

Bad Jury Charge Nixes \$1.9M Med Mal Award: Texas Justices

By Y. Peter Kang

Law360 (May 25, 2018, 9:24 PM EDT) -- The Texas Supreme Court on Friday tossed a \$1.9 million jury verdict in a medical malpractice suit over a botched hysterectomy, saying the trial judge's jury instructions improperly allowed the jury to consider an invalid theory of liability.

A jury had found that Dr. Jim P. Bengé and his employer, Kelsey-Seybold Medical Group, were liable for causing a perforation of patient Lauren Williams' bowel during a hysterectomy resulting in serious injuries. But the Court of Appeals later tossed the judgment and ordered a new trial, saying the trial judge impermissibly combined valid and invalid theories of liability into a single broad charge, or question, for the jury to consider.

The intermediate appellate court said the trial judge should've allowed Bengé's proposed jury instruction, which stated that Williams can't recover damages for Bengé not informing Williams that an inexperienced resident physician would be assisting in the surgery since the plaintiff never formally lodged a claim of lack of informed consent.

The state Supreme Court unanimously agreed Friday, saying Williams' counsel repeatedly stated at trial that Bengé failed to inform Williams that the resident would be involved in the surgery. In addition, Williams' medical expert, Dr. Bruce Patsner, testified repeatedly that Bengé's nondisclosure constituted medical negligence, according to the opinion.

"Williams argues that her claim of nondisclosure, which she clearly makes, is not the same as a claim of lack of informed consent, which she disclaims," Chief Justice Nathan L. Hecht wrote in an 18-page opinion. "We fail to see the difference."

The justices said the repeated questions and argument at trial regarding the nondisclosure were not merely used to attack Bengé's credibility, as Williams contends in her appellate brief, but were intended to demonstrate that the surgeon had a duty to provide Williams with that information.

"Williams' argument that the issue was Dr. Bengé's credibility is flatly refuted by the testimony she repeatedly elicited from Dr. Patsner, not that Dr. Bengé was unworthy of belief, but that he violated the standard of care and was negligent," the court said.

The justices said even though Williams indeed alleged that Bengé was negligent in allowing the resident doctor to participate in the surgery, that is a completely different issue than whether Bengé's failure to inform Williams of the resident's participation constituted negligence.

“Williams’ evidence and argument at trial confused [the jury],” it said. “While the jury was asked about a single liability theory, the plaintiff advanced multiple claims in the evidence. ... The jury could have based its finding of negligence only on that nondisclosure or any one or more of Williams’ other claims.” It added, “Because an appellate court cannot determine whether the jury found liability on an improper basis, we must presume that the error in denying Dr. Bengé’s limiting instruction was harmful.”

The justices vacated the jury verdict and ordered a new trial.

An attorney for Williams, Randall O. Sorrels of Abraham Watkins Nichols Sorrels Agosto & Aziz, expressed confidence regarding their chances at the retrial.

“It’s a case we won pretty convincingly, and we’re going to go back and win it again,” he told Law360 on Friday. “The first jury found the doctor to be negligent and I’m fairly sure a second, third or fourth jury will also find the doctor to be negligent.”

Sorrels added that the state high court ruling was concerning because it might give a party a procedural advantage and secure appellate review in cases where previously review might not have been available.

“It could bring a sea change to how jury charge conferences are approached in the future,” he said.

An attorney for Bengé did not immediately respond to a request for comment Friday.

Williams is represented by Lucy H. Forbes of The Forbes Firm PLLC and Randall O. Sorrels and Chelsie King Garza of Abraham Watkins Nichols Sorrels Agosto & Aziz.

Bengé and his employer, Kelsey-Seybold Medical Group PLLC, are represented by Earnest W. Wotring, David George and Amy Nilsen of Baker Wotring LLP.

The case is Dr. Jim P. Bengé et al. v. Lauren Williams, case number 14-1057, in the Supreme Court of the State of Texas.