

DAILY REPORT

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Hospital Faces Only \$4.5M in \$36M Verdict Over Botched Surgery

GREG LAND

A FULTON COUNTY JURY awarded \$4.5 million to the children and estate of a woman who spent the last 19 months of her life hospitalized and partially paralyzed after a surgeon preparing to remove a kidney mistakenly tied off her aorta, cutting off blood flow to the lower half of her body for more than 50 hours.

But the sum only represents a fraction of the \$36 million in damages the jury found. The other \$31.5 million were assessed against the doctor whose mistake led to the woman's injuries, but he had apparently settled those claims before the litigation was filed.

Five teams of lawyers represented other defendants for nearly three weeks before the jury ultimately decided that the only one bearing any liability was North Fulton Hospital.

"A formidable group of very talented and capable defense lawyers," is how plaintiffs attorney Philip Henry described the legal firepower arrayed against him and his Henry Spiegel Milling colleague, Wendy Huray, and Davis Zipperman Kirschenbaum & Lotito partner E. Marcus Davis.

North Fulton was represented by Kevin Race, Kimberly Woodland and Chelsea

Murphy of Insley & Race. Race said by email that North Fulton Hospital does not intend to file an appeal at this time. "However," he added, "we have filed a Motion to Apply Set Off, asking the Court to reduce the verdict by just over \$2 million."

Representing the other five defendants were Wayne McGrew III and Spencer Bomar of Carlock, Copeland and Stair; Hunter Allen Jr. and Joscelyn Hughes of Allen McCain & O'Mahoney; Daniel Huff and David Mackenzie of Huff, Powell & Bailey; Paul Weathington and Tracy Baker of The Weathington Firm; and Scott Commander of Commander Law.

The case began when Sonya Dubose, then a 37-year-old mother of seven, was admitted to North Fulton in March 2011 to have her left kidney removed. Henry said Dubose suffered from a chronic kidney infection and that less invasive treatments had not been effective.

According to plaintiffs' filings, Dubose was expected to be in the hospital eight to 10 days, then return to her job as a bus driver for the Fulton County Schools.

The surgery was performed by two urological surgeons: Harry Rutland, the primary surgeon, and Glover Little, who assisted.

Rutland used a silk ligature to tie off what he thought was the renal artery to



Philip C. Henry

Dubose's kidney. According to a plaintiffs' account, he had to perform that procedure by touch since he couldn't see the artery, and mistakenly tied off her aorta, which meant Dubose "lost essentially all blood flow to her lower body."

The surgeons did not recognize the error and continued with the surgery, which lasted more than five hours. In the hours after the surgery, Dubose repeatedly complained of pain, and—as the results of the blood loss became more pronounced—she developed numbness and an inability to move her lower extremities, which became increasingly cold.

Over the next two days Dubose was seen by several health care professionals, including Rutland; several North Fulton nurses; hospitalist Thomas Smith; infectious disease specialist Rabiul Alam; kidney specialist Madhu Reddy and critical care specialist Ashar Salman.

None suspected a vascular issue might be causing Dubose's symptoms, the plaintiffs' portion of the pretrial order said. It was only after she had lain in bed for more than 50 hours that a vascular surgeon was called, and he found the ligature tying off her aorta. The plaintiffs' summary said the surgeon reported that when he cut it, the aorta "popped open" and blood began flowing to Dubose's lower extremities again.

By then, however, Dubose had experienced catastrophic effects from the blood loss, including the loss of function in her remaining kidney, permanent paralysis in both legs and severe muscle and skin death in her lower body, pelvic area and legs, the plaintiffs' account said.

Henry said Dubose spent more than 19 months confined to her hospital bed.

"She was conscious; she had kidney failure, paraplegia, massive tissue loss of her lower body which led to open, gaping wounds on her lower back, buttocks and legs," he said. By the time she died on Aug. 16, 2013, her medical bills were about \$6.1 million, Henry said.

About five months before she died, Henry, Huray and Davis brought a suit for her in Fulton County State Court against North Fulton Medical Center Inc., the parent of North Fulton Hospital—whose nurses attended to Dubose—

along with doctors Little, Reddy, Smith, Alam and Salman and their respective practices.

Henry said he could not discuss the circumstances surrounding Rutland, the surgeon who tied off the aorta, not being a defendant.

When Dubose died, her estate, children and their custodians replaced her as plaintiffs.

Henry said there was a "mixed bag" of settlement offers and demands as the litigation progressed, and that two mediations before Gino Brogdon of Henning Mediation and Arbitration Services failed to resolve the dispute.

Trial began Oct. 26 before Judge Jay Roth.

Henry said there was a "significant dispute" between the hospital and the consulting physicians, with the nurses saying they had informed the doctors of concerns about Dubose's worsening condition, and those doctors saying they would have acted sooner had they been apprised of those concerns.

"And of course the hospital blamed Dr. Rutland and said he was 100 percent responsible for [Dubose's] injury and outcome," he said.

The defendants presented a "pretty united front on the issue of causation," Henry said, arguing that even if the tied-off aorta had been discovered much sooner, the damage from Dubose's lost blood flow was already done.

"Our position was that there was ongoing and continuing injury from some time after the suture was placed up until the time it was removed," he said.

Henry said the key defense witness for North Fulton was Thomas Naslund, chief of the vascular surgery division at Vanderbilt University Medical Center.

Naslund testified that, in his opinion, there had only been a partial occlusion of the aorta and that there had been adequate blood flow into the second day after the surgery, and that "over time it became significant enough to cause these injuries," said Henry.

The plaintiffs called vascular surgeon Charles Lewenstein, who had removed the suture from Dubose's aorta, and who testified that in his opinion there had been a total blockage, said Henry. Another plaintiffs expert, Pittsburgh vascular surgeon Paul Collier, supported the plaintiffs' position that irreversible injury from ischemia, or blocked blood flow, occurs after six to 18 hours, Henry said.

The plaintiffs' nursing expert, Darla Ura of Emory University, testified that the North Fulton nurses failed to notice the signs and symptoms that should have indicated that the aorta was tied off or severely restricted, he said.

In closing statements, Davis said the plaintiffs' team suggested damages of three to five times Dubose's medical bills, and—if jurors allocated liability—urged them to proportion 50 to 90 percent of the blame to North Fulton.

The trial ended on the afternoon of Nov. 11, and the panel returned the next day for a total of about seven or eight hours of deliberations before delivering a plaintiffs' award of \$36 million, including \$11 million for the wrongful death claim and \$25 million for the estate's claim for pain and suffering, medical and funeral expenses.

But the jury allocated 12.5 percent of the liability to North Fulton, and 87.5 percent to Rutland. In conversation with jurors afterward, Henry said there were no indications as to why the panel ruled as it did.

"Just the usual," he said. "Different people having different opinions about who shared responsibility and who didn't, and what percentage they had."

The case is *Marion v. Little*, No. 13EV016954.