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## FROM THE COURTS

### PUNITIVES OK'D AFTER DEFENDANT'S FLIP REMARK

by **Matthew Haggman**

**A**ngered by what she considered a callous deposition statement by a surgeon, Miami-Dade Circuit Judge Barbara Levenson has taken the highly unusual step of allowing a plaintiff to seek punitive damages in a med-

ical malpractice lawsuit.

The family of Edith Graupera, who lives in Pembroke Pines, is suing Palmetto General Hospital in Hialeah and five doctors. The suit alleges that their negligent care resulted in the April 2000 death of the 23-year-old woman two

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Miami-Dade Circuit Judge Barbara Levenson objected to deposition of doctor in malpractice case.

# FROM THE COURTS

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days after she was admitted to the facility for a life-threatening but easily treatable condition.

One of the allegations is that the hospital delayed treatment for Graupera's condition because of restrictions on who could provide care under her Medicaid-managed health care plan, Miami-based CAC Medicaid.

Punitive damages are seldom sought in medical malpractice cases because it must be demonstrated that a doctor not only made an error, but did so intentionally and knowingly. In addition, punitive damages may be hard to collect because they are not generally covered by insurers.

"I have rarely seen punitive damages in medical malpractice cases in 30 years of practicing law," said Ira H. Leesfield, a partner with Leesfield Leighton Rubio Mahfood & Boyers in Miami. Leesfield has extensive medical malpractice experience but is not involved in the case.

According to the suit, Graupera checked into Palmetto General on April 16, 2000, with a small abscess under her left arm. She was held in the emergency room for 12 hours without a diagnosis, and was finally seen by an infectious disease specialist. That doctor diagnosed her with toxic shock syndrome, and said she required immediate surgery to drain and remove the pimple-like abscess.

An immediate surgical consultation was ordered. But according to court papers, over the course of the next day and a half — despite three separate orders to have a surgeon drain the abscess — Graupera did not receive the treatment.

On April 18, Graupera, the mother of a young child, died in the hospital. According to court filings, her autopsy confirmed that she died of toxic shock syndrome due to an un-drained abscess.

The lawsuit, filed in February 2002, named Drs. Robert Urquiza, Abelardo Arango, Nestor De La Cruz-Munoz Jr., Jorge A. Caridad and Ruben Andrade, who is deceased. Three are surgeons, one was the attending physician and the other was the emergency room doctor. The suit also claims vicarious liability on the part of Palmetto General.

## Shouldn't consider health plan

The Graupera family's attorneys, partner **Stuart N. Ratzan** and associate **Rachel Alters** of **Ratzan & Alters** in Miami, claim that the care was so poor that both the hospital and the treating doctors should be held liable for punitive damages as well as compensatory and pain and suffering damages.

The Florida Supreme Court has held that punitive damages are reserved for cases that show "gross and flagrant character, evincing reckless disregard of human life."

"For a doctor, a diagnosis of toxic shock syndrome due to an abscess is equivalent to an observation by a lay person that a loaded gun is pointed at an innocent person's head," wrote Ratzan in his motion for punitive damages. "[The doctors] knew that Edith Graupera had a diagnosis of toxic shock syndrome due to axillary abscess, and none of them turned the gun away, even though each of them had actual knowledge that the conse-

quences were death."

Ratzan alleged that one of the reasons Graupera went without treatment was that the hospital adhered to a policy of only calling surgeons who were providers under Graupera's health plan, CAC Medicaid, rather than calling on other, non-network surgeons to handle an urgent medical problem.

Under typical managed care rules, medical providers who are not part of the patient's insurance network don't get paid, or get paid less, unless the health plan is convinced that the situation was a true emergency.

"The hospital shouldn't be thinking about what insurance plan she is on," Ratzan said. "Under federal and state law, she was entitled to emergency medical attention irrespective of her insurance status."

Another allegation in the lawsuit is that one surgeon, Dr. Arango, received two calls from the hospital about Graupera's condition but refused to leave his home and go to the hospital. In his deposition, Arango testified: "I actually think [a doctor] would be insulting me if he ask[ed] me to go and drain a small abscess."

At the hearing last week on the plaintiff's motion to amend the complaint to seek punitive damages, **Aram P. Megerian**, a partner with **Cole Scott & Kissane** in Miami who is representing Arango, argued that his client was not the general surgeon on call and that he was unaware that there was no other surgeon available to treat Graupera.

Another defense lawyer argued that punitive damages were inappropriate.

"[Y]ou must have evidence, or a proffer that shows the willful, wanton, conscious disregard, conscious and reckless indifference, that is the equivalent of criminal manslaughter, and we simply do not have that here," argued **Shelley H. Leinicke**, a partner at **Wicker Smith Tutan O'Hara McCoy Graham & Ford** in Fort Lauderdale, who is representing Urquiza.

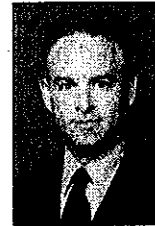
But last week, Judge Levenson allowed the plaintiffs to file an amended complaint for punitive damages. Under Florida law, a plaintiff must get permission from the court to seek punitive damages.

The judge chastised Arango for failing to respond to the call. "[T]hat would be kind of like me saying I have been on the bench for 11 years, and I've listened to murder trials and rape trials and medical malpractice trials and civil rights litigation, so I'm not going to listen to this automobile case because I'm just too senior to listen to that," she said.

None of the attorneys for the defendants in the case returned calls for comment by deadline.

The case had been set to begin trial on March 31. But with the addition of punitive damages, the trial date will likely be changed to a later time. ♦

*Matthew Haggman can be reached at [mhaggman@floridabiz.com](mailto:mhaggman@floridabiz.com) or at (305) 347-6649.*



**Stuart N. Ratzan** is co-counsel for the family of a woman who died in Palmetto General Hospital of toxic shock syndrome.