

Superior Court again OKs \$20 Mill. Med Mal Verdict

By Asher Hawkins
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For the second time in two years, a Superior Court panel has affirmed the \$20 million compensatory damages verdict a Philadelphia jury awarded in the fall of 2003 to a former University of Pennsylvania student whose family claimed he suffered brain damage after staffers at Temple University Hospital were slow to respond to a clogged tracheotomy.

Hugh Gallagher IV, 19 years old at the time, had been admitted into intensive care at the hospital in May 2000 after suffering severe burns during a failed suicide attempt.

The panel's unpublished opinion last week in *Gallagher v. Temple University Hospital* followed a June 2006 state Supreme Court remand order that vacated the compensatory damages award and directed the Superior Court panel to reconsider the appellate argument unsuccessfully raised by the hospital during the matter's first go-round before the Superior Court in March 2005.

The hospital's appellate counsel, Stephen Cozen of Cozen O'Connor, said it's clear that "the Superior Court did not listen to what the Supreme Court told them to do."

Gallagher plaintiffs' attorney Shanin Specter of Kline & Specter responded that the Superior Court has merely provided the high court with the clarification the justices had requested in their page-long, June 2006 per curiam order.

Ever since the verdict was returned, the hospital has claimed that the jury had become confused during deliberations and mistakenly included punitive damages in its malpractice damages award, one of the largest handed up by a city jury in recent years.

One key issue as *Gallagher* proceeded to trial was that, after over two years of discovery, it emerged that the original hospital records from the night Gallagher's brain damage occurred had been removed from Gallagher's file, replaced with a copy and put in a safe kept by Temple University Hospital's risk manager. The original had also been whited-out and rewritten in certain places.

When Kline & Specter found out that the hospital had in fact been in possession of the original records, it amended the *Gallagher* complaint to add a punitive damages claim, citing the allegedly deliberate failure to produce those originals.

After the *Gallagher* jury returned with its unanimous verdict as to liability, according to opinions filed in the matter, the jurors were told that due to the way they had answered the final interrogatory, 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. Temple's trial counsel immediately moved for a mistrial, according to the opinion, 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," Cozen told *The Legal* in 2005.

The 2005 Superior Court panel that heard *Gallagher* did reverse the \$15,000 punitive damages award ultimately returned by the jury.

But Judges Joan Orie Melvin and Jack A. Panella and Senior Judge Frank J. Montemuro Jr. sided with Philadelphia Common Pleas Senior Judge Alex Bonavitacola, who had presided at trial, on his decision to deny the defense's request for a new trial as to the malpractice claim on the grounds that the hospital had been prejudiced by the punitive damages claim's being included in the case.

The judges reasoned that evidence presented by the Gallaghers concerning the hospital's alleged records cover-up was relevant to liability and noted that it had not been objected to by the defense before the Gallaghers sought to amend their complaint.

But the justices seemed to feel there was something missing in the panel's 15-page, September 2005 opinion.

"This court concludes that the reason the Superior Court gave for its determination that [the hospital] sustained no prejudice as a result of the trial court's error is insufficient to support that determination," the June 2006 per curiam order said.

The justices added that if the Superior Court felt it could not decide that issue, it would have to remand the case to the trial court for a new trial.

"For people who are in the business, I think it lays it out pretty clearly," Cozen said of the high court's per curiam order.

On remand, the two-judge *Gallagher* panel — Montemuro has since retired — stressed that Bonavitacola had never charged the jury on punitive damages and had specifically told the jurors that they were not there to punish anyone.

The trial court had carefully bifurcated the jury's considerations of the case's compensatory and punitive aspects, Orie Melvin and Panella concluded.

Cozen said the hospital is intent on again appealing to the Supreme Court.

"It seems to me that the Superior Court totally ignored [the justices'] direction and simply viewed the remand as a simple request for additional reasons supporting their original opinion," Cozen said. "That is not what the Supreme Court asked them to do."

Specter said he hopes the justices will expedite their review of the hospital's allocatur petition.

"I am confident that the trial court was right, and the Superior Court was right both times, and I respect the Supreme Court's having raised the question with the Superior Court as to its thinking, but that has now been answered," Specter said. "Given the fact that this was a clear liability case, with horrendous conduct in whitening out the records and hiding them for three years, and the fact that this boy is catastrophically injured ... I would hope the Supreme Court would expedite the consideration of this case."

One prominent Cozen O'Connor appellate litigator who reportedly won't be participating in the latest appeal in *Gallagher* is Sandra Schultz Newman, the former state Supreme Court justice who retired from the bench at the end of last year after roughly 11 years' service.

Cozen said that while Newman won't be involved in the briefing or arguing of *Gallagher*, "I think we can certainly discuss with Justice Newman the substance of our legal arguments and what she thinks of them."

"But she can't share with us any of the discussions that took place [between the justices when they first considered the case], for sure," Cozen added.

(Copies of the nine-page opinion in Gallagher v. Temple University Hospital, PICS No. 07-0072, are available from The Legal Intelligencer. Please call the Pennsylvania Instant Case Service at 800-276-PICS to order or for information. Some cases are not available until 1 p.m.)