

Major Damages Award in Pelvic Mesh Case Underscores the Critical Role of Internal Email in Jury Trials

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Last week, a state court jury in Dallas awarded the plaintiffs in a pelvic mesh device litigation against Boston Scientific **approximately \$23.5 million in compensatory damages** and \$50 million in punitive damages.

In the bellwether case, ***Salazar v. Lopez***, plaintiffs Martha Salazar and her husband Felix Salazar sued Boston Scientific alleging she was injured by its Obtryx sling device. After a two-week trial, the jury found that Boston Scientific was negligent in designing the Obtryx device and that negligence was a proximate cause of Salazar's injuries. The jury also found that Boston Scientific failed to provide adequate warnings to doctors about the risks associated with the device. Finally, the jury found gross negligence, permitting the recovery of punitive damages.

While the jury awarded \$50 million in punitive damages, the actual amount of recovery of punitive damages is limited by Texas Civil Practice & Remedies Code § 41.008 to two times the amount of economic damages, plus an amount equal to any noneconomic damages found by the jury, not to exceed \$750,000, which in this case amounts to approximately \$11.2 million.

There are tens of thousands of pelvic mesh cases pending nationwide against various manufacturers. Only a few have gone to trial thus far. The Salazar verdict is the largest. Boston Scientific itself won two previous bellwether pelvic mesh trials in Massachusetts state court, one involving Obtryx and another involving a different device. What accounts for the outcome in the Salazar trial?

Many trial observers have pointed to a key internal Boston Scientific email introduced by the plaintiffs and used to argue that the company had knowledge of safety concerns about the device before it communicated such concerns to physicians. The August 2010 email from a Boston Scientific executive discussed a study published in December 2009 in the *American Journal of Obstetrics and Gynecology* comparing Boston Scientific's Obtryx device with its Advantage sling system. In the email, the executive stated, "I don't feel this paper would be useful to the sales force in terms of helping defend business or selling more slings." "It actually is a fairly negative outcome in terms of our Obtryx sling. I certainly wouldn't hand this out to any physicians."

In addition to using the email to argue what the company knew and when, the plaintiffs used the

email to imply that the company attempted to conceal negative information about the product from physicians. Based on the verdict, it appears the jury may have been persuaded. The Salazar case is a prime example of how internal company communications can play a major, even decisive, role in medical device product liability trials.

Boston Scientific faces thousands of additional mesh lawsuits, which are currently pending across the country. It will be interesting to see how the outcome of the Salazar trial and the plaintiffs' use of internal company email affects the future course of the litigation.

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