

**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**

---

**TABLE OF CONTENTS**

I.	INTRODUCTION .....	3
II.	RELEVANT BACKGROUND .....	3
III.	PLAINTIFFS' MOTION FOR LEAVE TO TAKE THE DEPOSITION OF RANDALL BREMNER, M.D. ....	6
	A. Applicable Law .....	6
	B. Analysis.....	7
IV.	PLAINTIFFS' MOTION TO RECONSIDER THIS COURT'S ORDER ON DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT .....	10
	A. Applicable Law .....	10
	B. Analysis.....	12

1.	Strict Liability for Design Defect .....	12
2.	Negligent Failure to Warn .....	14
a.	Application of the Learned Intermediary Doctrine .....	14
b.	Exception to the Learned Intermediary Doctrine.....	16
c.	Post-Sale Duty to Warn .....	18
3.	Negligent Misrepresentation .....	21
4.	Fraud-Based Claims .....	22
5.	Loss of Consortium.....	22
V.	DEFENDANTS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT ON THE STATUTE OF LIMITATIONS .....	23
A.	Applicable Law .....	23
B.	Analysis.....	24
VI.	CONCLUSION .....	29

## *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.*).<sup>1</sup> 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).

---

<sup>1</sup> 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).

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.