

SUPREME COURT OF NOVA SCOTIA

Citation: *Scharf v. DePuy Orthopaedics Inc.*, 2021 NSSC 198

Date: 20210609

Docket: Hfx. No. 342055

Registry: Halifax

Between:

JO-ANNE SCHARF

Plaintiff

v.

DEPUY ORTHOPAEDICS, INC., DEPUY INTERNATIONAL LTD., DEPUY, INC., JOHNSON & JOHNSON SERVICES, INC., JOHNSON & JOHNSON S.L., INC., JOHNSON & JOHNSON INC., JOHNSON & JOHNSON INTERNATIONAL, INC., and JOHNSON & JOHNSON ORTHOPAEDICS (P.R.) INC.

Defendants

DECISION ON APPROVAL OF DISMISSAL ORDER

Judge: The Honourable Justice Scott C. Norton

Heard: By Correspondence filed June 4, 2021

Decision: June 9, 2021

Counsel: Raymond F. Wagner Q.C., for the Plaintiff
Robin D. Linley, for the Defendants

By the Court:

[1] The representative Plaintiff in this Class Proceeding moves by correspondence for this Court to approve the dismissal of the within Action with prejudice and without costs.

[2] The proposed Class Proceeding was filed on January 10, 2011. The Statement of Claim alleged that Nova Scotia residents implanted with DePuy ASR hip implants, manufactured by the Defendants, suffered harm due to the alleged actions of the Defendants which led to premature revision surgery. The Action was commenced on behalf of “a class of all other Nova Scotia residents who were implanted with a DePuy Hip Implant at anytime between July 2003 to the date of certification of this proceeding”.

[3] The filing of the within proceeding was preceded by the filing of a substantially similar proposed class action in the Ontario Superior Court of Justice on December 3, 2010 (“Ontario proceeding”). The Ontario proceeding was certified on August 27, 2013. The certified class in the Ontario proceeding includes residents of Nova Scotia. Counsel for the Plaintiff in the Nova Scotia Action agreed to work collaboratively with Plaintiff counsel in the Ontario proceeding for the sake of efficiency and judicial economy and agreed that the Ontario proceeding would be advanced with no active steps taken in the Nova Scotia Action. To date, no steps have been taken in the Nova Scotia Action subsequent to its filing.

[4] The parties in the Ontario proceeding reached a settlement for the all-inclusive amount of \$15.5 million (the “Settlement Agreement”).

[5] On May 11, 2021 a motion to approve the Settlement Agreement was heard virtually by the case management judge, the Honorable Justice Edward Belobaba. At the conclusion of this hearing, Justice Belobaba approved the Settlement Agreement and the legal fees being sought in connection with the Settlement Agreement and advised that written reasons would be issued.

[6] That same day Justice Belobaba issued the order approving the Settlement Agreement (the “Settlement Approval Order”), Class Counsel fees, disbursements, costs for implementing the notice plan and the requested honoraria. On May 21, 2021 Justice Belobaba issued his written reasons approving the Settlement Agreement, requested legal fees and requested honoraria (*Crisante v. DePuy Orthopaedics*, 2021 ONSC 3703).

[7] Section 7.3(ii) of the Settlement Agreement provides that the Nova Scotia Action shall be dismissed on consent and with Court approval as required. Payment of the settlement funds under the Settlement Agreement is contingent on this Court dismissing the within action. The Defendants consent to the dismissal of the within action and to the form of order proposed.

[8] Section 38 of the *Class Proceedings Act*, S.N.S. 2007, c. 28, provides that:

- (1) A class proceeding may be settled or discontinued only
 - (a) with the approval of the court; and
 - (b) on the terms or conditions the court considers appropriate.

...

(5) In dismissing a class proceeding or in approving a settlement or discontinuance, the court shall consider whether notice should be given and whether the notice should include any of the following:

- (a) an account of the conduct of the class proceeding;
- (b) a statement of the result of the class proceeding;
- (c) a description of any plan for distributing any settlement funds.

[9] A resolution has been reached in the Settlement Agreement to resolve the claims of a class that includes Nova Scotia residents implanted with the ASR Implants. The Settlement Agreement has obtained the approval of the Ontario Superior Court of Justice as being fair and reasonable and in the best interests of the class. According to the settlement approval notification plan outlined in the Settlement Agreement at Schedule "F", a broad notice program will be implemented including publication of notice in the National Edition of the *Globe & Mail*, and local publication in the *Chronicle Herald*, in addition to providing direct notice to those known to class counsel. Counsel for the Plaintiff in the Nova Scotia Action will provide direct notice of the Settlement Agreement approval to those individuals in its database.

[10] For these reasons, this Court is of the view that additional separate notice of the dismissal of the within Action would be redundant and serve no useful purpose.

[11] This Court is satisfied on the motion record that it is appropriate that the within Action be dismissed with prejudice and without costs. The consent order submitted is approved and will issue.

Norton, J.