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Jury Awards Lost Damages in Legal Malpractice Case *Cox v. Barry*

\$1.78 Million Verdict

Date of Verdict:

Aug. 24, 2010.

Court and Case No.:

C.P. Philadelphia No. 080500376.

Judge:

Marlene Lachman.

Type of Action:

Legal Malpractice.

Injuries:

Loss of damages.

Plaintiff's Attorney:

Thomas J. Duffy, Duffy + Partners, Philadelphia.

Plaintiff's Expert:

Donna Lee Jones, legal, Philadelphia.

Defense Counsel:

James W. Christie, Christie Pabarue Mortensen & Young, Philadelphia; Daniel J. Sherry, Marshall Dennehey Warner Coleman & Goggin, Philadelphia.

Defense Experts:

Nancy Fullam, legal, Philadelphia; Alan Gordon, legal, Philadelphia.

Comment:

A Philadelphia jury has awarded nearly \$1.8 million in a legal malpractice case in which the plaintiff alleged her attorney failed to plead all of the relevant theories in her medical malpractice case, leading to the necessity of settling her case for \$1 million, despite having received a \$2.5 million verdict.

The jury in *Cox v. Barry* awarded a verdict of \$1.787 million Aug. 24, finding that attorney David M. Barry was negligent in his pleading of the underlying medical malpractice case.

The jury also found that the law firm Feldman & Pinto, which handled the medical malpractice case after a referral from Barry, was not negligent in its representation of the plaintiff.

The parties stipulated that plaintiff Barbara Cox's damages were \$1.787 million, according to the docket.

In the underlying medical malpractice action, *Cox v. Lonner, Cox*, of West Chester, Pa., had her hip replaced in October 2003 by Dr. Jess Lonner, according to her complaint in the legal malpractice case. After her surgery, Cox had a two-inch discrepancy in the length of her legs, a discrepancy that had not existed prior to



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the surgery. Cox also had corrective surgery in August 2004 to alleviate the problems stemming from the first surgery.

Cox retained Barry in October 2004 for a medical malpractice lawsuit, according to court papers. Barry filed a writ of summons in the lawsuit three days before Cox's statute of limitations would have run out in October 2005, Cox's complaint said.

Barry referred the case to Laura Feldman and Bradley McDermott of Feldman & Pinto in February 2006, according to court papers. The principals in that firm are Feldman and Rosemary Pinto.

Cox's complaint filed in January 2006 said that Lonner had been negligent in the placement of a hip replacement component, among other claims, according to Cox's legal malpractice complaint.

Feldman & Pinto said in court papers that the correct theory was that Cox was not a candidate for hip surgery, rather than there had been negligence in the performance of her hip surgery.

When Barry consulted with medical experts before referring the case, orthopedic surgeon Dr. Mark Allen opined that Cox had not been a candidate for surgery, but Allen refused to testify against Lonner's practice, according to Feldman & Pinto's memorandum.

Barry also consulted with orthopedic surgeon Dr. Sanford Davne, who agreed to provide a certificate of merit but did not agree to testify as an expert witness because he limited his practice to spinal surgery, court papers said. Davne opined that the "acetabular component," the part of a hip replacement inserted into the pelvis socket, was placed at an inappropriate angle.

When Feldman & Pinto consulted with three orthopedic surgeons, all three said Lonner had been negligent in recommending a total hip replacement, but not for the placement of the acetabular component, Cox's complaint said. Dr. Kenneth Lippman agreed to give an affidavit in support of Cox's claims.

Feldman & Pinto were given leave to amend Cox's medical malpractice complaint to conform it to Lippman's affidavit. The firm, according to the complaint, was "severely contained in their attempt to amend the complaint because Dr. Lippman's opinion as to Dr. Lonner's negligence was different from the theories of negligence pleaded in the complaint and the statute of limitations had run on plaintiff's claim."

When the medical malpractice case went to trial, the jury found Lonner was negligent and awarded \$2.5 million in damages. The defendants brought a post-trial motion pointing to

problems with the underlying complaint. The defendants' post-trial motion led Feldman to recommend her client accept the \$1 million settlement offer despite the jury verdict, according to the plaintiff's papers.

Feldman made that recommendation after consulting with several other attorneys and because Philadelphia Common Pleas Judge Sandra Mazer Moss said that the verdict was likely to be overturned because the complaint was not well-pleaded, the firm's pretrial memorandum said.

After being sued for legal malpractice, Barry joined Feldman & Pinto as defendants.

Barry said in his joinder complaint that he was to get one-third of any attorney fees collected by Feldman & Pinto under his referral agreement with the firm. Feldman & Pinto were to get one-third of Cox's recovery, according to court papers.

Barry said Feldman & Pinto were negligent for recommending that Cox accept the \$1 million settlement, Barry's joinder complaint said.

Barry's attorney in the legal malpractice case, James W. Christie, said the case never should have gone to trial, saying that summary judgment originally had been granted in favor of Barry, but was reversed without opinion before trial.

Christie also said that the claims against Barry were not brought within the two-year statute of limitations, which should have begun to run when the allegedly negligently drafted complaint was filed on Jan. 12, 2006.

The plaintiff's attorney, Thomas J. Duffy of Duffy + Partners, said the jury said on their interrogatory that the discovery rule applied to the statute of limitations.

Barry's defenses also included that Barry complied with the standard of care because he could only present a medical malpractice claim that was supported by his expert, according to his pretrial memorandum.

Barry also said that the amendment to the medical malpractice claim would not have been reversed on appeal.

"Plaintiff suffered no actual harm at the time she settled her claim, but instead settled to avoid what she perceived as a threat to her verdict," Barry's pretrial memorandum said. "... To now present the speculative argument that attorney Barry's conduct alone would have resulted in her losing her verdict is absurd."

— *Amaris Elliott-Engel, of the Law Weekly*