

## Verdicts & Settlements

### Failure to diagnose cancer results in settlement

A \$135,000 settlement was recently reached in a medical negligence action for failure to diagnose lung cancer.

The plaintiff (now deceased) was a 54-year-old Snohomish County housewife with a long history of cigarette smoking. Plaintiff was sent by her nurse-practitioner to a radiologist for a chest X-ray as part of a general physical exam. Although the X-ray indicated a lesion approximately 3 cm in diameter in the upper lobe of plaintiff's left lung, the defendant radiologist's report stated only that it was a "normal chest exhibiting old healed granulomatous disease."

Plaintiff's cancer was not diagnosed until more than 15 months later, by which time plaintiff had numerous metastases to her brain, and effectively a zero chance of long-term survival. Plaintiff died 11 months after her cancer was diagnosed, during the pendency of the lawsuit.

Plaintiff's expert radiologist, Dr. Melvin Figley, a professor and former long-time chairman of the University of Washington's Department of Radiology, indicated in his report that the lung lesion appearing on plaintiff's initial chest X-ray was indicative of significant disease, and warranted prompt further investigation. Dr. Figley's impression was of a significant lesion suggesting either active tuberculosis or primary neoplasm. This report was submitted to defendant's attorney as part of settlement negotiations, and was not refuted by any defense expert.

The major issue in the case was that of damages. Defendants contended that their failure to diagnose plaintiff's lung cancer made no appreciable difference in her probability of survival. Defendants utilized a "tumor doubling time" defense in support of this contention. By comparing the size of the primary lung tumor in the initial X-ray to its size 15 months later when plaintiff's cancer was diagnosed, defendants concluded that the tumor's "developing time" or growth rate was such that the brain metastases must already have been present at the time of the initial X-ray.

In response, plaintiff's attorneys were able to show that the tumor doubling time theory is a highly speculative, oversimplified mathematical model which provides only a crude estimate of tumor growth rate under erroneous assumptions. The theory is not relied on by doctors in prognosis and treatment of cancer, and the theory relies upon a number of variables that in plaintiff's case were impossible to prove.

Plaintiff's own lung oncology experts relied on the Staging System for Lung Cancer developed by the Task Force on Lung Cancer of the American Joint Committee for Cancer Staging. Plaintiff's cancer at the time of the initial X-ray was staged as T2 NO MO Stage I Adenocarcinoma, with a statistical survival chance of between 35-60% if plaintiff's cancer had been diagnosed correctly, treated and/or operated on at the time of the initial X-ray. By the time plaintiff's cancer was actually diagnosed, it was inoperable and her probability of survival

was less than 1%. Plaintiff's oncology experts were Dr. Clifton F. Mountain of Houston, Texas, chairman of the Thoracic Surgery Department at M.D. Anderson Hospital and one of the principal authors of the Staging System for Lung Cancer developed during the 1970s; and Dr. Peter Wright of Seattle, Washington, who is a member of the Task Force on Lung Cancer.

Plaintiff's damages included economic losses sustained by her family as a result of her death. In addition to normal homemaker duties, plaintiff was responsible for the full-time care of her adult retarded daughter. Plaintiff's expert economist was Prof. Eugene Silberberg of Seattle. Seattle attorney Albert Morrow contributed helpful information.

Plaintiff was represented by WSTLA Members James S. Rogers and Andrea A. Darvas of Crane, Stamper, Boese, Dunham & Rogers in Seattle, and by WSTLA member David S. Heller of Leonard Moen & Associates in Seattle. The case is *Schmidt v. Stead-Moix Radiology, Inc., et al.*, Snohomish County Cause No. 83-2-02961-7. WJA

### Jury awards large verdict in UCC warranty suit

A UCC warranty action against a grass seed supplier recently resulted in a Cowlitz County jury award of \$1,327,000.

