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New York Jury Verdict Review & Analysis

HAMILTON vs. ST. MARY'S HOSPITAL

Index No. 13314/97

Verdict Date: October, 2002;

Publication Date: March, 2003

Topic: MEDICAL MALPRACTICE - FAILURE TO COMMUNICATE RESULTS OF ABNORMAL MAMMOGRAM - ONE-AND-HALF-YEAR DELAY IN DIAGNOSIS OF BREAST CANCER - BONE METASTASIS - DEATH ACTION

Result: \$ 1,700,000 Recovery

State: New York

County: Bronx

Judge: n/a

Plaintiff Attorney: Mark M. Basichas of Sherman & Basichas in Manhattan

Facts: This was a medical malpractice death action in which the plaintiff contended that the defendant ob/gyn, who was seeing the decedent, then 35, as a clinic patient, negligently failed to communicate abnormal mammogram findings. The plaintiff contended that as a result, the cancer was not detected until two years later, by which time, it had metastasized to the bones. The decedent died three years after the diagnosis. She was divorced and left a son, 21 and a daughter, 14 at the time of the death. The decedent was unemployed. The evidence disclosed that the decedent presented with a complaint of a lump in the left breast. The plaintiff was sent for a mammogram and a follow-up appointment was made. The plaintiff contended that she kept this appointment, but was advised that the defendant was in surgery or otherwise unavailable and that the office would contact her if necessary. The plaintiff maintained that she was not contacted and that when she developed hip and leg pain approximately one and a half years later, it was determined that the earlier mammogram had shown significant abnormalities and that the breast cancer had now metastasized to the bones. The defendant denied that the plaintiff's factual position should be accepted, and contended that the plaintiff did not appear for her appointment. The defendant also maintained that the plaintiff, who indicated that the lump had remained during the approximate 18-month period between the time of the mammogram and the onset of hip and leg pain that led to the diagnosis, was comparatively negligent because she was aware the lump persisted, yet did not follow up to receive further care. The decedent countered that since she was not contacted, she believed that no abnormalities were found, and that although the lump remained, it did not grow or otherwise change in shape, arguing that she was lulled into a false sense of security. The plaintiff also contended that under the hospital's own protocol, the defendant was required to make significant attempts to communicate with a patient after abnormal mammogram results return. The plaintiff maintained that the patient should either be advised of the abnormal findings or strenuously advised to visit the facility. The plaintiff contended that on occasions, ob/gyns have even sent telegrams to the last known address of a patient. The plaintiff indicated that her address and phone number had not changed during this period.

The defendant physician denied such a formal protocol existed in the hospital, and plaintiff's counsel relates that he confronted the defendant with such a protocol during his deposition. The plaintiff's expert ob/gyn maintained that notwithstanding relatively significant signs of disease on the mammogram, it was probable that had the cancer been detected in a timely fashion, the plaintiff would have survived.

The defendant, however, denied that this position should be accepted and maintained that the cancer was aggressive and an earlier diagnosis would probably have not changed the decedent's medical outcome. The decedent lived for three years following the diagnosis, and the evidence disclosed that even if diagnosed in a timely manner, the

decedent would have required the same treatment modalities, including chemotherapy. The plaintiff maintained that the mental anguish suffered by the decedent because of her fear of death and belief that she was deprived of a very good chance of survival, was great. The decedent succumbed after she had given a videotaped deposition. In the deposition, the decedent, who was aware that she had virtually no chance of survival, discussed both her extensive fear of her impending doom and for the well-being of her two children. The case settled prior to trial for \$ 1,700,000.

Commentary: The defendant vigorously denied that the decedent's factual claim, that she arrived for her scheduled follow-up appointment with the defendant ob/gyn to learn about the mammogram results and was advised that the physician was in surgery or otherwise unavailable, should be accepted, and maintained that she failed to keep this appointment. The plaintiff would have stressed that notwithstanding the acceptance of either party's position regarding this factual dispute, the defendant's responsibility to reach out for a patient with abnormal results who does not return for the results, was formalized by a protocol of the defendant hospital which employed the clinic ob/gyn, and that the defendant failed to take any steps to follow this protocol. Additionally, the plaintiff would have endeavored to undermine the defense contention that in failing to seek further care during the approximate 18-month period in which the lump remained, the decedent was clearly comparatively negligent, by arguing that since she was advised that she would be contacted if there were any problems, and since the lump did not grow in the interim, she had been lulled into a false sense of security. Finally, the decedent had survived sufficiently long to give a videotaped deposition and plaintiff's counsel relates that the deposition, in which the decedent expressed the fears of her own impending doom and her fear for her children's well-being was compelling.

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