

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

SHELMA RICHARDSON,

Plaintiff,

v.

Civil Action No. 14-C- 547-0A

GARY PATRICK MCCARTHY, M.D. and
CONSENSUS ORTHOPEDICS, INC.

Defendants.



COMPLAINT

NOW COMES Plaintiff Shelma Richardson, by counsel R. Dean Hartley, Mark R. Staun and Hartley & O'Brien, PLLC and for her Complaint against defendants Gary Patrick McCarthy, M.D. and Consensus Orthopedics, Inc. states as follows:

PARTIES AND JURISDICTION

1. Plaintiff Shelma Richardson was at all times relevant to the events underlying this Complaint, a citizen and resident of Tazewell, Virginia.
2. Defendant Gary Patrick McCarthy, M.D. (hereinafter sometimes referred to as "Dr. McCarthy"), is a medical doctor licensed to practice medicine in the State of West Virginia.
3. Dr. McCarthy practices orthopedic surgery in Bluefield, Mercer County, West Virginia.
4. Dr. McCarthy is domiciled and resides at 2109 Jefferson Street, Bluefield, Mercer County, West Virginia 24701.
5. Dr. McCarthy's primary work location, as listed with the West Virginia Board of Medicine, is 512 Cherry Street, Bluefield, Mercer County, West Virginia 24701.
6. Dr. McCarthy was served with a Notice of Claim and Screening Certificate of Merit by Certified Mail, Return Receipt Requested, at his primary work location address. The

envelope containing these documents was signed for and accepted on September 12, 2014. (See Exhibit 1).

7. Defendant Consensus Orthopedics, Inc. (hereinafter sometimes referred to as "Consensus") is a California Corporation who is engaged in the design and manufacturing of orthopedic total joint implants to the global market, including the State of West Virginia.

8. Consensus' business address is 1115 Windfield Way Suite 100, El Dorado Hills, California 95762. Its agent of Service of Process is Carolyn E. Hayes.

9. Consensus designed and manufactured the plaintiff's orthopedic total knee implant.

10. Additionally, Consensus planned and defined the knee's femoral and tibial implant position specifically for the plaintiff's anatomy for the surgery that took place in Bluefield, Mercer County, West Virginia.

11. Shelma Richardson received treatment from Dr. McCarthy utilizing the Consensus total knee implant in Bluefield, Mercer County, West Virginia which treatment forms in part the basis of plaintiff's complaint.

12. Jurisdiction and venue are proper in the Circuit Court of Mercer County, West Virginia as both Dr. McCarthy and Consensus routinely conduct business in Mercer County, West Virginia; Dr. McCarthy is domiciled and lives in Mercer County, West Virginia and acts and/or failures to act giving rise to the action occurred in part in Mercer County, West Virginia.

OPERATIVE FACTS

13. On July 17, 2012, Shelma Richardson saw Dr. McCarthy for a consultation relating to her right knee.

14. During the visit, Dr. McCarthy reviewed x-rays which he believed demonstrated osteoarthritis.
15. Dr. McCarthy suggested to Shelma Richardson that she have injections or a total knee replacement.
16. On July 26, 2012, Shelma Richardson presented to Bluefield Regional Medical Center wherein a, "Noncontrast spiral computed tomography was performed according to the Consensus protocol for total knee replacement planning".
17. In addition, "An AP scout view of the entire femur, knee, and tibia was obtained. Images of the proximal femur, distal femur, proximal tibia, and distal tibia and ankle were obtained using a bone algorithm with a 512 x 512 matrix size."
18. The images and raw data were downloaded onto a CD and sent to Consensus for planning of Shelma Richardson's knee replacement.
19. Consensus provided the planning for the knee replacement, at the request of Dr. McCarthy, based upon the radiographic images taken on July 26, 2012.
20. Consensus provided various hardware for Shelma Richardson's knee replacement that was to be performed in Bluefield, Mercer County, West Virginia, including the patellar component; femoral component; tibial base plate; and tibial insert.
21. Consensus was paid a fee for the planning of the surgical procedure and for the hardware provided to Dr. McCarthy.
22. On August 30, 2012, Dr. McCarthy performed a total knee replacement on Shelma Richardson at Bluefield Regional Medical Center.
23. During the operation, Dr. McCarthy utilized the "Consensus cutting guides" provided by defendant Consensus.

