

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION**

SUSAN KELLY; and TIMOTHY
KELLY,

Plaintiffs,

vs.

ETHICON, INC.; and JOHNSON &
JOHNSON,

Defendants.

No. 20-CV-2036-CJW-MAR

**MEMORANDUM OPINION
AND ORDER**

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I. INTRODUCTION

This matter is before the Court on plaintiffs Susan Kelly (“plaintiff”) and Timothy Kelly’s (“Timothy”) (collectively “plaintiffs”) Motion for Leave to Take the Deposition of Randall Bremner, M.D. (“Dr. Bremner”) (Doc. 83) and plaintiffs’ Motion to Reconsider and Amend this Court’s Memorandum Opinion and Order on Defendants’ Motion for Summary Judgment (Doc. 84). As to both motions, defendants Johnson & Johnson and Ethicon, Inc. (“Ethicon”) timely resisted and plaintiffs timely replied. (Docs. 87, 88, 89, & 90). For the following reasons, the Court **denies** both of plaintiffs’ motions.

This matter is also before the Court on defendants’ Motion for Leave to File Supplemental Motion for Summary Judgment on the Statute of Limitations. (Doc. 82). Plaintiffs timely resisted and defendants timely replied. (Docs. 85 & 86). For the following reasons, the Court **grants** defendants’ motion.

The Court will address each motion below in the following order: (1) plaintiffs’ motion for leave to depose Dr. Bremner (Doc. 83); (2) plaintiffs’ motion for reconsideration (Doc. 84); and (3) defendants’ motion for leave to file a supplemental motion for summary judgment (Doc. 82).

II. RELEVANT BACKGROUND

Plaintiffs have resided in Iowa since at least 1990. (Doc. 38-1, at 3). Johnson & Johnson and its subsidiary Ethicon are both New Jersey corporations. (Doc. 1-1, at 1).

On March 7, 2004, plaintiff received a tension-free vaginal tape (“TVT”) mesh implant manufactured by Ethicon. *See* (Doc. 39, at 2). Plaintiff’s implantation procedure took place in Waterloo, Iowa. (*Id.*). Plaintiff received the implant to stabilize her prolapsed bladder. (Doc. 40-1, at 44). Dr. Bremner performed the procedure. (Doc. 39, at 2). Plaintiff testified that she does not remember receiving any brochures, handouts, or other materials about the TVT implant before her surgery, that she did not

know who manufactured the implant, and that she did not rely on any statements by defendants in selecting it. (*Id.*, at 2–3; Doc. 45, at 3–4). Plaintiff, however, states that Dr. Bremner failed to inform her of the potential risks posed by the TVT implant and that she relied on his advice. (Doc. 45, at 3–6). Plaintiff states she was only informed of the risks posed by the implant procedure and not the TVT implant itself. (*Id.*, at 5). Plaintiff alleges that, as a result of her TVT implant corroding, oxidizing, or eroding, she has suffered from, among other things, “depression, pelvic pain, dyspareunia, loss of services of her spouse, continued and worsening incontinence, [urinary tract infections], urinary retention, abdominal pain, urgency, frequency, and dysuria.” (*Id.*, at 4) (citing plaintiff’s deposition testimony).

On February 28, 2014, plaintiffs filed suit in the multidistrict litigation (“MDL”) related to defendants’ TVT implant in the United States District Court for the Southern District of West Virginia. (Doc. 1). Plaintiffs asserted 17 claims consisting of: negligence (Count I); strict liability for a manufacturing defect (Count II); strict liability for failure to warn (Count III); strict liability for a defective product (Count IV); strict liability for a design defect (Count V); common law fraud (Count VI); fraudulent concealment (Count VII); constructive fraud (Count VIII); negligent misrepresentation (Count IX); negligent infliction of emotional distress (Count X); breach of express warranty (Count XI); breach of implied warranty (Count XII); violation of consumer protection laws (Count XIII); gross negligence (Count XIV); unjust enrichment (Count XV); loss of consortium (Count XVI); and punitive damages (Count XVII). (*Id.*).¹ On September 17, 2014, plaintiff had part of her TVT implant removed in Iowa City, Iowa by Dr. Elizabeth Takacs. (Docs. 39, at 2; 45, at 3).

¹ As previously noted, Timothy’s only claim is for loss of consortium. (Doc. 81, at 4 n.1).

On August 9, 2019, defendants moved for partial summary judgment on plaintiff's claims for negligence (to the extent it asserted claims for negligent failure to warn or negligent manufacturing defect) (Count I), strict liability for manufacturing defect (Count II), strict liability for failure to warn (Count III), strict liability for defective product (Count IV), strict liability for design defect (Count V), common law fraud (Count VI), fraudulent concealment (Count VII), constructive fraud (VIII), negligent misrepresentation (Count IX), negligent infliction of emotional distress (Count X), breach of express warranty (Count XI), breach of implied warranty (Count XII), violation of consumer protection laws (Count XIII), gross negligence (Count XIV), and unjust enrichment (Count XV). (Doc. 38, at 1). On August 28, 2019, plaintiffs timely filed a resistance. (Doc. 45).

On June 2, 2020, this case was transferred from the Southern District of West Virginia to this Court. (Doc. 62). On August 7, 2020, the Court granted in part and denied in part defendants' motion for partial summary judgment. (Doc. 81). The Court granted summary judgment on plaintiff's claims for negligence (as it relates to negligent failure to warn and negligent manufacturing defect) (Count I); strict liability for manufacturing defect (Count II); strict liability for failure to warn (Count III); strict liability for defective product (Count IV); strict liability for design defect (Count V); common law fraud (Count VI); fraudulent concealment (Count VII); constructive fraud (VIII); negligent misrepresentation (Count IX); breach of express warranty (Count XI); breach of implied warranty (Count XII); violation of consumer protection laws (Count XIII); and gross negligence (Count XIV). (*Id.*, at 22). It denied summary judgment on plaintiff's claims for negligence (as it relates to negligent design) (Count I); negligent infliction of emotional distress (Count X); and unjust enrichment (Count XV). (*Id.*, at 23). Defendants did not request, and the Court did not grant, summary judgment on plaintiffs' claims for loss of consortium (Count XVI) and punitive damages (Count XVII).

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