Big Verdicts, Big Vacancies

Top Phila. Courts' Stories in '06

The Legal Intelligencer

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Editor's Note: This is the first in a series of year-end articles on the Philadelphia legal scene. The next article will focus on area law firms and the various mergers and acquisitions that were a hallmark of 2006.

Medical malpractice-minded rule changes may have led to a decrease in whopper verdicts in Philadelphia Common Pleas Court, but that doesn't mean City Hall didn't see its fair share of courtroom drama in 2006.

Wal-Mart

In terms of monetary size and national attention, Philadelphia's biggest verdict this year stemmed from the class action against Wal-Mart brought by Pennsylvania employees of the retail juggernaut who claimed they were not properly paid for missed rest breaks and off-the-clock work.

Following a month-long trial process, the 12-member jury in Hummel v. Wal-Mart Stores Inc. awarded 186,000 current and former employees of Pennsylvania Wal-Marts nearly $78.5 million; the jurors' mid-October award was comprised exclusively of compensatory damages.

Philadelphia Common Pleas Judge Mark I. Bernstein, who presided over the trial, will in the near future have to decide, without the jury's input, how much Wal-Mart's Pennsylvania employees are owed under a statutorily designated damages scheme.

Class counsel have said they hope that figure will total an additional $62 million on top of the Hummel jury's award, but Wal-Mart's attorneys are sure to contest that calculation.

The multimillion-dollar award roughly reflected the total amount asked for by lead class counsel Michael Donovan of Donovan Searles in Philadelphia during his damages-related closing argument.

In turn, Wal-Mart's lead attorney in Hummel, Neal Manne of Susman Godfrey in Houston, had requested that the jury take into account problems with the plaintiffs' experts' statistical analyses and hand up an award more along the lines of $7 million.

The jury's monetary award came a day after its members determined that Wal-Mart had failed to pay its post-1998 Pennsylvania workers for time worked off-the-clock and for missed rest breaks, but not for meal breaks that class representatives said they routinely missed as well.

It took the jurors about two hours to reach their damages-specific verdict.

"This case is the same case that we read about in literature, that we see on TV," Donovan argued before the jury during his closing argument as to liability. "It's a case about the employees - the less powerful - [fighting] against the more powerful. This is a conflict that has been repeated over and over again in our history."

A quick glance into the gallery on that day seemed to underscore Donovan's rhetoric.

On the plaintiffs' side of the aisle was a group of class members, most of them casually dressed. Donovan identified several of them during his closing.

On the defense side of the audience sat a cadre of well-manicured attorneys, in what appeared to be color-coordinated outfits, endlessly fingering wireless handheld devices.

But by the time Wal-Mart's lead counsel rose to address the jury for his liability closing, a number of current Wal-Mart employees who testified for the defense at trial had taken seats in the front rows of the defense's side of the gallery.

Calling the jury's attention to the happy Wal-Mart workers, lead defense attorney Mann implied that the class's representatives are disgruntled former Wal-Mart employees whose testimonies are less than credible.

"The plaintiffs' lawyers ask you to believe a story, a fairy tale," Manne said.

Donovan's co-counsel in the matter included Judith Spanier of Abbey Spanier Rodd Abrams & Paradis in New York City and Rodney Bridgers of Franklin D. Azar & Associates in Aurora, Colo.

Manne was assisted in his representation of Wal-Mart by fellow Susman Godfrey attorneys, along with Brian Flaherty of Wolf Block Schorr & Solis-Cohen in Philadelphia.

The Hummel verdict marked the second major jury award Wal-Mart has been hit with this year over its failure to pay workers for missed break time.

This January, a California jury awarded a 115,000-member class with grievances similar to those in Hummel $172 million following four months of litigation. Of that award, $115 million was for punitive damages.

Med-Mal Verdict

Despite the recent downturn in the number of high-stakes medical malpractice matters going to trial in Philadelphia, the second-largest jury award in the city's court system in 2006 came in just such a case.

In June, a city jury awarded $30 million to the family of a 5-year-old South Jersey boy whose severe cognitive and developmental deficiencies were alleged to have resulted from the misadministration of a blood-clot-busting medication.

