

The Legal Intelligencer

Jury Awards \$1.7 Mil. Over Death of Elderly Patient

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A Philadelphia jury awarded \$1.7 million to the estate of a 77-year-old man who died at Temple University Hospital after a mucus plug formed in his nasotracheal tube.

In *Small v. Temple University Hospital*, attorneys for Rufus Small's estate said they argued that he slowly suffocated over a period of hours, as he was unable to tell nurses that he couldn't breathe because of the tube down his throat and the restraints that held him to the bed.

Small's attorney, Norman Perlberger of Pomerantz Perlberger & Lewis, alleged in court papers that doctors failed to communicate with one another, failed to detect Small's distress and failed to regularly suction the tube to avoid a mucus plug, which takes hours to form.

However, the jury found the three doctor defendants in the case not liable for negligence and three other doctors were dismissed from the case before the trial began.

Defense attorneys argued that there were no signs Small was having trouble breathing. They said he had normal agitation that intensive care unit patients have when intubated and he suffered from ICU psychosis, according to attorney Ira Bushman of Abrahams Loewenstein & Bushman.

While mucus plugs can be common in Small's situation, Bushman said there was nothing out of the ordinary in his behavior to lead doctors to believe a plug existed. When the mucus plug was found after Small's condition worsened, Bushman said doctors timely and appropriately managed the situation.

At Small's age, and with his pre-existing medical conditions, Bushman said he couldn't handle the respiratory distress and had a heart attack that resulted in his death.

Small was admitted to Temple Hospital on Sept. 23, 2003, with swelling of the throat and tongue, and was diagnosed with an allergic reaction known as angioedema, according to court documents.

After oxygen didn't improve the situation, Small was intubated that day. According to Perlberger, the angioedema was noted to be improving on Sept. 24 and the doctors considered removing the tube. They ultimately decided to wait one more day.

Between 8 p.m. and 9 p.m. on Sept. 24, Small passed two notes to his daughter who was visiting to tell her that it was "hard to breathe," according to Perlberger.

A nurse attended to Small after the first note and told the daughter, after the second note, that she would take care of it. The daughter then left because visiting hours were over, he said.

According to Bushman, Small was sleeping comfortably at 11 p.m. that evening.

He was given sedation throughout the evening, with the last dosage around 2 a.m. At 2:40 a.m. on Sept. 25, it was noted that Small's breath sounds were no longer audible, according to Perlberger. He coded at 4 a.m. and was pronounced dead at 4:32 a.m., Perlberger said.

He said he argued that a prescription for Albuterol given at 9:14 p.m. on Sept. 24 to help with the secretions and swelling that put him in the hospital was not given. Bushman said the record didn't reflect whether the drug was administered, but it could have been and just wasn't written down.

Perlberger said a treating doctor - and one of the defendants - Susan D. Agrama admitted on the stand that not administering the drug and not communicating with the nurses would have been below the standard of care. He said the defense's expert, Michael Grippi, said the same thing. Grippi is the chief of medicine at a Veterans Affairs hospital and a professor of medicine at the University of Pennsylvania.

"We had, really, admissions by the defendant that if those things didn't happen . . . [Small] probably would have been alive today."

Bushman said those admissions were taken out of context. Although Agrama admitted that not administering the Albuterol if ordered would be below the standard of care, Small had been given other medication that Bushman said was working.

Philadelphia Common Pleas Court Judge Frederica Massiah-Jackson presided over the trial and would not allow the attorneys to talk to the jury afterward.

Perlberger said he thinks the jury could have been swayed by the fact that a mucus plug takes hours to form, not minutes. In his summation, Perlberger described a man who was slowly suffocating. He had beat cancer three times and fought in World War II. Perlberger said Small was a fighter and was not suffering from any other illnesses when he was admitted to Temple University Hospital. He took care of his blind wife and drove her to dialysis. He would do work around the house and spend time with his grandchildren, Perlberger said.

Bushman said the verdict was "completely inconsistent against the evidence and the law," and he is filing post-trial motions on several grounds.

Perlberger is also working on post-trial matters. He said the delay damages he is seeking would bring the total award to more than \$1.88 million.

The 12-member jury in the case was selected on Nov. 26 and they began deliberations in the afternoon of Dec. 5. After about five hours of deliberations over two days, the jury came back with a unanimous verdict on Dec. 6 against Temple University only.

According to the verdict sheet, Agrama and Drs. Nicholas Patellis and Wissam Chatila were not found to be negligent.

Bushman said that showed that the care given Small was very appropriate.

Perlberger said three other doctors were dismissed before the trial began.

The demand in the case started at about \$3 million, according to Bushman. It was at about \$2 million at the start of the trial, Perlberger said. There were never any offers in the case, both attorneys said.