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J&J Subsidiary Seeks to Ax $13.5M Pelvic Mesh Verdict

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The Johnson & Johnson subsidiary that was recently hit with a $13.5 million verdict over one of its pelvic mesh products has asked the court to toss the verdict.

Ethicon, which was slammed earlier this month with the verdict, has filed post-trial motions with the Philadelphia Court of Common Pleas, outlining numerous arguments for why the jury's verdict should be reversed, including statute of limitation, federal pre-emption and evidentiary disputes.

The motion, filed Monday by Butler Snow Law Firm attorney Nils B. Snell, asked the court to either enter judgment notwithstanding the verdict, grant a new trial, or reduce the verdict award.

"This court should order a new trial—or, in the alternative—remit the compensatory and punitive damages award, because they are excessive and unsupported by the evidence in the case," Ethicon said in the motion.

An Ethicon spokeswoman said in a statement that evidence showed the device was properly designed, the company acted responsibly during the research, development and marketing, and the mesh did not cause the plaintiff's injuries.

"We have always made patient safety a top priority and will continue to do so," spokeswoman Samantha Lucas said.

Plaintiff Sharon Carlino's attorney, Shanin Specter of Kline & Specter, said the motion is "boilerplate."

"Judge [Kenneth] Powell tried the case conservatively, and I'm not concerned about appellate review," Specter said. "The verdict will grow at 6 percent per year, so we're happy to let the appellate process run its course."

Ethicon's post-trial motion came several days after Carlino filed a motion for delay damages. In the motion, Carlino asked the court to add $918,460 to the verdict, including $238,120 in compensatory and $680,340 in punitive damages.

On Feb. 10, a Philadelphia jury handed up the verdict, which broke down into $3.5 million in compensatory damages and $10 million in punitive damages.

Carlino had alleged Ethicon's mid-urethral sling device failed because it was negligently designed, and that its failure led her to suffer permanent pain during sex.

The device was implanted in her in 2005 to combat urinary incontinence; however, she claimed the mesh was defective because its pores were too small, it had a tendency to degrade, it was overly friable because it was cut by a machine and not a laser, and the mesh can erode through the patient's tissue.

Along with making arguments that Carlino failed to prove that the device caused her injuries, Ethicon contended in its 105-page post-trial motion that the plaintiff failed to show that a safe alternative product was available.

"Supposed alternative designs theorized by plaintiff and their experts ... are not legally cognizable because they required but had not received clearance as of 2005, or even to this day," the motion said. "Any contrary result would unfairly and illogically subject defendants to liability for not taking an action that federal law prohibited them from taking."

Ethicon further contended that the case should have been tossed out because it was not timely filed within the two-year statute of limitations.

The motion noted that, although Carlino underwent surgeries to address complications that arose with the mesh in 2007 and 2010, she did not file her lawsuit until 2013.

Although Specter had told the jury that Carlino was seeking recovery of damages that arose only after the 2010 revision surgery, Ethicon contended the statute of limitations still should have begun to run when the 2007 revision procedure was performed.

"A cause of action accrues when the harm occurs, not when a plaintiff chooses to seek damages," the motion said. "If every plaintiff were permitted to define the statute of

limitations by recovering only damages within the statutory period, the very idea of a period of limitations would be illusory."

Regarding causation, Ethicon argued Carlino had numerous health conditions that could have led to pain during sex, and she failed to rule out that these conditions, such as vaginal atrophy and pelvic floor hypertonicity disorder, were the cause of her injuries.

Carlino's urogynecologist expert "acknowledged that Mrs. Carlino has intermittent muscle spasms, which are synonymous with pelvic floor muscle disorder," the filing said. "Nowhere did [the expert] exclude the possibility that the spasms were the result of Mrs. Carlino's back and knee pain, which [another expert] identified as the cause of the spasms."

The motion also contended that Powell should not have issued a blanket ban on all U.S. Food and Drug Administration-related evidence. Ethicon said that decision barred evidence that the FDA cleared the device and the label, and that it underwent a rigorous approval process. The ruling further stopped the company from countering specific arguments from Carlino.

Ethicon also argued that numerous emails and company documents, including one in which an Ethicon official told a doctor that "it might be wise to be more elusive" about the rates of erosion, were irrelevant and should not have been allowed at trial. The motion specifically said the internal document telling a doctor to be "evasive" related to a different product.

"Defendants were plainly prejudiced by the court's admission of this improper evidence," the motion said, noting that Specter had cited the internal document during his closing arguments. "Introduction of this evidence—and, indeed, this argument at closing—were improper and warrant a new trial."