

State High Court Won't Hear Appeal Of \$20 Mil.

Med Mal Damages Verdict



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In a move that could finally put to rest a years-long appeals process, the state Supreme Court has declined to review the Superior Court's second affirmation of the \$20 million compensatory damages verdict a Philadelphia jury awarded in the fall of 2003 to a former University of Pennsylvania student.

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

Gallagher's family claimed Hugh subsequently suffered brain damage after staffers at the hospital were slow to respond to a clogged tracheotomy.

Ever since the verdict in *Gallagher v. Temple University Hospital* 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 the Gallagher family's attorneys at 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," the hospital's lead appellate counsel, Stephen Cozen of Cozen O'Connor, told *The Legal* in 2005.

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

But Judges Joan Orié Melvin and Jack A. Panella and Senior Judge Frank J. Montemuro Jr. sided with Philadelphia Common Pleas Senior Judge Alex Bonavita, who had presided at trial, on his decision to deny the defense's request for a new trial.

The appellate 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 Superior Court 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 justices' 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.

On remand, the two-judge Gallagher panel — Montemuro had 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, Orié Melvin and Panella also noted in an unpublished opinion filed earlier this year.

The justices' two-line per curiam order late last week states simply that the petition for allowance of appeal has been denied.

John Salvucci of Cozen O'Connor said his firm will recommend to Temple University Hospital that it petition the U.S. Supreme Court for certiorari.

"If that's really what they are going to do," plaintiffs' attorney Shanin Specter responded, "it will be cited by Merriam-Webster in the dictionary definition of 'frivolous.'"