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## VERDICT MAY CHANGE HOSPITAL IMMUNITY STANDARD

by SUSAN BORRESON

**T**here was good reason to believe that Richard Mithoff's suit against a hospital for granting privileges to a doctor allegedly addicted to painkillers

would never survive summary judgment, much less result in a \$40.6 million verdict.

Most lawyers and even some Texas Supreme Court justices believed hospitals virtually immune from liability in credential-

ing suits filed by patients after the high court ruled that the Texas Medical Practice Act required plaintiffs to prove malice in such cases.

But for the first time

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## JURORS HIT HOSPITAL WITH \$40.6 MILLION VERDICT

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since the high court's widely criticized 1997 ruling in *St. Luke's Episcopal Hospital v. Agbor*, a jury has found that a hospital acted with malice in placing a physician on its staff.

"The whole world told me that I couldn't win the case," says Mithoff, of Mithoff & Jacks in Houston, who sued Columbia Kingwood Medical Center on behalf of Ricardo Romero and his family. "Quite frankly, that's part of the challenge that drove me."

Romero suffered brain damage in July 1998 after undergoing what is normally a routine surgery to repair a herniated disk. Romero's orthopedic surgeon, Dr. Merrimon Baker, performed the procedure at Columbia Kingwood.

In *Dolores Romero, et al. v. Columbia/HCA Healthcare Corp., et al.*, a Harris County jury on April 7 ordered Columbia Kingwood to pay \$12 million in punitive damages after finding that the hospital acted with conscious indifference when granting privileges to Baker and was aware of the extreme risk posed to others by doing so.

On the malpractice claim, jurors found Baker 40 percent liable, the hospital 40 percent liable and Dr. William Huie, the anesthesiologist, 20 percent liable. Jurors found that Linda Fincher, a certified nurse anesthetist, was not liable. Mithoff argued Romero lost vast amounts of blood, causing

a cardiac arrest that led to his brain damage, and that there was a 45-minute delay in getting blood replenishment to the operating room. The hospital denied any delay, and says the blood loss was a risk of the surgery.

Mithoff says Baker settled for \$400,000 before trial and Huie and his anesthesiology group settled for \$1.8 million before trial, so the compensatory damages may be reduced.

Under Texas law a codefendant has the right to have the jury determine the liability of other defendants even though they settled before trial, says Deanna Smith, Baker's lawyer.

On the malice claim, Mithoff presented evidence that hospital officials were aware that Baker had been sued nine times for malpractice while working at other hospitals and also had heard of his alleged addiction to prescription painkillers.

There has never been a negligence finding against Baker, according to Smith.

Randall Jones, of Houston's McFall, Sherwood & Sheehy, co-lead counsel for Columbia Kingwood at trial, says the hospital acted properly and did everything it could by law to check Baker's qualifications. Baker's privileges at the hospital lapsed in November 1998. He was granted provisional privileges there in 1994 and granted active status in 1996.

Physicians in high-risk specialties like Baker's often get sued, but that doesn't mean they're incompetent, Jones says. He says he presented evidence that a noted Houston heart surgeon has been sued more than 50 times in Harris County alone.

The Texas State Board of Medical Examiners investigated the drug addiction allegation and some of the malpractice suits, and found no wrongdoing, Jones says. Jill Wiggins, a spokeswoman for the board, says the board's investigations are confidential. Only disciplinary action that is not dismissed is public, and records show no discipline taken against Baker, she says.

One of the nine suits alleged Baker operated on the wrong leg and the Cleveland hospital where he performed the surgery suspended him two months before Romero's surgery, Jones says. Another suit alleged he removed and replaced the wrong hip in 1991 at the same hospital, Mithoff says. According to Mithoff, Baker settled those suits and at least five others.

But Jones says Columbia Kingwood could not find out about the suspension because Baker obtained a restraining order and injunction prohibiting Cleveland hospital officials from discussing the suspension.

Mithoff and other plaintiffs lawyers say they hope that if the hospital appeals, the high court will reconsider the standard it set in *Agbor*, which one consumer group called the court's most damaging decision of that term.

Others are much less optimistic. Medical malpractice plaintiffs lawyer Michael Shore, of Dallas' Shore ♦ Feinberg, says he doubts the high court would uphold the verdict on appeal.

"They will reverse that faster than you can say 'Hecht, no,'" says Shore, who says he stopped accepting credentialing suits against hospitals after *Agbor*. "If [Mithoff and his partner, Tommy Jacks] get it to the Supreme Court, I'll go and wash their car for them, but it ain't going to happen."

