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## Court Backs New Trial After Mesh Defense Verdict

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*Of the Legal Staff*

A rare defense verdict in favor of the Johnson & Johnson subsidiary that made surgical pelvic mesh is going back for a new trial as the Pennsylvania Superior Court on Wednesday upheld a Philadelphia trial judge's ruling that the jury verdict was against the weight of evidence and that a weight-of-evidence challenge could not be waived before the verdict was announced.

The appeals court panel rejected Ethicon's efforts to nix the retrial of a pelvic mesh case that initially resulted in one of the company's few defense wins in the litigation in Philadelphia.

The panel affirmed the trial court's decision in *Adkins v. Johnson & Johnson*, in which the judge who oversaw the case determined that the jury's verdict went against

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## Mesh

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the weight of the evidence. The ruling sends the case back for a new trial on both liability and damages.

The medical device maker, Ethicon, which is a subsidiary of Johnson & Johnson, had won a defense verdict when the jury determined that, although the mesh device at the center of the litigation had been defective, it was not the cause of plaintiff Kimberly Adkins' injuries. However, Superior Court Judge Kate Ford Elliott, who wrote the majority's precedential decision, said testimony from the defense's causation expert contradicted the jury's findings.

"The record clearly demonstrates that it was undisputed that from 2011 to 2012, the erosion of the mesh as found to be a defect by the jury caused Adkins to suffer the following injuries: vaginal bleeding, pelvic pain, vaginal pain, palpable mesh, pain with sex, and mesh exposure in her vagina. There is also no dispute that because the device caused these injuries, Adkins had

to undergo surgical removal of the device," Ford Elliott said in the 11-page decision. "Because the evidence did not conflict with respect to the injuries the device caused in 2011 to 2012, as well as the necessity for surgical removal, the jury's finding that the device did not cause any injury to Adkins was against the weight of the evidence. Therefore, the trial court did not abuse its discretion when it granted a new trial as to damages."

Superior Court Judge Jack Panella joined Ford Elliott, while Judge Judith Olson filed a concurring and dissenting opinion.

In an emailed statement, Ethicon spokeswoman Mindy Tinsley said the company disagreed with the decision and will seek an application for reargument.

Kline & Specter attorney Charles "Chip" Becker, who handled the appeal, said in an emailed statement, "The Superior Court's ruling permits the case to go back for a new trial. We're confident our badly injured client will prevail, as nearly all plaintiffs have prevailed in Philadelphia and across the country in transvaginal mesh cases against Johnson & Johnson."

Aylstock, Witkin, Kreis & Overholtz attorneys Bryan Aylstock, Daniel Thornburgh and Bobby "Brad" Bradford were trial counsel for the plaintiff. Bradford and Thornburgh said the three attorneys will also retry the case.

"We're looking forward to presenting Miss Adkins' case to another jury," Thornburgh said. "The evidence was very clear the first time around."

In June 2017, a Philadelphia jury had handed up a defense verdict in the case, but the following month Philadelphia Court of Common Pleas Judge Michael Erdos, who handled the trial, granted Adkins' post-trial motion contending that the jury's findings were inconsistent on the issue of whether the alleged design defect caused the injuries.

Erdos subsequently expanded his decision to allow for a trial on both liability and damages.

Only one other pelvic mesh case out of Philadelphia resulted in a defense win on causation. That case is *Krolkowski v. Ethicon Women's Health and Urology*, which is currently on appeal to the Superior Court.

The frontline appeals court said there is nothing a party can do before a verdict to preserve a weight of the evidence claim, rejecting Ethicon's view that plaintiffs' failure to object to jury instructions waived its grounds for relief.

In *Adkins*, Ethicon argued that the plaintiff waived her arguments for setting aside the verdict as against the weight of evidence when she failed to object to the trial court's jury instructions, the verdict sheet, or the verdict itself.

But Ford Elliott said there is nothing a party can do before a verdict to preserve a weight-of-the-evidence claim.

"Unlike an inaccurate jury instruction or an erroneous verdict sheet, which are capable of correction in pretrial proceedings or during trial, the manner in which a jury weighs evidence and arrives at a verdict is incapable of correction," Ford Elliott said. "Therefore, because a weight of the evidence challenge ripens after the verdict, it is properly raised for the first time in a post-trial motion."

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