TEXAS CIVIL JUSTICE LEAGUE

Court·Watch

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To: TCJL Board of Directors

From: George Christian

Date: May 21, 2018

Re: *DePuy Orthopaedics, Incorporated, Pinnacle Hip Implant Product Liability Litigation*, No. 16-11051, United States Court of Appeals for the Fifth Circuit (April 25, 2018)

In an important decision, both for its analysis of Texas product liability law and scathing denunciation of unethical lawyer conduct, the Fifth Circuit threw out a $502 million verdict against DePuy and its parent company, Johnson & Johnson, and ordered a new trial.

The case is the second in a series of bellwether trials in the Pinnacle Hip Implant multi-district litigation in the Northern District of Texas, U.S. District Judge Ed Kinkeade presiding. It consolidated for trial the claims of five of the thousands of plaintiffs alleging injuries from metal-on-metal hip implants manufactured by DePuy. The claimants also sued J&J as a nonmanufacturing seller under §82.003, Texas Civil Practice & Remedies Code. The first bellwether trial resulted in a defense verdict after a two-month trial. The second trial lasted 9 weeks and resulted a verdict against DePuy and J&J for $500,000 in economic damages, $141.5 million in non-economic damages, and $360 million in punitive damages (reduced to $9.6 million under the Texas cap on punitive damages).

On appeal, Judge Jerry Smith, writing for a unanimous panel that also included Judges Rhesa Barksdale and Stephen Higginson, found that unethical and deceptive conduct during and after the trial by plaintiff's counsel Mark Lanier tainted the verdict and warranted a new trial. As Judge Smith put it, "This is the rare case in which counsel's deceptions were sufficiently obvious, egregious, and impactful to penetrate the layers of deference that would ordinarily shield against reversal."

Specifically, Lanier, over the objection of the defendants, introduced at trial evidence of alleged bribes paid by non-party subsidiaries of J&J to official's in Saddam Hussein's government in the 1990s and induced the trial court to order a DePuy executive to testify before the jury about a 2011 Deferred Prosecution Agreement (DPA) between the Justice Department and J&J that settled this and other alleged violations of the Foreign Corrupt Practices Act. Lanier argued that DePuy and J&J opened the door to this evidence by presenting evidence of their corporate culture and marketing practices. Observing that J&J owns more than 265 companies in 60 countries and that the Iraqi part of the DPA has nothing to do with the parties in the case, Judge Smith denounced Lanier's repeated statements to the jury linking DePuy and J&J to Saddam Hussein. "Lanier tainted the result by inviting the jury to infer guilt based on no more than prior bad acts, in direct contravention of Rule 404(B)(1) [Federal Rules of Civil Procedure]," Judge Smith wrote. "That alone provides grounds for a new trial."

But there is more. Lanier also waved a resignation statement by a former employee of DePuy alleging racist comments by a DePuy executive. The trial court promptly overruled a defense motion to strike the statement as hearsay and grant a mistrial. Lanier went on in his closing argument to refer to the "filthy . . . racist email" to support his claim that J&J should bear liability for marketing the hip implant. Judge Smith: "In reading the letter to the jury, Lanier refocused its attention on serious, and seriously distracting, claims of racial discrimination that defendants had no meaningful opportunity to rebut via cross-examination. This spectacle fortifies our conviction that a new trial is required."

If these antics were not enough on their own, the Fifth Circuit found that Lanier concealed payments to two experts whom he claimed at trial were testifying *pro bono*, in contract to the highly compensated defense experts, which Lanier denounced to the jury as "bought testimony." Lanier made much of this in his closing argument as well, claiming that the surgeon testified "on his own" In one case, Lanier made an undisclosed charitable contribution in anticipation of the testimony at trial of an orthopedic surgeon who had operated on George H.W. Bush and Billy Graham. "Once it was 'formally' decided that [the surgeon] would testify," wrote Judge Smith, "Lanier's failure to disclose the donation, and his repeated insistence that [the surgeon] had absolutely no pecuniary interest in testifying, were unequivocally deceptive." A second surgeon, who happened to be the other one's son, likewise testified, according to Lanier "pro bono" and without expectation of compensation.

The only problem? At the conclusion of the trial, Lanier cut checks to both of them: Dad got $35,000 and son got $30,000. Son also testified that he had expected to get paid all along and was surprised when he got a check for twice the amount he thought was standard in this type of litigation.

Judge Smith:

> *Now to the question whether Lanier, knowingly or unknowingly, misled the jury representing repeatedly that the [surgeons] had neither pecuniary interest nor motive in testifying. The facts speak pellucidly: The pre-trial donation check, [the son's] expectation of compensation, and the post-trial payments to both doctors are individually troubling, collectively devastating.*

Lanier tried to explain that the donation was a "thank you" for time spent before trial discussing the case, and not a promise to make a contribution in exchange for testimony (even though Lanier at trial designated Dad as a non-retained expert who "might" testify). The Court easily saw through this dodge, even calling it "specious": "Lawyers *cannot* engage with a favorable expert, pay him 'for his time,' then invite him to testify as a purportedly 'non-retained' neutral party. That is deception, plain and simple. And to follow that up with post-trial "thank you" check merely compounds the professional indiscretion."

In sending the case back to the district court, the Fifth Circuit admonished the trial court's "serious evidentiary errors" and "counsel's misrepresentations." One wonders

what might happen the next time Lanier shows up in the Fifth Circuit. We should also note that when TCJL filed an *amicus curiae* brief in this matter with respect to the nonmanufacturing seller provision in the Texas product liability statute, Lanier objected. In that brief, TCJL urged the Fifth Circuit to rule that § 82.003 grants immunity to a nonmanufacturing seller, not a cause of action to the plaintiff. Alternatively, we asked the Court to certify a question to the Texas Supreme Court requesting a clarification of Texas law. We strongly suspect that Lanier did not want that to happen, but the issue lives to fight another day.