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## Verdicts & Settlements In-Depth

# Arbitration Panel Awards \$1.5 Million In MedMal Case

*By Ertel Berry*

An arbitration panel has awarded \$1.55 million to the family of a patient who suffered a massive heart attack after a Duke doctor told him he didn't need a test that would have disclosed severe coronary disease.

### ARBITRATION AWARD REPORT

#### ADVERTISEMENT

A heart catheterization would have pinned down the patient's blocked arteries, which could then have been fixed by bypass surgery, according to the plaintiff. But after the heart attack, the patient's condition was too weak for major open-heart surgery. He died a little over a year later after suffering another heart attack and a stroke.

The plaintiff received no settlement offers before the case was heard by an arbitration panel comprised of three retired Superior Court judges, according to Raleigh attorney Karen Rabenau. She and law partners Don Beskind and Howard Twiggs represented the plaintiff.

"In the current debate over damage caps, physician groups claim that medical malpractice verdicts are the product of prejudice. That clearly wasn't the case here since we won with three distinguished judges paying close attention to the evidence," said Rabenau.

The case is *Anne LaSalle, Executrix of the Estate of Leon Thomas LaSalle v. James Joseph Morris, M.D., and Private Diagnostic Clinic, PLLC* (Durham County Superior Court No. 00 CvS 5191; American Arbitration Case No. 30M1420007101).

In *LaSalle*, a 71-year-old patient's Florida heart doctor strongly recommended he have a cardiac catheterization before undergoing knee surgery at Duke's Private Diagnostic Clinic. That opinion was based on test results indicating the man could have blocked coronary arteries.

But a senior Duke cardiologist said "a mountain had been made out of a molehill" after reviewing

the patient's medical records and performing an EKG. According to the Duke doctor, the man did have a heart problem — left ventricular hypertrophy — but it wasn't serious enough to stop the planned knee surgery.

The patient had a heart attack two days after the knee operation. A cardiac catheterization was performed which revealed significant blockages in three vessels, cutting the heart's pumping capacity in half.

Because the heart attack had further weakened his condition, the patient decided not to take a chance on major bypass surgery and chose a stent procedure instead, according to the plaintiff's case report. After one of the stents clogged up, the patient had another MI. Three months after the first heart attack, he had a severe stroke from a clot that formed in his heart. He died a year later.

The plaintiff contended the stroke was caused by damage from the man's first heart attack, which could have been prevented if proper testing had been done. The defendants, the Duke doctor and the Private Diagnostic Clinic, said the stroke was due to a ventricular arrhythmia, which the patient had before coming to Duke. The Duke cardiologist argued his recommendation was correct because the risks of catheterization outweighed the benefits.

A panel of three retired Superior Court judges — Robert Farmer, James Long and Robert Kirby — ruled for the plaintiff and awarded \$1,557,506.

### **Arbitration Route**

The plaintiff's attorneys chose not to contest the enforceability of an arbitration agreement included in Duke's standard admission forms. Arbitration isn't a prerequisite for treatment and patients don't have to sign the form.

"Obviously one of our main concerns with arbitration is costs," Rabenau said. "Up to this point, we haven't had a ledger sheet to compare the costs with a jury trial. Now that we have hard data, we can say it's more expensive. We had the built-in costs of having to rent a facility, then had to compensate the arbitrators for their time. With a jury, your client doesn't pay for them to sit there for a week."

"In looking back through our files, we found the plaintiff spent \$13,228.55 in costs associated with arbitration that would not have been incurred in a jury trial," said Rabenau. "Since the parties each paid the arbitration costs in equal amounts, Duke would also have paid \$13,228.55 in arbitration costs, for a total of \$26,457.10 in additional expenses borne by the parties due to the arbitration process."

Beskind said the expense issue could be grounds for constitutional objections to Duke's arbitration form.

"There is a constitutional challenge to be had under the access-to-courts provision of the North Carolina constitution," said Beskind. "The reason is that the cost of the arbitration could preclude an indigent plaintiff from pursuing a claim, especially where the claim wasn't large enough that a lawyer would be willing to front the costs. But this was not that kind of case."

Rabenau agreed that *LaSalle* would not have made a "good test case so we decided to make the best out of a bad situation.

