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Phila. Judge Increases \$12.5M Award In Pelvic Mesh Suit for Delay Damages

BY MAX MITCHELL
Of the Legal Staff

As post-trial disputes get under way in Philadelphia's first pelvic-mesh suit to hit trial, the judge has added nearly \$800,000 to the \$12.5 million verdict that was awarded in the case last month.

Philadelphia Court of Common Pleas Judge Mark I. Bernstein, who presided over the *Hammons v. Ethicon* trial that resulted in an award of \$5.5 million in compensatory damages and \$7 million in punitive damages, added \$797,602 in delay damages to the verdict, and entered judgment at about

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\$13.3 million. The decision was docketed Jan. 12.

The plaintiff entered a response Jan. 13 to the defendant's post-trial motions filed earlier in the month.

Ethicon's 80-page motion for post-trial relief asked the court to toss the verdict, grant a new trial, or modify the amount of damages.

The plaintiff, Patricia Hammons, had alleged the Gynecare Prolift pelvic mesh device was negligently designed, and Johnson & Johnson subsidiary Ethicon failed to properly warn health professionals about the risks of the device.

In 2009, the Prolift device had been implanted into Hammons, an Indiana resident who worked as a stocker for Wal-Mart, to address a prolapsed bladder.

Her counsel had argued, among other things, that the density of the mesh caused scar tissue to build up and contract, which eventually led to erosion of Hammons' bladder and "excruciating" pain during sex.

After the device failed, she had to have numerous surgeries, but will not be able to

completely remove portions of the mesh that eventually adhered to the bladder, according to Hammons' attorney, Shanin Specter of Kline & Specter.

Ethicon's attorneys contended that doctors led the development of the device, and the risks of using pelvic mesh were well known throughout the medical community. They also contended that, despite the later complications, the mesh worked properly to support Hammons' bladder.

Among other things, Ethicon's post-trial motion cited a Texas court of appeals' decision last year to toss a \$1.2 million verdict awarded in another pelvic mesh case.

The decision in *Johnson & Johnson v. Batista* dismissed the verdict after finding that testimony from the plaintiff's medical causation expert failed to tie the plaintiff's pelvic pain to the alleged defects, the motion said.

According to the defendants, Hammons' causation expert likewise only generally linked the injuries to the Prolift surgery, which, Ethicon argued, would require the claims to be tossed under Indiana products liability law.

"Indiana law is no different, refusing to impose liability on a manufacturer simply because risks of a product were suffered by a plaintiff," the motion said.

The post-trial motion initially contended the Philadelphia courts did not have jurisdiction over the claims, and that the jury should not have been allowed to consider whether Hammons filed her case within the two-year statute of limitations.

The motion noted that she first experienced pain during sex within six weeks after the device was implanted in 2009, but did not file the suit until May 2013.

Hammons, the motion said, had authorized the release of medical records related to her implant for possible litigation in 2011, and therefore, she must have known the pain was related to the implant before that time.

"Plaintiff posited no event after January 2010 and August 2011 that would trigger her knowledge or constructive knowledge that her symptoms were the product or act of another, and the only logical inference is that she was on notice in January 2010 or shortly thereafter when she had been cleared for sex but her symptoms persisted," the motion said.

The filing raised a total of 21 issues, including arguments that the awards were excessive, and that the court should have dismissed a juror who was "demonstratively gesturing towards the plaintiff in sympathy" during the plaintiff's closing arguments.

The plaintiff filed her opposition to the post-trial arguments, saying that, while she joined Ethicon's request for a new trial on the amount of punitive damages, the rest of Ethicon's arguments "contain legal argument and characterizations of the trial record to which no response is required, and hence are denied."

Specter called Ethicon's post-trial motions "meritless."

"There is a suggestion in their post-trial motions that they would like a new trial on the punitive damages amount, and if that's what they're really seeking, we have told the court that's OK with us," Specter said.

The *Hammons* case was the first pelvic-mesh suit to go to trial in Philadelphia.

Although one suit had been set to begin Jan. 11, that suit was dismissed on summary judgment earlier this month. The next case set for trial, *Carlino v. Ethicon*, is expected to begin Jan. 25.

Molly E. Flynn of Drinker Biddle & Reath, who filed Ethicon's post-trial motion, referred comment to a company spokesperson, who did not return a call for comment. Specter also did not return a call seeking comment.

Max Mitchell can be contacted at 215-557-2354 or mmitchell@alm.com. Follow him on Twitter @MMitchellTLL. •