

# SOUTH CAROLINA LAWYERS WEEKLY

June 6, 2011

www.sclawyersweekly.com

## Doctor misses cancer report; patient dies

*Family settles for \$1 million after diagnosis is left unread for year*

By **FRED HORLBECK**

*fred.horlbeck@sc.lawyersweekly.com*

When Franklin Scott Jr. and his wife, Leslie Ann Scott, walked into the doctor's office in August 2009 to review Franklin's second chest X-ray in a year, neither knew that his first chest X-ray had detected cancer 12 months before.

Nor did the Williamsburg County couple expect the doctor, after looking at the latest scan, to walk out on them without warning or explanation, leaving them sitting in his office without a clue as to where he had gone or why he had left.

Nor did they know that Franklin Scott that would die of cancer before the year was out.

But all of that happened, according to lawyers who represented Scott's wife and two children in a recent \$1 million medical malpractice settlement.

The settlement, finalized on May 12, came after the plaintiffs, wielding a videotaped deposition in which Scott himself talked about his experience in the weeks before his death, sued the doctor and his practice for negligence.

"It was pretty moving," Summerville lawyer Steven Goldberg said of the videotape. "The man knew he was dying, and he was a sharecropper and a machinist and had worked hard all his life. He was only 64."

Scott died in November 2009.

In their lawsuit, the plaintiffs claimed the defendants never told Scott he had a cancerous lesion on his right lung even though in August 2008, the defendants had received a radiology report identifying the lesion. By the time Scott received his

second chest scan in 2009, the cancer had spread to Scott's liver, but neither his doctor nor anyone at the medical practice told Scott what was happening, lawyers for the plaintiffs told Lawyers Weekly.

After the 2008 X-ray, Scott's condition "got worse over the course of the year, so they sent him back for another chest X-ray, and this time it came back with a comparison and it showed that (the cancer) had metastasized ... to the point where chemotherapy wouldn't have helped," Goldberg said.

That was when the doctor pulled his disappearing act, the plaintiffs claimed.

He was reviewing Scott's file when he asked how long Scott had been his patient. Then the doctor said, "We should have been on this a year ago" and walked out, the plaintiffs claimed.

When the couple asked office staffers where the doctor was, they were told he had left the building and would get in touch with them. But he never did, the plaintiffs said.

The plaintiffs' lawyers declined to identify either the defendants or their attorney, citing a confidentiality agreement.

In October 2009, the family first heard the cancer diagnosis from an emergency room physician. Scott and his family then sought help from Goldberg, whose first move was to videotape Scott's deposition. Goldberg then associated Mount Pleasant



Yarborough



Applegate



Goldberg

personal injury lawyers David Yarborough and William Applegate to develop the plaintiffs' case for trial.

The team checked whether the 2008 chest scan was unclear or misinterpreted. It was neither, Yarborough said.

The defendant doctor "was a kidney doctor who was treating him for diabetes and, for whatever reason, this doctor ordered the scan of his chest, and the (radiologist's) report came back with a clear indication that there was this cancerous process going on in his chest. So it's not like a case where a radiologist fails to properly read a scan or include something like that in the report," Yarborough said.

The report "went back to the physician's office, and either it wasn't properly filed or it was filed and the physician didn't properly follow up on it," Yarborough said.

Armed with that contention, the plaintiffs' lawyers went to a pre-suit mediation, as required by state law. They rejected the defense's plan for a settlement of about \$400,000, Yarborough said. The plaintiffs then filed suit, refusing to discuss settlement offers that fell short of their \$1 million goal.

Part of their case was evidence from an expert witness who was ready to testify not only that the defendants had violated the standard of care, but also that treatment of the cancer after the 2008 chest scan would have given Scott a 50 percent to 60 percent chance of living another five years.

"That's an important part of these failure-to-diagnose cases," Yarborough said. "Not only do you have to show that there was a deviation from the standard of care. You also have to prove that, had the cancer been diagnosed, the outcome would have been different than it ultimately was."

But both lawyers said they were stumped as to why the doctor left the Scotts sitting in his office during their August 2009 visit.

■ See **CANCER** on next page

# CANCER

■ Continued from previous page

After the couple inquired as to the doctor's whereabouts, "they were sent on their way and never told that he had Stage IV, untreatable cancer even at that time and were not told that there had been an earlier finding of Stage I cancer," Yarborough said.

They didn't learn about it until Scott, complaining of abdominal pain, dizziness and shortness of breath, sought emergency room treatment in October 2009, Yarborough said.

