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News Story

KC Cancer Patient Wins \$2.2B Vs. Pharmacist Drug Companies Had Settled Before Trial

By Michael M. Bowden

Last Demand: Insurance policy limits

Size of Verdict: \$2.2 billion

Status: Post-trial motions, including motion for new trial, pending

Type of Case: Negligence (pharmacy malpractice)

Date of Verdict: Oct. 10, 2002

Length of trial: 3 days

Jury Deliberations: 2 hours

Case Name: *Hayes v. Courtney and Courtney Pharmacy, Inc., d/b/a Research Medical Tower Pharmacy*

Court: Jackson County Circuit Court

Plaintiff's Attorneys: Grant Davis, Davis, Bethune & Jones, Kansas City and Michael Ketchmark, Ketchmark, Eichens & McCreight, Kansas City

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Uncovering the multi-million dollar cancer medication scam that will ultimately kill Georgia Hayes occurred almost by accident.

In May 2001, the plaintiff's doctor was chatting with a nurse who mentioned that a drug salesman for Eli Lilly had told her a local pharmacist seemed to be selling three times more of a cancer drug than he was buying. The statement roused the doctor's suspicions and prompted her to bring her patient's medication for testing at a local laboratory.

Sure enough, the chemotherapy medication had been diluted to one third its prescribed strength; a deception that explained the sudden return of her cancer and virtually ensured her death after a promising initial response to treatment. The doctor notified the FBI, an investigation ensued and the Kansas City pharmacist pleaded guilty to federal criminal charges.

Investigators found that Robert Courtney had been diluting chemotherapy medications for nearly a decade, defrauding an estimated 4,200 customers. And while those customers were slipping into the final stages of cancer, the millionaire pharmacist was pocketing the profits.

Defense counsel in Hayes' civil suit, while acknowledging that their client's scam was heinous, argued that those

acts had no significant impact on Hayes because her cancer would have been fatal even with the proper medication.

The jurors didn't buy it. In fact, they were so incensed by Courtney's brazen scheme that they awarded a staggering \$2.2 billion verdict, saying it was intended to "send a message to the world."

"When the unanimous verdict was read aloud, spectators in the courtroom gasped," reported the Jefferson City News Tribune.

But plaintiffs' attorney Grant Davis said the enormous award was "just" on both practical and symbolic levels.

"If we keep just one person from doing what Robert Courtney did, can you imagine how many we're going to affect?" he told jurors in his closing argument.

Davis's co-counsel, Michael Ketchmark, who also hails from a small Kansas City law firm, added that "counterfeit drug" schemes of this sort are rife around the country, with Courtney's dilution approach being "only one way to do it."

"This verdict will help dissuade any pharmacist who might be thinking about profiting off the health of their patients," Ketchmark said.

The two lawyers also expect to collect a "sizeable portion" of the verdict from several sources — most notably, Courtney's pharmacist malpractice insurance policies, which together come to \$71 million. The insurer has filed a declaratory judgment action in a Kansas City federal court contesting its liability, Davis said. But he dismisses this as a side issue, saying the real action is in state court, where collection efforts are already underway.

"We're going to garnish the insurance company and put heavy pressure on them in a lot of ways to do the right thing and own up to their obligations," Davis said.

Ketchmark added that he and Davis will also pursue any money that Courtney may have hidden from authorities, or that he may receive in the future from sources such as book or movie deals.

As Davis put it, "When someone does something this heinous, I think the financial death penalty is absolutely appropriate."

Chemotherapy Scam

Hayes was diagnosed with ovarian cancer in 1996 at the age of 37.

As a relatively young and healthy patient, Hayes responded well to her chemotherapy regimen of Gemzar and Taxol, and was already in remission when her oncologist, Dr. Verda Hunter, began using Courtney's pharmacy to supply the drugs.

During the years 2000 and 2001, Hayes received 27 doses of chemotherapy mixed and dispensed by Courtney's pharmacy. Her health began to decline; her cancer reappeared and started to spread.

That's when Dr. Hunter became suspicious, tested Hayes' medication and alerted the FBI to the possible scam. In February of 2002, facing a potential sentence of 196 years, Courtney avoided trial by confessing to diluting the cancer medications of hundreds of customers.

