

Plaintiff's attorney drops brain surgery suit

9 days into doctor's trial, lawyer scraps case on suspicion of juror misconduct

By Linda Satter

<http://www2.arkansasonline.com/news/2008/may/03/plaintiffs-attorney-drops-brain-surgery-s-20080503/?subscriber/national>

Saturday, May 3, 2008

LITTLE ROCK — Nine days into a trial stemming from a surgeon operating on the wrong side of a boy's brain, the plaintiffs' attorney on Friday abruptly withdrew the case, citing possible juror misconduct.

Attorney Phillip Duncan of Little Rock, who's representing Pamela and Kenny Metheny, the parents of 19-year-old Cody Ryan Metheny, said he first asked Pulaski County Circuit Judge Ellen Brantley to grant a mistrial over his concerns about possible jury improprieties. She declined.

Duncan said that because the jurors' actions bothered him so much, and he didn't want to risk a miscarriage of justice if the panel were allowed to continue hearing the case, he decided to "nonsuit" the case. That means he can refile it within a year, to have it retried by a different jury.

"And I will refile it," Duncan said.

He noted that the law allows one nonsuit before a case is presented to a jury.

While he's glad that the option is available, he said, he "did not do it lightly." He'd already spent close to \$100,000 on witness fees, exhibits and other costs.

He was planning to complete the plaintiffs' case Monday, the trial's 10th day, Duncan said. Then, attorneys for the defendant, the Medical Assurance Co. Inc., which is the insurance provider for Arkansas Children's Hospital in Little Rock, were to begin presenting their side.

Attorney Will Griffin, representing the insurance company, couldn't be reached for comment after the case came to a halt midafternoon.

The doctor in question, Badih Adada, settled his portion of the lawsuit before the trial began. As a nonprofit charity, the hospital is immune from litigation.

The boy was 15 at the time of the surgery, which was aimed at ridding him of recurring seizures. The doctor mistakenly operated on the wrong side of the boy's brain before realizing his error and performing the surgery on the correct side. The insurance provider claims that the error didn't cause any real harm.

Duncan said there were two issues that concerned him about the jury. First, he said, employees of his law firm learned that one of the jurors was an insurance adjuster who had been a witness in an earlier case Duncan's firm, although the woman hadn't disclosed that connection during jury selection. She used a slightly different name in each case, he said.

Also, Duncan said that in a hearing Friday outside the presence of jurors, he asked to question the woman and wanted to address inappropriate talking and laughing during the trial by about three jurors. He said the talking had become disruptive and particularly noticeable Thursday.

Just as attorneys were discussing his concerns, he said, the judge received a note from another juror that read, "Please ask the jurors to be nice and keep their thoughts to themselves. There is a lot of talking coming from the top while testimony. My view will not be affected. However, I don't care to hear their remarks and laughter. It's really getting on my LAST nerve! It's very childish and disrespectful."

Duncan said the note indicated that other jurors were discussing the case. He said he asked for a mistrial on that basis, but the judge declined, saying she didn't know the nature of the jurors' discussions. Duncan said the judge then placed certain limitations on questions he wanted the jurors to be asked, prompting his decision to drop the case for the time being, rather than pursue it under those limitations.

"I don't want to be in a trial that I perceive to be unfair to either side," he said afterward.

Arkansas, Pages 11, 20 on 05/03/2008