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Verdicts & Settlements

Did motion practice lead to med mal settlement?

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It would be purely speculative to conclude that Ramsey County District Court Judge Margaret Marrinan's statement in court that she would consider the plaintiff's *Frye-Mack* motions and that she was skeptical of the defense arguments on *Frye-Mack* led to the recent settlement of a vigorously litigated medical malpractice case.

It also would be purely theoretical to say that the case settled because the judge took a motion for punitive damages under advisement, or because she gave the go-ahead for the plaintiff to do discovery on the relationship between the defense witnesses and the malpractice carrier, MMIC. But that in fact is what happened in the case of *Christenson v. Koepin*, a medical malpractice case that recently settled for an undisclosed amount after being in suit since 2008.

According to the plaintiff's lawyer, William Tilton of St. Paul, such motions are rare. Minneapolis attorney Chris Messerly agreed that they are unusual and overlooked by many practitioners. There ought to be more punitive damages motions in medical malpractice cases, Messerly said.



Lee Christenson (left), with her lawyer, William Tilton of St. Paul, settled her medical malpractice case after her vocal cords were paralyzed during thyroid removal surgery. (Staff photo: Bill Klotz)

Paralyzed vocal cords

The plaintiff, Lee Christenson, has paralyzed vocal cords requiring her to breathe through a tracheotomy tube. She alleges the

cords were paralyzed during a thyroid removal surgery because her surgeon, Dr.

Christenson

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Michael Koeplin, cut both of the recurrent laryngeal nerves that control the vocal cords. Those nerves typically run between the thyroid gland and the windpipe. It is not contested that she sustained the nerve injury during the surgery. She alleges that the doctor rushed through her operation and failed to meet the standard of care that requires the doctor to identify and isolate the recurrent laryngeal nerves.

The plaintiff argued that the defense expert testimony should be subject to a *Frye-Mack* analysis and should be excluded as "junk science." A *Frye-Mack* analysis requires the trial court judge to

determine that the proffered evidence is generally accepted and reliable.

The defense was prepared to offer three experts to testify that the defendant acted within the standard of care and that it is not always possible to observe the recurrent laryngeal nerves. In its brief, the defense also argued that its medical evidence was not novel and not subject to *Frye-Mack*.

The defense witnesses are "outliers," Tilton told the court, while defense attorney Richard Bland of Minneapolis argued that the question is how aggressively the doctor should look for the nerve and what happens if the doctor can't find it, and whether the doctor breached the standard of care when the question is thus framed.

But Marrinan said she was "skeptical" of the defense position, in part because the doctor spent only 53 minutes on the operation.

Frye-Mack motions are not uncommon in med mal cases, but it's very unusual for a plaintiff to bring one, Messerly said.

Creating a division?

Tilton also brought an unusual motion for punitive damages. The doctor's actions had a high likelihood of harm, even if not intentional, Tilton said. The doctor was "playing fast and loose with the patient's well-being" and knew or should have known that failure to identify the recurrent laryngeal nerve was extremely dangerous, he told the court. An operation that should have taken two hours or more was "rushed through" in 53 minutes, Tilton argued.

"It's a tough motion to bring. I know the bench doesn't like these motions," Tilton said in court.

He acknowledged that the motion creates a possible conflict between MMIC and the doctor and argued that the doctor was advised years ago to get private counsel.

Bland retorted that the evidence in the case has not changed during the discovery process and had not brought to light any intentional act to injure the plaintiff. Is the plaintiff suggesting that "Dr. Koeplin said, 'I don't care about Lee Christenson' so I'm going to do something deliberately so she gets hurt?" he said in an incredulous tone.

"The plaintiff's motive in bringing the motion now is clear. It's their last gasp. 'Let's create a division between Dr. Koeplin and Dick Bland,'" Bland argued. As he pointed out in his memorandum, the trial was scheduled in three weeks.

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"Dr. Koeplin will be prejudiced based on his inability, on such short notice before trial, to retain personal counsel to conduct an investigation and develop a defense on the punitive damages claim before trial commences," Bland wrote in his brief, suggesting that a continuance would be warranted.

'Fair game'

Tilton also moved the court to allow discovery and introduction of evidence on malpractice insurance. "This is an extraordinary motion. There are extraordinary facts which support this motion," Tilton wrote in his brief. Those facts are that all the defense experts, their partners and their practice groups are insured by MMIC, the defendant's insurer. Not only are the defense experts paid by MMIC, they may be compensated for other work by the company. Furthermore, MMIC is a physician's mutually owned company and the insureds receive dividends.

Marrinan was receptive to the plaintiff's argument that the relationship between the malpractice carrier and the defense experts was germane. She rejected the defense argument that the evidence would confuse the jury and lead to collateral issues, such as the question of how much the defense experts would gain if the defendant won this particular malpractice case.

All the information about financial relationships between the experts and the insurer is "fair game," Marrinan said. "What is the kickback to any given physician per annum? That's important for the court to know." The plaintiff could direct interrogatories on the issue, she ruled.

"I think it's crystal clear that the jury has a right to hear this evidence," Messerly said. "I'm glad Tilton made the motion."

Tilton didn't think such a motion had ever been pursued. He noted that the court wasn't asked to rule on what evidence would be admitted and that would have required another motion.

Bland could not be reached for comment on the case. 