

## Elderly Woman Wins \$300K For Breast Surgery Med-Mal

### Surgeon Blamed Scarring For Nipple Placement

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A 75-year-old woman who underwent reconstructive surgery after losing both breasts to cancer won \$300,000 in her St. Louis County case against her plastic surgeon.

Billie Kelley claimed that after the final phase of the surgery, her left nipple was located on the side of her breast rather than in the front.

According to experts, the verdict dis-

proves two commonly-accepted theories — that plaintiffs can't win med-mal cases in St. Louis County and that elderly plaintiffs can't recover high damages.

"I was told that it's a big deal in the county if there's one plaintiff's verdict in med-mal cases in a year," said Genevieve Nichols, the plaintiff's attorney. "We were terrified that the jury wouldn't care because she was 75. I think when you're talking about a breast reconstruction, that's an issue."

Nichols attributed her victory — which came in her first trial — to "keep[ing] it simple and genuine. You have to find out where the power of the story is and I think the power of the story here is that they were saying that it didn't matter because she was 75, and that's just not right. It does matter."

The defendant's attorney, Jonathan Ries of St. Louis, denied that he argued Kelley's damages were less because of her age. "Mrs. Kelley, like any other individual, is entitled to consideration based on her own personal circumstances and so I don't think that her age was a factor in the lawsuit, at least not from the defense perspective."

But Nichols said that, while the argument was not explicitly made, "they certainly mentioned many, many times her age and mentioned many times that no one else saw her undressed." Nichols believes that the implication may have inflamed the jury and caused jurors to sympathize with Kelley.

A verdict report on the case, *Kelley v. Stromberg*, appears on Page 6.

#### Witness Testimony

Ries explained that the defendant, Dr. Brent Stromberg, argued the nipple moved to the side over time as a result of the natural healing process. "In reconstructive breast surgery following cancer treatment, the patient and physician unfortunately can't expect the same kind of cosmetic result as one more generally achieved in cosmetic surgery," he said.

Because of scar tissue, he said, "you can have variation from one patient to the next. You can even have variations



**GENEVIEVE NICHOLS**  
Wins \$300K in her first trial

from one breast to the other breast. [Defense experts] tried to show the jury how there were indeed scars associated with this surgery that you can actually see in the photographs producing stress or tension and pulling that skin over to the left side, which, in our evidence and opinion, pulled the left nipple with it."

Nichols said that the plaintiff's expert was critical in refuting this defense argument. "Our expert said that the incision that was made during the nipple reconstruction was on the opposite side of the breast than the defendant said it was, and the medical records showed

that where the incision was would have actually pulled the nipple in the opposite direction if it was going to pull it anywhere."

In addition to expert testimony, Kelley presented lay witnesses to bolster her claim that the nipple misplacement was an immediate rather than a gradual shift. "There was some testimony from Mrs. Kelley, her best friend and her daughter that she had complained about the location of the nipple immediately after the surgery," Nichols said.

"Their defense was that the scar tissue pulled it over and the evidence was that, if the scar tissue was going to pull it over, it would have been done gradually.

So we were trying to put on as much evidence as we could that she was complaining about the location of the nipple just after the surgery. There was a pretty hard fight about whether that testimony could get in."

Ries did not comment on this specific evidentiary battle, but said, "The defendant is strongly considering asking for a new trial because of certain events at the trial of this case."

#### County Trend

Experts agree that a large verdict in favor of an elderly plaintiff in a medical malpractice case is rare in St. Louis County.

"Trying a case in St. Louis County is the same as trying it anywhere else," said St. Louis plaintiffs' attorney Philip C. Denton. "The only thing that's really different is how the juries interpret your evidence. Typically in St. Louis County, juries tend to be conservative in malpractice cases. I always speak of it in terms of being pro healthcare provider."

Bob Seibel of St. Louis, who handles both defendants' and plaintiffs' cases, said he was surprised by the verdict because "it's the kind of jury verdict you might see in [St. Louis] city and yet we're seeing it the county."

Seibel said the unusual verdict may be explained by "a blurring of the traditional distinctions between the city and the county."

"We are seeing a shifting demographic between the city and the county in that you can get a city-looking jury in



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Philip C. Denton, St. Louis

the county and a county-looking jury in the city from time to time," he said. "That's not the rule but it's happening more often than it did in the past. It used to be that you could almost always count on a county jury that would probably lean toward the doctor's side and this often dissuaded plaintiffs from bringing cases in the county if they couldn't get a city venue."

St. Louis attorney Mary Ann Shea agreed that there has been a recent trend of more favorable plaintiffs' verdicts in St. Louis County med-mal cases. Shea said that "this doesn't necessarily reflect on St. Louis County but instead reflects a general nationwide trend to grant damages to elderly patients. Maybe 10 years ago, a lot of attorneys

wouldn't even be taking these cases because the damages just weren't there.

"I think that, historically, in the calculation of damages involving cases of disfigurement there's been more of a focus on how disfigurement affects others," Shea said. "Perhaps this verdict reflects the reality that victims of all ages are indeed very personally traumatized by being disfigured."

"Even if nobody else sees it, this person has to see this disfigurement and deal with it every day," she said.

Seibel agreed that attorneys have devalued damage claims involving the elderly in the past, but has noticed a shift toward people becoming more sensitive and receptive to such claims in general. "We might, as defense counsel, fall into the trap of saying, 'Well, this woman has a 10 or 15 year life expectancy, so how much could this be worth?' In some respects that's true, but in other respects, the jury is going to understand that that's 100 percent of her life left."

"She was obviously well enough to have the reconstructive surgery and cared about that, so that's an important issue. I think we have to fully understand how the jury is going to look at this from the beginning."

Nichols said that she conducted a focus group study to get a better idea about how a jury might view the plaintiff's case.

"We called a temp agency and asked them to send over six of their temp workers and talked to them for about two hours," she said. "We first talked to them about their life experiences and how they feel about personal injury claims, how they feel about lawyers and doctors and plastic surgery. Then we talked to them about the facts of this case in particular and what they thought it was worth and what kind of questions they had after hearing the facts."

Nichols said she applied what she learned in the focus group to the actual jury, which was comprised of roughly half women and half men. All but one of the jurors were middle-aged or older.

Ries said that jury sympathy was a factor in the verdict. "My best guess is that this jury bonded very warmly with the plaintiff, Mrs. Kelley, who's a very nice lady."

Denton agreed. "This was a jury that seems to have been motivated at least in part by sympathy with the plaintiff, and really empathized with her mental anguish connected with what this really meant to her. This went to the essence of her womanhood, of her self image, and it sounds like the jury fully comprehended that."