

# Florida's biggest med mal lawsuit far from settled

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Florida's biggest ever malpractice verdict will likely be tied up in court for years, as the physicians and their insurer struggle to find a legal out from their \$217-million burden.

"I believe it will be several years before it's ultimately resolved," said Frank O'Neil, senior vice president of corporate communications for ProAssurance Corporation. The Alabama-based company is the country's fourth largest medical-malpractice carrier and parent company for ProNational Insurance Company, which covered the physicians in the landmark case.

Jurors early this month awarded \$217 million to a 50-year-old Tampa man who suffered severe brain damage six years ago because a stroke was misdiagnosed as sinusitis. Allan Navarro and his family were awarded \$116.7 million in compensatory damages for medical expenses and loss of income, and \$100.1 million in punitive damages.

The high verdict is especially startling in the wake of Florida's malpractice caps. The state in 2003 capped non-economic damages in most cases at \$500,000. The Navarro case escaped the limit because it was filed before the caps took effect in September 2003.

Tampa attorney David Dickey, who represented Navarro, said the jurors

were moved by the plight of a once vigorous husband and father in his mid-40s rendered helpless by an ER mistake.

"He's incontinent — bowel and bladder," Dickey explained. "He has no sexual function. His sole pleasure in life is eat-

ing, and when he does, he risks aspiration.

He had sinusitis and sent home. Navarro returned to the hospital the next morning with severe symptoms of stroke. That afternoon, he lapsed into a coma during surgery to relieve swelling in his brain. He was hospitalized for a

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ing, and when he does, he risks aspiration. He's had 12 hospital admissions for aspiration pneumonia."

Navarro's wife also impressed the jury, Dickey continued, when she told how she comes from her job as a nurse at a nursing home only to spend several more hours every day caring for her husband.

Navarro might have recovered from his stroke if he'd been properly diagnosed when he went to University Community Hospital in Carrollwood complaining of a headache, nausea, confusion, double vision and dizziness. Navarro told ER personnel his family had a history of stroke. After five hours in the ER, he was told he

month and in a coma for three.

### Carrier says "no" to settlement

The Navarros sued both the hospital and the attending physician, Michael Austin, DO, along with his group. The hospital settled, while ProNational determined to pursue the case in court.

"We made offers to settle at many points along the way," Dickey said. "ProNational rejected those offers and never made a counter offer until August, when they made an offer of \$300,000."

The policy would have covered \$1 million for Austin and another \$1 million for the group.

O'Neil wouldn't explain why ProNa-

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tional wouldn't accept a settlement. Dickey said he suspects the company adopted a policy of defending all its clients in court. Providers win an estimated 80 percent of malpractice trials.

"Companies are aggressively defending these cases," said Michael Petrucci, a medical-malpractice defense attorney in Fort Lauderdale. "The carriers believe cases should be defended and not settled."

The first kink in the complicated case cropped up in testimony, when Dickey and his clients learned that Austin, the ER physician they were suing, hadn't made the misdiagnosis after all. It was made by Mark Herranz, who was working as a physician's assistant for Austin's emergency-medicine group. Austin directed Herranz to perform a neurological exam on Navarro, never realizing the man who had been working as a physician's assistant had never passed the licensing exam.

"Herranz testified he didn't know how to do a neurological exam," Dickey said. "Dr. Austin said, 'I thought he was a PA.' It was an incredible mistake not having policies and procedures in place. The jury recognized it was grossly negligent."

Herranz died several months before the case went to court.

## Scramble to cut losses

The scramble for the doctors and insurer to cut their losses started while the jury was still out. Austin's group, Carrollwood Emergency Physicians and affiliated Franklin Favata & Hulls, filed for bankruptcy during jury deliberations. U.S. Bankruptcy Judge Paul Glenn opted to set aside the petition until after the jury reached their verdict.

Two weeks later, Dickey said the physicians claimed they never wanted to file for bankruptcy, and did only at the insistence of their lawyers.

ProNational's attorney, Jeffrey Goodis of St. Petersburg, would not comment on the bankruptcy filing. He did acknowledge, though, that the defendants petitioned the court for a new trial.

"We believe the court made errors," he said.

Neither Goodis nor O'Neil would discuss details. O'Neil said only that "there are many open issues regarding the merits of the case of coverage."

Dickey said ProNational is claiming the physicians' coverage contract is void because they fraudulently employed an unlicensed assistant.

But, Dickey said, "There's no evidence they deliberately set out to have an unlicensed person practice medicine. ProNational is going to try to be creative, to come up with ways to say these claims are not covered," he continued. "They're doing the typical post-judgement motions and once those are dismissed, they'll file for appeal."

When the dust settles on the judgement, yet another lawsuit will most likely follow. This one will be a bad-faith claim filed by the physicians demanding ProNational pay the judgement in full because the carrier rejected attempts to settle within the physicians' coverage limits. Florida's bad-faith laws give physicians the right to sue their insurers in such instances.

"It protects doctors on one hand, because they would lose everything on a big verdict," said Matt Gracey of Danna Gracey malpractice insurance in Delray Beach, "but it also raises insurance rates." ♦

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