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Another Law Court Win for Taintor

The Maine Supreme Judicial Court, sitting as the Law Court, recently decided the case of *Carol Cutting v. Down East Orthopedics*. The Court affirmed a judgment on a defense verdict obtained by JD Hadiaris and Mark Lavoie after a seven-day medical malpractice trial. The Law Court's decision is the culmination of nearly nine years of litigation, which included not only the state-court malpractice suit but also two separate suits brought by Cutting in federal court. Chris Taintor represented Down East Orthopedics on the appeal.

The case arose out of a procedure on Cutting's shoulder that was performed by an orthopedic surgeon in November 2013. Cutting had been having shoulder pain for three years. Pre-operative imaging revealed joint narrowing, mild arthritic changes at the acromioclavicular joint, supraspinatus tendinopathy, and a partial rotator cuff tear. Her surgeon offered a procedure aimed at "cleaning up" the structures around the acromion, to minimize wear and tear on the rotator cuff, and to effectively relieve her long-standing pain.

When the procedure was performed, the surgeon found, in addition to a partial tear of the rotator cuff, a full-thickness tear that had not been identified either by imaging or by exam. Surgical repair of a full thickness tear requires immobilization of the shoulder for at least six weeks post-surgically, and the success of the procedure hinges completely on postoperative compliance with the immobilization protocol. Because Cutting suffers from Tourette's Syndrome, which causes involuntary rapid and forceful arm movements, the surgeon determined that her inability to keep the shoulder immobilized post-operatively made it imprudent to repair the full-thickness tear.

In late 2016, Cutting filed, almost simultaneously, a medical malpractice Notice of Claim in state court and a separate suit in federal court. In the federal case, Cutting sought to hold Down East liable under the Americans with Disabilities Act, alleging that the surgeon had refused to repair the full-thickness rotator cuff tear not because it was medically inadvisable, but solely because of discriminatory animus aimed at patients with disabilities. The Court granted summary judgment to Down East in that case.

In May 2018, Cutting's malpractice claim was presented to a prelitigation screening panel, as required by the Maine Health Security Act. After the panel found unanimously in favor of Down East – and while the ADA and malpractice suits were still pending – Cutting filed a second federal lawsuit, this one asking the court to declare invalid, on constitutional grounds, the prelitigation screening process. Essentially, Cutting asked the federal court to rule that the finding of the panel that heard her case would be inadmissible at trial, because it was the product of a constitutionally defective process. The Court granted Down East's motion to dismiss that suit. The Court agreed that it had no jurisdiction to adjudicate the constitutionality of the MHSA – rather, that question could only be resolved by the state court that would be called upon to decide, at trial, whether to admit the panel finding.

The malpractice case finally went to trial in September 2023 – ten years after the surgery and seven years after Cutting first brought suit. Over Cutting's objection, the Superior Court admitted the panel finding into evidence. At the close of the plaintiff's case, the trial judge ruled that the evidence was legally insufficient to support a claim for punitive damages, and he dismissed that claim. On the seventh day of trial, after deliberating for less than three

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hours, the jury returned a defense verdict.

On appeal, Cutting argued (1) that the trial judge had improperly limited her counsel's cross-examination of the defense expert, (2) that the trial judge abused his discretion by admitting the Prelitigation Screening Panel's finding, and (3) that the court erroneously dismissed the punitive damage claim.

The Law Court deemed the first argument unworthy of discussion, limiting itself to a discussion of the panel findings and the punitive damage argument.

The Court started by observing that it had previously "examined in several cases challenges to the admission at trial of prelitigation screening panel findings." Based on its prior decisions, the Law Court found no error in the trial judge's ruling. With respect to Cutting's contention that the panel members had "prejudged" the case, and that their prejudgment was discernible from the fact that they had expressed their willingness to decide the case on the basis of the parties' written submissions, the Court found it significant that "she did not file any objection to the conduct of the panel chair or other members or seek removal of any of the panel members" – instead, she had proceeded to hearing without objection, and had raised concerns about the fairness of the process only after she lost. The Court also rejected the notion that "the panel process is generally 'skewed in favor of' defendants and almost never results in unanimous findings against them." "Contrary to Cutting's suggestion," the Court said, "there [was] nothing in this record supporting these assertions."

The Law Court then turned to the punitive damage argument. The Court agreed with Down East that "[p]unitive damages may be awarded only if the plaintiff has also been awarded actual or compensatory damages based on tortious conduct of the defendant," and "because the jury found that Down East was not liable for medical negligence, the jury could not award any damages at all, let alone punitive damages." In a footnote, the Court gave short shrift to Cutting's theory that she was nevertheless prejudiced by the dismissal of the punitive damage claim. Her theory was that because her lawyer had discussed punitive damages in her opening statement, and then no punitive damage claim was presented to the jury at the close of the evidence, "the jurors may have incorrectly assumed that the *court* did not think the evidence supported her *negligence* claim and might have been improperly influenced by that misimpression." The Court found "no merit to this speculation," observing that "Cutting made the strategic choice to discuss punitive damages in her opening statement, and the prejudice she posits could only result from the jury failing to follow the court's instructions."

In summary, the Law Court unanimously found that each of Cutting's arguments on appeal was completely without merit.

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