The plaintiff's principal, the operator of a golf course in Woodland, decided to start a sod operation in 1978. He contacted a representative of the defendant who advised him to use Bristol-Baron Blue Grass (VBB). The defendant represented that VBB grass seed would be suitable for the marketing area of sod operation—Portland to Seattle. The plaintiff purchased the VBB seed and planted it. Within a year, the entire crop had been sold, and the plaintiff expanded into more acreage.

In 1979, the plaintiff began receiving complaints from purchasers, principally landscapers: unwanted weeds were reported to be prospering in the presence of the VBB sod. The plaintiff contacted the defendant about this and was provided schedules for fertilization, watering, and mowing. The defendant predicted this regimen would "crowd out the undesirable weeds." More grass seed was purchased in 1979 and in 1980.

The weed problem continued to mount. The defendant took samples of the seed; assurances were made the seeds were pure and the weeds were not coming from the seed itself. Frustrated, the plaintiff finally gave up in 1981. Because no remedy or cure to the weed problem had been identified or was expected, the plaintiff stopped selling the VBB sod.

At the request of some customers, the plaintiff had planted a blend of blue grass, ryegrass, and fescue after the first year of operation. In 1981, side-by-side plantings of VBB (an all-blue grass mix) and the blended sod were compared. The blend was largely weed-free; the VBB was weed-infested.

At trial, the plaintiff alleged that blue grass, by itself, is not suitable for sod growing operations or home lawns along the western coast of the Pacific Northwest. It was asserted that blue grass tends to go dormant at about 50 degrees, and unwanted weeds do not go dormant until a much colder temperature is reached; the result is weed-

infestation. The testimony of agronomists Dr. Roy Goss of Washington State University and Tom Cook of Oregon State University supported these assertions.

The defendant denied all liability. Its defenses were the statute of limitations had run and no UCC notice of defect had been given.

A total of \$1.8 million in damages was claimed. Of this amount, \$331,000 was special damages for labor and materials to grow the VBB to mature sod; the remainder was for lost profits and sod which had to be destroyed because it was unsuitable for sale. Dr. Vincent Jollivet, an economist, testified on damages for the plaintiff.

The plaintiff was represented by WSTLA member Steven A. Branom of Seattle and his partner James M. Beecher. The case is *Lewis River Golf, Inc. v. O.M. Scott & Sons, a Division of ITT Corporation*, Cowlitz County Cause No. 84-2-00111-0. WJA

## Insurance

(Continued from page 2)

In *Dahmen*, State Farm issued three separate policies to the plaintiff on three different vehicles and charged an UIM premium for each policy. The plaintiff was severely injured. Judge Faris, in part relying on the Spokane County determination, ruled on summary judgment that State Farm's attempt to avoid stacking did not work. Judge Faris concluded:

The policy language utilized by Defendant State Farm did not exclude or limit the stacking of the three underinsured motorist policies issued to Plaintiff, under the facts of this case. Therefore, Plaintiff has the right to pursue the rights and remedies available under all three of his policies with State Farm.

The language relied upon by State Farm to prevent stacking is not ambiguous, the Court simply finds that it does not apply in this situation to prevent the stacking of the three different policies. The language used is an excess clause. In the facts of this case there is no primary underinsured coverage for the State Farm policies to be excess to. The liability limits paid by the tortfeasor's insurance company do not constitute primary insurance or "underinsured motor vehicle coverage" within the meaning of that clause in . . . [the policy].

If you have a seriously injured plaintiff and insufficient limits under the tortfeasor's liability coverage and one UIM policy, you should go after additional UIM benefits if your client has more than one vehicle insured. This is particularly true if your client is insured with State Farm; however, the rationale and legal reasoning may well apply to other carriers. A copy of the judgment, the plaintiff's briefs, and the order for summary judgment are available from the WSTLA Brief Bank.

Michael Nelson and Timothy Esser are to be commended for their work. If you know of new developments in these areas or have handled insurance problems in ways that you think would be helpful to others, please write to me at W. 1402 Broadway, Spokane 99201. We want to pass the word on! WJA

David M. Grant is a sole practitioner in Spokane whose specialty is insurance litigation. A former claims adjuster, he also teaches insurance law at Gonzaga Law School.

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