IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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EMILY M. THOMPSON, SARA M. THOMPSON
and SCOT G. THOMPSON,

Plaintiffs,

v.

OPINION and ORDER

10-cv-612-bbc

STRYKER CORPORATION and
STRYKER SALES CORPORATION,

Defendants.

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In this products liability case, initially filed in the District of Minnesota, plaintiff Emily Thompson and her parents, Sara and Scot Thompson, contend that defendants Stryker Corporation and Stryker Sales Corporation should be held liable for causing permanent damage to Emily Thompson's shoulder by manufacturing, promoting and distributing unsafe medical pumps that were used to continuously inject anesthetic into plaintiff's shoulder following surgery. According to plaintiffs, the treatment, which has not been approved by the Food and Drug Administration, resulted in complete destruction of Emily's shoulder cartilage. Plaintiffs allege that Emily will be required to undergo additional surgeries, including shoulder transplants and insertion of a prosthetic shoulder to treat her condition. Plaintiffs raise six counts in their complaint: (1) negligence; (2) negligent

misrepresentation; (3) fraud; (4) strict product liability; (5) strict tort liability—failure to warn; and (6) breach of implied warranty.

Now before the court is defendants' motion for judgment on the pleadings, in which they seek judgment on counts 2, 3 and 6 of the complaint. Dkt. #52. Defendants contend that Wisconsin law applies, not Minnesota law, and that Wisconsin does not recognize plaintiffs' breach of warranty or misrepresentation claims. In addition, defendants contend that plaintiffs' fraud claims are not pleaded with particularity as required by Fed. R. Civ. P. 9(b). Also, defendants move to dismiss plaintiffs' request for disgorgement of profits and attorney fees.

I am denying the motion. Before transferring the case to this court, the district court in Minnesota considered and rejected the same arguments defendants make in the present motion with the case in essentially the same posture. (Defendants' motion for judgment on the pleadings does not differ in any material way from a motion to dismiss, which they filed in Minnesota.). Under the law of the case doctrine, I will not reconsider that court's decision without a compelling reason. Defendants have offered none.

OPINION

Under the law of the case doctrine, "a successor judge should not reconsider the decision of a transferor judge at the same hierarchical level of the judiciary when a case is transferred." Brengettcy v. Horton, 423 F.3d 674, 680 (7th Cir. 2005); see also Gilbert v.

Illinois State Board of Education, 591 F.3d 896, 902 (7th Cir. 2010) ("in general, the successor judge is discouraged from reconsidering the decisions of the transferor judge"). "[T]he law of the case doctrine in these circumstances reflects the rightful expectation of litigants that a change of judges mid-way through a case will not mean going back to square one." Brengettcy, 423 F.3d at 680 (quoting Best v. Shell Oil Co., 107 F.3d 544, 546 (7th Cir. 1997)).

On October 14, 2010, this was case transferred from the District of Minnesota, where several dozen "pain pump" cases have been filed against defendants and other pain pump manufacturers. Dkt. #33. However, before transferring the case, the district court denied a motion to dismiss filed by defendants. In that motion, brought under Fed. R. Civ. P. 12(b)(6), defendants argued that plaintiffs' complaint should be dismissed for several reasons. In particular, defendants contended that Wisconsin law applies to plaintiffs' claims, that Wisconsin does not recognize a claim for breach of warranty, that plaintiffs' fraud and misrepresentation claims were not pleaded with particularity as required by Rule 9(b) and that the complaint did not state a claim for an award of disgorgement of profits or attorneys fees. In other words, defendants raised arguments in its motion to dismiss before the Minnesota court nearly identical to those it is raising in its Rule 12(c) motion for judgment on the pleadings. (In their motion to dismiss, defendants also raised arguments regarding the plausibility of plaintiffs' negligence claims that they have not repeated in the present motion.) The district court denied defendants' motion to dismiss in full, concluding that it

amounted to an "extraordinarily premature motion[] for summary judgment" that asked the court to make credibility determinations, weigh evidence and reject plaintiffs' allegations as untrue. Dkt. #33 at 3.

