Products Liability Law Daily Wrap Up, TOP STORY—MEDICAL DEVICES—N.D. Ill.: All claims dismissed in one of the Zimmer knee replacement cases, (Oct. 24, 2016)

Products Liability Law Daily Wrap Up

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By Robert B. Barnett Jr., J.D.

In a failed knee replacement suit against a knee implant manufacturer, Zimmer, Inc., the injured patient's expert witness was not permitted to testify that the patient's injuries resulted from the implant's design defect because the witness, in reaching his conclusions, failed to apply his methodology correctly or explain adequately the reasons for his conclusions, an Illinois federal district court ruled. Without the expert witness's testimony as to causation, in addition to other shortcomings, the injured party's claims failed, and the court granted summary judgment for the implant manufacturer on all counts (*Joas v. Zimmer, Inc.*, October 21, 2016, Pallmeyer, R.).

History. Injured patients in several states have filed suit against Zimmer, Inc., alleging that the manufacturer's NexGen Flex knee implants failed after total knee replacement surgery. In the first case to go to trial, about a year ago, the jury returned a verdict for Zimmer. This current action is the second bellwether case.

The injured patient in this case received a total knee replacement in Wisconsin in 2008. He returned to work at a job requiring heavy lifting and repetitive squatting. In 2011, he again experienced pain, and, in 2014, he had revision surgery in Wisconsin to correct a loosening of the tibia. The patient, believing that a design defect caused a premature loosening, sued Zimmer for strict liability design defect, strict liability failure to warn, strict liability manufacturing defect, negligence, negligent misrepresentation, breach of express warranty, breach of implied warranty, violation of Wisconsin consumer protection law, unjust enrichment, and fraudulent concealment. Zimmer filed both (1) a motion to exclude the testimony of the patient's expert witness—a physician who examined the patient, the device itself, and the patient's medical records to offer an opinion on causation, and (2) a motion for summary judgment on all counts.

Expert testimony. In the previous Zimmer case, the court allowed the same physician expert to testify to his opinion on biomechanics, but excluded his opinions on the risk of component loosening, the adequacy of Zimmer's warnings, and the adequacy of Zimmer's pre-market testing. In this case, the injured party again was offering the physician's opinions to establish causation, but the patient claimed that the difference was a new report that the physician issued that was specific to him. In determining whether the physician would be permitted to testify as to causation, the court applied the U.S. Supreme Court's mandate that the trial judge ensure that the expert's testimony rest on a reliable foundation and be relevant to the task at hand (*Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1973)).

In reaching his conclusions on causation, the physician applied a process called differential etiology, in which he ruled in all potential causes of the patient's ailment and then systematically ruled out each cause until he was left with the likely cause. The court, however, was highly critical of this approach and his opinions, for several reasons. First, he offered no additional support or explanation beyond the conclusions reached in the previous Zimmer case in which his opinions were excluded. Second, he offered conclusions without explaining in sufficient detail how he arrived at those conclusions. For example, he stated that he reviewed sources, such as medical records, but he never explained how those sources informed his opinions. Third, he failed to apply a consistent standard for determining which causes were ruled in to his differential etiology. For example, a defect in the surgical cement used to hold the knee together could have caused the knee failure, but he never considered it as a possible cause. Fourth, he failed to apply a systematic approach in deciding when to rule out a cause. For example, he ruled out polyethylene wear debris, surgical technique, and arthritis medication, but for different and inconsistent reasons. As a result, applying *Daubert*, the judge concluded that the expert's opinions were

not based on a reliable foundation and that Zimmer's motion to exclude his testimony on causation should be granted.

Summary judgment. The injured party failed to respond to Zimmer's motion for summary judgment on strict liability manufacturing defect, negligent misrepresentation, breach of express warranty, breach of implied warranty, violation of Wisconsin consumer protection law, unjust enrichment, and fraudulent concealment. As a result, the motion for summary judgment on all those counts was granted.

The remaining claims were for design defect, negligent design, failure to warn, and punitive damages. Given that causation was a required element of each of those claims, the absence of the physician's expert testimony was fatal to them. Even if the physician was allowed to testify, however, the injured party could not have survived the motion for summary judgment because of numerous other shortcomings in his proof. For example, Wisconsin requires in a design defect case that the plaintiff establish a reasonable alternative design, which the injured party in this case never provided. In addition, the patient failed to produce any evidence that Zimmer failed to conduct adequate product testing, as is required in a negligent design case. As for failure to warn, the court concluded (for the first time) that the "learned intermediary doctrine" applied in Wisconsin. Thus, the warning was to the physician rather than to the patient. In this case, the surgeon admitted that he never read the Zimmer warnings, which meant that any change in the warnings would have been irrelevant. Finally, given that all the other claims failed to survive, the punitive damages claim also failed.

Future Zimmer cases. In dicta, the court addressed the impact of this decision on other cases against Zimmer in this multidistrict litigation, opining that this case is distinguishable on several grounds. Other cases, for example, may not rely on differential etiology to establish causation, or other cases may apply differential etiology more rigorously. Wisconsin's requirements for proving design defects may differ from other states' requirements. The surgeon in other cases may have read the warnings. This case involved only a loosening at the tibia; other cases involving a loosening at both the tibia and the femora might be easier to pursue.

In any event, the court granted both Zimmer's motion to exclude the physician's testimony and its motion for summary judgment on all counts.

This case is No. 13 C 9216.

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Companies: Zimmer, Inc.

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