

# MISSOURI LAWYERS WEEKLY

March 1, 1999

www.molawyersweekly.com

## Nursing Home Negligence Case Brings \$785K Verdict

### 94-Year-Old's Leg Amputated Due To Gangrene

BY CHRIS BROWN

A 94-year-old woman whose leg was amputated as a result of nursing-home negligence has won a \$785,000 verdict in Henry County Circuit Court.

The victory demonstrates that even plaintiffs who are very old and suffering from severely impaired mental function can win substantial jury verdicts.



plaintiffs who are very old and suffering from severely impaired mental function

The woman's attorney, Timothy E. Dollar of Kansas City, argued that Etgers' age and poor health should not be used as mitigating factors.

"All of their residents are elderly and in declining health," said Dollar. "If you give them a break because of those factors, then the nursing homes can count on a free ride from the jury any time they mistreat any of their patients."

Instead, Dollar encouraged the jury to look at his client in a very different light. "My client is a child — as helpless and defenseless as a child," said Dollar. "I asked the jury to imagine what they would be willing to award a child who had suffered the same kind of abuse and neglect."

#### Pushed From Her Bed

Cecil Etgers entered Appleton City Manor in 1995, at the age of 92, when her daughter decided that she was no longer able to provide adequate care.

Appleton City Manor was owned by three locally prominent figures: Dr. Wayne Morton, Dr. Glenn Reed, and Mark Reed, the prosecutor for the city of Clinton, which is southeast of Kansas City. The home had a capacity of 60 residents, and was normally staffed by one licensed practicing nurse and a team of certified nurse assistants.

At the time she entered the home, Etgers was still able to walk, although she suffered from arthritis. But within six months of her admission, she became permanently bedridden.

Her stay at Appleton Manor was un-

eventful until July 6, 1997, when another resident who also had senile dementia pushed Etgers out of her bed onto the floor.

Four days later, nurses noticed that her leg had become swollen. Etgers was taken to Ellett Memorial Hospital next door, where the leg was found to be broken. The treating physician was one of the home's owners, Dr. Morton.

Morton kept her in the hospital until July 14. He then discharged her to the home with instructions to the nursing staff to monitor her cast.

#### Cast Care

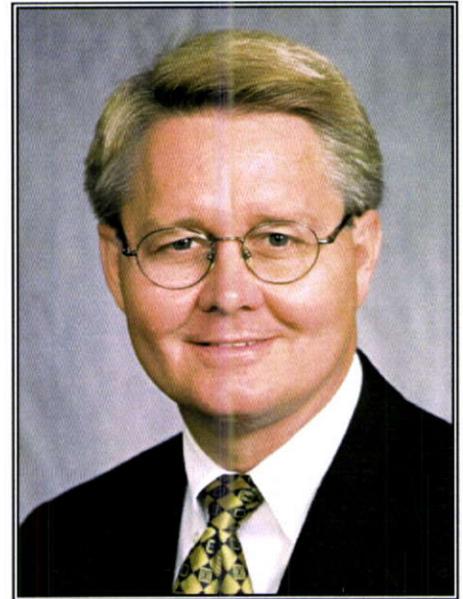
The tasks the nurses were charged with performing included: taking the temperature of her leg above and below the cast; making general observations of her skin above and below the cast; looking for discoloration, swelling and coolness, as well as any leaking or staining; performing a squeeze test of the toes to check blood circulation; and checking for foul odors.

On July 17, one of the nurses made a note in Etgers chart that her leg was "very swollen." Reed, who was also medical director of Appleton City Manor, examined the leg and decided to partially split the cast to relieve pressure from the swelling.

Over the next two days, nurses recorded that her leg remained swollen. But from July 19th to the 27th, the chart contained no mention of Etgers' leg. On July 27th, a nurse made an entry that, two days earlier, she had noticed a reddened, ulcerated spot above the cast. She also wrote that she had informed Reed and that he had said he would examine Etgers.

Another nurse observed the ulcerated spot on the 27th, and Reed was called again. The cast was cut open the next day, revealing four large, deeply ulcerated patches that had become gangrenous.

Etgers was taken to Ellett Memorial, and then transferred to an orthopedic specialist in Kansas City. The specialist concluded that the gangrene had damaged Etgers' leg beyond repair. On July 30, her leg was amputated above the knee.



TIMOTHY E. DOLLAR  
Represented the plaintiff

#### Ignore The Doctors

Although the physicians were vulnerable to a charge of negligence, Dollar decided to ignore them and focus his attack on the nursing home and the conduct of the nurses.

"Having doctors in a case puts a completely different spin on it," said Dollar. "To get the jury on your side, you want to focus its attention on the home."

Dollar argued that Etgers lost her leg because the nursing staff failed to adequately monitor the leg and cast.

With the help of his expert, Dollar put together a time line "that stretched the length of the courtroom." The expert testified that gangrene started to develop on July 23rd, five days before it was discovered. He also said that the leg could have been saved as late as the 26th — one day after Dr. Reed was informed of the ulcerated spot above the cast.

The home claimed that the nurses were diligent in making their observations, although neglectful in recording them.

"They tried to say, 'Our charting was lacking, but we performed the care,'" said Dollar. "They said they monitored the cast but didn't record their observations."

