

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2007

PHILADELPHIA, WEDNESDAY, NOVEMBER 28, 2007

VOL 236 • NO. 104 \$3.00

ALM

U.S. Justices Won't Review \$20 Mil. Verdict Against Local Hospital

BY SHANNON P. DUFFY

U.S. Courtroom Correspondent

If Yogi Berra had been a lawyer, he might have said, "It ain't over until the U.S. Supreme Court denies cert."

For a team of lawyers at Kline & Specter, a long battle to defend a \$20 million verdict ended Monday when the justices refused to review a series of decisions by Pennsylvania appellate courts in *Gallagher v. Temple University Hospital*.

In its 2003 verdict, a Philadelphia jury found that Hugh Gallagher IV suffered brain damage after staffers at the hospital were slow to respond to a clogged tracheotomy.

Gallagher, a Temple student who was 19 at the time, was admitted into intensive care at Temple University Hospital in May 2000 after suffering severe burns during a failed suicide attempt.

In the appeals, lawyers for the hospital argued that the jury had become confused during deliberations and mistakenly included punitive damages in its compensatory damages award.

But Gallagher's lawyers — Shanin Specter, Charles Becker and Andrew Youman — argued

that the \$20 million award was purely compensatory, and that the jury's separate award of \$15,000 in punitive damages was already overturned on appeal.

In an interview, Specter said the jury's award has been growing with interest at the rate of \$3,000 per day and is now worth \$27 million.

Specter said he considered the hospital's petition to the U.S. Supreme Court to be frivolous because "they were trying to create a constitutional question where none existed."

In its appeals in the Pennsylvania courts, the hospital was represented by Stephen Cozen and John Salvucci of Cozen O'Connor. For the petition to the U.S. Supreme Court, the hospital hired Christopher Landau of Kirkland & Ellis.

In the petition, Landau argued that the \$20 million award was at least partly punitive in nature and that its sheer size violated the hospital's constitutional right of due process.

Landau could not be reached for comment.



SPECTER

One key issue in the case centered on claims that the hospital had altered its records.

After more than two years of discovery, plaintiffs' lawyers said the original hospital records 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 the hospital's risk manager.

The original had also been whited-out and rewritten in certain places, the plaintiffs' lawyers said.

As a result, Kline & Specter amended the complaint to add a punitive damages claim, citing the allegedly deliberate failure to produce the original records.

Defense lawyers argued that a remark by the jury's foreperson revealed that the jury was confused about its role in the first phase of the trial.

According to court records, when the jury returned with its unanimous verdict on liability, the jurors were told they 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," but was quickly interrupted.

Hospital continues on 10

Hospital

continued from 1

according to court records.

Temple's trial counsel immediately moved for a mistrial, arguing that the foreperson's comment clearly indicated that the jurors had considered punitive damages evidence in reaching their liability verdict.

"You don't think that the \$20 million didn't already include punitive damages? I mean, please, give me a break," the hospital's lead appellate counsel, Stephen Cozen, told *The Legal Intelligencer* in 2005.

But the Pennsylvania appellate courts rejected nearly all of the defense arguments.

A Superior Court panel overturned the jury's \$15,000 punitive damages award, but sided with Philadelphia Common Pleas Judge Alex Bonavita, who had presided at trial, on his

decision to deny the defense's request for a new trial.

In a September 2005 decision, the Superior Court found that evidence of the hospital's alleged altering of the records was relevant to liability and noted that it had not been objected to by the defense before the Gallaghers sought to amend their complaint.

The Pennsylvania Supreme Court later instructed the Superior Court to revisit the case. In a second opinion, the Superior Court found that Bonavita had carefully bifurcated the jury's considerations of the case's compensatory and punitive aspects.

In his jury instructions prior to the liability verdict, Bonavita had never charged the jury on punitive damages and had specifically told the jurors that they were not there to punish anyone, the Superior Court noted.

The Pennsylvania Supreme Court later refused to take the case up, leading to the hospital's petition to the U.S. Supreme Court. •