



Specter Helps Secure \$4 Mil. Verdict in Berks Med Mal Case

The Legal Intelligencer

By Zack Needles

March 10, 2009

The wife of a man who died after his doctor allegedly failed to diagnose and treat him for heart disease has been awarded \$4 million by a Berks County jury.

After four-and-a-half hours of deliberation capping off an 11-day trial, the panel, by a vote of 10-2, found Dr. Donald J. McBryan Jr. and his group, Berks Internal Medicine, negligent in the death of Gregory S. Volutza.

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, Dianne, 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, said Volutza's attorney, Shanin R. Specter of Kline & Specter.

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.

According to Specter, a claim against Reading Hospital and Medical Center, where both Hey and Winn worked, alleging that its policy regarding reporting abnormal results to referring physicians was improper was dismissed, while a second claim that the hospital is vicariously liable for any negligence of Hey and Winn was agreed to by the hospital and wasn't part of the jury trial.

McBryan's practice group, Berks Internal Medicine, as well as Hey's practice group, Cardiology Associates of West Reading, and Winn's practice group, West Reading Radiology Associates, were also named as agency defendants.

According to the plaintiff's pretrial memorandum, expert David S. Hopkins estimated the total economic loss as a result of Volutza's death at \$4,906,128.

On Feb. 9, the jury awarded Dianne Volutza \$2.49 million for loss of earning 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.

Specter said he had found evidence of possible records tampering by McBryan.

In his notes from his initial examination of Volutza, according to Specter, it appeared McBryan had added a note in the margin that said Volutza's symptoms had resolved on the way to his office as a result of taking Ativan. But, down further, in a note that appears to have been written before that, McBryan wrote that Volutza's symptoms were resolving during the examination as a result of the Ativan.

Specter said he confronted McBryan on this issue during trial but that the doctor never admitted to adding anything.

Still, Specter said he thinks that might have had an impact on the jury's ruling.

"Dr. McBryan should have lost the case on the medicine alone, so he may have," he said. "It also may have been the case that he lost in part because the jury decided he knew he had done the wrong."

Specter said his client was "very satisfied" with the jury's ruling, especially since it was delivered in Berks County, which is known to be a conservative place to try medical malpractice cases.

According to data posted on the Administrative Office for Pennsylvania Courts' Web site, Berks County had only two medical malpractice jury verdicts over \$1 million between 2000 and 2003. Between 2003 and 2007, juries handed down only two verdicts in favor of medical malpractice plaintiffs. Neither verdict was above \$500,000.

McBryan's attorney, Michael M. Badowski of Margolis Edelstein in Camp Hill, Pa., said the verdict was "entirely inconsistent with the evidence" and that his client has filed a petition for a new trial.

"There were other defendants in the case who, even in the worst case scenario, should have shared in a percentage of the responsibility," he said.

Volutza, meanwhile, has petitioned for a new trial against Reading Hospital, Hey and Winn "as simply a precautionary measure" in case McBryan is granted a new trial, Specter said.

Winn's and his practice group's attorney, James P. Kilcoyne of Kilcoyne & Nesbitt in Plymouth Meeting, Pa., said he was "happy the jury saw it our way" and that he and his client plan to oppose Volutza's motion for a new trial.

Reading Hospital's attorney, Edwin L. Stock of Roland & Schlegel in Reading, Pa., could not be reached at press time.

Hey's and his practice group's attorney, Kevin H. Wright of Kevin H. Wright & Associates in Lansdale, Pa., was also unavailable.

Kline & Specter attorney **Andrew S. Youman** cross-examined three defense experts in the case and **Garabet M. Zakeosian**, also of Kline & Specter, prepared the case for trial. •