

# The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES

*By Saranac Hale Spencer*

July 23, 2012

## **\$17.5 Mil. Verdict Against VA Over Dental Mishap Stands**

Since the U.S. government has dropped its appeal in a case brought on behalf of a man who suffered a stroke following the extraction of several of his teeth at the Veterans Affairs hospital in Philadelphia, a federal district judge's \$17.5 million verdict stands.

Although the government had filed a notice of appeal after the judgment from U.S. District Judge William H. Yohn Jr. of the Eastern District of Pennsylvania last fall, an order issued from the U.S. Court of Appeals for the Third Circuit last week dismissed the case pursuant to the government's concession.

"The decision not to pursue an appeal was made by the solicitor general of the United States and we are not at liberty to discuss his decision," said Thomas Johnson, of the U.S. Attorney's Office for the Eastern District of Pennsylvania, in a prepared statement. He tried the case on behalf of the government.

"The government's decision, although it took longer than I would have liked, I think it's a ringing endorsement of Judge Yohn's judgment," said **Shanin Specter** of Kline & Specter in Philadelphia, who was the lead attorney representing the Ellisons.

Because Christopher Ellison's wife, Cheryl Ellison, brought her claims of medical malpractice against the government under the Federal Tort Claims Act, they were tried in front of a judge rather than a jury, Yohn explained in his September decision. He held that VA doctors had been negligent in their care for Christopher Ellison and had awarded more than \$3.1 million for past and future medical expenses, more than \$1.1 million for past and future lost earnings, \$2.5 million for past pain and suffering, \$7.5 million for future pain and suffering, \$226,000 to cover the costs of buying a new home and having it modified to be accessible for Christopher Ellison, and \$3 million to Cheryl Ellison for her loss of consortium claim.

"The idea that Judge Yohn would be reversed ... was always, to use a fancy legal term, silly," Specter said. The verdict wasn't rendered by a jury that could be moved by passion or prejudice, he said, but by an experienced judge "who's conclusively not given to excess."

Specter said of the size of the judgment: "It appears to have been one of the largest Federal Tort Claims Act awards that has been rendered," aside from those related to birth injuries.

"It was an appropriate award in terms of the size," he said, since the once vibrant man now needs 24-hour care and has three children who had depended on his income.

Yohn adopted figures suggested by Mona Yudkoff, the "qualified life planner" supplied by Christopher Ellison's lawyers, who estimated a life expectancy of 79.2 years for Ellison, who is currently 54.

"Mr. Ellison has suffered a catastrophic brain injury resulting in severe permanent cognitive and physical injuries ... Mr. Ellison has a performance scale IQ of 68, which corresponds with mild mental retardation. He is capable of stating only simple phrases and understanding only simple instructions. He is thus unable to express himself, except for a few words, and often gets very frustrated when not understood," Yohn said in his findings of fact and conclusions of law.

Ellison, who served for 20 years in the Marines and had worked as a calibration technician at Kandel Electronics since 2001, got a diagnosis from the VA hospital of tooth decay and gum disease in May 2007, according to Yohn's decision. In August of that year he had three teeth extracted at the hospital with no complications and returned in September to have eight more teeth extracted. During that hourlong procedure, Ellison, who had known aggravating factors for strokes, had four hypotensive episodes during which his blood pressure dropped and he felt nauseated and light-headed, according to the decision.

Ellison stayed in the dental chair about 10 minutes longer than patients with no complications, but got up and appeared to be well, according to the decision. He picked up medicine from the hospital pharmacy and proceeded to drive himself home. At about 1 p.m., a tow-truck driver discovered Ellison, whose car had crashed into the sidewalk 100 yards from the hospital.

"I find that Dr. Abel's failure to stop the dental extractions after the first episode of hypotension was a substantial factor in causing Mr. Ellison's stroke," Yohn said. He went on, "Dr. Abel's failure to refer Mr. Ellison to a medical facility for observation for at least 30 minutes to one hour after his procedure to ensure that he was stable, was a significant factor in the severity of the stroke.

"If Mr. Ellison had been monitored at a hospital, or was escorted home, the symptoms of stroke would have been recognized sooner, he would have had a CT scan sooner, which would have showed less damage, and he would have most likely been eligible for tPA therapy, thus limiting the extent of his injuries."