Under his plea agreement, the pharmacist, now 49, was sentenced Dec. 5 to 30 years in prison. As part of the agreement, Courtney must fully cooperate in disclosing any other criminal activity he committed and any knowledge he possesses of crimes by others. If the government believes he has been truthful, he will not face any other charges.

The federal case against Courtney froze more than \$8 million of his assets, stripped him of his pharmacy licenses and forced him to sell two pharmacies, one in Kansas City and one in suburban Merriam, Kan. Under the plea agreement, Courtney's assets — estimated to be in excess of \$10 million — will be used as restitution for victims in the criminal case.

In addition, Courtney faces about 300 more civil lawsuits filed in state court claiming fraud, malpractice and wrongful death (Hayes's case was simply the first to reach trial).

Between them, Davis's and Ketchmark's firms are handling "about 90 percent" of those cases, and the two lawyers will act as co-counsel on all of them — that is, if the cases ever get to trial now that the defendant has been wiped out financially.

"As a practical matter, this [verdict will] probably bring an end to the separate lawsuits against Robert Courtney," Ketchmark acknowledged. Davis agreed, adding that the final decision would be left to the individual clients.

The remaining plaintiffs will probably settle out of the federal fund for a proportionate share of the pharmacist's assets, and Hayes has promised that she will share any money she collects with the other plaintiffs. Further, two drug manufacturers, who were named as co-defendants with Courtney in the civil complaints, will contribute a confidential sum to all the civil plaintiffs as well.

Manufacturers Settle Out

In addition to Courtney and his pharmacies, Hayes's lawsuit originally named two chemotherapy drug manufacturers — Eli Lilly and Bristol-Myers Squibb — claiming that they knew or should have known that Courtney was diluting their products, but negligently failed to report him or take any other action.

This portion of the claim sprang from the casual comment of the Eli Lilly drug salesman to Dr. Hunter's nurse. Davis and Ketchmark argued that if the company's salesman knew Courtney's purchases and sales of the cancer medication didn't add up, the two companies must have had notice of Courtney's scheme.

The companies moved for summary judgment.

The plaintiff's response to Eli Lilly's motion lays out their theory: "The major flaw in Courtney's scheme — which Courtney never suspected — was the fact that Eli Lilly carefully monitors his purchases and sales of Gezmar down to each individual vial of the drug. Eli Lilly watched and analyzed Courtney's purchases and sales for its own marketing purposes, and to pay commissions to [its salesman]."

FBI investigations had revealed that the salesman complained to a district manager for Eli Lilly that he was not being paid enough in commissions, based on Courtney's sales of Gezmar. In investigating this complaint, the company reviewed its invoices to compare Courtney's sales against the amount of Gezmar he was purchasing.

Davis and Ketchmark argued that "any reasonable company would have gone to the proper authorities once it learned of the vast discrepancies between the amounts of Gezmar Courtney was buying and the amount he was selling. Lilly did not. Instead, it placed the investigation on the 'back burner' and hid all the relevant facts from Dr. Hunter. People died as a result, and others suffered and continue to suffer unimaginable injuries. Punitive damages are appropriate in this case."

Similar allegations were made against Bristol-Myers Squibb, and in early October, trial judge Lee E. Wells denied the companies' summary judgment motions.

Although the drug companies had spent the entire pretrial period vehemently denying liability, Judge Well's decision changed their minds. On the second day of voir dire for Courtney's civil trial, they agreed to an eleventh-hour, confidential settlement with Hayes and the 300-odd other civil plaintiffs who'd filed similar suits.

A joint statement issued by the drug companies and the plaintiffs' lawyers stated simply that developments in the case had "forced all parties to take an additional hard look at this case and to consider the emotional impact of protracted litigation on the plaintiffs."

The Plaintiff's Case

Voir dire for the Hayes case actually took longer than the trial — three full days, compared to only two days for testimony between opening and closing statements. Davis said he had a "very specific" approach to getting the jurors that he wanted — but refused to describe it in case any of the other Courtney cases end up going to trial.

He did comment, however, that the voir dire was complicated by two circumstances: First, he thought he was going to have the pharmacies as defendants — they settled out only after the second day of voir dire.

