

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2011

PHILADELPHIA, FRIDAY, SEPTEMBER 20, 2019

An **ALM** Publication

Pa. Superior Court Shaves \$5M From \$20M Pelvic Mesh Verdict

By Max Mitchell
Of the Legal staff

A Pennsylvania appellate court has rejected a medical device maker's attempts to toss a \$20 million verdict, but has agreed that the verdict needed to be reduced by \$5 million.

A split three-judge panel of the Superior Court on Friday largely affirmed the multimillion-dollar award a Philadelphia jury handed up in 2017 in *Engleman v. Ethicon*. The verdict, awarded to a woman allegedly injured by a defective pelvic mesh product, included \$2.5 million in compensatory damages, as well as \$17.5 million in punitive damages.

The majority agreed that New Jersey's punitive damages cap should apply to the case and reduced that element by \$5 million, to \$12.5 million; on all other issues, though, the Superior Court majority said Ethicon either waived its arguments or failed to meet its burden to convince the court to alter the trial court's decisions.

Superior Court Judge Deborah Kunselman, who wrote the majority's 31-page opinion, observed that New Jersey law caps punitive damages at five times the compensatory award in ordering the reduction.

All other elements of damages were upheld, however.

"Simply because the trial court reached conclusions that the manufacturers consider 'wrong' does not mean that the court abused its discretion," Kunselman said.

Cleveland attorney Benjamin Anderson of Anderson Law Offices tried the case on behalf of the plaintiff. Anderson did not immediately return a call for comment Friday afternoon.

Ethicon also did not return a call seeking comment.

In an emailed statement, **Kline & Specter attorney Shanin Specter, who is a leading attorney in the mesh litigation and whose firm was involved in Engleman, said the products should be taken off the market.**

"Over and over and over, juries have found Johnson & Johnson recklessly made and sold plastic mesh products that have caused permanent and crippling pelvic injuries in women," Specter said. "It's heartening to see these verdicts upheld by our trial and appellate courts."

Plaintiff Margaret "Peggy" Engleman, of Cinnaminson, New Jersey, alleged in court papers that she had Ethicon's TVT-Secur mesh implanted to help with her stress urinary incontinence, but her doctor discovered erosions in the material just two months later.

Engleman said in her pretrial memorandum that the eroding mesh began causing her pain and she was eventually forced to undergo three separate surgeries, under anesthesia, to remove the material. However, portions of the mesh remain in her body and she has developed chronic pain and urinary dysfunction, according to the memorandum.

Engleman alleged in court papers that TVT-Secur was "defective in design, warnings and instructions" and that Johnson & Johnson released the product to the public despite knowing that there was a significant risk that the mesh would erode inside patients.

Ethicon argued in its own pretrial memorandum that Engleman offered no evidence that the company "failed to warn of risks

not within the common knowledge of pelvic floor surgeons."

The jury sided with Engleman and awarded the verdict in April 2017. It was the third pelvic mesh case to be tried in Philadelphia—all of which ended with a more than \$10 million verdict.

On appeal, Ethicon challenged rules on the statute of limitations and several of the judge's evidentiary rulings. However, Kunselman, citing the Pennsylvania Supreme Court's recent decision in *Nicolaou v. Martin*, deferred to the jury's findings on the statute of limitations issue, and on other issues said Ethicon failed to meet its burden of proving error.

"The manufacturers totally ignore our deferential standard of review," Kunselman said, regarding the issue of remittitur for the compensatory award. "Because the manufacturers do not explain how the trial court abused its discretion, we dismiss this issue as affording them no relief."

Kunselman was joined by Superior Court President Judge Jack Panella.

Judge Alice Beck Dubow dissented, saying she saw numerous evidentiary errors by the trial court, and contended the majority was misapplying *Nicolaou*.

"To accept the majority's interpretation of *Nicolaou* would result in the limitations period commencing, in any case involving medical causation, only when a medical professional informs a patient of a link between the patient's condition and the cause of the condition," Dubow said. "However, the Supreme Court in *Nicolaou* specifically rejects the majority's expansive interpretation of the Discovery Rule."