"I think under *Agbor*, and under the law... as it's applied malice in the past, to prove malice in a credentialing situation, you'd have to prove the credentialing committee granted a doctor privileges with the specific intent to harm an individual patient who they didn't even know was going to exist at the time," Shore says. "I don't think that's possible."

Mithoff says that Shore's view is an incorrect interpretation of the *Agbor* decision and says he believes his case will hold up if appealed. Jones says his client is still considering whether to appeal. Mithoff says both sides have discussed settlement, but declines further comment.

## In Good Standing

Writing for the majority in *Agbor*, then-Justice Raul Gonzalez said a patient's proof of malice does not necessarily require conduct directed to a specific person.

But Chief Justice Thomas R. Phillips in his dissent in *Agbor* said even if a hospital acted with malice in credentialing a doctor, a plaintiff could not prove it because of the confidentiality of a hospital's peer review records.

The confidentiality privilege is another huge obstacle for a patient to prove in a malice case against a hospital, forcing plaintiffs lawyers to find other means of getting information about a physician, says plaintiffs lawyer Wayne Fisher, of Houston's Fisher, Boyd, Brown, Boudreaux & Huguenard.

"You've got to find a nurse or another doctor who is willing to tell you, sometimes off the record, 'Well, OK, don't quote me, but here's what's been happening,'" Fisher says.

Indeed, Mithoff says he proved malice without those records, since Columbia Kingwood did not waive its privilege to keep the records confidential.

Mithoff instead relied on Baker's ex-wife and two of his former office managers, who alleged they saw prescription pill bottles in Baker's office and testified that Baker suffered severe mood swings, a possible sign of addiction.

Jones says there was no evidence that Baker was impaired or on painkillers when he performed Romero's surgery, although Mithoff alleges he showed a pattern of drug use leading up to the surgery.

Smith says that neither Baker's ex-wife nor his former office managers ever saw Baker taking pills.

Baker's ex-wife testified Baker suffered a severe mood swing just days before Romero's surgery and allegedly tried to strangle her. Mithoff also admitted into evidence records from a counselor who had treated Baker, and the counselor's records showed Baker admitted a chemical dependency in 1995.

Baker's lawyer, Smith, of Houston's, Smith, Rymer, Moore & Moos, says Baker denies ever admitting an addiction or seeing a counselor for drug dependency. He sought family counseling with his wife, Smith says.

But Mithoff says the most damaging testimony came from Dr. Ronald Kerr, Columbia Kingwood's own

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chief of staff, who testified he believed as far back as 1990 that Baker posed a risk to patients, and has not changed his opinion since. Kerr was chief of staff when Columbia granted Baker active staff privileges in 1996.

Kerr testified that in 1990, before he became chief of staff, he checked out a rumor he heard that Baker had problems with patient care in South Carolina. Kerr heard the rumor after a business dispute arose between Kerr and Baker, who had been sharing office space.

Physicians in South Carolina told Kerr that they fired Baker because of problems they had with Baker's patient care in their group practice. Kerr testified he also learned then that Mississippi had initially denied Baker a license because he had allegedly forged other physicians' signatures as references. Baker later obtained a license to practice in Mississippi.

Jones says the hospital presented evidence that the South Carolina and Mississippi licensing boards show that Baker is licensed and in good standing in both states.

Testimony showed that Kerr also heard a rumor in 1996 about Baker's alleged addiction from another physician, who reported it to the Texas board. Baker's ex-wife testified that the hospital held up Baker's application for active privileges while awaiting the outcome of the board's investigation.

"Even if what she said was true, that showed we acted with responsibility, not malice," Jones says.

Jones and other lawyers who represent hospitals say the verdict will not change how hospital peer review committees gather information to credential physicians, a process that they say is already strict but not as easy as the public may believe.

"You almost never get a letter from another hospital saying, 'Whatever you do, don't put this doctor on your staff, he routinely kills people,'" says Brenda Strama, a health care defense lawyer with Houston's Vinson & Elkins. "That does not happen."

Jones says hospitals should be concerned about the verdict because jurors found Columbia acted with malice based on unsubstantiated rumors and a lot of malpractice suits.

"Is the hospital liable every time one of its 360 doctors happens to hear a rumor during the course of his everyday activities?" Jones says. "I don't know too many hospitals that would survive long, if that's the rule." ■■■

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