

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE No. 0:12-cv-61946-CMA

JAMIE SIMON,

Plaintiff,

vs.

HOWMEDICA OSTEONICS CORPORATION,
et al.

Defendants.

**PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO MOTION FOR REMAND
AND FOR LEAVE TO AMEND THE COMPLAINT**

COMES NOW the Plaintiff, Jaime Simon by and through the undersigned counsel, and files this Reply in Support of Plaintiffs' Motion for Remand and for Leave to Amend the Complaint, and respectfully requests that this Court enter an Order remanding this case back to the Circuit Court for the 17th Judicial Circuit in and for Broward County, Florida.

SUFFICIENT EVIDENCE EXISTS TO PERMIT PLAINTIFF'S TO AMEND THE COMPLAINT TO SUBSTITUTE ORTHOPEDIC IMPLANT PROFESSIONALS, INC. – A NON-DIVERSE DEFENDANT – FOR DEFENDANT ORTHOPEDIC SOLUTIONS, INC.

Defendant Howmedica Osteonics Corporation in its Response to Plaintiff's Motion for Remand provides affidavit testimony and documentary evidence demonstrating that Orthopedic Implant Professionals, Inc. (hereinafter "OIP"), an entity Plaintiff has sought leave to add to her complaint pursuant to Rule 15 (a)(1)(B) and 28 U.S.C. §1447 (e), has an exclusive agency

relationship with Howmedica for the sale, marketing and, in certain instances, distribution of its products, including but not limited to the Rejuvenate Hip System at issue in this case.

As stated in her Motion for Remand, it is undisputed that Florida has expanded the doctrine of strict liability to virtually the entire chain of distribution to include manufacturers, wholesalers, distributors, lessors and retailers. See *Samuel Friedland Family Enterprises v. Amoroso*, 630 So.2d 1067, *1068 (Fla.,1994)(citing *Mobley v. South Florida Beverage Corp.*, 500 So.2d 292 (Fla. 3d DCA 1986) (retailers), review denied, 509 So.2d 1117 (Fla.1987); *Visnoski v. J.C. Penney Co.*, 477 So.2d 29 (Fla. 2d DCA 1985) (distributors); *Perry v. Luby Chevrolet, Inc.*, 446 So.2d 1150 (Fla. 3d DCA 1984) (retailers); *Adobe Bldg. Centers, Inc. v. Reynolds*, 403 So.2d 1033 (Fla. 4th DCA) (retailers and wholesalers), review dismissed, 411 So.2d 380 (Fla.1981). See also *Siemens Energy v. Medina*, 719 So.2d 312 (Fla. 3rd DCA 1998).

If Defendant's affidavits and exhibits are to be accepted on their face, Orthopedic Implant Professionals, Inc., which Plaintiff seeks to add to this cause of action, is and was the exclusive agent of Howmedica Osteonics Corporation with exclusive right to sell its products including the Stryker Rejuvenate Hip Prosthesis, in South Florida, including Broward County, during the relevant periods covered by the Plaintiff's cause of action. See, Exhibit 1-A to Defendant's Response to Plaintiff's Motion for Remand. Interestingly, the affidavit of Charles C. O'Brien is based upon the Exclusive Agency Agreement effective January 1, 2010 which lays most of the salient facts underlying Defendant's argument is selectively and heavily redacted. For example, the Agreement subheading entitled "1. Exclusive Agency" is redacted rendering an incomplete picture, at best, of the parameters of the agency agreement. In fact, very nearly all the terms of the agreement are redacted saving those which support Defendant's arguments. Areas of the agreement redacted either in whole or in part include "Covenants of the Agent," "Covenants of

Stryker Orthopedics,” “Direct Sales by Stryker Orthopedics,” “Performance Requirements,” “Supply of Instruments to the Agent,” “Order; Delivery,” “Changes in Products, Parts, and Policies,” Personal Guaranty,” “Returns,” and “Relationship of the Parties,” to name but a few. Defendant asks this Court to evaluate whether Orthopedic Implant Professions, Inc. was a distributor under Florida law based a partial and at best selective presentation of the evidence. Certain portions of the agreement detailing Howmedica’s relationship to Orthopedic Implant Professionals, Inc. and its principle Frank Russo will certainly be illuminating. Provisions of the Agreement detailing responsibilities of the parties as to Performance Requirements, Personal Guaranty, Changes in Product, Parts and Policies, and Returns if unredacted would significantly expand our understanding of the relationship between Howmedica, Orthopedic Implant Professionals, Inc. and the sale and distribution of these products.