"In the meantime, the family had tried to get the records from the physician's office and were denied access to his medical records," Yarborough said.

Exactly why remains unknown, the plaintiffs' lawyers said. They never deposed the doctor because, amid their trial preparations, they received a settlement offer of \$1 million, which the plaintiffs accepted.

The amount was lower than the potential \$2.8 million the plaintiffs' lawyers thought they might recover at trial under their interpretation of the S.C. Medical Malpractice Reform Act of 2005. But it was close to the \$1.05 million that, under the defense's likely interpretation of the act, would have been the plaintiff's highest recovery absent a finding of gross negligence, Yarborough said.

The act limits recovery of non-economic damages in medical malpractice actions against three or fewer defendants to \$350,000 per defendant, but plaintiffs' lawyers and the defense bar have differed over its interpretation, with the former arguing that the caps don't preclude multiple awards to plaintiffs with more than one cause of action.

The caps do not apply when a jury finds gross negligence, and Yarborough and Goldberg "certainly felt that this was a case with some facts that would have supported a finding of gross negligence," Yarborough said.

"That the original ... radiology report was in (Scott's doctor's) file," Goldberg said, "and for a year and several visits with this client he never pulled it out to review it or to look at it, I think may have itself been gross negligence, but so, of course, would have been the way he handled the discovery after the second radiology report."

## Settlement Report

**Brief statement of claim:** This was a medical malpractice case against a physician and his practice for failure to convey a diagnosis of cancer to his patient, Franklin Scott Jr. The plaintiffs claimed that, in early August 2008, the defendant physician ordered a CT scan of Scott's chest. A radiologist read it on Aug. 19, 2008, reporting that the scan showed a cancerous nodule in Scott's right lung, and the CT scan was transmitted to defendant physician and his practice immediately after it was read.

Scott saw the defendant physician for follow-up on or about Oct. 20, 2008, and several more times throughout 2009, and neither the physician nor his staff informed Scott of the CT scan's findings of the cancerous nodule in his lung, nor was he referred for further treatment, the plaintiffs asserted.

In August 2009, Scott was seen by defendant physician, who ordered another CT scan, which was completed and read by a radiologist on Aug. 10, 2009. The radiologist noted on the radiology report that "a nodule which is irregular marginated in the... right lower lobe... is larger now measuring roughly 1.6 by 2.0 cm compared to 1.1 cm on the prior study."

Several days later, Scott and his wife, Leslie Ann Scott, went to the physician's office to review the second scan, the plaintiffs claimed. The physician was reviewing the chart when he asked how long Scott had been a patient of his and then said "We should have been on this a year ago." He then left the office without another word to the couple and left the office building without explanation, the plaintiffs claimed.

On Oct. 3, 2009, Scott and his daughter, Mary Inez Scott, went to the emergency room because Scott was complaining of abdominal pain, shortness of breath and dizziness, according to the plaintiffs. The emergency room physician returned after the tests to tell Mary and her father that he had Stage 4 cancer that seemed to have spread to his liver and lungs. It was the first they had heard of Scott's grave condition.

Franklin Scott, Jr. lived for approximately seven weeks after being informed of his diagnosis of cancer.

**Special damages:** Funeral and burial expenses in the amount of \$8,170.20

**Tried or settled:** Settled

**County and court where tried or settled:** Confidential

**Case name and number:** *Mary Inez Scott as Personal Representative for the Estate of Franklin Scott, Jr. and Leslie Ann Scott, Individually v. Confidential Physician and His Practice*

**Date concluded:** May 12, 2011

**Amount:** \$1 million

**Insurance carrier:** Confidential

**Expert witnesses, areas of expertise and hometown:** Barry Singer, MD, oncology, Norristown, PA

**Attorneys for plaintiff:** David B. Yarborough Jr. and William E. Applegate IV of Yarborough Applegate Law Firm; and Steven E. Goldberg of the Steinberg Law Firm.

**Submitted by:** David B. Yarborough Jr. and Steven E. Goldberg

**Other useful information:** Counsel for the plaintiff was able to take a videotaped statement from the plaintiff in his final days, which made a very powerful statement about who the plaintiff was, how he felt about his doctor's failure to inform him of his cancer, and the emotional and physical suffering he was experiencing knowing he only had weeks to live.

**Editor's note:** *The information in Lawyers Weekly's verdicts and settlements reports was submitted by the counsel for the prevailing party and represents the attorney's characterization of the case.*