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JURY AWARDS \$3 MILLION IN INFORMED CONSENT CASE
BUT DOCTORS FOUND NOT LIABLE FOR MEDICAL NEGLIGENCE

Michael A. Riccardi
Of the Legal Staff

Two doctors who were found not to have fully explained treatment alternatives were slapped with a \$3 million verdict for lack of informed consent on Monday by a Philadelphia Common Pleas Court jury.

The defendants performed a controversial procedure known as thoracic outlet syndrome surgery on a woman in 1991, and then repeated the treatment when it did not work the first time. According to one of the plaintiffs' attorneys, Stephen J. Pokiniewski of Anapol Schwartz Weiss & Cohan, plaintiff Kathleen Sheperd today is completely disabled and unable to use her right arm.

Alan Schwartz of Anapol Schwartz was lead counsel for the plaintiffs.

The verdict came after a full day of deliberation Monday at the end of a four-week trial before Common Pleas Court Judge Mark I. Bernstein.

At the same time they entered their informed consent verdict, jurors said that the defendants did not commit professional negligence.

Defendants Joseph Hunter of Hand Rehabilitation Center and Stephan Whitenack of Northwest Surgical Associates in 1991 were treating Sheperd, a 30-year-old postal worker, for numbness and pain in her right arm.

Defense counsel for Hunter, Anna M. Bryan of White & Williams, said yesterday that she was preparing post-trial motions on the issue of whether the statute of limitations had run out before the complaint was filed in the case.

The attorney for Whitenack was David Soltz of Sand & Sidel.

Sheperd was operated on in the fall of 1991 and again in the autumn of 1992. The complaint was filed in December 1995.

"Informed consent was given on Sept. 30, 1991, when the first surgery was performed, and again on Oct. 30, 1992, when the second surgery was performed," Bryan said. The defense is prepared to argue that the cause of action expired before December 1995 when the complaint was filed.

In 1991, Sheperd was diagnosed with thoracic outlet syndrome, in which the three nerves running from the neck and down the arm are compressed by an aberrant muscle. One treatment option is to perform surgery to relieve pressure on the nerves.

But, Pokiniewski said, the procedure is "very controversial." And there may

have been "grave doubts" about the diagnosis, since the electromyograph test used to diagnose the nerve pressure is less reliable because its view is blocked by the clavicle, Pokiniewski said.

Hunter and Whitenack literally wrote the book on TOS surgery, and in their co-authored textbook, they said that the procedure may have negative effects on patients with reflex sympathetic dystrophy in an advanced stage. Sheperd apparently did have RSD.

A question was whether Sheperd's RSD was in "stage three," in which TOS surgery is contraindicated, or in "stage two," when she might have been a candidate for the surgery.

Hunter and Whitenack performed the procedure, but Sheperd's condition was not improving, even with rehabilitation.

Both sides agreed that there are two schools of thought on the treatment of Sheperd's condition, with TOS surgery being the school adhered to by the defendant doctors. Whether, under the TOS school of thought, there was a valid diagnosis of the malady and whether, under that school of thought, the surgery was contraindicated because of the RSD condition were two key questions in the negligence phase.

Jurors decided that there was no negligence in making the diagnosis or in the treatment given to Sheperd.

But according to the attorneys in the case, the "two schools" evidence may well have spilled over into the jurors' deliberation on whether Sheperd was given a full presentation on informed consent.

Pokiniewski said the jurors may have had the "two schools" evidence on their minds when they approached the informed consent claim.

According to Bryan, Bernstein rejected a proposed jury instruction on the issue of whether a second school of thought must be explained to a surgery candidate. But she would not go so far as to conclude that the jury had "two schools" on its mind during its deliberation on informed consent.

The defense said that alternative treatments were fully explained to Sheperd. Under the school of thought that does not approve of TOS surgery, the treatment alternative was to do nothing, Bryan said.

"Our answer was that the doctors did talk to Ms. Sheperd about alternative methods of treatment, and that those alternative methods are the other school of thought," Bryan said.

But Pokiniewski said that the admonition that Sheperd could either submit to TOS surgery or do nothing was not an adequate explanation of the two schools of thought.

"Our position is that there is more to it than that," he said.

"If they are going with two schools of thought [as justification for their treatment decisions], the doctors should have told her that these are respected physicians who would not recommend surgery," Pokiniewski said. "They only told the patient that she could have surgery or she could not."

The plaintiffs also said that there was not enough advice from the doctors on the potential complications of surgery.

The jury believed Sheperd and her husband, who testified to much-less-thorough informed consent talks than the two doctors recalled.

In the course of events, the first surgery did not cure Sheperd's difficulties, and the doctors concluded that scar tissue had formed on muscle and continued to impact on the nerves. After the second surgery, there was no improvement and Sheperd's RSD-related pain became worse, according to Pokiniewski.

Eventually, Sheperd rejected the option of undergoing a third surgery and in 1994 stopped treatment with Hunter and Whitenack.