"When Duke made its motion to stay proceedings pending arbitration, attached were orders from various Superior Court judges upholding the arbitration provision as valid and enforceable so long as the person signing had the capacity and authority to sign it.

"The recent *Milon* case of course presented the factual situation of a wife who did not have authority, apparent or otherwise, to enter into an arbitration agreement on behalf of her husband, as well as the absence of reliance by the defendants when they did not realize the existence of the agreement until well into the course of litigation.

"In our case, there was no argument to be made that Tom LaSalle, a retired orthodontist, lacked the authority or the mental capacity to sign on his own behalf," said Rabenau. "Further, Dr. LaSalle was unable to communicate with us due to the stroke he suffered, so we did not have any information from him as to the particular circumstances of the signing of the agreement.

"Instead of creating one more order that was not immediately appealable, we chose to work out an agreement with Duke that provided a modified plan of discovery and arbitration."

#### **Modified Plan**

Here are provisions of the parties' modified arbitration agreement, according to Rabenau.

\* Three arbitrators would be mutually agreed upon by the parties, with an arbitration decision made by a majority of the arbitrators. The AAA does not prohibit 'party appointed' arbitrators from serving on the panel, according to Rabenau. The parties agreed upon retired Superior Court judges Farmer, Kirby and Long.

"Basically, AAA puts medical malpractice into their commercial case category and you get a lot of business people," said Rabenau. "Both parties here felt comfortable about using three well-respected retired Superior Court judges."

\* The parties would immediately agree to terms and dates for a discovery order.

\* The parties would immediately identify witnesses to depose. "There was no limitation as to the number of witnesses each party could initially list, but other than this list, we each had two 'wild cards' of additional witnesses we could later add," said Rabenau.

\* Each party would serve no more than 20 interrogatories.

\* There would be no restriction on the number of requests for admissions.

\* There would be no restriction on the number of requests for production of documents.

Based on those provisions, the parties entered into a consent order to submit the claim to arbitration.

Quicker decisions are often touted as major benefit of arbitration, but Rabenau said that wasn't true in *LaSalle*. The process took just as long as regular court litigation, she said.

*Questions or comments may be directed to [eberry@nc.lawyersweekly.com](mailto:eberry@nc.lawyersweekly.com).*

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#### **ARBITRATION AWARD REPORT**

[NOTE: The following information was provided by the counsel for the winning party and represents the attorney's characterization of the case.]

**Brief Statement of Claim:** Arbitration Award: Medical Negligence/Patient Improperly Cleared by Cardiologist for Bilateral Knee Replacement Surgery/Failure to Perform Cardiac Catheterization/Postoperative Myocardial Infarctions/Stroke/Death

**Other Useful Info:** Tom LaSalle, a 72-year-old retired orthodontist from Florida had a history of atrial flutter for which he had been successfully treated with radiofrequency ablation in the fall of 1998. Thereafter he had a cardiac ultrasound test that showed some lack of movement at the bottom of the heart (the apex) and probably coronary artery disease. An exercise stress test in late 1998 was significant for a 5 mm ST segment depression, typically the product of either left ventricular hypertrophy or multi-vessel coronary artery disease. A dual isotope study run at the same time showed a questionable transient apical defect (again, the apex of the heart). Based on these results, LaSalle's Florida cardiologist recommended a diagnostic heart catheterization that LaSalle did not immediately pursue.

Shortly thereafter, LaSalle then decided to have bilateral knee replacement surgery at Duke, causing his cardiologist to renew the recommendation that he have a cardiac catheterization. In fact, the cardiologist felt so strongly about the recommendation that in addition to sending LaSalle's medical records to Duke from the heart testing, he called LaSalle's orthopedic surgeon at Duke, and made the recommendation directly to him. Upon his arrival at Duke, LaSalle signed the typical admission forms including Duke's Consent to Arbitration clause which is sandwiched on the same page between clauses on other, unrelated subjects, including Assignment of

Insurance Benefits, Statement of Financial Responsibility and Authorization to Release Medical Information. After becoming aware of the existence of the signed arbitration agreement, plaintiff considered challenging it, but opted to work out an arbitration plan with defendants in which the parties would agree upon arbitrators and a discovery plan.

