IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
NORTHERN DIVISION

ROBERT BEST,

Plaintiff,

v.

CASE NO: 1:19-cv-46-JM

CONSENSUS ORTHOPEDICS, INC. and JOHN DOES 1-10,

JURY DEMANDED PER F.R.C.P. 38

Defendants.

CIVIL ACTION COMPLAINT

COMES NOW, Plaintiff Robert Best, by and through his counsel of record, and files this complaint against Defendants Consensus Orthopedics Inc. and John Does 1-10, and alleges as follows:

PARTIES, JURISDICTION, AND VENUE

1. At all times relevant hereto, Plaintiff Robert Best is an individual and resident of Cleburne County, Arkansas.

2. Defendant Consensus Orthopedics Inc. ("Consensus") is and at all times herein mentioned was a California corporation, or other business entity, organized and existing under the laws of the State of California with a principal place of business located at 1115 Winfield Way, Suite 100, El Dorado Hills, California 95762. Defendant Consensus may be served with process by personally serving Paul Rugg as registered agent for service of process at the above address or by serving the Arkansas Secretary of State pursuant to Arkansas Code Annotated § 16-58-120(2) (2019).

This case assigned to District Judge Moody
and to Magistrate Judge Deere

3. John Does 1-10 are other persons or entities yet to be identified, who may be liable for the damages alleged herein for any reason, including, but not limited to, their involvement in the design, manufacture, sale, supply, distribution, marketing, inspection or maintenance of the subject knee implantation device.

4. This Court has personal jurisdiction over Defendants pursuant to Arkansas' Long Arm Statute § 16-58-120, as Defendants have conducted substantial or systemic business in Arkansas by designing, manufacturing, producing, making, marketing, distributing or selling the below-described product in Arkansas, including the one implanted in Plaintiff.

5. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332, because the parties are diverse and the amount in controversy exceeds $75,000.

6. Venue is proper in this Judicial District pursuant to 28 U.S.C. § 1391, because a substantial part of the events or omissions giving rise to the claims occurred in this judicial district.

ALLEGATIONS COMMON TO ALL COUNTS

7. Defendants designed, fabricated, produced, compounded, processed, assembled, marketed, distributed and/or sold the Consensus Total Knee System Replacement prosthesis.

8. On March 7, 2014, Plaintiff underwent a right total knee replacement with surgical placement of a Consensus Knee System artificial knee joint.

9. On September 19, 2017, x-rays of Plaintiff's right knee showed that the polyethylene insert component of the Consensus implant had failed and become dislodged from the tibial tray.

10. On February 14, 2018, Plaintiff underwent a total revision right total knee arthroplasty.

11. Consensus Total Knee System Replacements and its components were defectively designed in that the polyethylene tibial insert would dislodge from the tibial tray causing dangerous instability, injury, and pain.

12. Additionally, the Consensus Total Knee System Replacements and its components were defectively manufactured in such a manner as to cause the tibial insert to bend, move, slip, and/or break.

13. As a result of the device's failure, Plaintiff has endured and incurred physical pain and suffering (both past, present, and future), emotional pain and suffering (both past, present, and future), permanent impairment and scarring, medical bills and expenses (both past, present, and future), loss of enjoyment of life, pre-judgment and post-judgment interest, statutory and discretionary costs, and any and all such other and further legal and equitable relief to which he is entitled.

CAUSES OF ACTION

COUNT I – STRICT PRODUCT LIABILITY

14. Plaintiff hereby incorporates all other paragraphs of this complaint as though fully set forth herein.

15. Plaintiff was damaged by the defective and unreasonably dangerous Consensus Total Knee System Replacement prosthesis, including having to undergo a revisions surgery less than 4 years after post-implant.

16. Defendants designed, fabricated, produced, compounded, processed, assembled, marketed, distributed and/or sold the Consensus Total Knee System Replacement prosthesis implanted in Plaintiff's right knee, by which he has been damaged.

17. The Consensus Total Knee System Replacements and related components were in a defective condition that rendered it unreasonably dangerous in that the polyethylene tibial insert,

tibial replacement components, and other components, would bend, move, slip, and/or break, and thus were defective and unreasonably dangerous to consumers, including Plaintiff.

18. The Consensus Total Knee System Replacements and its components were defective, unreasonably dangerous and unsafe for reasonably foreseeable use and consumption due to their design, manufacture and/or Defendants' failure to warn of dangers beyond that which would be contemplated by the ordinary and reasonable user, consumer, patient, and medical professional.

19. After recovery from the respective surgeries, and after regular use for their intended purpose, the Consensus Total Knee System Replacement and, subsequently, the Consensus revision knee replacement components failed, causing pain and forcing Plaintiff to undergo additional surgeries.

20. The defective nature of the devices was a direct and proximate cause of injury and damages to Plaintiff, including physical pain and suffering (both past, present, and future), emotional pain and suffering (both past, present, and future), permanent impairment and scarring, medical bills and expenses (both past, present, and future), loss of enjoyment of life, pre-judgment and post-judgment interest, statutory and discretionary costs, and any and all such other and further legal and equitable relief to which he is entitled.

COUNT II – NEGLIGENCE

21. Plaintiff hereby incorporates all other paragraphs of this complaint as though fully set forth herein.

22. Defendants owed a duty of reasonable care to the general public, including Plaintiff, when it designed, manufactured, assembled, inspected, tested, marketed, placed into the stream of commerce, and sold the Consensus Total Knee System Replacements to protect users from

unreasonable risk of harm when using the device for its intended purpose in a reasonably foreseeable manner.