24. On November 3, 2012 Shelma Richardson was visiting in Hickory, North Carolina and experienced a dislocation of her right knee arthroplasty.
25. Shelma Richardson was taken to Frye Regional Medical Center wherein she was diagnosed with a “subluxation/dislocation of her right total knee arthroplasty”.
26. An emergent closed reduction under general anesthesia of her right total knee arthroplasty was performed.
27. Upon her return from Hickory, North Carolina Shelma Richardson scheduled an appointment and saw Dr. McCarthy at his office.
28. Upon information and belief, Dr. McCarthy did not make a note of this office visit in Shelma Richardson’s medical chart.
29. Shelma Richardson told Dr. McCarthy about what happened in North Carolina and his reaction was that such dislocations are to be expected while she gets used to the implant.
30. On November 18, 2012 Shelma Richardson was visiting in Sevierville, Tennessee and experienced a dislocation of her right knee arthroplasty.
31. Shelma Richardson was taken to LeConte Medical Center wherein she was diagnosed with a right knee dislocation.
32. An emergent closed reduction under propofol sedation of her right total knee arthroplasty was performed.
33. On November 19, 2012 Shelma Richardson consulted with Phillip J. Branson, M.D. an Orthopedic Surgeon in Princeton, West Virginia for her recurrent knee dislocations. This appointment was set up on a referral from her family physician Phil Peterson, M.D.
34. Dr. Branson’s notes of his examination of Shelma Richardson’s right knee state: She has an effusion; She has flexion instability; Slight valgus alignment; patient walks with foot

everted; The knee is grossly stable in extension but quite unstable with flexion greater than 30 degrees.

35. Dr. Branson notes that he aspirated Shelma Richardson's knee and carefully discussed treatment options both conservative and surgical.

36. On November 26, 2012 Shelma Richardson returned to Dr. Branson's office for second consultation.

37. Dr. Branson's notes of his examination of Shelma Richardson's right knee state: She has an effusion; She has flexion instability; Slight valgus alignment; patient walks with foot everted; The knee is grossly stable in extension but quite unstable with flexion greater than 30 degrees; With the knee in flexion there is about 40 degrees of varus/valgus instability with a palpable feeling of contact between the poly and metal of the knee with slight external rotation of the foot; With valgus stress the patient becomes extremely apprehensive and the patellofemoral joint subluxes; There is about 6mm of anterior and posterior play in the knee with the knee in flexion.

38. Dr. Branson relayed to Shelma Richardson that surgical revision was her only option and that conservative treatment was unlikely to result in reasonable function over time.

39. After leaving Dr. Branson's office on November 26, 2012 Shelma Richardson experienced her third dislocation of her right knee arthroplasty.

40. Shelma Richardson was taken to Princeton Community Hospital wherein she was diagnosed with a "dislocation, right posterior constrained total knee arthroplasty".

41. Frederick B. Morgan, D.O. performed an emergent closed reduction under general anesthesia of her dislocated total right knee arthroplasty.

42. On November 27, 2012, Dr. Branson performed a revision arthroplasty of Shelma Richardson's right knee under general anesthesia at Princeton Community Hospital.

43. In his operative report, Dr. Branson notes that, "...the tibial component was in slight varus and a little bit of flexion".

44. In his operative report, Dr. Branson states, "The intramedullary guides were used to create distal femoral resection, bringing the distal femur out of varus and then increasing external rotation based on the femoral condylar access..."

45. Follow-up exams performed by Dr. Branson indicate that Shelma Richardson has "good motion and stability" and that it "appears her problem has been resolved".

COUNT I
NEGLIGENCE OF GARY PATRICK MCCARTHY, M.D.

46. Plaintiff incorporates all allegations above the same as if fully restated and re-alleged and Plaintiff further complains and says as follows:

47. The standard of care required Dr. McCarthy to thoroughly and comprehensively review the instructions, guides, and plans pertaining to Shelma Richardson's knee replacement surgery furnished by Consensus prior to starting the surgical procedure, to identify any and all improprieties or discrepancies therein.

48. If the guides and plans were correct, the standard of care required Dr. McCarthy to follow the "Consensus cutting guides" and implement the surgical plan developed by Consensus for the knee replacement.

49. The standard of care required Dr. McCarthy to properly assess the placement and alignment of the Consensus knee components implanted during the surgery.

50. The standard of care required Dr. McCarthy to properly balance the knee during the surgical procedure.

51. In the alternative and without limitation, if the “Consensus cutting guides” and surgical plan were incorrect, then the standard of care would require Dr. McCarthy to recognize that the surgical plan was incorrect and that components were not properly aligned and to make all appropriate adjustments during the operative procedure.

52. Dr. McCarthy breached the standard of care by failing to review, in any manner or quality, the instructions, guides, and plans pertaining Shelma Richardson’s knee replacement surgery furnished by Consensus prior to starting the surgical procedure.

53. If the guides and plans were correct, Dr. McCarthy breached the standard of care by failing to follow the “Consensus cutting guides” and implement the surgical plan developed by Consensus for the knee replacement.

54. Dr. McCarthy breached the standard of care by failing to properly assess the placement and alignment of the Consensus knee components implanted during the surgery in that, without limitation, the tibial component was placed with too much posterior slope and the femoral component was placed in excessive varus.

55. Dr. McCarthy breached the standard of care by failing to properly balance the knee during the surgical procedure.

56. In the alternative and without limitation, if the “Consensus cutting guides” and surgical plans were incorrect, then Dr. McCarthy breached the standard of care by failing to recognize that the surgical plan was incorrect in that the components were not properly aligned and by failing to make all appropriate adjustments during the operative procedure.

57. As a direct and proximate result of Dr. McCarthy's acts and/or failures to act and negligence, Shelma Richardson had three separate dislocations of her total right knee arthroplasty.

