

Superior Court Affirms \$20 Million Verdict in Med Mal Case

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A Superior Court panel has upheld the \$20 million in compensatory damages a Philadelphia jury awarded in October 2003 to a former Penn student whose family claimed he suffered brain damage after staffers at Temple University Hospital were slow to respond to a clogged tracheotomy.

In *Gallagher v. Temple University Hospital*, the judges did, however, reverse the jury's \$15,000 punitive damages award.

Hugh Gallagher IV, who was 19 years old at the time of the procedure, had been admitted into intensive care at the hospital in May 2000 after suffering severe burns during a failed suicide attempt.

In appealing, the defense had argued the jury had become confused and mistakenly included punitive damages in its malpractice damages award.

The ruling is a victory for Shanin Specter and Andrew Youman of Kline & Specter.

Defense attorney Stephen Cozen said the decision would be appealed to the state Supreme Court.

"You don't think that the \$20 million didn't already include punitive damages?" Cozen asked. "I mean, please, give me a break."

The panel, which issued its decision in a memorandum filed Sept. 15, consisted of Judges Joan Orié Melvin, Jack A. Panella and Senior Judge Frank J. Montemuro Jr.

According to the opinion, the blockage of Gallagher's tracheal opening kept him from breathing, resulting in severe brain damage that will prevent him from ever living independently.

One key issue as the case proceeded to trial was that, after over two years of discovery, it emerged that the original flowsheet from the night Gallagher's brain damage occurred had been removed from Gallagher's file, replaced with a copy and placed in a safe kept by Temple University Hospital's risk manager. The original had also been whited-out and rewritten in certain places.

When Kline & Specter found out that the hospital had in fact been in possession of the original flowsheet, it amended its complaint to add a punitive damages claim, citing the allegedly deliberate failure to produce the original.

Addressing the appeal of the punitive damages, the judges agreed with Temple that "a defendant's acts that are independent from the conduct on which liability is premised may not serve as the basis for punitive damages."

"While the conduct surrounding the alleged withholding of certain medical records and the whiting out of portions of other records, if true, is undoubtedly reprehensible, none of these facts, however, relate to the malpractice being litigated," the opinion states.

Philadelphia Common Pleas Senior Judge Alex Bonavita Cola, who presided at trial, should not have denied Temple's motion for judgment n.o.v. as to the punitive damages award, the judges concluded.

But they went on to reject Temple's request for a new trial as to the med mal claim on the grounds that it was prejudiced by the punitive damages claim's being included in the case.

The judges reasoned that the evidence offered to establish a cover-up was relevant to liability and noted that it had not been objected to by Temple before the Gallaghers sought to amend their complaint.

The panel then turned to Temple's assertion that the trial court did not investigate indications of juror confusion after it rendered the compensatory damages portion of its verdict.

When the jury returned with its unanimous verdict as to liability, according to the opinion, it was told that due to the way it had answered the final interrogatory, it would need to return again at least another day to consider a punitive damages award.

The jury's foreperson then said that the verdict they had reached had been "half on one and half on the other" before being interrupted. Temple's trial counsel immediately moved for a mistrial, according to the opinion, arguing that the foreperson's comment clearly indicated that the jurors had considered punitive damages evidence in reaching their liability verdict.

"We reject [Temple's] self-serving interpretation that this partial utterance by one juror shows that the jury awarded punitive damages as part of the compensatory award," the opinion states.

Specter said he hopes the case has prompted Temple University Hospital to address issues related to the integrity of its risk manager's office.

Cozen said he believes his client has rectified any problems with that office in the years since the verdict was awarded, and described what happened to the original flowsheet as an "innocent act which was twisted way out of context by plaintiff's counsel."

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