



Portfolio Media, Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

NJ Judge Won't Disturb \$11M Award In J&J Mesh Mass Tort

By **Joshua Alston**

Law360, New York (July 17, 2014, 6:30 PM ET) -- A New Jersey judge has refused to overturn an \$11.1 million jury award for a South Dakota woman who said a Johnson & Johnson unit's vaginal mesh product caused debilitating nerve pain, ruling overwhelming evidence and an appropriate jury award obviated a new trial.

J&J's Ethicon Inc. lobbied New Jersey Superior Court Judge Carol E. Higbee for a new trial or a judgment notwithstanding the verdict in a product liability suit filed by Linda Gross, who in February 2013 was awarded \$3.35 million in compensatory damages and \$7.76 million in punitive damages for injuries caused by her use of the Gynecare Prolift mesh product to repair a pelvic floor collapse. But Judge Higbee on Tuesday denied Ethicon's bid, finding the plaintiff's evidence too compelling to second-guess the jury's result.

"Plaintiffs presented a lot of evidence that certainly could support a finding by the jury that this was a very risky product, that particularly when it came to the removal of the product, where it didn't work properly, that a woman could be faced with very, very substantial risks to her well-being and to her quality of life and substantial pain, loss of sexual activity, all kinds of different problems in addition to numerous surgeries," said Judge Higbee, according to a court transcript.

Judge Higbee also said Gross presented ample proof Ethicon failed to warn of the dangers of the Prolift product, specifically the risks of removing the Prolift, a process Gross' attorneys compared to "removing rebar from concrete."

Ethicon didn't fare any better when it argued the jury should have never gotten charges of deceit and fraudulent misrepresentation in the first place, which it said is forbidden in strict liability cases. Judge Higbee said the reasoning would be true under New Jersey law, but the claims were valid under the laws of South Dakota, Gross' home state.

The J&J arm also tried to knock down the punitive award, arguing punitive damages weren't supported by the evidence, or were improper under New Jersey's Product Liability Act because the product had received FDA approval.

Judge Higbee found the argument unconvincing, citing evidence that Ethicon did not in fact seek FDA approval for the Prolift, but assumed the product would be approved because it was made of the same polypropylene material used in products already approved for hernia surgeries. Gross' attorneys argued the Prolift should have received more FDA approval because of its unique, tentacled shape, which was designed to make the product sturdier, but also made it more difficult to remove once installed.

"The problem with this product from the defense point of view was that they didn't get approval of any type," the judge said. "They didn't get approval, they didn't get a license,

they didn't get clearance. They had nothing. And they got clearance, but they didn't get it till two years after the plaintiff was injured.”

Judge Higbee also said the punitive award wasn't excessive, as it could have gone as high as \$16.75 million under New Jersey law.

An attorney for Gross, Adam Slater of Mazie Slater Katz & Freeman LLC, told Law360 the punitive award is about the message it sends more than the number itself.

“The amount is important too, and we're happy with it. But the most significant thing is that the jury spoke, and that will have significant ramifications for future cases,” Slater said.

The trial featured testimony from an array of Ethicon employees who were questioned about the design, testing and marketing of Prolift, which Gross had implanted in 2006 to repair a pelvic organ prolapse. Gross had 18 subsequent surgeries to remove the mesh after she said the product caused severe nerve pain that ended her nursing career and prevented her from enjoying time with her family or having a normal sex life.

Gross' case was the bellwether in New Jersey's multidistrict litigation over Ethicon's vaginal mesh products, which it agreed to stop selling in June 2012, despite saying it did not believe the products to be harmful.

Gross is represented by Adam M. Slater and David A. Mazie of Mazie Slater Katz & Freeman LLC.

Johnson & Johnson and Ethicon are represented by Christy Jones and William M. Gage of Butler Snow O'Mara Stevens & Cannada PLLC, and by Kelly Crawford-Riker, Maha M. Kabbash and Mary Ellen Scalera of Riker Danzig Scherer Hyland & Perretti LLP.

The case is Gross v. Gynecare Inc., case number Atl-L-6966-10, in the Superior Court of the State of New Jersey, County of Atlantic.

--Editing by Mark Lebetkin.

All Content © 2003-2014, Portfolio Media, Inc.