

## Allowing punitive damages in N.J. medical liability case unwarranted

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**Editor's note:** *Punitive damages will not be considered as a case against a physician (PDF) who performed a hysterectomy and other defendants moves forward. In a win for physicians, the New Jersey Supreme Court has reversed the trial court's decision that denied a request for summary judgment that would have dismissed the punitive damages without a trial.*

*"We hold as a matter of law that the evidence presented, even affording plaintiffs all favorable inferences, does not establish that defendants' acts or omissions were motivated by actual malice or accompanied by wanton and willful disregard for Ruscitto's health and safety," New Jersey's highest court ruled. "A reasonable jury could not find by clear and convincing evidence that punitive damages are warranted based on these facts." The case now goes back to the trial court for further proceedings.*

Punitive damages are reserved for a "markedly extraordinary occurrence" where there is actual malice or wanton and willful disregard of people who could be harmed, physicians tell New Jersey's Supreme Court.

They were warranted in a New Jersey case where the owner of an oil truck knew that the brakes needed repair and that the driver wasn't trained to do so—and the truck then crashed into a car, killing the driver. And the standard was met in a case where an intoxicated motorist driving erratically at 50 mph swerved around a car stopped to let pedestrians cross the street, striking a person.

But the threshold for punitive damages has not been met in a 2014 case in which a physician performed a hysterectomy, the Litigation Center of the American Medical Association and State Medical Societies and the Medical Society of New Jersey (MSNJ) tell the state Supreme Court in an amicus brief they filed in the case, *Rivera v. The Valley Hospital*.

The brief filed asks the New Jersey Supreme Court to reverse lower-court decisions denying the physician and other defendants' request for summary judgment so that the punitive damages request is not part of the lawsuit going forward. It notes that the decision on the motion is contrary to previous case law.

“The denial of summary judgment lowers the threshold showing required for such a claim and sets in motion unintended collateral consequences. These include a chilling effect on health care that will follow discouraging physicians from offering surgical procedures known to have serious risks—a circumstance commonly present in medical interactions—even where the probability of the risk materializing is small or uncertain,” the brief tells the court.

Find out more about the cases in which the AMA Litigation Center is providing assistance and learn about the Litigation Center's case-selection criteria.

## Making a surgical decision

Howard H. Jones, MD, met with Viviana Ruscitto in June, July and September 2014 to evaluate the woman's condition and discuss options for suspected benign fibroids.

Records from the September visit show Ruscitto decided to have surgery, but had not yet chosen whether to have an abdominal myomectomy for partial removal of the uterus or a robotic-assisted laparoscopic hysterectomy. According to court records, Dr. Jones wrote: “I did counsel her about the risk of morcellation including morcellation of a malignancy.”

In April 2014, the Food and Drug Administration (FDA) had issued a safety communication that estimated that 1 in 350 women undergoing a hysterectomy or myomectomy to treat fibroids has unsuspected uterine sarcoma and there is a risk that performing a laparoscopic power morcellation can spread the cancerous tissue, “significantly worsening the patient's likelihood of long-term survival.” The FDA recommended the procedure not be used in women with suspected or known uterine cancer, but it did not recall or ban the use of the device that had been used since 1995.

When Dr. Jones performed the robotic-assisted laparoscopic supracervical hysterectomy on Ruscitto in October 2014 to remove presumably benign fibroids, the FDA had taken no further action beyond hearings held two days in July. After Ruscitto's surgery, a biopsy showed there was cancer. Ruscitto underwent chemotherapy and other treatments, but the cancer continued to spread and she ultimately died. Her sister filed a lawsuit on behalf of Ruscitto's estate that included the ask for punitive damages.

## No wanton or willful disregard

The AMA Litigation Center and MSNJ tell the court that unlike the defendants in other cases, there is no clear and convincing evidence that Dr. Jones and the others “knew there was ‘a high degree of probability of harm’ to this patient in the October 2014 surgery.”

“Whether the calculated risk is 1 out of 7,450 [the prevalence of occult leiomyosarcoma based on study of the literature with a larger group of women] so that it is less than 0.02% or even 1 out of 350, which is to say 0.28%, there is no ‘high probably’ as to an outcome harming the patient,” the brief says.

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