

\$1.8M in Delay Damages Added to \$9.7M Med Mal Verdict, Rejecting Arguments Over Pandemic Court Closures

MAX MITCHELL FEBRUARY 21, 2022



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A man suffering from long-term neurological injuries stemming from a botched brain surgery has had \$1.8 million in delay damages added to the \$9.7 million verdict his attorneys won late last year.

The decision, which a Philadelphia judge issued Feb. 9, rejected arguments from the defense seeking to exclude from the delay damages several months when the courts in Pennsylvania were closed under emergency shutdown orders due to the COVID-19 pandemic.

Although Philadelphia Judge Ann Butchart did not issue an opinion explaining her reasoning, her order granted the plaintiff's

motion and awarded the full amount the plaintiff had requested.

Kline & Specter's Shanin Specter, who tried the case with Kila Baldwin on behalf of the plaintiff, Michael Brassloff, said he expects defendants will continue to seek to limit delay damages in light of the pandemic closures. However, he said he expects plaintiffs will continue to win those arguments.

"The pandemic has created a lot of legal issues. This is one that the defense has raised and I don't blame them for raising it, but Judge Butchart clearly got it right," Specter said. "The law is clear that unless the delay was the fault of the plaintiff, the delay damages run."

Counsel for the defendants, Daniel Ryan of O'Brien & Ryan, did not return a message seeking comment.

Feldman Shepherd Wohlgelernter Tanner Weinstock Dodig's Alan Feldman, a personal injury attorney who was not involved in *Brassloff*, agreed that the issue clearly favors the plaintiffs. Feldman said the court order extending timelines due to the pandemic were only meant to affect filing deadlines.

"All of us have settled cases during the pandemic. That happened all the time, but that did not happen here," Feldman said, noting that Rule 238, which enables parties to seek delay damages, is intended to incentivize settlement talks. "The court clearly could have said Rule 238 was suspended, and they didn't."

However, Feldman said he would be surprised to see too many similar motions given the clarity of the law and the fact that the court closures would only shave off a few months worth of any potential delay damages.

In November, a Philadelphia jury found neurosurgeon Kevin Judy and Thomas Jefferson University Hospital to be 43% and 15% liable, respectively, for the injury Brassloff sustained while undergoing surgery to remove a benign brain tumor.

Judy had conducted laser-induced thermal therapy on Brassloff in 2015 to treat radiation necrosis in his brain left over from a previous treatment. Brassloff's injury occurred when the tip of the now-recalled NeuroBlate 2.2 mm SideFire broke off and caused pressurized carbon dioxide to release into his brain. Following the procedure, Brassloff remained in a coma for several days. He slowly regained consciousness and movement, but continues to suffer cognitive and mobility impairments and seizures.

Counsel for the plaintiffs argued there was also insufficient informed consent and that Brassloff would have opted for a more typical craniotomy had he known the surgeon was planning to use a newer, more experimental procedure.

The maker of the NeuroBlate device, Monteris Medical Inc., was found 42% liable but had settled for \$12.75 million earlier in the case. At the close of the trial, the jury awarded \$5 million for

noneconomic damages, \$1.6 million to Brassloff's wife for loss of consortium, and \$3.1 million for future medical expenses.

Following the verdict, the plaintiffs sought delay damages starting in 2017—a year after the complaint was filed—and running through when the verdict came down. However, the defendants argued that the delay damages should be limited in part because Brassloff's attorneys allegedly failed to engage in good faith settlement negotiations after February 2020, and secondly because Pennsylvania courts were shut down from March until May 2020.

“Via multiple administrative orders, the Supreme Court of Pennsylvania expressly directed that all time calculations for the purposes of time computation relevant to court cases were suspended throughout that period,” defense counsel said in their motion. “Hence, because all time calculations were suspended during that time frame, plaintiffs are not entitled to receive delay damages for that period.”

Reply papers filed by Charles “Chip” Becker of Kline & Specter countered those arguments, contending that their demands during settlement negotiations turned out to be very close to the eventual jury verdict and that the closures did not prevent the parties from negotiating.

“They should not be permitted to try to hide behind COVID-19 just because the jury awarded substantially more compensation for

plaintiffs' injuries than defendants were willing to offer in settlement," the response said.

Ultimately Butchart agreed with the plaintiffs and molded the verdict to \$11.6 million.

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