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Pa. Ruling In \$6.3M Med Mal Case Could Change Trial Strategy

By **Y. Peter Kang**

Law360 (October 11, 2022, 8:07 PM EDT) -- The Pennsylvania Supreme Court's recent reversal of a new trial order in a medical malpractice suit could make parties more likely to request special verdict sheets, experts say, given the justices' finding that the health care providers' failure to do so waived their right to a new trial.

The state's highest court **ruled Sept. 29** that Dr. Sobhan Kodali and St. Luke's University Health Network waived their right to a new trial to challenge pain-and-suffering damages awarded by the jury because they failed to request a special verdict sheet itemizing the various categories of damages. The justices cited the state's "general verdict rule," which holds that general verdicts that do not categorize damages can't be overturned in cases where the evidence supports at least one of several theories of liability.

Eric Weitz of The Weitz Firm LLC, a personal injury plaintiffs attorney, told Law360 that parties may reassess their trial strategies due to the ruling, which he said is more "overarching" than any previous high court decision regarding the general verdict rule.

The "conventional wisdom" of Pennsylvania trial attorneys, Weitz said, is that plaintiffs are more likely to request special verdict sheets, while defendants will generally favor general verdicts.

"There seems to be conventional wisdom that if there are more lines on the verdict sheet, a jury may award more damages," he said. "Now, I think both sides will rethink whether there is any accuracy in that historic belief or whether concerns of preserving issues for appeal will be more significant."

He said predicting the psyche of a jury is mostly conjecture absent focus group data.

"So parties are left with guessing certain things, which is exactly why the [Pennsylvania] Supreme Court is reaffirming the general verdict rule," he said. "I don't know if there is any data to uphold the conventional wisdom, and this ruling will make lawyers rethink it — particularly for defense counsel."

Casey Coyle, a Babst Calland Clements and Zomnir PC complex litigation shareholder, said the decision will have "far-reaching consequences" because it extends the general verdict rule to not just the sufficiency of evidence but to the admissibility of the evidence, given that the trial court rejected the health care providers' bid to have the plaintiff's pain-and-suffering testimony excluded, which Pennsylvania's intermediate appellate court, the Superior Court, later said was in error.

"The general verdict rule was only seen in the context of a sufficiency-of-evidence challenge," he said. "By extending the general verdict rule, you're not only expanding its reach into other areas where it hadn't been used, you are now imposing this additional obstacle on a litigant to preserve an issue on appeal."

Coyle said he believes the ruling will prompt parties to go out of their way to ask for special verdict forms with itemized damages.

"I think you're going to have defense counsel operating from a position of extreme caution; you're going to see itemized verdict slips be part and parcel of the normal trial strategy," he said. "Even where it isn't immediately apparent that the [general verdict rule] would apply, just to avoid a situation like you had here, where you go up on appeal years later and you're ultimately precluded

from prevailing on a meritorious issue ... because they didn't ask for the special verdict."

Coyle said one open question moving forward is the extent to which the decision applies.

"Now it's not just limited to a sufficiency-of-the-evidence challenge. We're now looking at admissibility challenges and other types of challenges where lower courts are going to say the general verdict rule applies, and if you don't ask for an itemized verdict slip, the losing party on appeal waives the right to challenge that issue," he said.

The suit alleged that the health care providers failed to diagnose patient James Cowher's heart disease, which resulted in his August 2016 heart attack death as he jogged around his neighborhood.

The standard verdict sheet agreed to by both parties simply listed two types of damages: wrongful death and so-called Survival Act damages. The latter could consist of four categories: pain and suffering, past lost income, future lost income and "loss of life's pleasures."

In December 2019, a Lehigh County jury awarded Cowher's widow, Karen Cowher, \$6.3 million — \$2.5 million in wrongful death damages and \$3.8 million in Survival Act damages.

But the Pennsylvania Superior Court found in February 2021 that while the finding of liability and wrongful death damages was proper, the pain-and-suffering portion of the verdict was unsupported by trial testimony given by the plaintiff's medical expert, and ordered a new trial on that issue.

Cliff Rieders, a personal injury plaintiffs attorney with Rieders Travis Humphrey Waters & Dohrmann, said the state high court made the right call in finding that a new trial was waived by the absence of a special verdict sheet.

"There was no question that if you don't ask for a special interrogatory, then you can't complain that a verdict is ambiguous," he said. "What happened here is that there was other evidence other than the [plaintiff's medical expert's testimony] to support pain and suffering."

Rieders said the general verdict rule states that if a party has evidence to support the general verdict, the losing party can't try to challenge a piece of evidence or one component of the verdict that was arguably defective, given the ambiguity of the types of damages.

"The defendants can't hide behind a general verdict because they were not satisfied with one piece of evidence when other pieces supported the evidence," he said. "That's a classic case of trying to have your cake and eat it too."

--Editing by Orlando Lorenzo and Daniel King.