58. As a direct and proximate result of Dr. McCarthy's acts and/or failures to act and negligence, Shelma Richardson had to undergo three closed reductions of her total right knee arthroplasty.

59. As a direct and proximate result of Dr. McCarthy's acts and/or failures to act and negligence, Shelma Richardson had to undergo a revision arthroplasty by Dr. Branson.

60. As a direct and proximate result of Dr. McCarthy's acts and/or failures to act and negligence, Shelma Richardson has suffered and will continue to suffer enormous pain and suffering, physically, mentally and emotionally.

61. As a direct and proximate result of Dr. McCarthy's acts and/or failures to act and negligence, Shelma Richardson has suffered and will continue to suffer a loss of enjoyment of life.

62. As a direct and proximate result of Dr. McCarthy's acts and/or failures to act and negligence, Shelma Richardson has incurred medical and other care related expenses.

63. Plaintiff Shelma Richardson's course could have been avoided had she been appropriately treated within the standard of care by Dr. McCarthy.

COUNT II
NEGLIGENCE OF CONSENSUS ORTHOPEDICS, INC.

64. Plaintiff incorporates all allegations above the same as if fully restated and re-alleged and Plaintiff further complains and says as follows:

65. Consensus manufactures and designs knee implants for use by physicians practicing medicine in the United States of America and globally, including the State of West Virginia.

66. Consensus has caused its knee implants to be placed into the stream of interstate commerce and has done so for a number of years preceding the filing of this Complaint.

67. Consensus has engaged in contracts for the sale of orthopedic implants in the State of West Virginia on a regular basis and in particular to defendant Dr. McCarthy in Bluefield, Mercer County, West Virginia.

68. As Consensus has regularly engaged in contracts in the State of West Virginia and in particular with Dr. McCarthy, the Circuit Court of Mercer County exercising jurisdiction over Consensus would not offend traditional notions of fair play and substantial justice.

69. As part of its design and manufacturing process of total knee implants, Consensus has a mandatory protocol for total knee replacement planning that utilizes various radiographic studies from knee replacement candidates.

70. These radiographic studies were used to plan, *inter alia*, the placement of the femoral and tibial implant placement for Shelma Richardson's surgery.

71. A noncontrast spiral computed tomography in addition to an AP scout view of the entire femur, knee and tibia; images of the proximal femur, distal femur, proximal tibia and distal tibia and ankle were sent to Consensus for the planning of Shelma Richardson's knee replacement performed by Dr. McCarthy.

72. "Consensus cutting guides" were generated by Consensus for Dr. McCarthy's use in Bluefield, Mercer County, West Virginia during Shelma Richardson's knee replacement

surgery which cuttings guides were to be followed by Dr. McCarthy for the implantation of the Consensus total knee.

73. The femoral and tibial implant positions utilized by Dr. McCarthy in Shelma Richardson's surgery were planned and defined by Consensus.

74. The standard of care required Consensus to properly design a surgical plan including, but not limited to the "Consensus cutting guides" based upon the studies and information provided regarding Shelma Richardson.

75. Consensus breached the standard of care and was negligent by failing, without limitation, to correctly plan Shelma Richardson's surgery by developing a flawed surgical plan and cutting guides which permitted Dr. McCarthy to place the tibial component with too much posterior slope and the femoral component with excessive varus.

76. As a direct and proximate result of Consensus' acts and/or failures to act and negligence, Shelma Richardson had three separate dislocations of her total right knee arthroplasty.

77. As a direct and proximate result of Consensus' acts and/or failures to act and negligence, Shelma Richardson had to undergo three closed reductions of her total right knee arthroplasty.

78. As a direct and proximate result of Consensus' acts and/or failures to act and negligence, Shelma Richardson had to undergo a revision arthroplasty by Dr. Branson.

79. As a direct and proximate result of Consensus' acts and/or failures to act and negligence, Shelma Richardson has suffered and will continue to suffer enormous pain and suffering, physically, mentally and emotionally.

80. As a direct and proximate result of Consensus' acts and/or failures to act and negligence, Shelma Richardson has suffered and will continue to suffer a loss of enjoyment of life.

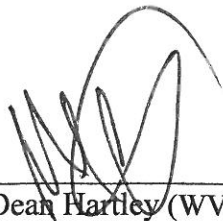
81. As a direct and proximate result of Consensus' acts and/or failures to act and negligence, Shelma Richardson has incurred medical and other care related expenses.

WHEREFORE, plaintiff demands compensatory damages from defendants Gary Patrick McCarthy, M.D. and Consensus Orthopedics, Inc. and in an amount in excess of this court's jurisdictional minimum to be determined by the trier of fact. Plaintiff further demands prejudgment and post-judgment interest, as well as such other relief as a judge or jury shall find fair and just.

PLAINTIFF DEMANDS A TRIAL BY JURY.

Dated: October 13, 2014

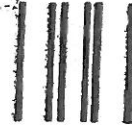
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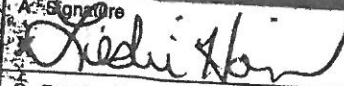
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EXHIBIT 1