Knowing the recommendation of LaSalle's Florida cardiologist, his orthopedic surgeon at Duke sent LaSalle for a cardiac consultation with Dr. James Morris, a senior cardiologist at Duke. Dr. Morris examined LaSalle, reviewed a Duke EKG and reviewed LaSalle's medical records from his prior heart testing in Florida. At the conclusion of his evaluation, Dr. Morris informed LaSalle that "a mountain had been made out of a molehill," that he did not need any further testing and that his problems were due to left ventricle hypertrophy, not multi-vessel coronary artery disease. In support of his opinion, he interpreted LaSalle's Duke EKG as showing electrical changes consistent with left ventricle hypertrophy.

LaSalle had his surgery, which was successful, but two days later LaSalle suffered a massive anterior wall myocardial infarction. Thereafter, LaSalle had recurrence of his atrial arrhythmias. A cardiac catheterization revealed that LaSalle had significant occlusions in three vessels, one of which was the left anterior descending artery, where the infarct occurred. In LaSalle's heart, the LAD provided blood to the apex, the area where the possible defect had been seen during LaSalle's cardiac stress test, and the area where the lack of movement had been seen on LaSalle's cardiac ultrasound test in Florida. The cardiac catheterization also showed that the pumping capacity of LaSalle's heart had been cut by more than 50 percent due to damage from the myocardial infarction.

As treatment, LaSalle was offered coronary artery bypass grafting or another catheterization with stenting. He chose the later, thinking that in his weakened condition he would not survive major heart surgery.

After the initially successful stenting, one stent occluded while LaSalle was in rehabilitation at Duke, causing a second but less serious MI. The blocked stent was cleared in another catheterization, and eventually LaSalle was allowed to go home to complete his cardiac and knee rehabilitation.

After completing rehabilitation, and approximately three months after his first myocardial infarction, LaSalle suffered a massive embolic stroke. LaSalle never recovered his speech and had very limited ability to walk or manage the activities of daily life after his stroke. During the following year his condition began to decline and he started having seizures. Literally one year to the day after his stroke, LaSalle died at home after having been cared for by his wife, Anne. LaSalle left two children by his first marriage and two adopted children, his wife's from her first marriage. All of the children were grown with their own families.

At the arbitration which lasted one week, plaintiff contended that Dr. Morris should have recommended a catheterization and if the recommendation was not accepted, refused to clear LaSalle for surgery. Morris's position was that his recommendation was correct and that the risks of the catheterization outweighed the likelihood it would have revealed anything on which he would have recommended surgery. Morris admitted during the arbitration, as did the physicians called to testify on his behalf, that he was incorrect that LaSalle's preoperative Duke EKG showed left ventricular hypertrophy.

Plaintiff contended that the stroke was caused by emboli forming due to LaSalle's damaged heart. The defense contention was that the stroke was due to ventricular arrhythmia, from which LaSalle suffered before coming to Duke.

Judge Robert L. Farmer presided at the arbitration hearing, with co-arbitrators Judge James M. Long and Judge Robert L. Kirby. Their award of \$1,557,506.80 was unanimous. There were no settlement offers pending at the time of arbitration.

**Principal Injuries (in order of severity):** Two postoperative myocardial infarctions, followed by stroke approximately three months later and death one year later.

**Tried or Settled:** Tried.

**County where Tried or Settled:** Durham

**Arbitrators:** Retired North Carolina Superior Court Judges Robert Farmer (Raleigh), James Long (Pilot Mountain) and Robert Kirby (Gastonia)

**Case Name & Number:** *Anne LaSalle, Executrix of the Estate of Leon Thomas LaSalle v. James Joseph Morris, Jr., M.D. and Private Diagnostic Clinic, PLLC*, 00 CVS 5191 (Durham County). American Arbitration Association Case 30M1420007101.

**Dates Concluded:** Arbitration January 6-10, 2003. Arbitration Award Jan. 28, 2003.

**Settlement Amounts & Insurance Carriers:** Arbitration Award of \$1,557,506.80, plus post award interest. Self Insured.

**Attorneys for Plaintiff:** Karen Rabenau, Don Beskind & Howard Twiggs of Twiggs, Beskind, Strickland & Rabenau, P.A., Raleigh

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