

# Daily Business REVIEW

LAW ♦ REAL ESTATE ♦ FINANCE

**VICTIMIZED**

January 29, 2004

## **Complex bankruptcy case stalls claim of woman who lost legs due to complications after liposuction**

By Steve Ellman YLINE: by Steve Ellman Bedridden for year Failed 'smell test'

In the weeks following her liposuction at the Florida Center for Cosmetic Surgery in Fort Lauderdale, Broward housewife Mona Alley developed a severe infection that required extensive surgery and, over the next two years, multiple follow-up hospitalizations.

Her weakened condition left the woman bedridden for so long she developed bedsores and circulatory problems that required the amputation of both her legs above the knee. Now 50, she lives in Hollywood under the care of her husband.

In December 2002, Alley's attorney, Stuart Ratzan, a partner in Miami litigation boutique Ratzan & Alters, filed suit in Broward Circuit Court alleging that Alley's suffering was a result of medical malpractice by the Fort Lauderdale clinic and its employees.

Alley's claim has been bolstered by the news, reported this month in the South Florida Sun-Sentinel, that since last November two other patients of the clinic died shortly after procedures at the center.

But liability in Alley's suit, which has yet to be tried, has become a hot potato between the Florida Center and a co-defendant in the suit, Alpharetta, Ga.-based American Plastic Surgery LLC, the national health care company that bought the Florida Center's assets out of bankruptcy proceedings in July 2002.

The bankruptcy court ordered that American Plastic Surgery has no successor liability in litigation against the Florida Center. As a result, there will be no justice for Mona Alley until this is figured out.

The bankruptcy judge's jurisdiction in the matter is disputed by Ratzan:

He and co-counsel Charles W. Throckmorton, a partner at Miami bankruptcy boutique Kozyak Tropin & Throckmorton, claim that the two defendant companies' actions in the bankruptcy case are a fraud on that court.

Around the time of Alley's surgery in November 2000, the Florida Center for Cosmetic Surgery was sold to a firm that went into bankruptcy in California.

Then, American Plastic Surgery bought the Florida Center as part of the bankrupt firm's assets sale.

In the saga's latest twist, American Plastic Surgery has filed a third-party complaint in the Alley lawsuit to rescind its purchase of the Florida Center.

APS claims that it was defrauded by the Florida Center's original principals and major shareholders - company founder Paul Refkin and his family - who allegedly failed to disclose to APS the full extent of Alley's injuries. Knowledge of the suit could have been a deal breaker.

Neither company's attorneys would discuss the litigation - in which both companies have denied liability.

Florida Center is represented by attorney Loren Granoff, a partner at Miami firm Granoff & Pena. American Plastic Surgery is represented by Kenneth Horkey, a partner in the Fort Lauderdale office of Greenberg Traurig, and by Michael Lowe, formerly of Greenberg Traurig and as of Jan. 12 a partner in the Orlando office of Ruden McClosky Smith Schuster & Russell.

Bedridden for year

Mona Alley's liposuction was performed at the Fort Lauderdale clinic by its employee, Dr. John Pinnella, on Nov. 24, 2000, according to court documents. She felt increasingly ill afterward and, on Dec. 8, 2000, according to her complaint, "was rushed to the hospital where she was diagnosed with a massive peritoneal infection" that required "major intra-abdominal surgery."

Bedridden for the next year, she experienced ulcerations of the lower back and buttocks, and her circulatory system degenerated to the point that both legs had to be amputated, one in November 2001 and the other in May 2002.

Ratzan alleges that the infection occurred because Pinnella pierced Alley's intestine with a surgical instrument during the liposuction. He alleges that the double amputation was a consequence of the infection, the surgery and the debilitation that followed.

"They perforated her intestine during the procedure and sent her home with feces leaking into her abdomen," Ratzan said in an interview. "She was a diabetic and they failed to evaluate her medical condition both before and after the surgery."

Ratzan filed suit against the Florida Center, Pinnella and Pinnella's professional association on Dec. 13, 2002, alleging negligence by the Florida Center and Pinnella as well as vicarious liability by the Florida Center for Pinnella's actions.

In its answer and affirmative defenses last December, the Florida Center denied

that Alley's injuries were caused by Pinnella. And even if they were, Granoff argued, the doctor was an independent contractor for whose actions the clinic had no vicarious liability.

Pinnella has also denied that he bungled the surgery.