23. Defendants breached this duty by designing, manufacturing, assembling, inspecting, testing, marketing, distributing, and selling the Consensus Total Knee System Replacements in a defective and unreasonably safe condition including, but not limited to, its foreseeably appreciated risk of harm of the tibial insert's propensity to dislodge from the tibial tray. A reasonably careful medical device manufacturer would not have acted in this manner.

24. Defendants knew or should have known that the subject products were defective and could fail and that use of the products involved an unreasonable, foreseeable danger, for which Defendants were required to warn.

25. Defendants' knowledge included, but was not limited to, knowledge that the polyethylene tibial insert, tibial replacement components, and other components, would bend, move, slip, and/or break, and thus were defective and dangerous to consumers, including Plaintiff.

26. Defendants had a duty to take steps to prevent any additional implantations of the defective devices and/or to warn patients who already had the devices implanted of the possibility of failure.

27. Defendants had a duty to warn Plaintiff of the dangers of the devices as the dangers were such that they were not generally known or not reasonably expected by a purchaser or user to find in said devices.

28. Defendants failed to provide adequate warning.

29. As a result of Defendants' failure to warn, the devices continued to be implanted in additional patients, including Plaintiff, and their sudden failure without warning caused Plaintiff to suffer injuries and losses.

30. Defendants' negligent design, manufacture, sale, and failure to warn were the direct and proximate causes of Plaintiff's injuries and damages, including physical pain and suffering (both past, present, and future), emotional pain and suffering (both past, present, and future), permanent impairment and scarring, medical bills and expenses (both past, present, and future), loss of enjoyment of life, pre-judgment and post-judgment interest, statutory and discretionary costs, and any and all such other and further legal and equitable relief to which he is entitled.

COUNT III – GROSS NEGLIGENCE

31. Plaintiff hereby incorporates all other paragraphs of this complaint as though fully set forth herein.

32. Defendants knew or should have known, in light of the surrounding circumstances and past litigation, that the Consensus Total Knee System Replacements were defective and unreasonably dangerous and knew or should have known that their products and conduct would naturally and probably result in injury or damage to others, including that suffered and incurred by the Plaintiff. Defendants acted willfully, wantonly, and/or recklessly in disregard of the consequences; and therefore, in addition to his other damages as alleged herein, Plaintiff seeks exemplary and punitive damages against Defendants in an amount to be determined at trial.

COUNT IV – BREACH OF WARRANTY

33. Prior to the time that Plaintiff used the products for their intended purpose, Defendants expressly and/or impliedly warranted to Plaintiff that the products were of merchantable quality, reasonably fit, and safe for their ordinary use and intended purpose.

34. At the time of contracting for sale and the retail sale of the subject Consensus Total Knee System Replacement prostheses and revision components, Defendants knew or had reason

to know the particular purpose for which the goods were required and that Plaintiff was relying on Defendants' skill and judgment to select and furnish suitable goods.

35. In a reasonable and foreseeable manner, Plaintiff relied on Defendants' express and implied representations and warranties in consenting to knee implant surgery using Defendants' devices.

36. Defendants' breached their express and implied representations and warranties regarding the safety and merchantability and fitness for particular purpose of their devices.

37. The subject devices were not safe, not fit for their intended use, nor of merchantable quality as warranted by Defendants.

38. Defendants knew or had reason to know that the devices were not safe, not fit for their intended use, nor of merchantable quality as warranted by Defendants.

39. On information and belief, Defendants' knowledge included, but was not limited to, knowledge that the polyethylene tibial insert, tibial replacement components, and other components, would bend, move, slip, and/or break, and thus were defective and dangerous to consumers, including Plaintiff.

40. As a direct and proximate result of Defendants' breaches of warranty, Plaintiff has suffered injuries, losses and damages including physical pain and suffering (both past, present, and future), emotional pain and suffering (both past, present, and future), permanent impairment and scarring, medical bills and expenses (both past, present, and future), loss of enjoyment of life, pre-judgment and post-judgment interest, statutory and discretionary costs, and any and all such other and further legal and equitable relief to which he is entitled.

PRAYER FOR RELIEF

WHEREFORE, ALL PREMISES CONSIDERED, Plaintiff requests the Court grant judgment against Defendants Consensus Orthopedics, Inc. and John Does 1-10, jointly and severally, for COMPENSATORY DAMAGES and PUNITIVE DAMAGES as alleged herein, in an amount considered fair and reasonable by a jury, and for all such further relief, both general and specific, to which the Court deems proper, just, and equitable under the circumstances. Plaintiff also seeks general relief.

JURY DEMAND

Plaintiff requests a jury trial of all matters appropriately tried to a jury.

DATED this 11 day of June 2019.

Respectfully submitted,

/s/ Richard Underwood
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FARRIS BOBANGO & BRANAN, PLC
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Counsel for Plaintiff Robert Best

JS 44 (Rev. 02/19)

CIVIL COVER SHEET 1:19-cv-46-JM

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS
ROBERT BEST

DEFENDANTS
CONSENSUS ORTHOPEDICS, INC., and JOHN DOES 1-10

(b) County of Residence of First Listed Plaintiff Cleburne
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Richard Underwood, 999 S Shady Grove Road, Ste 500, Memphis, TN 38120, 901.259.7100

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☒ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☒ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☒ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*
Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☒ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent - Abbreviated New Drug Application
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 485 Telephone Consumer Protection Act
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
28 USC 1332

Brief description of cause:
Products Liability- medical device

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY *(See instructions)*:

JUDGE DOCKET NUMBER

DATE 6/11/19

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE