

electronic records the following week and learned that all of her specimens from the surgery were negative for cancer.

When the plaintiff began asking questions, a second review of her slides was performed by University of Michigan Hospital. The mix-up in the numbering of the slides had not yet been discovered, and the doctor who performed the second review of the plaintiff's slides found that the specimens were cancerous. The plaintiff was informed that there was no error in the diagnosis of cancer based on the April 17, 2003, slides/specimens.

The plaintiff continued to ask for answers and on June 27, 2003, Dr. Chang emailed the director of the cytopathology department, asking whether there may have been some confusion in the lab that would explain the discrepancy.

On July 1, 2003, the head of the cytology department reviewed all of the slides and specimens that were received in the lab on April 17, 2003. It was discovered that the lab clerk had mislabeled the plaintiff's slide and had mixed it up with a male patient's slide.

Plaintiff's counsel said that, at various times, the plaintiff was informed that the University of Michigan had lost her slides or that her slides were missing. The plaintiff was also told that Dr. Chang may have missed the area of the thickening of her breast during the fine needle aspiration and that she may still have cancer.

When the plaintiff met with the head of the cytopathology department, she was told of the error in the lab, and that she should not have undergone the partial mastectomy, and the lymph node mapping, dissection and removal.

The plaintiff testified that the University of Michigan doctor told her she should go home and forget about what had happened.

Due to the partial mastectomy and lymph node removal, the plaintiff developed a permanent and disabling condition called lymphedema. Some of the limited treatments available for this condition include manual drainage, compression garments and kinesiotaping. The goal of treatment is to try to manage swelling and reduce pain.

The plaintiff attempted to return to work a few days after her surgery, but developed physical difficulties doing her job. Moreover, plaintiff's counsel said, she also experienced difficulty working with patients as a nurse, began to question the accuracy of the hospital's test results regarding patients, and developed a severe distrust and suspicion of the University of Michigan and its medical staff. The plaintiff's treating doctor took her off work on Oct. 14, 2003, and she has never returned to work as a nurse or at the University of Michigan after this date.

Suit was filed in the Court of Claims against the University of Michigan, alleging both malpractice and ordinary negligence. At the time suit was filed, plaintiff's counsel said the hospital had refused to divulge the name of the clerk who had made the mistake. Subsequently, suit was filed in Washtenaw County Circuit Court against the lab clerk once her name was learned. The Court of Claims action was then consolidated with the circuit court action.

Just prior to trial, and again during trial, the judge ruled that the defendant lab clerk's actions constituted ordinary negligence, not medical malpractice, because the claim did not raise questions of medical judgment pursuant to *Bryant v. Oakpointe Villa Nursing Centre, Inc.*, 471 Mich. 411 (2004). Labeling the samples was a clerical function, not a medical function. The court went on to state it was simple human error, which could be evaluated by jurors on the basis of their common knowledge and experience.

Moreover, it was also found that the defendant lab clerk was an employee of the hospital at the time of her negligence and was acting within the scope of her employment when she committed her negligent act. Thus, defendant University of Michigan Hospital was responsible under the doctrine of respondeat superior.

At trial, the defendants admitted they had committed an error, but said the mistake was professional negligence rather than ordinary negligence. Plaintiff's counsel said that, based on the court's ruling that the case was one of ordinary negligence, the medical malpractice caps on non-economic damages did not apply.

The plaintiff's theme throughout trial was that the case was about the defendants accepting full

responsibility for their wrongful actions. According to plaintiff's counsel, even though the defendants stated at trial that they were admitting the plaintiff was entitled to compensation, they tried to minimize damages by attacking the plaintiff's credibility, claiming she was out for revenge, and alleging her response was idiosyncratic and that she should have been happy that she didn't have cancer.

The jury rejected these defenses and awarded the plaintiff \$500,000 for past non-economic damages, \$325,000 for future non-economic damages, \$206,000 for past lost earning capacity, \$20,000 for past medical expenses, \$1,264,790 for future lost earning capacity, and \$466,658 for future medical expenses. Moreover, the plaintiff's husband was awarded \$200,000 for past loss of consortium and \$60,000 for future loss of consortium damages.

The total award was \$3,042,448. The court granted plaintiff's counsel's request for interest, costs and fees.

The defendants had offered zero in settlement at facilitation, and made no offer at the settlement conference. A \$1.2 million case evaluation was rejected by the defendants. About one month prior to trial, the defendants offered \$500,000, which was rejected by the plaintiffs.

Type of action: Ordinary (medical) negligence

Type of injuries: Unnecessary partial mastectomy and lymph node removal; subsequent development of lymphedema

Name of case: Doe v. University of Michigan, et al.

Court/case no./date: Washtenaw County Circuit Court; #05-139-MZ; Feb. 21, 2007; Court of Claims; #05-1012-NH; March 12, 2007

Name of judge: Timothy P. Connors

Verdict amount: \$3 million

Allocation of fault: None

Attorneys for the plaintiff: Michael J. Garris and Kitty Groh

Attorney for the defendant: Withheld

Name/city of most helpful experts: Dr. Jennifer Doble, treating physical medical rehabilitation specialist; Dr. Alan Krohn, treating psychologist; Sandra Hilton, treating physical therapist; Dr. Michael Thomson, economist; Dr. Robert Ancell, vocational rehabilitation

Insurance carrier(s): Self-insured

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