UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NO. 3:12CV-00317-JHM

MARK BURTON and ANGELA BURTON **PLAINTIFFS**

v.

MEDTRONIC, INC., MEDTRONIC SOFAMOR DANEK USA, INC., NORTON HOSPITALS, INC. d/b/a NORTON HOSPITAL, JOHN DOE #1 **DEFENDANTS**

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Plaintiffs' motion to remand pursuant to 28 U.S.C. § 1447(c) [DN 7]. Fully briefed, the matter is ripe for decision.

I. BACKGROUND

On May 22, 2012, Plaintiffs, Mark Burton and Angela Burton, filed this action in the Jefferson Circuit Court. The Complaint asserts claims arising out of the posterior spinal surgery of Mark Burton (hereinafter "Plaintiff" or "Burton") on November 7, 2007, at Norton Hospital in Louisville, Kentucky. Burton underwent a posterior lumbar interbody fusion of his L5-L6 during which he was implanted with Infuse, a bone graft device manufactured by the Medtronic Defendants. Plaintiffs allege that Burton was not informed prior to surgery that Infuse would be used in his spine in an "off-label or experimental manner" or "that there were any risks specific to the use of Infuse in the lumbar spine." (Complaint ¶ 38-43.) Plaintiffs allege that Infuse was approved by the FDA in 2002 for only one specific operation which was an anterior single level fusion using an LT Cage and it was not approved for the posterior-approach lumbar spine surgery performed on Burton. Plaintiff asserts claims of fraud, negligent misrepresentation, strict products liability manufacturing and design defects, failure to warn, negligence, breach of implied warranty,

Morphogenetic Protein.) According to the Medtronic Defendants, extensive media coverage developed in 2008 concerning the alleged inappropriate relationship between Medtronic and physicians and hospitals and concerning the lawsuits regarding the off-label uses of Infuse. (Medtronic Defendants' Response, Exhibit B.)

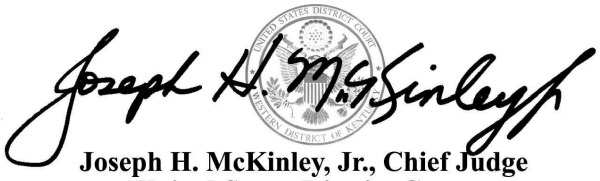
While Defendants have raised a potentially valid statute of limitations defense, the Court finds that questions of fact remain as to when Plaintiff discovered or should have discovered his cause of action against Norton Hospital. Elam, 594 F.3d at 467. The fact that Burton had spinal surgery on November 7, 2007, and that his recovery was "marked by severe painful and debilitating complications" does not, in itself, demonstrate that Burton discovered or should have discovered that he had suffered an injury from the off-label use of Infuse. Similarly, the Medtronic Defendants' stated *belief* that Plaintiff should have discovered the reason for his injury through discussions with his physicians prior to May 21, 2011, does not definitively demonstrate that Burton discovered or should have discovered the injury. "'[O]ften the patient cannot know whether the undesirable outcome is simply an unfortunate result of proficient medical care or whether it is the consequence of substandard treatment.'" Elam, 594 F.3d at 467 (quoting Harrison v. Valentini, 184 S.W.3d 521, 524 (Ky. 2005)). Additionally, the Medtronic Defendants have presented no evidence that Plaintiffs were aware of the FDA Public Health Notification or the media coverage in question. In fact, Plaintiffs aver in their Complaint that they "did not know, and could not have known by the exercise of reasonable diligence, until April, 2012 at the earliest that the off-label use of Infuse caused abnormal ectopic bone growth in Mark Burton, which in turn caused his ongoing, chronic pain and other complications." (Complaint ¶ 10.) Based on Burton's lack of medical knowledge and the conflicting evidence submitted by the parties, "a jury should decide when the statute begins to run

in accordance with Kentucky law and the Seventh Amendment requiring a jury trial in civil cases at law." Elam, 594 F.3d at 471.

Resolving all contested issues of fact and ambiguities of state law in Plaintiffs' favor, the Court finds that the Medtronic Defendants have not established that Norton Hospital was fraudulently joined and, therefore, complete diversity is lacking and remand is proper.

IV. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED** that Plaintiffs' motion to remand [DN 7] is **GRANTED**. The case is remanded to the Jefferson Circuit Court.



Joseph H. McKinley, Jr., Chief Judge
United States District Court

October 30, 2012

cc: counsel of record
Jefferson Circuit Court