses in the future.

FIFTEENTH CAUSE OF ACTION

(Truth in Advertising—Utah Code Ann. §§ 13-11a-1 *et seq.*—DePuy Defendants)

199. Plaintiff re-alleges and incorporates by reference all paragraphs above as if fully set forth herein.

200. The DePuy Defendants constitute a “person” within the meaning of Utah Code section 13-11a-2(7).

201. The DePuy Defendants have engaged in deceptive trade practices as described above by representing that the DePuy ASR Hip had characteristics, benefits, and/or qualities that it does not have and/or by representing that the DePuy ASR Hip was of a particular standard, quality, or grade when, in fact, the product was not of that standard, quality, or grade. These actions meet the definition of “deceptive trade practices” set forth in Utah Code section 13-11a-3.

202. The Plaintiff, as an injured party, may sue and recover damages sustained as a result of Phippen Medical’s unlawful acts.

203. The Plaintiff, as an injured party, is entitled to an award of costs and reasonable attorneys’ fees incurred in enforcing its rights.

SIXTEENTH CAUSE OF ACTION

**(Utah Consumer Sales Practices Act—Utah Code Ann. § 13-11-1 *et seq.*—
DePuy Defendants)**

204. Plaintiff re-alleges and incorporates by reference all paragraphs above as if fully set forth herein.

205. The DePuy Defendants constitute a “supplier” within the meaning of Utah Code section 13-11-3(6).

206. The promotion and sale of the DePuy ASR Hip by the DePuy Defendants constitutes a “consumer transaction” within the meaning of Utah Code section 13-11-3(2)(a).

207. The DePuy Defendants have engaged in deceptive acts and practices as described above by knowingly and intentionally representing that the DePuy ASR Hip had approval, performance characteristics, uses, or benefits which it did not have; and indicating that the DePuy ASR Hip was of a particular standard, quality, or grade when, in fact, the product was not of that standard, quality, or grade. These actions meet the definition of a “deceptive act or practice of a supplier in connection with a consumer transaction” as set forth in Utah Code section 13-11-4(1) and -(2).

208. Plaintiff has suffered loss as a result of the DePuy Defendants’ violation of the Utah Consumer Sales Practices Act, and is therefore entitled to recover damages sustained as a result of the DePuy Defendants’ unlawful acts.

209. Plaintiff, as an injured party, is entitled to an award of costs and reasonable attorneys’ fees incurred in enforcing its rights.

SEVENTEENTH CAUSE OF ACTION

(Fraud by Concealment —DePuy Defendants)

210. Plaintiff re-alleges and incorporates by reference all paragraphs above as if fully set forth herein.

211. DePuy, from the time that the DePuy ASR Hip was first tested, studied, researched, evaluated, endorsed, manufactured, marketed, distributed and sold, and up to the present, willfully deceived Plaintiff by concealing from Plaintiff, Plaintiff's orthopedic surgeon and the general public, the true material facts concerning the DePuy ASR Hip, which the DePuy had a duty to disclose.

212. DePuy conducted a sales and marketing campaign to promote the sale of the DePuy ASR Hip and willfully deceived Plaintiff, Plaintiff's orthopedic surgeon and the general public as to the health risks and consequences of the use of the DePuy ASR Hip.

213. DePuy was aware of the foregoing, and that the DePuy ASR Hip was not safe, fit, or effective for human use, was hazardous to health, and had a substantial propensity to cause serious injuries to users, including but not limited to the injuries suffered by Plaintiff as delineated herein.

214. DePuy intentionally concealed and suppressed the true facts concerning the DePuy ASR Hip with the intent to defraud Plaintiff, in that DePuy knew that Plaintiff's orthopedic surgeon would not recommend and prescribe the DePuy ASR Hip, and Plaintiff would not have used the DePuy ASR Hip, if they were aware of the true facts concerning the dangers of the DePuy ASR Hip.

215. At all times herein mentioned, neither Plaintiff nor her physician was aware of the facts set forth, and had they been aware of said facts, they would not have acted as they did, that is, reasonably would not have relied upon said misrepresentations of safety and efficacy and utilized the DePuy ASR Hip.

216. As a direct and proximate cause of the DePuy Defendants' concealment of material facts as set forth above, Plaintiff has suffered severe physical pain, distress and injury; emotional distress and injury; incurred medical and other expenses; suffered shame, humiliation and the inability to lead a normal life; and has suffered loss of enjoyment of life.

217. The injuries and losses of Plaintiff are permanent in nature and Plaintiff will continue to suffer such losses in the future.

EIGHTEENTH CAUSE OF ACTION

(Negligent Misrepresentation—DePuy Defendants)

218. Plaintiff re-alleges and incorporates by reference all paragraphs above as if fully set forth herein.

219. DePuy, from the time that the DePuy ASR Hip was first tested, studied, researched, evaluated, endorsed, manufactured, marketed, sold and distributed, and up to the present, made represented and markets the DePuy ASR Hip as being safe and effective.

220. After DePuy became aware of the numerous risks associated with the DePuy ASR Hip, however, DePuy failed to communicate to Plaintiff, Plaintiff's medical providers, or the general public that the DePuy ASR Hip was not safe, fit, or effective for human use, was hazardous to health, and had a substantial propensity to cause serious injuries to users, including but not limited to the injuries suffered by Plaintiff as delineated herein.

221. DePuy conducted a sales and marketing campaign to promote the sale of the DePuy ASR Hip and willfully deceived Plaintiff, Plaintiff's orthopedic surgeon and the general public as to the health risks and consequences of the use of the DePuy ASR Hip.

222. DePuy made the foregoing and below representations without any reasonable grounds for believing them to be true, when it knew or reasonably should have known of the falsity of such misrepresentations, including but not limited to:

- a. The DePuy ASR Hip is designed to reduce wear and provide higher function for all patients;
- b. The DePuy ASR Hip is clinically proven to reduce wear;
- c. The DePuy ASR Hip is based on a strong clinical history and reduces wear compared to the traditional hip replacement; and
- d. The DePuy ASR Hip is designed to be installed in younger and more active patients and will last longer.

223. DePuy failed to disclose information concerning the DePuy ASR Hip which was known at the time of the purchase by Plaintiff and was used to induce Plaintiff's orthopedic surgeon and Plaintiff into purchasing the DePuy ASR Hip, including but not limited to:

- a. Failing to disclose that independent experts from around the world were warning that the design of the DePuy ASR Hip was flawed;
- b. Failing to disclose that orthopedic experts were warning that the DePuy ASR Hip cup was too thin and prone to deformation;
- c. Failing to disclose that the clearance between the DePuy ASR Hip cup and head was too small and patients could experience jamming of the components;

- d. Failing to disclose that the treatment of the metal used for the DePuy ASR Hip cup was prone to increased wear and caused excessive metal debris;
- e. Failing to disclose that the DePuy ASR Hip cup failed to obtain bony ingrowth and became loose; and
- f. Failing to disclose that by 2005, the DePuy ASR Hip cup was shown, in Australia, to have a 4-fold higher rate of revision than similar cups of competitors.

224. These representations and omissions were made directly by DePuy, by sales representatives and other authorized agents of DePuy, and in publications and other written materials directed to physicians, medical patients and the public, with the intention of inducing reliance and the prescription, purchase and use of the DePuy ASR Hip, even though DePuy knew or reasonably should have known that such representations and omissions were false and misleading.

225. The foregoing representations and omissions by DePuy were in fact false, in that the DePuy ASR Hip was not safe, fit, or effective for human use, was hazardous to health, and had a substantial propensity to cause serious injuries to users, including but not limited to the injuries suffered by Plaintiff as delineated herein.

226. The foregoing representations and omissions by DePuy were made with the intention of inducing reliance and the prescription, purchase and use of the DePuy ASR Hip.

227. In reliance on the misrepresentations and omissions by DePuy, Plaintiff and/or Plaintiff's orthopedic surgeon were induced to purchase and use the DePuy ASR Hip.

228. If Plaintiff had known of the true facts and the facts concealed by DePuy, Plaintiff and/or Plaintiff's orthopedic surgeon would not have used the DePuy ASR Hip.

229. The reliance of Plaintiff and/or Plaintiff's orthopedic surgeon upon DePuy's misrepresentations and omissions was justified because such misrepresentations and omissions were made and conducted by individuals and entities that were in a position to know the true facts.

230. As a direct and proximate cause of DePuy's concealment of material facts as set forth above, Plaintiff has suffered severe physical pain, distress and injury; emotional distress and injury; incurred medical and other expenses; suffered shame, humiliation and the inability to lead a normal life; and has suffered loss of enjoyment of life.

231. The injuries and losses of Plaintiff are permanent in nature and Plaintiff will continue to suffer such losses in the future.

PUNITIVE DAMAGES ALLEGATIONS

232. Plaintiff re-alleges and incorporates by reference all paragraphs above as if fully set forth herein.

233. The acts, conduct, and omissions of Defendants, and each of them, as alleged throughout this Complaint were willful and malicious and were done with a conscious disregard for the rights and safety of Plaintiff and other users of the DePuy ASR Hip and for the primary purpose of increasing Defendants' profits from the sale and distribution of the DePuy ASR Hip.

234. Defendants' outrageous and unconscionable conduct warrants an award of exemplary and punitive damages against each Defendant in an amount appropriate to punish and make an example of each Defendant.

235. Prior to the manufacturing, sale and distribution of the DePuy ASR Hip, Defendants, and each of them, knew that the DePuy ASR Hip was in a defective condition as previously described herein and knew that those who were prescribed the DePuy ASR Hip would experience and did experience severe physical pain, mental, and emotional injuries.

236. Further, Defendants, and each of them through their officers, directors, managers, and agents, had knowledge that the DePuy ASR Hip presented a substantial and unreasonable risk of harm to the public, including Plaintiff and as such, said consumers of the DePuy ASR Hip were unreasonably subjected to risk of serious injury from the use of the DePuy ASR Hip.

237. Despite such knowledge, Defendants, and each of them, acting through their officers, directors and managing agents for the purpose of enhancing Defendants' profits, knowingly and deliberately failed to remedy the known defects in the DePuy ASR Hip and failed to warn the public, including Plaintiff of the extreme risk of injury occasioned by said defects inherent in the DePuy ASR Hip.

238. Defendants and their individual agents, officers, and directors intentionally proceeded with the manufacturing, sale, and distribution and marketing of the DePuy ASR Hip knowing persons would be exposed to serious danger in order to advance Defendants' own pecuniary interest and monetary profits.

239. Defendants' conduct was despicable, and so contemptible that it would be looked down upon and despised by ordinary decent people, and was carried on by Defendants with willful and conscious disregard for the safety of Plaintiff, entitling Plaintiff to exemplary damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against the Defendants, and each of them jointly and severally, as follows, as appropriate to each cause of action alleged and as appropriate to the particular standing of Plaintiff:

1. General damages in an amount in excess of \$10,000,00;
2. Special damages in an amount in excess of \$10,000.00;
3. For punitive or exemplary damages according to proof;
4. Injunctive, restitutionary, and other equitable relief;
5. Attorneys' fees;
6. For costs of suit incurred herein;
7. For pre-judgment interest as provided by law; and
8. For such other and further relief as the Court may deem just and proper.

JURY DEMAND

Plaintiff hereby demands a trial by jury as to all claims in this action.

DATED this 29th day of June 2011.

BENNETT TUELLER JOHNSON & DEERE

A handwritten signature in black ink, appearing to read "Eric G. Goodrich", written over a horizontal line.

Eric G. Goodrich
Attorneys for Plaintiff