

MISSOURI LAWYERS WEEKLY

Patient wins verdict over botched gall bladder surgery

Argued doctor used outdated technique that caused injury



Genevieve Nichols

\$101,300 verdict

A patient won \$101,300 in his Scott County case over a botched gall bladder removal surgery. His attorney says it represents the county's first plaintiff's verdict in a medical malpractice case in about four years.

Defense verdicts are the norm for medical malpractice cases in this conservative, rural county sandwiched between Cape Girardeau and Sikeston. But in this case, it was clear the defendant doctor made a mistake, said plaintiff's attorney Genevieve Nichols of St. Louis.

"He admitted he made a mistake, but said it was not negligent," Nichols said. "The jury didn't buy that."

Richard Gaines, a 55-year-old unemployed man, had laparoscopic gall bladder removal in July 2003 at Three Rivers Hospital in Poplar Bluff, Mo. Dr. Stephen Bush performed the surgery.

Gaines claimed Bush removed a portion of his common bile duct

and his common hepatic duct during the procedure. He argued Bush was negligent for using an outdated technique that caused the injury rather than a newer, safer technique for removing the gall bladder.

Bush testified that he knew about the new technique and decided not to use it because he didn't think the old technique was dangerous. Dr. Steven Strasberg developed the new technique, which was published in literature in 1995 and 2000.

Bush testified that he read the articles and disagreed with Strasberg. Bush then hired Strasberg as his expert for trial, as the pre-eminent surgeon in the field and the authority on the standard of care.

Strasberg testified that he believed the technique Bush used was unsafe and should be abandoned, but that it was not below the standard of care to use the old technique because other doctors still use it. The new technique has

been found to avoid the very mistake Bush made, and Strasberg testified that use of the new technique would probably have avoided Gaines' injury.

"The standard of care is what doctors are doing, not what they should be doing," said James P. Reinert of St. Louis, attorney for Bush. "Although Dr. Strasberg supported a different approach, he said Dr. Bush's conduct was within the standard of care. Since the plaintiff cited Dr. Strasberg as their authority, we thought that would have some weight with the jury."

Gaines accumulated more than \$200,000 in medical bills, but the court ruled that he could not recover those expenses as economic damages because they were discharged in bankruptcy. The court rejected plaintiff's argument that the bills were admissible as economic damages, despite the bankruptcy, under the collateral source rule.

"We argued that it was the de-

fendant's conduct that put my client in bankruptcy, so the defendant shouldn't be allowed to benefit from it," Nichols said.

Because there were no lost wages, special damages were limited to future medical expenses for annual blood testing over seven years. The jury awarded \$1,300 for his future economic damages, plus \$60,000 for past non-economic damages and \$40,000 for future non-economic damages.

"We were disappointed in the finding of negligence," Reinert said. "But we were relieved because the verdict was substantially less than we could have settled the case because the lowest demand was \$700,000."

The defense has filed a motion for new trial based on evidentiary and instructional errors. The plaintiffs will respond with a motion arguing that Gaines' medical bills should be admissible as economic damages if there is a new trial, Nichols said.

— Anne Vitale

Facts of the Case

Type of Action: Medical malpractice

Type of Injuries: Partial removal of biliary tree

Court/Case Number/Date: Scott County Circuit Court/06SO-CV00039/Dec. 6, 2006

Caption: Gaines v. Bush

Judge, Jury or ADR: Jury

Name of Judge: David Dolan

Verdict or Settlement: \$101,300 verdict

Special Damages: \$1,300 future medical expenses

Allocation of Fault: N/A

Last Offer: None

Last Demand: \$700,000

Attorney for Plaintiff: Genevieve Nichols, Coffey & Associates, St. Louis

Attorney for Defendant: James P. Reinert, Carmody MacDonald, St. Louis

Insurance Carrier: Missouri Physicians Mutual

Plaintiff's Expert: Francis Barnes, Columbus, Ohio (general surgeon)

Defendant's Expert: Steven Strasberg, St. Louis (hepato-biliary surgeon)