However, the actual disposition amount in Keenan v. Children's Hospital of Philadelphia was officially under wraps for months, as the parties reached a confidential high-low agreement shortly after the jury began its five-day-long deliberations.

Philadelphia Common Pleas Judge Victor J. DiNubile, who presided at trial, refused to authorize the release of a transcript generated when DiNubile and both plaintiffs' and defense counsel addressed the settlement in the presence of an official court reporter.

But by August, The Legal had learned that the parties' high-low had ranged from $4 million to $500,000, meaning that the family received the higher sum as a result of the jury's award.

According to court papers filed in the matter, 5-year-old Daniel Keenan, a twin, had suffered the worst of a November 2000 breech birth. Soon into his infancy, regular infantile spasms began to require frequent hospitalizations, and, ultimately, a feeding tube and daytime nursing care.

But Daniel's parents, plaintiffs Betty Jean and Gerald Keenan, claimed that Daniel would have had a chance for a full, or at least partial, recovery from the damage caused by his infantile spasms had it not been for a massive stroke at age 1 while a patient at the Children's Hospital of Philadelphia (CHOP).

That stroke, the Keenans alleged, was caused by improper treatment of a blood clot that developed in Daniel's thigh during a multi-week March 2002 stay at CHOP necessitated by his chronic seizure disorder.

The defense contended in court papers that Daniel's tragic fate was brought on by West syndrome, which results in infantile seizures and spasms.

The Keenans' attorney in the matter was Gayle Lewis of Media, who handled the case with associate Matthew Schelkopf.

Richard Kolb and Mary Kay Schwemmer of White & Williams in Philadelphia served as defense counsel for CHOP and the individual doctors involved in the litigation.

Theatrics in the Jury Room

Some of the stories emanating from cases tried in Philadelphia this year seemed straight out of a TV drama.

Nelson v. Wyeth, the city court system's first hormone-therapy trial, started out as just another slugfest between big-firm defense attorneys and plaintiffs lawyers who represent dozens of similarly situated clients - not unlike the diet drug actions also being handled by Philadelphia's Complex Litigation Center.

The hormone therapy cases generally involve claims that prescription drug treatment for women's menopausal problems led to breast cancer - as in Nelson - and/or other serious health problems.

The phase-one jury in Nelson had concluded in mid-October that Wyeth, if found liable during the second phase in the litigation, would have to pay the action's wife-and-husband plaintiffs $1.5 million.

Then that judgment was mysteriously vacated by presiding Senior Judge Norman C. Ackerman - apparently without the objection of either side - following the sealed filings of a wave of motions.

Once those court papers were unsealed late last month, the reason for the mistrial became clear.

At one point shortly after the Nelson verdict was returned by the jury, it seemed as if a mistrial might be declared on the grounds that one juror had threatened another with a detached table leg during deliberations.

But later, the decision was made to have a second try at the first phase in January when defendant Wyeth revealed that one Nelson juror had failed to disclose a felony theft conviction during voir dire.

In an Oct. 11 memo, Wyeth's attorneys informed Ackerman they had learned that one of the jurors had pleaded guilty to stealing more than $11,000 from his/her employer in August 2000, apparently to pay off gambling debts.

According to court papers, the juror was called into Ackerman's chambers that day and questioned in the judge's presence by defense attorney Michael Scott of Reed Smith in Philadelphia, who serves as defense liaison counsel for the CLC's hormone therapy program.

When pressed as to why he/she had not previously informed the court of the conviction when asked about prior criminal history during voir dire, the juror replied, "I thought it meant present, like I was convicted presently," according to court papers.

"You thought it meant whether you had been convicted of a crime that day we were picking the jury?" Scott asked, according to court papers.

"No, I thought recent," the juror replied.

"How recent did you think?" Scott asked.

"I really misunderstood the question."

Representing Jennie and Lawrence Nelson of Dayton, Ohio, in their case has been Tobi Millrood of Schiffrin & Barroway in Radnor, Scott's plaintiffs'-side counterpart in the hormone therapy program.