Although defendants have abandoned some of the arguments they made before the Minnesota court and expanded others, they are essentially raising the same arguments that were rejected as premature by the district court in Minnesota. In particular, defendants argue for the second time that Wisconsin law applies to plaintiffs' claims, that Wisconsin law does not recognize certain of plaintiffs' claims, that plaintiffs' fraud claims are not pleaded with particularity and that plaintiffs' requests for attorneys fees and disgorgement of profits should be dismissed. Although the motion is now called a "motion for judgment on the pleadings" because defendants have filed an answer, none of the facts or claims in the case have changed; the motion is governed by the same legal standard, Buchanan-Moore v. County of Milwaukee, 570 F.3d 824, 827 (7th Cir. 2009), and a ruling in defendants' favor on this motion would achieve the same results that a favorable ruling on their 12(b)(6) motion would have achieved. In sum, defendants seek reconsideration of the Minnesota court's order.

As the Court of Appeals for the Seventh Circuit has explained, "[a]lthough the second judge may alter previous rulings if he is convinced they are incorrect, he is not free to do so . . . merely because he has a different view of the law or facts from the first judge." Best, 107 F.3d at 546 (internal citations and quotation marks omitted); Gilbert, 591 F.3d

at 902 (successor judge should depart from the transferor judge's decision only if she has "strong" conviction that earlier ruling was wrong); Santamarina v. Sears, Roebuck & Co., 466 F.3d 570, 572 (2006) (successor judge should overturn earlier ruling "if there is a compelling reason, such as a change in, or clarification of, law that makes clear that the earlier ruling was erroneous").

Defendants have not presented the court with a compelling reason "mak[ing] clear" that the Minnesota court erred in denying defendants' motion to dismiss was erroneous. Nor do defendants contend that there is a difference between the standard of review applicable to its motion to dismiss on the one hand and the motion for judgment on the pleadings on the other that would lead to a different result.

In response to plaintiffs' argument that defendants are "attempting a second bite at the apple," defendants respond only that "the Minnesota court did not address the substantive issues in the Rule 12(b)(6) motion and merely transferred venue on forum non conveniens grounds." Dfts.' Br., dkt. #60, at 1. However, although the Minnesota court did not devote a significant portion of its order to defendants' motion to dismiss, the court cited the correct legal standards for evaluating a motion to dismiss, concluded that defendants' motion was premature and denied it in full. Dkt. #33 at 2-3. Moreover, the court's denial of defendants' motion to dismiss was in line with many similar orders the Minnesota district court has issued in response to a wave of similar motions to dismiss pain pump complaints that defendants have filed under Rules 12(b)(6) and 9(b). See, e.g., McIntosh v. Stryker

Corp., 2010 WL 4967820, *2-3 (Dec. 1, 2010) (denying motion to dismiss as premature summary judgment motion, finding that complaint satisfies Rule 8 and Rule 9 pleading standards considering the types of claims alleged and limited discovery that had taken place, and concluding that without more information, it would be premature to determine which state's law applies to plaintiff's claims); Partridge v. Stryker Corp., 2010 WL 4967845, *2-3 (D. Minn. Dec. 1, 2010) (same); Ridings v. Stryker Sales Corp., 2010 WL 4963064, *2-3 (D. Minn. Dec. 1, 2010) (same); Mack v. Stryker Corp., 2010 WL 4386898, *2-3 (D. Minn. Oct. 28, 2010) (same). Because defendants have not offered a compelling reason to deviate from the rationale applied by the transferring court in its earlier order in this case (and in other cases decided by the district court in Minnesota), the law of the case doctrine counsels against reconsideration of that ruling. Therefore, I will deny defendants' motion for judgment on the pleadings.

ORDER

IT IS ORDERED that the motion for judgment on the pleadings, dkt. #52, filed by defendants Stryker Corporation and Stryker Sales Corporation is DENIED.

Entered this 28th day of July, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge