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Md. Court Reinstates \$2.6M Award In Cancer Death Suit

By **Y. Peter Kang**

Law360 (November 23, 2020, 8:21 PM EST) -- A Maryland appeals court on Monday reinstated a \$2.6 million jury verdict in a suit accusing a radiologist of failing to timely diagnose a woman's breast cancer that caused her death, saying the trial judge's decision to toss the verdict was erroneous.

In a published opinion, a three-judge Court of Special Appeals panel reversed a Baltimore County judge's decision to grant a post-trial judgment notwithstanding the verdict in a suit accusing Dr. Sanford Minkin and his practice group, Advanced Radiology PA, of failing to timely diagnose Lana Burton's breast cancer, which allowed it to spread and caused her 2016 death.

The suit filed by the patient's family, husband Charles Burton and daughter Larae Burton McClurkin, alleges that Minkin in 2012 failed to properly interpret a mammogram and ultrasound taken after Lana Burton had found a lump in her breast. The alleged negligence caused the stage 1 cancer to go untreated for 15 months and advance to stage 3 cancer, according to the suit.

After the jury had awarded the family approximately \$2.6 million in damages, the trial judge granted Minkin's JNOV bid, saying the family failed to establish that the alleged negligence proximately caused the patient's death since their own medical expert purportedly opined that Burton had more than a 50% chance of survival even assuming Minkin had been negligent.

On appeal, the family argued that Minkin mischaracterized the testimony of their expert, Dr. Gabriel Pushkas. While the panel did not necessarily agree with that argument, it said on Monday that the trial judge erred by focusing on Pushkas' statement that patients like Lana Burton have a 66% chance of survival five years after being diagnosed with her form of stage 3 cancer.

The appeals court said instead, the trial court should've analyzed whether the evidence, when viewed in its entirety, supported the jury's determination that Minkin proximately caused Burton's death. Pushkas had also testified that if a stage 1, 2 or 3 cancer spreads, or metastasizes, "the patient will die"; that stage 3 cancer patients typically have a less than 50% survival rate in five years; and that Minkin's failure to diagnose and remove the cancer in 2012 caused it to spread, according to the opinion.

"The totality of Dr. Pushkas' testimony provides more than merely conjecture or speculation that had Dr. Minkin performed a biopsy of the lump in Ms. Burton's right breast in May 2012, it would have revealed that she had cancer," the panel said, noting that a biopsy may have revealed the fact that the patient had a particularly difficult-to-treat form of cancer known as triple-negative. "It may be logically inferred from that testimony that had the cancer been discovered, Ms. Burton may have survived."

The panel said the jury should've been given deference in light of conflicting medical expert testimony.

"While a review of the cold record of Dr. Pushkas' testimony might seem confusing or worse, contradictory, the jury had the benefit of hearing his testimony in-person and evaluated it," the opinion states. "They were free to believe all, part, or none of it."

Attorneys for the parties did not immediately respond to requests for comment Monday.

Judges Michael W. Reed, Gregory Wells and Robert A. Zarnoch sat on the panel for the Court of Special Appeals.

Burton is represented by George S. Tolley III of Dugan Babij Tolley & Kohler LLC, Ellen B. Flynn of Flynn Law Group LLC and Elisha N. Hawk of Brown & Barron LLC.

Minkin is represented by Andrew E. Vernick of Vernick & Associates.

The case is Willie James Barton Jr. et al. v. Advanced Radiology PA et al., case number 1336, September Term 2019, in the Court of Special Appeals of Maryland.

--Editing by Bruce Goldman.

Updated: This article has been updated to include additional counsel info.

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