

\$2M malpractice verdict for open-heart surgery patient



DANIEL P. MCKIERNAN

Plaintiff's attorney puts emphasis on 'constellation' of issues

Almost a decade after a Warwick man entered Rhode Island Hospital for open heart surgery, a Providence County jury has returned a \$2 million medical-malpractice verdict against the hospital and one of its cardiac surgeons.

The plaintiff alleged that his care was mismanaged, resulting in low oxygen and brain damage that continues to cause him memory and communication problems.

According to The Providence Journal, the plaintiff testified to the General Assembly last year

about an incident involving a small child who was brought into his room by a nurse and who interfered with the medical equipment being used to help the plaintiff breathe. But no such claims were made during the trial for "tactical" reasons, according to the plaintiff's attorney, Daniel P. McKiernan of the Providence firm of McKiernan Hessler.

Instead, McKiernan focused on a "constellation" of issues, including the plaintiff's contention that signs of low oxygen were not properly investigated or treated.

McKiernan recently spoke with Lawyers Weekly reporter Noah Schaffer about the verdict.

Q. *What was your response to the verdict? Would you have guessed going in that the judgment would be so high?*

A. I thought the verdict was fair and consistent with my view of the case. Going in, I might have selected a lesser number, but that kind of prediction is fraught with guesswork.

Q. *What factors led to such a high verdict?*

A. I think the main factor was the defense team's approach at trial. They tried to minimize him as a valuable human being. In fact, he's got a track record of community service. He's volunteered thousands

of hours. The jury was willing to see everything in its context and understand that he is a very good man.

Q. *What do you mean by "minimize him as a human being"?*

A. Because records of other treatments were relevant and had been discovered, what the defense seemed to be intent on doing was to take some of those entries and string them together in a manner that portrayed my client as someone who was an "operator," trying to maximize his claim, as opposed to someone who was legitimately injured.

The jury understood that those treatment entries were taken out of context. ... One of the things they did was to look at isolated entries created by, ironically, Rhode Island Hospital employees. Another way was by juxtaposing facts from my client's personal life. All of the facts that they pointed to — and there were many — certainly could be looked [at] from a different angle, because they were consistent with the fact that my client is disabled. What was meaningful to me was that my client was greeted by many of the jurors af-

Continued on page 11

Important decisions of the week. Opinions begin on page 4.

EMPLOYMENT

Age discrimination - Promotion

A plaintiff employee, who was not selected for a job promotion, cannot succeed on an age discrimination claim despite the fact that his human resources "certification score" was the highest of all the candidates considered for the promotion, the 1st U.S. Circuit Court of Appeals rules. **page 5**

CONSTITUTIONAL

Military policy

A constitutional challenge to the military "Don't Ask, Don't Tell" statute must be rejected, as the governmental interest in preserving the military's effectiveness as a fighting force is adequate to justify the intrusion on liberty worked by the statute, states the 1st U.S. Circuit Court of Appeals. **page 5**

CONTRACT

R.I. Fair Dealership Act

The Rhode Island Fair Dealership Act — a substantive law creating, defining and regulating the rights of the parties to a dealership agreement — does not apply retroactively, a U.S. District Court judge concludes. **page 9**

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Continued from page 1

ter the verdict was released. They shook his hand and wished him well.

Q. *How long was the trial?*

A. There were 19 trial days. The jury was out for two days. The trial actually commenced on April 21; the verdict came out on June 6. Due to some unique circumstances, a number of breaks were taken during the course of the trial. The breaks were not related to the case; they were of a personal nature. But Judge [Netti C.] Vogel, in her wisdom, saw this would be an elongated trial. She allowed the jury to take notes when evidence was being presented; she did not allow notes to be taken unless there was actual evidence being presented. That allowed the jury to retain a collective memory when evidence was being presented. Also, we had some very agreeable experts and ran into some luck in terms of their availability.

Q. *Having now been in front of a jury that is taking notes, would you like to see that be*

Verdict Report

Type of action: Medical malpractice

Names of case: Barrett v. Rhode Island Hospital, et al.

Court/case no.: Providence Superior Court, PC-2001-5291

Tried before judge or jury: Jury

Name of judge: Netti C. Vogel

Amount of verdict: \$2 million (plus \$1.6 million in interest)

Date: June 6, 2008

Most helpful expert: Gus Slotman, M.D.

Attorney: Daniel P. McKiernan, McKiernan Hessler, Providence (for the plaintiff)

the norm?

A. I think, in certain cases, a standard three-to-four-day tort or auto accident case, it isn't necessary. But it is certainly something that I'll raise in the future if a case is going to go for a long time. Every trial judge has a different viewpoint when it comes to notes. This jury was mostly listening, as opposed to trying to record in their notes everything that was said. I thought it was a great idea, and I

the negligence transpired over a few days. He was able to walk through all the evidence in a clear and concise fashion. He was very influential.

We also had Dr. Robert Balk, an expert in adult respiratory distress syndrome, a complication that my client was diagnosed with a few days after the surgery. He also performed the sort of detailed analysis that was very helpful.

Q. *Since you were basing your argument on the overall level of care, rather than a specific incident, what did you need to get across to the jury?*

A. That strategy presents a significant challenge when you're a plaintiff. It's much easier to present a case where there's a concrete, discernable decision or act that is negligent. Here we had a culmination of many different smaller decisions we said were negligent, creating a larger result, which is a catastrophic low-oxygen situation for a patient. That's why it was important for these experts to go through the chart in a coherent fashion. RILW

will be thinking about that in future cases.

Q. *Who were your main expert witnesses?*

A. One was Dr. Gus Slotman, who is both board-certified as a surgeon and specializes in critical care medicine. He talked about the two-to-three-day period following [the plaintiff's] surgery and the care he received, and he explained a number of important concepts. Our contention was that