"They also said that they thought the swelling was going down, not up. Their position was, 'If we had seen anything alarming, we would have called the doctors.'"

Dollar and his expert argued that the physical evidence contradicted the nurses' testimony. "With the degree of ulceration that was present, there had to have been swelling of the leg and the toes. In fact, our expert said that the toes were very important — and would almost certainly have shown swelling, discoloration and elevated temperature."

"He also pointed out there would have been an odor from the gangrene."

### Who Noticed What, When

The chart entry from the 25th, in which an open sore above the cast was first reported, was also useful in impeaching the nurses' testimony. "The nurses claimed they monitored the cast," said Dollar. "But in the one place where we can check their claim, it's clear that they were not monitoring carefully. Because the other nurses on the 25th and 26th had to admit that they didn't notice the sore."

The home also said that the ulceration and gangrene were not caused by the cast, but by peripheral vascular disease.

"They said that the ulceration was caused by the poor blood circulation from her vascular disease," said Dollar. "They argued that she would have gotten these ulcers eventually anyway."

But Dollar pointed out to the jury that the circulatory disease affects both legs — and that Etgers had never developed ulcers in the surviving leg.

### Value Of A Useless Leg

The main thrust of the nursing home's defense concerned damages rather than liability, said Dollar. "They were basically arguing, 'How much could a leg be worth to a 94-year-old woman who hadn't used it in two years?'"

"They took the same view that nursing homes do in every case. They say, 'Well, look, the medical expenses were only \$35,000, and she's 94-years-old — how much could a jury possibly award?'"

Dollar countered this argument by insisting on a distinction between nursing home cases and other cases. "If this were an auto accident case, it would be appropriate to see a distinction between the damages of a 25-year-old and the damages of a 92-year old for the same injury."

"But it's not appropriate to discount the damages of an elderly plaintiff in a nursing home case," he said. "Because you have to start with the premise that all of their residents are elderly."

Dollar was able to use the testimony of the defendants' expert witness to establish the degree of suffering undergone by Etgers. Their expert had gone to see Etgers and had reached out to touch her. When she did, Etgers flinched.

---

## **"If you give nursing homes a break because their residents are old and in declining health, then the homes can count on a free ride any time they mistreat their patients."**

Timothy E. Dollar, Kansas City  
*Attorney for Plaintiff*

"I said to her, 'That means that she has suffered a great trauma, doesn't it?' And she answered, 'Yes.'"

"I argued to the jury that this event illustrated the fear that this woman will feel every time she's approached by nurses over the five or so years that we can expect her to live — because she won't be able to trust her nurses any more."

The jury's award of \$785,000 included \$200,000 in punitive damages. The total, said Judge William Roberts to Dollar, was almost double the previous record verdict for Henry County.

Timothy J. Becker was co-counsel on the case with Dollar.

A detailed report on the case, *Gibson v. Appleton City Manor*, appears on page five.

### The Lay Of The Land

Dollar said attorneys should take a fresh look at nursing home cases, and encouraged them not to be intimidated by their similarity to medical malpractice cases. "They're a completely different ball game," he said.

In fact, Dollar views medical malpractice cases as an uphill battle for plaintiffs because of the favorable view of doctors held by most jurors.

But jurors do not have the same view of nursing homes, Dollar insists. Quite the contrary: "In a nursing home case, the jury starts with preconceptions that work against the home. It's the defense that has

to fight uphill."

Nursing homes also have to contend with strict state regulations that can be turned against them by an effective plaintiffs' attorney.

"State regulations set up a strict liability standard for nursing homes," said Dollar. "The regs say, 'You will protect residents from accident or injury.'"

"Nursing home administrators are also required by law to sign an affidavit stating that they are aware of and understand the regulations. And because they have sworn they understand them, you're allowed to force them to draw conclusions. You can make them admit that they're in violation of the regulations."

"And I've made them do that in every nursing home case I've ever had."

### A Culture Of Failure

In order to fight downhill rather than up, Dollar chose to leave the physicians out of the case. This meant that the focus of his attack on the home was the conduct of the nursing staff.

"Nursing home cases are always a question of nursing care rather than physician care," said Dollar. "Juries don't accord nurses the same deference."

Nurses do benefit from jury sympathy, however, as the defense lawyers well knew.

"They stood up and said, 'In order to accept what the plaintiff is saying, you'd have to conclude that these nurses are liars and monsters — these women who work so hard to care for these people,'" reported Dollar.

Dollar countered by directing the blame for the nurses' failures on the home itself. He contended that the ratio of nurses to patients in the home — 60 to one — was inadequate. "They were too reliant on certified nurse assistants, who can't even do assessments," said Dollar.

"No one was saying the individual nurses were evil people. I argued that the owners of the home put in place a system that forced the nurses to fail."

"The owners created a culture of failure that began to spread and fester into a culture of deceit. It grew and spread just like the gangrene that ate up Mrs. Etgers' leg. It was the system that needed to change."

He also pointed out that some of the home's spending priorities appeared misplaced. "They had put on a new roof and installed new drapes — both of which would increase the value of the property should they decide to sell — but had not been willing to pay for adequate nursing care."