But because the Florida Center had changed hands since Alley's liposuction, the company's ultimate purchaser wasn't named as a defendant until May of last year.

According to court documents, the Florida Center was sold in late 2000 to the Plastic Surgery Co. Inc., which is based in Santa Barbara, Calif., and paid the Refkins \$900,000 in cash and \$6.1 million in notes and stock for all outstanding shares of the company. The Plastic Surgery Co. then hired the Refkins to run the Florida Center.

The enterprise foundered, however.

On March 29, 2002, both companies and three other plastic surgery companies owned by the Plastic Surgery Co. filed for bankruptcy in the Northern Division of the U.S. Bankruptcy Court for the Central District of California, the nation's busiest bankruptcy court.

On April 8, Judge Robin Riblet ordered joint administration of the cases. On July 12, Riblet approved the Plastic Surgery Co.'s sale of assets including the Florida Center to American Plastic Surgery, a subsidiary of Alpharetta, Ga.-based American Healthcare Services.

So when Ratzan filed Alley's claim, he also sent a formal notice of intent to initiate medical malpractice litigation to American Plastic Surgery. It was added as a defendant in an amended complaint filed in May 2003 and amended again in August.

Failed 'smell test'

What shocked Ratzan was American Plastic Surgery's response to the notice of intent. The company claimed that the bankruptcy court's sale order included a finding that American Plastic Surgery had no successor liability in lawsuits outstanding against the Florida Center.

"It smelled funny to me," Ratzan said. And when he and co-counsel Throckmorton investigated, the smell grew stronger.

Broward Circuit Leonard Fleet later agreed. "It doesn't pass the smell test," he said during a Dec. 10 hearing in the case.

According to court documents, prior to Riblet's July 12 sale order, the Florida Center had filed a motion for voluntary dismissal of its bankruptcy suit, which Riblet granted May 3. Ratzan and Throckmorton said that the dismissal means that the court erred when it ruled that American Plastic Surgery had no successor liability.

"The Florida Center was no longer under the court's jurisdiction," Throckmorton said in an interview. "How could its free and clear sale to American Plastic Surgery be authorized?"

The purchase agreement in the sale contains a list of pending litigation against the Plastic Surgery Center's assets, with Mona Alley's suit against the Florida Center at the top of the list. But a transcript of the sale order hearing includes no discussion of that or any other suit.

Throckmorton said that bankruptcy judges are sometimes so overwhelmed with cases and the number of documents they contain that their understanding of a case depends on the truthfulness of the attorneys before them.

"We haven't gotten to the bottom of how the sale was explained to the court," he said. "Somehow, the court's order was engineered by American Plastic Surgery to insulate the assets they were acquiring from liability."

In his second amended complaint in the Alley suit, Ratzan argues that the sale of the assets to American Plastic Surgery "was part of a fraudulent effort to avoid the liabilities of the Florida Center."

As additional support for that argument, Alley's attorneys point out that their client received no notice of the bankruptcy court's sale of the Florida Center.

"Mona Alley had no opportunity to contest it," Throckmorton said. "The order insulating APS isn't binding on her."

Fleet said he was "greatly troubled" by Alley's lack of notice.

And, he said, "I don't think this court is bound by the decision of the bankruptcy court under the peculiar circumstances of this case."

Looking at a potential multimillion-dollar judgment in Alley's case if Fleet disregards the bankruptcy court's order of immunity, American Plastic Surgery filed a third-party complaint Jan. 7, arguing that it was defrauded by the Refkins, who "misrepresented or failed to disclose" the full extent of Mona Alley's injuries.

The company asked the court to hold that the Refkins and the Plastic Surgery Co. share liability for any damages awarded to Alley. And it asked to rescind the purchase of the Florida Center.

Loren Granoff, attorney for the Florida Center, offered a distanced appraisal of the fraud claims against his client. "The evidence is in its infancy," he said. "The bankruptcy documents haven't been fully vetted."

Ratzan wouldn't place a precise estimate on Mona Alley's damages other than "an eight-figure claim." He expects that the case may be resolved through separate trials - one for Alley's claim for medical liability and damages, a second between APS and the Refkins.

"I don't know what the Refkins' role or anyone else's role in all this is," he said. "We're going to find out. It's not a question of whether anyone is going to pay for this. It's a question of who." u

Steve Ellman can be reached at <mailto:sellman@floridabiz.com> or at [561] 820-2071.