Similarly, Exhibit 4 to its Response to Plaintiff’s Motion for Remand entitled “Holy Cross Hospital Letter of Participation for Orthopedic Implants and Instrumentation” is heavily redacted. Specifically redacted are sections of the agreement concerning “Returned Product,” “Order Cancellation,” “Education/Marketing/Sales Support,” “Warranty” and “Product Recalls.” See, Ex. 4 to Defendant’s Response to Plaintiff’s Motion for Remand at ¶¶ 8-10, 12 and 13. There is no specific statement by anyone on behalf of Orthopedic Implant Professions, Inc. that they did not have responsibilities concerning any of these interactions with Holy Cross Hospital. Again, Defendant’s selective reveal of its agreements with Plaintiff’s healthcare provider and OIP presents an incomplete appreciation of Orthopedic Implant Professionals place in the chain of distribution.

Defendant does however provide some detail as to OIP activities. Specifically, Defendant states that OIP transmits orders from customers in its territories to Howmedica.

Affidavit of Charles O'Brien at ¶9. OIP may under certain circumstances "facilitate the delivery of products, including the Rejuvenate System," to customers in its territory. Id. "On occasion, OIP may deliver products, including the Rejuvenate System directly to its customers within OIP's Territory." Id. According to Defendant's own affidavits and redacted agreements, OIP is more than a "mere conduit of information," as suggested by Defendant.

"The rationale for targeting all entities in the chain of distribution is that "they are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products." *Faddish v. Buffalo Pumps*, 2012 WL 3140200, *8 (S.D. Fla) *citing* *Vandermark v. Ford Motor Co.*, 391 P.2d 168 (1964). Judge Hurley in *Faddish* declined to extend liability in an asbestos case to manufacturers of component parts that were purchased and used by the Navy where said manufacturers had no control over insulation used and derived no revenue from sale of asbestos containing products used on the ship in question. Unlike defendants in that case, here OIP had exclusive rights to sell Howmedica's products in South Florida, directly marketed those products to healthcare providers in South Florida, placed orders for Homedica products, occasionally distributed those products to customers in its exclusive territory, was in the business of selling Howmedica products including the Rejuvenate System, and derived a revenue from those sales, marketing and distribution activities. It is not dispositive on this issue that OIP never took "title" to the products. See, *Rivera v. Baby Trend, Inc.*, 914 So.2d 1102 (Fla. 4th DCA 2005)(holding that distributor liable where it never took possession of product, but was actual seller of the product, marketed the product albeit in its own name and accepted payment for the product).

Though they deny the specific devices in this case were distributed by Orthopedic Implant Professionals, Inc., Defendant concedes that OIP in fact distributes its products. It is

indisputable that OIP was in the business of marketing, selling and, at times distributing or facilitating the distribution of Howmedica's products in South Florida. See, generally *Lane v. International Paper Company*, 545 So.2d 484 (Fla 1st DCA 1989)(on any theory of products liability, plaintiff must show that defendant is in the business and gains profits from the distribution and sale of products through the stream of commerce). In fact, none of the affidavits submitted in opposition to Plaintiff's motion allege that Orthopedic Implant Professionals, Inc. did not market these products to William Leone, MD, Plaintiff's surgeon, or Holy Cross Hospital or profit from their sale. In fact, they confirm the opposite.

CONCLUSION

Plaintiff asserts there is adequate basis as outlined above to allow the amendment of her Complaint to add, at a minimum, proposed Defendant Orthopedic Implant Professionals, Inc., and subsequently to have the matter remanded to Circuit Court for the 17th Judicial Circuit in and for Broward County, Florida.

Plaintiff does not believe oral argument is warranted on the matter and will submit on the papers.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of October, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system and a true and correct copy was served by CM/ECF on all counsel of record identified on the Service List below.

/s/ Jesse N. Bernheim
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