



Superior Court Upholds \$5.2M. Berks County Verdict

Zack Needles

The Legal Intelligencer

August 26, 2011

The state Superior Court has upheld a nearly \$5.3 million verdict a Berks County jury awarded to the wife of a man who died after his doctor allegedly failed to diagnose and treat him for heart disease.

The original verdict, which was handed down in February 2009, was for \$4 million, but a Berks County trial court entered an order in December 2009 for delay damages in the amount of nearly \$1.3 million, according to court papers.

The plaintiffs attorney in the case, [Shanin R. Specter](#) of Kline & Specter, said in 2009 that, with interest, the total amount his client hopes to collect is more than \$6 million.

A unanimous three-judge Superior Court panel, in an unpublished Aug. 16 opinion, affirmed the jury verdict.

"The verdict of negligence against defendants was supported by the evidence presented at trial and the trial court did not err or abuse its discretion in denying defendants a new trial based on this claim," said Judge Paula Francisco Ott, who was joined by Judges Christine Donohue and John T. Bender.

On Feb. 9, 2009, after four-and-a-half hours of deliberation capping off an 11-day trial in January 2009, the jury, by a vote of 10-2, had found Dr. Donald J. McBryan Jr. and his group, Berks Internal Medicine, negligent in the death of Gregory S. Volutza.

The jury awarded the decedent's wife, Dianne Volutza, \$2.49 million for loss of earnings and earning capacity, \$10,000 for Gregory Volutza's discomfort on the morning of his death and \$750,000 apiece to her and the Volutzas' 6-year-old daughter.

In *Volutza v. McBryan*, according to the plaintiff's pretrial memorandum, Gregory Volutza, a 37-year-old with a family history of heart disease and a number of risk factors including hypercholesterolemia and hypertension, died less than a week after he consulted his physician, defendant McBryan, about chest pain, jaw pain, lightheadedness and anxiety.

According to the plaintiff's pretrial memorandum, Volutza went to McBryan as soon as he felt the symptoms but, by the time McBryan's examination was over, at least an hour after the onset, the symptoms had subsided.

The plaintiff's pretrial memorandum alleged that, upon examination of Volutza, McBryan told him he thought it was unlikely that the symptoms were cardiac-related and directed him to schedule a Cardiolyte stress test sometime in the near future and to go to the emergency room if the symptoms returned.

Volutza went to Dr. E. Berry Hey Jr. for the stress test the following day, the plaintiff's memorandum said.

Hey, a defendant in the case, told Volutza he tested negative for ischemia and sent him home, the plaintiff's memorandum said. But the cardiac imaging portion of the test showed a partially reversible defect in Volutza's heart and neither Hey, nor the doctor he reviewed the portion with, defendant Dr. Randall S. Winn, made any attempt to contact Volutza or McBryan to tell them, according to the memorandum.

Three days later, Volutza suffered a massive heart attack and died, the plaintiff's memorandum said.

The plaintiff, Volutza's wife, said in her pretrial memorandum that either Hey or Winn should have immediately notified Volutza or McBryan of the results of the cardiac imaging test, and that McBryan should have called the laboratory to get the results.

McBryan, in his own pretrial memorandum, said that Volutza indicated to him that he had taken Ativan following the onset of his symptoms and that the symptoms were resolving so McBryan's staff scheduled a Cardiolyte stress test appointment for the next day.

Winn said in his own pretrial memorandum that, although the results of Volutza's test were abnormal, they did not necessitate an immediate call to McBryan.

The jury ended up siding with Winn, who it felt had followed policy by not calling to alert Volutza or McBryan about the test results, Specter said in 2009.

The jury also found in favor of Hey, who it felt was simply following McBryan's directions and that it was McBryan's responsibility to diagnose Volutza, Specter said at the time.

On appeal, McBryan and Berks Internal Medicine asked the Superior Court to determine whether the trial court should have either granted their motions for partial nonsuit and/or directed verdict or instructed the jury that McBryan had no duty to call or to access Volutza's test results.

The defense said the plaintiffs' expert witness, Dr. Josef Machac, offered no testimony to support the claim that McBryan should have accessed Volutza's test results, according to Ott.

Instead, according to the defense, this theory originated during Volutza's wife's testimony at trial, Ott said.

But according to Ott, the trial court said Volutza's wife's testimony was not significant enough to warrant a jury instruction.

Ott sided with the trial court.

"Volutza presented ample evidence to support a viable cause of action for failure to diagnose and monitor decedent independent of the duty to access or request theory," she wrote. "Furthermore, wife's testimony did not establish that Dr. McBryan possessed a separate duty to access the test results."

The defense also argued that the trial court should not have admitted Machac's testimony because he specialized in nuclear medicine and cardiology rather than in primary care medicine like McBryan, Ott said.

According to the defense, Machac was not qualified to testify to the standard of care in this case and that the American Heart Association guidelines and other medical publications on which he based his opinions constituted inadmissible hearsay, Ott said.

The defense also claimed it should have been allowed to cross-examine Machac on the issue of "whether a primary care physician should be responsible for an unforeseen outcome in a patient who presents with nonspecific complaints," according to Ott.

According to Ott, the defense asked Machac at trial: "And a doctor could make an assessment and say, well, probably fatigue, it might be a migraine, it might be a stress headache; and all within keeping within the standard of care, that patient, it could be your patient, walks out the door and blows an aneurysm in the brain and dies instantly; correct?"

Volutza's counsel objected and the trial judge sustained it as an improper line of questioning, according to Ott.

Ott said the trial court was right in determining that the defendants "mischaracterize this line of questioning as decedent's death resulted from an unforeseen outcome in a patient who presents with non-specific complaints."

Ott said Volutza "did not present one symptom like a headache but informed Dr. McBryan of numerous symptoms, including tightness in the chest, jaw pain, lightheadedness, and family history involving heart disease."

"Therefore, the trial court did not abuse its discretion in limiting defense counsel's line of questioning," Ott said.

As for the defense's argument that the verdict was "inconsistent and irreconcilable," Ott said the "there was a reasonable theory to support the jury's verdict."

"Based on Dr. Machac's testimony, Dr. McBryan deviated from the accepted standard of medical care in diagnosing and monitoring decedent based on numerous risk factors, including the symptoms decedent presented on Jan. 20, 2003, as well as his age, weight, family history and the EKG reading," Ott said.

Specter said Wednesday that, of the original \$4 million verdict, the Medical Care Availability and Reduction of Error Fund indemnified McBryan for \$1 million and the Pennsylvania Medical Society Liability Insurance Co. insured McBryan for \$1 million.

MCARE has also agreed to cover \$553,000 in delay damages and post-judgment interest through Dec. 30 of this year, Specter said.

According to Specter, he's currently in discussions with PMSLIC, which has posted a bond for the entire judgment plus 20 percent, about paying the remainder of what's owed to his client.

"It would surprise me if they took the matter any further at this point since there's no allocatur-worthy issue here and since their co-insurer, MCARE, has tossed in the towel," he said.

Specter said Kline & Specter attorney Charles "Chip" Becker handled the case on appeal.

McBryan and Berks Internal Medicine's attorney, Michael M. Badowski of Margolis Edelstein in Camp Hill, Pa., could not be reached for comment.