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Judge Grants New Trial Over J&J Hip Implant

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A Chicago judge has granted a new trial in one of the only verdicts involving DePuy Orthopaedics Inc.'s ASR XL hip implants.

Tuesday's ruling by Cook County Circuit Court Judge Deborah Mary Dooling reversed a 2013 defense verdict that came out just before DePuy reached a $2.5 billion global settlement resolving about 8,000 cases. The judge found that a key scientific expert for plaintiff Carol Strum should have been allowed to testify at the trial about the wear on the hip implants. The lawsuits claimed the devices caused pain, grinding or clicking in the hips and high metal content in blood tests.

"He was going to provide objective proof of the amount of metal loss on the device versus the amount that should be lost," Strum's lawyer, Peter Flowers, said of the expert, Dr. David Langston. "The lack of objective proof of that certainly played a large role in the ultimate outcome."

On Thursday, Dooling told both sides to return next week with possible trial dates.

"We believe the verdict arrived at by the jury in 2013 was consistent with the facts in this case," wrote Stela Meirelles, a spokeswoman for DePuy, which is a subsidiary of New Jersey's Johnson & Johnson. "DePuy's actions concerning the product were appropriate and responsible."

The ruling is a big win for the plaintiffs bar, whose scientific evidence and experts at several mass tort trials have been criticized as "junk science." It has come up in litigation involving Johnson & Johnson's baby powder, acne drug Accutane and cholesterol drug Lipitor.

In her ruling, Dooling relied on a scientific evidentiary test established in Illinois called the *Frye* standard, named for the U.S. Court of Appeals for the District of Columbia Circuit's 1923 holding in *Frye v. United States*. Under the standard, evidence can be admitted that is "generally accepted" in the scientific community. Dooling concluded that her original definition of that field was "too restrictive" and that Langton's methodologies were generally recognized, even by scientists at the U.S. Food and Drug Administration.

"Surely the FDA, the agency responsible for ensuring safety for patients who have medical devices implanted, would not request a device manufacturer to perform testing that was not generally accepted in the scientific community," she wrote.

Strum had the device implanted in 2008 due to arthritis in her left hip. Two years later, DePuy recalled the ASR. After suffering pain, Strum had another surgery in 2011 to replace the implant.

Her case wasn't the first to go to trial over the ASR hip implant. Months earlier, a jury in Los Angeles awarded $8.3 million to Loren Kransky after finding the ASR was defectively designed. But many lawyers considered that case, which was bumped up for trial due to Kransky's poor health, to be an outlier. DePuy reached its global settlement before the first bellwether trial in the federal cases began.

But thousands of plaintiffs have been excluded from the deal, which limited payouts to those who had revision surgeries as of Aug. 31, 2013.

As of Sept. 15, there were more than 1,600 cases still pending over ASR hip implants in the federal multidistrict litigation in Ohio, according to the U.S. Judicial Panel on Multidistrict Litigation. Flowers, of Chicago's Meyers & Flowers, said dozens of ASR lawsuits remain in Illinois, including Strum's case, which was excluded from the settlement because it went to trial.

That doesn't mean it couldn't settle, rather than go to trial.

"It very well could," Flowers said. "That remains to be seen."

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