

4743 - Medical Negligence - It was alleged that a difficult patient with a history of ER visits was dumped by a hospital, it having rolled him outside in a wheelchair with taxi fare – hours later the man was dead of an untreated duodenal ulcer – his estate prevailed at a first jury trial in 2005 and took \$1.525 million including \$1.5 million in punitives – the punitives award was reversed on appeal – the case came back for a second trial seven years later (and 13 years after the events) on punitive damages only

Gray v. St. Joseph Hospital, 00-1364

Plaintiff: Darryl L. Lewis, *Searcy*

Denny Scarola Barnhart & Shipley, West Palm Beach, FL and Elizabeth R. Seif, *DeCamp & Talbott*, Lexington

Defense: Robert F. Duncan and Jay E.

Engle, Jackson & Kelly, Lexington

Verdict: \$1,450,000 for plaintiff

Court: **Fayette**, J. Goodwine,

2-29-12

James Gray, age 39, was a quadriplegic when he presented in March of 1999 to the ER St. Joseph Hospital in Lexington. Gray had been involved in a shooting when he was sixteen. His life had been difficult since and had been plagued by drug abuse and homelessness. He also had a lengthy history of frequent ER visits – hospital staff remembered he was often a combative patient who regularly ignored medical advice.

Against this backdrop, Gray was seen on 3-9-99 by an ER doctor, Joseph Richardson – Gray was complaining of abdominal pain. Richardson ran several tests, including an x-ray. He did not come to a conclusive diagnosis, and Gray was released.

The key events in this case occurred on the evening of 4-8-99. Gray returned to the St. Joseph ER by ambulance at 8:00 p.m. He reported suffering severe abdominal pain for a period of four days. An ER doctor, Barry Parsley, evaluated Gray's condition. No diagnosis was made.

A little after midnight, St. Joseph was ready to discharge Gray. It sent him by ambulance to stay with family – they wouldn't take him. The ambulance returned to the hospital and social services got involved. Gray was wheeled across the street to the Kentucky Inn – a room at the motel was found for him.

Gray was in excruciating pain through the night – motel staff recalled hearing him scream for hours. At 5:10 a.m., an ambulance was called, and Gray was taken back to the ER – he was covered with bloody vomit. He was seen again by Parsley, a second ER doctor, Jack Geren taking over Gray's care when the shift ended.

On that second visit, fecal impaction was manually removed. Gray was also given a soap suds enema. His condition appeared to improve. He was released a second time just after noon. This time his wheelchair was rolled outside and he was given a taxi voucher.

There were fact disputes about what Gray was told next. It would later be alleged hospital staff told him that (1) he was abusing the hospital services, and (2) if he returned, the police would be called. Gray went to a family member's house. He was found dead four hours later. The cause of death was a ruptured duodenal ulcer.

In this lawsuit, Gray's estate targeted a variety of defendants. They started with Richardson, criticizing his failure to diagnose peptic ulcer disease on the first ER visit on 3-8-99. Then to the two visits on 4-8-99 and 4-9-99, Parsley, Geren and the hospital nurses were blamed for failing to diagnose the ruptured ulcer – essentially Gray's complaints of severe pain were ignored, the defendants acted to shuffle off rather than diagnose a difficult patient.

A second claim was presented against St. Joseph hospital alone – the estate alleged that Gray had been dumped in violation of EMTALA. Rather than make a diagnosis and treat his severe symptoms, the hospital staff got rid of him – it rolled him out the front door to die. The claim particularly alleged that

he should not have been discharged until he was stable – screaming in pain with no diagnosis, it was postured, is not stable.

Experts for Gray were Dr. Frank Baker, ER, Oak Brook, IL, Dr. Mathias Okoye, Pathology, Lincoln, NE, Dr. Eric Munoz, ER, Newark, NJ and Dr. John Schriver, ER, New Haven, CT. If prevailing on the negligence count and against all defendants, the estate sought pain and suffering for Gray's suffering. The jury could also award punitives against St. Joseph if prevailing on the EMTALA count.

This case first came to trial in October of 2005. It was mistried. Following that trial, all defendants but St. Joseph settled. Thus, by the time the second trial started in November of that year, the three doctors named above were non-parties, implicated only for purposes of apportionment.

St. Joseph defended the negligence case, posturing that Gray was properly treated and evaluated. At every instance when he was discharged, his condition was stable and improving. It also flatly denied dumping Gray – in this regard, hospital officials also denied advising him he'd be arrested if he returned. Hospital experts included Dr. Jeffrey McKinzie, ER, Nashville, TN, Dr. Kenneth Boniface, ER, Cincinnati, OH and Dr. Douglas Kennedy, Pain Management, Lexington.

This first jury first considered negligence counts – it found fault with the hospital, Parsley, Geren and the plaintiff. Richardson was exonerated. On the negligence count, that fault was assessed as follows: Hospital-15%, Plaintiff-25%, and 30% each to Parsley and Geren. Then to compensatory damages, Gray's suffering was valued at \$25,000.

The jury continued to the second count against the hospital which alleged an EMTALA violation. Again the verdict was for the estate, and continuing the jury assessed punitive damages of \$1.5 million. A consistent judgment was entered. **See** Case No. 3040 for the original verdict report from 2005. Special Judge Robert Overstreet tried the first case.

The hospital appealed and challenged the entirety of the verdict. The Court of Appeals affirmed everything but the punitive damages in a 12-5-08 opinion authored by Judge Wine. The court cited instruction error, there being no "clear and convincing" language in the trial court's charge.

Discretionary review was sought, the Supreme Court instead remanding the case in November of 2009 to the Court of Appeals to reconsider the EMTALA ruling in light of the then recently decided *Shreve v. Ohio County Hospital*. The Court of Appeals reconsidered and the result was the same in a July 2010 opinion. The hospital again sought discretionary review. That motion was denied in April of 2011 and the case returned to trial.

In the interim the organization of the plaintiff's lawyers had been rearranged. William Gallion of *Gallion & Associates* and Shirley Cunningham of *Cunningham & Grundy* who participated in the first trial with Lewis and Seif (noted above) were not available. Gallion and Cunningham became embroiled in the Fen Phen scandal and are both in federal prison.

The second trial started in the first week of February in 2012. It lasted three weeks. The court's instructions described the prior trial and its finding for the plaintiff as well as mentioning the \$25,000 in compensatory damages. [Nothing was said of the \$1.5 million punitive award.]

The prefatory charge out of the way, Judge Goodwine instructed the jury to consider punitive damages – the instruction included clear and convincing language. The jury awarded the estate \$1.45 million in punitives following lengthy deliberations over two days. As it deliberated, the jury asked: Do we consider the doctors as well? Judge Goodwine told the jury to read the instructions (which indicated they were agents of the hospital). A consistent judgment was entered following the verdict.

St. Joseph has since sought JNOV relief and argued among other things that, (1) the punitive award was improper because it was based on the conduct of agents (the treating doctors) whose actions it did not ratify, (2) a juror (Corey Blackburn) slept through most of the trial, and (3) the award of punitives was excessive. The motion was pending when the record was reviewed.