Rule 1925(b) Issues Flare Up

This year also witnessed Rule 1925(b) madness, and Philadelphia's court system was not spared involvement. In fact, one civil action involving two sets of Center City lawyers helped spark much of the 1925(b)-related malaise felt by practitioners across the state.

Kanter v. Epstein was a fee dispute between attorneys at Spector Gadon & Rosen and local lawyer Nancy Kanter over an allegedly promised $431,000 referral fee in a federal lawsuit a Spector Gadon attorney had brought against the city on behalf of a severely abused foster child for whom Kanter had served as child's advocate.

That dispute ultimately settled this spring, with the help of no less a mediator than former state Supreme Court justice Russell Nigro, but not before generating a Superior Court appeal that resulted in the oft-cited December 2004 opinion.

On appeal, Kanter was represented by her attorney, George Bochetto of Bochetto & Lentz. Alan Epstein was represented personally by Gabriel L.I. Bevilacqua of Saul Ewing, while Spector Gadon as a firm was defended by attorneys from Sprague & Sprague.

The panel in Kanter - which consisted of Senior Judges Zoran Popovich and Peter Paul Olszewski and Judge John L. Musmanno, who filed the opinion on behalf of the panel - did not reach the merits of the appeal.

Instead, the judges tossed out the appeal after finding that the defense had "blatantly violated" civil procedural rules when the courts were flooded with appellate issues that were too numerous - more than 100 - and too wordy.

Amendments to the current Rule 1925(b) were put before the state Supreme Court's Appellate Court Procedural Rules Committee this fall, and that group is expected to approve them in the near future. Among the Philadelphia attorneys active in backing the amendments are Carl Solano of Schnader Harrison Segal & Lewis and **Charles Becker** of Reed Smith.

Supporters of those amendments have described them as intended to foster a presumption of inclusiveness with respect to appellate court review of 1925(b) statements. The amendments as proposed would effectively allow lawyers to raise key appellate issues while resting assured that ancillary points have not been waived.

Yet not everyone is fully convinced the amendments, if approved by the committee, will be the panacea for 1925(b)-induced headaches.

During an October meeting with members of the Philadelphia Bar Association, retiring Pennsylvania Supreme Court Justice Sandra Schultz Newman suggested that the rule is likely to continue to cause confusion even after the committee makes its changes.

At that same October meeting, Supervising Judge William J. Manfredi of Philadelphia Common Pleas Court's Civil Branch, in discussing how a trial judge goes about recognizing an overly lengthy 1925(b) statement, made use of U.S. Supreme Court Justice Potter Stewart's classic pronouncement on pornography: "You know it when you see it."

Changes in Leadership

While 2006 did not see as many administrative changes within the city court system as in 2005, events that unfolded late in the year could have a big impact on the First Judicial District in 2007.

After state Supreme Court Justice Sandra Schultz Newman announced her decision to step down from the bench, rumors began to circulate that Administrative Judge James J. Fitzgerald III of the FJD's trial division was a top candidate to be nominated by Gov. Edward G. Rendell as her temporary replacement.

Newman's departure has also raised questions as to whether or not she will be replaced as the high court's liaison justice to the FJD. Some believe the liaison arrangement, which has effectively been in place since the early 1990s, gives the Supreme Court, which typically has at least several Republican members, too much influence over the management of the FJD, which has historically been overwhelmingly Democratic.

Final decisions on both fronts aren't expected until well into January 2007.

Newman's departure, as well as the voters' fall 2005 rejection of former justice Russell Nigro's retention bid, have created high court vacancies that several current and former city judges have their sights on.

Among those said to be considering a run for either of the two state Supreme Court seats likely to be up for grabs in next November's elections are Philadelphia Common Pleas President Judge C. Darnell Jones II, Coordinating Judge Paul P. Panepinto of Philadelphia's Complex Litigation Center, Superior Court Judge Seamus P. McCaffery and Nigro himself.

Both McCaffery and Nigro were judges with the city's court system before being elected to their respective appellate courts.

Aside from Republican Panepinto, all of those listed above are Democrats.