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Boston Scientific, Bard Beat $28M Pelvic Mesh Defect Suit

By **Brandon Lowrey**

Law360, Los Angeles (February 2, 2016, 5:54 PM ET) -- A Missouri state jury on Tuesday found Boston Scientific and C.R. Bard not liable in a woman's $28 million suit alleging the companies' pelvic mesh implants rendered her incontinent and suffering from pain and other ailments.

The two-month trial centered on Boston Scientific's Solyx device and Bard's Align device. Plaintiff Eve Sherrer claimed that the devices were defective and caused a litany of problems for her, including pain, difficulty walking and a "nonfunctional vagina."

The defendants argued that the implants are safe and effective, and that other issues, including doctor error, past surgeries and medical problems, caused Sherrer's problems.

Sherrer had sought $28 million in compensatory damages from Boston Scientific and Bard, including $10 million for past injuries and $18 million for future injury. She also sought punitive damages.

Sherrer's attorney Thomas Philip Cartmell of Wagstaff & Cartmell LLP told jurors during closing arguments Monday that mesh implanted into her pelvic region became scar-plated, causing it to shrink and contract and become rigid, creating a dangerous and painful condition.

"That's not supposed to happen," he said. "Nobody disagrees with that. They never brought an expert witness in here, neither Bard nor Boston, to say, 'Oh, this is normal. It won't hurt a lady,' ... They all admitted that that is a dangerous condition, and that is what came out of Ms. Sherrer's pelvis."

Sherrer's attorneys told jurors during the trial that the Marlex-brand mesh in both devices wasn't medical grade, and that the devices caused pain and were prone to failing and shifting inside the body. The mesh was not designed or intended for permanent implantation, they said.

That fact prompted the mesh manufacturer to refuse to extend its contract with Boston Scientific for use with medical devices, he said. But Boston Scientific cut a deal in which it would buy 10 years' worth of the Marlex mesh at once and would release the manufacturer from liability, Sherrer's attorneys told jurors.

The U.S. Food and Drug Administration had expressed concern over potential safety risks with the product in a so-called 522 order, which demanded that Boston Scientific must conduct a post-market surveillance study.

Cartmell told jurors during opening arguments at the beginning of December that medical device companies, in a race to profit, used mesh designed for abdominal applications for the vagina without testing, despite the fact that the tissue areas are vastly different.

The Marlex mesh destabilized and degraded inside the body because it wasn't intended for medical use, he said.

"This is polypropylene that is supposed to be used for carpet backing. It's supposed to be used for ropes and cords," Cartmell said. "It's not medical-grade polypropylene that they decided to use."

Bard, he said, set up intermediary companies to buy the Marlex resin directly from its manufacturer, Chevron Phillips Chemical, while intentionally keeping it a secret from Chevron Phillips that the materials would be used in medical implants.

Sherrer received her Solyx implant in October 2010. The implant was partially removed, and an Align device implanted in January 2011. Pieces of both devices were removed in April 2014, and she had an additional surgery in August.

The defendants argued that the implants are safe and still on the market today, and that the problems were caused by other factors.

Bard attorney Lori Cohen of Greenberg Traurig LLP said that the company fully complied with FDA standards, and that its device remains the "gold standard" treatment for stress urinary incontinence. The device worked and benefited the patient until a doctor needlessly removed the Align and caused more damage, she said.

She also added that Sherrer had other pelvic floor surgeries dating back to 1997. More surgeries mean more scarring and potential for problems, Cohen said.

Cohen also pointed to Sherrer's other past medical issues, including severe osteoarthritis and degenerative disc disease, among others, as alternative causes for her alleged injuries.

Cohen said Marlex mesh has been implanted into patients for more than five decades, with great success and benefits to patients. The raw materials are also not the same as end-product mesh, she said.

In addition, Bard warned Sherrer's doctor, who, in turn, warned Sherrer, about possible risks of the Align implant, Cohen said.

On Monday, Cohen contended that Sherrer failed to follow her doctors' recommendations, and that the plaintiff's allegation that the product degraded over time fails because the only problematic mesh was implanted 18 years ago and was not Bard's or Boston Scientific's.

Following the verdict on Tuesday, Cohen told Law360 that she and her client are pleased with the total defense verdict.

"This jury obviously over the course [of the trial] reviewed all of the extensive science, data and literature and came to the right conclusion based on all of that," she said.

Sherrer is represented by Ben Bertram, Scott Bertram and Blair Bertram Matyszczyk of Bertram & Graf LLC, Grant Lavalle Davis and Shawn Foster of Davis Bethune & Jones LLC, Thomas Philip Cartmell, Diane K. Watkins, Andrew N. Faes and Jeffrey M. Kuntz of Wagstaff & Cartmell LLP, and Valley Renshaw and Kaitlyn Jennifer Syring.

Boston Scientific is represented by Robert Thomas Adams, Hildy Sastre and Mike Kleffner of Shook Hardy & Bacon LLP.

Bard is represented by Lori Cohen, Cliff Merrell, Marcella Ducca, Wade Bowden, Sara Deskins Tucker and Sean Jessee of Greenberg Traurig LLP.

The case is Sherrer v. Boston Scientific et al., case number 1216-CV27879, in the 16th Judicial Circuit of Missouri.

--Editing by Mark Lebetkin.