"Mostly, [the complexity of voir dire] was about the drug companies," Davis said. "I thought we were looking at a five-and-a-half week trial. Voir dire changed dramatically after the drug companies left."

Suddenly, instead of a hotly contested negligence argument, Davis and Ketchmark faced only Courtney himself, who had already admitted liability. Now the trial would be about little more than damages.

However, voir dire remained problematic, Davis said. There was such wide knowledge of the case and such "String him up!" hostility toward Courtney that his best candidates were disqualifying themselves left and right.

At trial, the plaintiff's team called other victims of Courtney's diluted pharmaceuticals in order to underscore the breadth of his wrongdoing — a technique borrowed from other types of personal injury cases.

"It's similar to the way I might, in a railroad-crossing case for example, call other people who've been hit by trains at the same crossing, if they're still alive, or people who've had near misses. In this case, we also had a combination of live testimony and the videotaped depositions of victims who'd already died of their cancer by the time this case reached trial."

Oncologist Robert Oldham testified that Hayes probably missed her best chance for a cure because she received diluted medicine. He said the cancer cells in her body may have become more resistant to treatment because the medication was only partial strength. He also testified he did not believe Hayes would survive her ovarian cancer.

"During the period she received these diluted doses, her cancer grew and spread and, as her doctor said, once it gets loose you can't put it back," Davis explained. "Now the cancer has spread microscopically over her body, and there is no cure — she's going to die from it. Whereas, had she continued receiving full doses of the chemo she'd been responded so well to, more likely than not she would have survived."

During her testimony, Dr. Hunter corroborated this opinion.

But perhaps the most damning and emotional testimony came from Hayes herself. She told the jury, "If I had my wish, they would paint all of our faces on [Courtney's] cell block wall so that when he goes to sleep at night, we are the last thing he sees and when he wakes up in the morning, we are the first thing he sees."

The Defense Case

The defense did not contest the fact that Courtney had diluted the medication, but argued that Hayes suffered no real damages since she was still alive, and had already lived well beyond the life expectancy of people diagnosed with recurrent ovarian cancer.

In making this argument, however, the defense lawyers used no live testimony, instead relying principally upon the videotaped testimony of two expert oncologists. One of them, Dr. Robert Ozols, said that even with full doses of chemotherapy, Hayes "still would have had a recurrence."

Davis noted that since he had been present at the defense depositions, he had no objections to presenting the testimony on videotape. He said he was confident the jury would reject the defense position.

"If Courtney's argument had prevailed, it would have been open season on cancer patients," Davis said. "People could say, 'What does it matter? They're going to die anyway.'"

Courtney's attorney, David Buchanan of Kansas City, Mo., acknowledged that it was difficult to make these arguments — especially since his own father had died of cancer, and he strongly identified with the victims and their families.

"The jurors didn't hear anything during the trial that they hadn't heard over the previous few months in the media," he added. "So I don't think it made a lot of difference what anyone said during the trial."

Courtney himself addressed the jury only via a videotaped deposition from Leavenworth prison, in which he answered every question by invoking his Fifth Amendment right against self-incrimination.

In closing arguments, Buchanan reminded the jury that hundreds of similar cases were pending, and that a huge award for Hayes would only reduce compensation for the others.

"I couldn't ask the jury to be fair to Robert Courtney — all it would do would be to get the jury mad at me," Buchanan explained. "So I argued that they should be fair to the civil jury system," by telling jurors that an oversized award would simply feed popular criticism of the jury system.

But Davis countered that — due to ongoing settlement efforts on the part of federal authorities and Courtney's malpractice insurers — this could turn out to be the only case to reach trial, and their only chance to send a message that would catch the world's attention.

The jurors apparently agreed: After only two hours of deliberation, the jury returned its \$2.2 billion verdict, which included \$578,880 in past economic damages, \$150 million in future non-economic damages and \$2 billion in punitive damages.

Davis, who had asked for \$1.2 billion in his closing statement, said he was not surprised by the verdict — but almost everybody else seemed to be.

As the jurors left the courtroom, each of them hugged Hayes, who acknowledged in a public statement outside the courthouse that cancer would probably kill her and many of Courtney's other victims before the case was finally resolved.

"Though we will probably never see a dime, I feel justice has been done," she said.

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