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4th Circ. Upholds \$18.5M Boston Scientific Mesh Verdict

By **Rick Archer**

Law360 (February 6, 2018, 7:03 PM EST) -- The Fourth Circuit on Tuesday rejected Boston Scientific Corp.'s appeal of an \$18.5 million verdict in a trial over injuries allegedly caused by its Obtryx pelvic mesh devices, saying the company had gotten a fair trial.



The panel rejected Boston Scientific's claim the decision to consolidate the plaintiffs' claims into one case was unfair and confused the jury. (AP)

The panel said the four plaintiffs in the 2014 West Virginia federal trial had brought sufficient evidence to prove their case and that the district court's decisions about the evidence or the jury instructions were not cause for overturning the verdict, and rejected Boston Scientific's claim the decision to consolidate the plaintiffs' claims into one case was unfair and confused the jury.

"The results here were not purchased at the cost of fairness to any party," U.S. Circuit Judge J. Harvie Wilkinson III, writing the opinion for the panel, said. "In these cases, common questions of fact and law formed a substantial part of each suit, and, as we have noted, the district court bent over backwards to ensure that distinct questions of fact and law could be appropriately developed at trial and distinguished by the jury."

The decision upholds a **November 2014 jury verdict** reached after 10 days of trial. Jurors sided with plaintiffs Jacquelyn Tyree, Carol Sue Campbell, Jeanie Blankenship and Chris Rene Wilson on their claims that Boston Scientific's Obtryx Transobturator Mid-Urethral Sling System was defectively designed and that its warnings about potential injuries arising from the devices were insufficient.

The jury awarded \$14.5 million in past and future compensatory damages and \$4 million in punitive damages. BSC has since settled with two of the plaintiffs.

BSC challenged the verdict on multiple grounds, arguing that the court's consolidation of the four plaintiffs' cases allowed evidence that would have been inadmissible in some of the cases to be heard and confused the jury. It also argued that the court wrongly excluded evidence of the device's Food and Drug Administration approval while admitting what it called hearsay warnings about the materials used, and that the plaintiffs had failed to establish specific design flaws or safer

alternatives, or provide expert testimony on the adequacy of the product directions. It also claimed the jury received erroneous instructions on punitive damages.

The panel said BSC had not provided proof the consolidation resulted in inadmissible evidence reaching the jury or that the jury had difficulty separating the cases, noting the four plaintiffs all received different awards for future damages, ranging from \$3 to \$4 million.

"That the total damages awards were of the same order of magnitude appears to reflect the very similarities between the cases that justified consolidation in the first place," Judge Wilkinson said.

The panel found the FDA approval evidence was of "questionable relevance" and that the materials warning was not hearsay, as the question was whether BSC had received warnings and not if the warnings were true.

It also found there had been discussion of specific design flaws and safer alternatives at the trial and that expert testimony on the instructions was not legally required.

"This evidence was largely introduced through the testimony of physicians, some of whom testified that there were significant risks not included in the Obtryx's directions for use. A jury could reasonably conclude based on this evidence that the Obtryx's instructions were inadequate," Judge Wilkinson said.

The panel also found the jury instructions on punitive damages conformed to West Virginia law at the time of trial.

Counsel for Boston Scientific declined comment. Counsel for the plaintiffs did not immediately respond to requests for comment late Tuesday.

Circuit Court Judges J. Harvie Wilkinson III, Albert Diaz and Dennis W. Shedd sat on the panel for the Fourth Circuit.

Boston Scientific is represented by Daniel Brandon Rogers and Robert T. Adams of Shook Hardy & Bacon LLP.

The plaintiffs are represented by Anthony J. Majestro of Powell & Majestro PLLC and Scott A. Love of Clark Love & Hutson GP.

The case is Carol Sue Campbell et. al. v. Boston Scientific Corp., case number 16-2279 in the United States Court of Appeals for the Fourth Circuit.

--Editing by Kelly Duncan.