



High court upholds malpractice judgment against LV hospital

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CARSON CITY -- In a 5-2 decision, the Nevada Supreme Court has upheld a \$4.8 million medical malpractice judgment against Sunrise Hospital in Las Vegas in the case of a man who was left in a vegetative state after surgery for a rotator cuff injury.

The court ruled that Otho Lee Banks, as guardian for James L. Banks Jr., was entitled to the money. At the same time, it rejected the appeal of the Banks were entitled to another \$1.9 million.

In August 1995, when he was 51, James Banks was admitted to Sunrise Hospital for rotator cuff surgery. During the surgery, James went into cardiac arrest and he failed to regain consciousness.

The hospital used an anesthesia machine on Banks that Banks' lawyer maintained was defective and led to Banks' brain damage.

Before the surgery, Sunrise Hospital had an agreement to sell that machine and others. The equipment was sold several months after Banks' operation. The hospital never recorded the serial numbers or documented which machine was used in Banks' surgery.

During the first trial before District Judge Sally Loehrer, a jury instruction was given that Sunrise had failed in its duty to preserve the evidence for inspection. The instruction told the jury, "You may infer that had the equipment been preserved and tested that it would have been found to be not operating properly."

The trial ended in a hung jury in 1999. A second trial was held before District Judge Michael Cherry who approved the same jury instruction.

In its appeal, the hospital said Cherry abused his discretion in giving the instruction that amounted to sanctions against Sunrise. The hospital said it warranted a new trial.

The state's high court, in the majority opinion Friday written by Justice Deborah Agosti, said

Sunrise "had a duty to preserve information relating to the attending physicians and the equipment." Agosti said the hospital was on notice that there could be a malpractice suit.

"In fact, if the equipment had been functioning properly, it is reasonable under any circumstance to infer that Sunrise would have wanted to preserve it in order to protect itself from a false claim of negligence," Agosti wrote.

Justice Bill Maupin and Nancy Becker dissented from the majority opinion. Maupin said the jury instruction "unfairly and retrospectively imposed a duty to preserve evidence at a time many months before the plaintiff first generated even so much as a remote reference to the evidence and years before the plaintiff took formal action against the defendant."

Maupin said Banks' lawyer never claimed Sunrise willfully destroyed evidence. In addition, Banks did not make the claim about the machine malfunctioning "until well after the machine was turned over to a purchaser," the justice wrote in his dissent.

The full court rejected the claim of Banks that Cherry should not have reduced the jury verdict by the \$1.9 million paid by the two physicians in the case. It said the jury properly offset the amount awarded to Banks by the jury.

Before trial Dr. Robert L. Kinsman, the anesthesiologist, reached a settlement to pay \$1.8 million and Dr. James Manning, the orthopedic surgeon, paid \$100,000 after arbitration.

-- In another ruling Friday, the Nevada Supreme Court upheld a district court judgment giving Stuart and Barbara Cowan \$260,000 for lost business goodwill when the state Transportation Department condemned a one-half acre parcel on the corner of Sahara Avenue and Rancho Drive to expand Interstate 15 in Las Vegas.

The Cowans operated Lou's Texaco, a gas station and convenience store, at the site.

The court said normally the award of damages for lost business is not permitted. But it said in exceptional circumstances the business owner may be compensated over and above the value of the real property.

Chief Justice Miriam Shearing, who wrote the majority opinion, said, "The Cowans were unable to relocate their business because oil companies were not extending new leases for gas station franchises in the Las Vegas Area.

"Consequently, the lease's value was inextricable tied to the unique location of the real estate that was condemned," said Shearing.

The court also upheld the award of \$97,650 in fees for the attorneys that represented the Cowans, based on \$325 per hour.

Justice Bill Maupin agreed with the decision that the Cowans were entitled to the \$260,000 but said there should be a new trial to allow the couple to present evidence of comparable sales from other states in valuing the property.

Justice Mark Gibbons also dissented, saying District Judge Ron Parraguirre should have permitted the Cowans to present sales and appraisal information based on comparable California sales. Gibbons said there were insufficient comparable sales in Clark County to use for appraisal purposes on the worth of the property.

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