

# \$1.5 Mil. Damages Finding Reached in Bifurcated Trial

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A Lehigh County jury has returned a \$1.5 million damages finding following the first phase of what appears to be the first reverse-bifurcated medical malpractice trial to be held in a Pennsylvania state court.

The damages phase in *Gulick v. St. Luke's Hospital and Health Network, Inc.*, which stems from the October 2002 death of a 3-day-old boy, also highlighted challenges presented by the new damages calculations provisions of the MCARE Act, according to the plaintiffs' attorney in the case.

Thomas Kline of Kline & Specter in Philadelphia also said that two of the case's physician defendants settled for \$500,000 each prior to the conclusion of the damages phase, guaranteeing the parents of Connor Gulick a recovery of at least \$1 million going into anticipated inter-phase settlement talks that are expected to be supervised by Judge Alan M. Black, who presided at trial.

Those two defendants, who settled under Section 714(e) of the MCARE Act, have only tendered their primary policies' limits, and will remain defendants in the case for the purposes of any second phase, Kline said.

According to Kline, who is trying the case with Matthew Casey, it would be a "near impossibility" for the two defendants that settled to be apportioned any significant percentages of liability during a second phase.

Kline described other defendants used in the case as the main targets of the *Gulick* litigation

Only one of the defense attorneys in *Gulick* returned a call seeking comments, and he declined to make one.

A St. Luke's spokeswoman stressed that liability has not been determined. She said that the hospital is interested in engaging in settlement discussions before Black.

"We are confident that we have met all the standards of care," said hospital spokeswoman Sue Schantz.

According to court papers, well before Connor's birth, ultrasounds revealed an omphalocele, which is a hernia at the umbilical cord site.

Connor's mother Elizabeth (at the time, a nonmedical employee of St. Luke's) underwent a scheduled Caesarean at St. Luke's after roughly nine-and-a-half months of pregnancy. Following the birth, Connor was taken to an operating room that was prepped to correct his omphalocele.

Connor was given anesthesia, "but before the procedure could begin, his breathing worsened, and the surgery was called off. He died three days later at St. Christopher's Hospital for Children.

The plaintiffs filed suit against St. Luke's, its perinatologist Steven Feinstein and its neonatologist, Waseem Akhter; obstetrician/gynecologist Karen Sciascia, who performed the Caesarean; St. Christopher's pediatric surgeon Max Ramenofsky, who was to perform the omphalocele surgery; and anesthesiologist William Cherry, who administered anesthesia to Connor prior to his aborted omphalocele surgery.

The demand was for \$10 million, according to court papers; the defendants made a joint offer of \$1 million, which was rejected.

The two defendants that settled were Ramenofsky and Cherry.

The plaintiffs alleged in court papers that, contrary to specific pre-birth instructions from a number of physicians who consulted with the Gulicks, Feinstein and Sciascia failed to ascertain by way of amniocentesis Connor's lung maturity before the Caesarean was performed; they asserted that his lack of mature lungs led to serious injuries when anesthesia was administered.

The plaintiffs also argued that before being brought in to the OR, Connor was not properly stabilized by Akhter, Rameonfsky and Cherry.

According to court papers filed by Cherry's attorneys, prior to surgery, Akhter noticed on an X-ray of Connor's chest that there were lung abnormalities, but felt that Connor would be able to proceed to surgery.

According to those court papers, Cherry heard a heart murmur when he examined Connor prior to surgery, but felt that it was innocent.

In response to the plaintiffs' assertions, the defendants stated that the C-section was scheduled for the day it was because Elizabeth's husband, Gregory, was undergoing FBI training and had few chances to schedule an absence.

They also attributed the lack of a prenatal amnio to Elizabeth: Feinstein had scheduled one for three days before the Caesarean, they wrote, but Elizabeth was nervous about it, and the St. Luke's head of neonatology suggested that as Elizabeth had already been pregnant for over nine months, there was no reason to suspect Connor's lungs were not sufficiently mature.

The damages phase began on Dec. 4 and ended four trial days later, with the 12-member panel returning its unanimous finding. The exact amount was \$1,547,500, \$500,00 of which was for pain and suffering.

Kline described the first phase of the trial in *Gulick* as a battle of the economics experts.

A central issue during the examination of those witnesses, he said, was whether the lifetime earnings of Connor—who had one parent with a bachelor's degree, and one with a master's—should offset by what his college education would have cost.

The defense argued that it should be, according to Kline, but Black ultimately instructed the jury not to do so. Black reasoned that it would be too speculative to assume that Connor's college tuition fees would not have been footed by his parents, or some sort of scholarship.

The plaintiffs' economics expert was David Hopkins, a King of Prussia actuary; the defense's was Thomas Walsh, a Virginia based economist.

Due to the fact that *Gulick* fell under the scope of MCARE, which took effect in 2003, the jurors were called upon to consider complex theories of how interest rates and other economic factors will change over the course of coming decades, Kline said.

“While that may not have been on the minds of the Legislature when they wrote the MCARE Act,” that's exactly what med mal juries in Pennsylvania are needing to do, Kline said.

“The new MCARE Act has made the life of the trial courts and the practitioners in med mal cases, and the juries, much more complicated and difficult,” he added later.

*Gulick* was also unique for another reason.

Kline and other med mal practitioners contacted *The Legal* said they could not recall another case where the reverse bifurcation format has been applied outside of the mass torts arena.

The reverse bifurcation order in *Gulick* was sua sponte, but none of the parties objected to it, according to Kline.

“Judge Black obviously believed that it would be the most efficient way to proceed,” Kline said, adding “[Reverse bifurcation] has been commonplace for many years in mass tort cases where liability is clear, including Diet Drugs and asbestos cases, so the application to med mal, while novel, is in the appropriate case a reasonable alternative for the court when facing a long trial in cases where liability is likely to be assessed against the defendants in any event.

“It is not appropriate for every case.”

Unlike the reverse bifurcation format found in most mass tort matters, especially those handled in Philadelphia's Complex Litigation Center, the liability phase in *Gulick*, if one held, will be heard by a different jury than was the damages phase. Kline said the latter half of the *Gulick* trial has been tentatively scheduled for this spring.

St. Luke's, Akhter and Feinstein were represented in the matter by Arthur Hankin of Blank Rome in Philadelphia, who passed *The Legal's* request for comment on to St. Luke's spokeswoman Schantz.

Sciascia's attorney was Mark Zofaghari of Kevin H. Wright & Associates in Conshohocken; Cherry's was Frederick Stellato of Tallman Hudders & Sorrentino in Allentown. Neither responded to calls seeking comment.

Timothy McCann of McCann & Geschke in Philadelphia, whose firm is representing Ramenofsky and St. Christopher's, declined to comment on the case.