

Summary of SC95022, *William Dieser v. St. Anthony's Medical Center*

Appeal from the St. Louis County circuit court, Judge Michael D. Burton
Argued and submitted February 24, 2016; opinion issued October 4, 2016

Attorneys: St. Anthony's was represented by Paul N. Venker, Lisa A. Larkin and Nathan D. Leming of Williams Venker & Sanders LLC in St. Louis, (314) 345-5000; and Dieser was represented by Mary E. Coffey, Genevieve Nichols and Adam Henningsen of Coffey & Nichols in St. Louis, (314) 647-0033.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: Both a man who sued a hospital for medical negligence and the hospital appeal a trial court judgment awarding \$883,000 in damages, without post-judgment interest, to the man. In a unanimous decision written by Chief Justice Patricia Breckenridge, the Supreme Court of Missouri affirms the judgment. Procedurally, this Court has exclusive appellate jurisdiction because, under the facts of this case, the man raised his constitutional claims at the earliest opportunity. Substantively, the trial court did not err. When the applicable statutes are read together, post-judgment interest is prohibited in this case. The statute prohibiting post-judgment interest does not violate the open courts provision or the man's right to a trial by jury, and the man waived his equal protection claim by failing to raise the same grounds in the trial court that he raises on appeal. The medical center failed to establish that certain testimony by an expert affected the case's outcome or otherwise caused the jury not to follow the trial court's instructions as to the standard of care. Likewise, the medical center cannot establish it was prejudiced by opposing counsel's use of percentages in describing the burden of proof, as the trial court properly instructed the jury about the burden of proof during jury selection and at the close of evidence. The trial court did not abuse its discretion in overruling the medical center's motion for a new trial on the basis of part of the man's testimony or in overruling the medical center's objection to part of the man's closing argument. The trial court also did not abuse its discretion in overruling the medical center's motion to reduce damages because the medical center did not show the verdict was excessive.

Facts: Days after a January 2008 surgery at St. Anthony's Medical Center, William Dieser developed a pressure wound that developed into a stage IV pressure ulcer, extending to the bone. A second surgery was performed to remove dead tissue from the wound. Dieser was discharged in February 2008, and while the wound initially healed in five months, Dieser later began experiencing pain at the wound site when bending or sitting. He had another surgery in October 2008 to remove scar tissue and replace it with a skin graft. By February 2009, the wound had healed completely. In 2012, Dieser filed a medical negligence suit against St. Anthony's, alleging the medical center negligently failed to follow its own policies, procedures and protocols for pressure injury prevention. Following a trial, the jury returned a verdict in Dieser's favor. The jury awarded him a total of \$883,000 in damages – \$33,000 in past economic damages; \$750,000 in past noneconomic damages; and \$100,000 in future noneconomic damages. Both parties filed post-trial motions regarding whether Dieser was entitled to post-

judgment interest. The trial court entered its judgment without post-judgment interest. Dieser appeals, and St. Anthony's cross-appeals.

AFFIRMED.

Court en banc holds: (1) Dieser raises sufficiently real and substantial constitutional claims – that the trial court's application of section 538.300, RSMo, to overrule his motion for post-judgment interest violated his constitutional rights to equal protection, open courts and a jury trial – to invoke this Court's exclusive appellate jurisdiction over his case. He did not waive his claims by not raising them before a post-trial motion. The statute does not permit a health care provider such as St. Anthony's to avoid legal liability in a medical negligence action and, as such, it does not act as an affirmative defense (a defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's claim, even if all the plaintiff's claims are true) in this case. Further, the pleadings St. Anthony's filed were insufficient to assert section 538.300 as an affirmative defense. The record reflects that, once St. Anthony's raised the application of section 538.300 in its post-trial motion, Dieser raised his constitutional challenges to the statute in his post-trial motion, and the trial court heard argument regarding the issue.

(2) The trial court did not err in overruling Dieser's motion for post-judgment interest. Read as a whole, section 408.040, RSMo, does not mandate post-judgment interest on all judgments. Subsection 1 of the section provides that post-judgment interest accrues on the judgment balance as prescribed in subsections 2 and 3. Section 538.300, however, provides that subsections 2 and 3 of section 408.040 do not apply to medical negligence cases against health care providers. As such, accrual of post-judgment interest is prohibited in this case.

(3) Dieser waived his claim that the section 538.300 prohibition on post-judgment interest violated his state constitutional right to equal protection. The argument he makes on appeal is not the same one he made in the trial court. As such, Dieser failed to preserve in the trial court the grounds for the equal protection claim he raises on appeal.

(4) Section 538.300 does not violate the open courts provision of article I, section 14 of the state constitution. No procedural bar prevented Dieser from bringing his medical negligence claim in a Missouri court, nor was he unreasonably or arbitrarily denied access to the courts, and, in fact, he obtained a favorable judgment in his case. The fact that the statute prevented him from obtaining post-judgment interest on that judgment does not affect his access to Missouri courts.

(5) Section 538.300 does not violate Dieser's right to a trial by jury as provided by article I, section 22(a) of the state constitution. The restriction on post-judgment interest in section 538.300 does not curtail the jury's determination of damages. The right to post-judgment interest is purely statutory and never has been assessed by the jury at common law.

(6) The trial court did not abuse its discretion in permitting an expert testifying on behalf of the medical center to be cross-examined about stage III and stage IV pressure ulcers being classified as "never events" in proposed guidelines from the Centers for Medicare and Medicaid Services. The jury was instructed properly as to the standard of care in this case. The fact that Dieser's counsel used the term "never event" once in closing arguments does not overcome the

presumption that the jury followed the trial court's instruction. St. Anthony's failed to establish that the expert's testimony regarding "never events" affected the outcome of the case.

(7) Counsel's discussion of percentages in describing the burden of proof during jury selection did not result in prejudice to St. Anthony's. The trial court properly instructed the jury as to the burden of proof, both during jury selection and at the close of the case. As such, St. Anthony's cannot establish it was prejudiced by the discussion of percentages.

(8) The trial court did not abuse its discretion in overruling St. Anthony's motion for a new trial based on Dieser's testimony that, as a Catholic, he felt betrayed by the medical center, which is a Catholic institution. The testimony was in the context of Dieser explaining the emotional impact of his wound and was not elicited to mislead or prejudice the jurors against St. Anthony's.

(9) The trial court did not abuse its discretion in overruling St. Anthony's objection to Dieser's closing argument. The argument that jurors would be telling the community what constitutes acceptable medical practices was not an improper appeal to punish St. Anthony's. The argument did not tell the jury it could consider punishment or deterrence as an element of damages, nor did it tell the jury it should award a portion of the verdict to punish or deter certain medical care.

(10) The trial court did not abuse its discretion in overruling St. Anthony's motion for remittitur (to reduce the amount of damages awarded by the jury) because the medical center did not show the damages award was excessive.