

[Products Liability Law Daily Wrap Up, INDUSTRY NEWS—SUPREME COURT: Petition challenges Sixth Circuit's reasoning in excluding expert testimony, \(Dec. 9, 2016\)](#)

Products Liability Law Daily Wrap Up

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By Leah S. Poniatowski, J.D.

A patient who alleged that the rupture of a silicone breast implant caused several physical ailments has asked the U.S. Supreme Court to review a decision by the U.S. Court of Appeals for the Sixth Circuit that granted summary judgment to the implant manufacturer on the basis that the expert testimony proffered by the patient was not admissible because it was not based on accepted methodologies ([*Ezra v. DCC Litigation Facility, Inc.*](#), Docket No. 16-740, filed December 5, 2016).

The patient underwent breast augmentation surgery in 1984. At that time, she received silicone breast implants manufactured by Dow Corning. The left implant ruptured nine years later, causing the patient a plethora of health issues. In 1995, Dow Corning filed for Chapter 11 bankruptcy, and the bankruptcy court thereafter approved a reorganization plan under which breast-implant claimants were given a choice to either receive fixed payments specified under the plan or to litigate their individual claims against Dow's new litigation corporation—DCC Litigation.

The patient chose to pursue a lawsuit against DCC in 2010, claiming that her silicone implants caused her muscle aches, dizziness, chronic low-grade fevers, and fatigue, among other problems. In 2013, a federal district court in Michigan granted summary judgment in DCC's favor, finding that the patient lacked proof of general causation. The U.S. Court of Appeals for the Sixth Circuit reversed and remanded the trial court's decision, however, advising that Michigan law does not require proof of general causation in products-liability cases.

On remand, DCC again moved for summary judgment, this time challenging the admissibility of the patient's expert witnesses. The trial court granted DCC's motion, holding that two of the experts had failed to offer any methodology for their conclusions and that the other expert had offered no conclusions at all about the patient's condition. The patient appealed, arguing that the lower court abused its discretion by excluding and limiting the testimonies of the identified expert witnesses.

Sixth Circuit ruling. In an unpublished opinion, the appellate panel ruled that the trial court had not abused its discretion when it excluded and limited the testimony of the three experts providing opinions on behalf of the patient [see *Products Liability Law Daily's* July 28, 2016 [analysis](#)]. The panel agreed with the lower court that the opinions provided by the two physician-experts were unsupported by accepted methodologies. Additionally, the third expert—a chemist with extensive experience researching medical implants and their impacts on human tissue—offered no opinion as to the cause of the patient's health problems.

Based on the admission of the witness that his expertise did not include offering diagnoses, the trial court had determined that he could testify about the chemical makeup of silicone gel and not about specific causes of the patient's health problems. The patient objected to that determination, but failed to offer any reasonable explanation for her challenge. Thus, the appellate panel concluded that limiting this expert's testimony was reasonable and was not an abuse of discretion.

Petition. The patient complains in her petition that the Sixth Circuit's ruling was "based on egregiously irrational reasoning and violates fundamental fairness," in addition to violating her right to trial by jury as well as her equal protection and due process rights. The patient asserted that there is an "epidemic" of *Daubert* rulings in which a lack of rational reasoning has rendered these decisions arbitrary and capricious. She argues that the opinions provided by the two physicians were based on generally accepted methodology—i.e., review of records created

by the patient's treating physicians, review of laboratory and imaging records, analysis based upon education, training, and clinical experience—and differential diagnosis, which applicable case law supports as satisfying the federal evidentiary rule requirements.

The patient also offered examples of the Sixth Circuit reversing rulings in which expert opinions had been excluded for not providing identifiable methodology. Accordingly, the patient asked the High Court to remand her case to the district court in order to "have her experts as well as the defense experts subjected to vigorous direct and cross-examination in a full and fair *Daubert* hearing in front of a rational, fair, impartial, disinterested jury."

The case is Docket No. [16-740](#).

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Companies: DCC Litigation Facility, Inc.

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