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## 'No cause' for medical-malpractice suit

### Plaintiff failed to appear on day of trial

On Dec. 31, 2001, plaintiff Eva Buie, a 56-year-old female, fell down the stairs leading to her basement after returning from a New Year's Eve party at which she drank approximately four beers and three glasses of Martel. She suffered a "hangman's fracture" at C2 and also fractured C3.

The next morning, the plaintiff was taken by EMS to Borgess Hospital. After CT scanning of the cervical spine as well as cervical X-rays demonstrated the above fracture, the first neurosurgeon to see the plaintiff placed her in a halo ring with mild cervical traction in an attempt to better align the fracture. He noted, however, that given the degree of subluxation, it may not be feasible for the fracture to heal with halo alone and she may require surgical stabilization.

After four days, the fracture had not successfully aligned and the decision was made to perform surgery. On Jan. 5, 2002, defendant Dr. Fabi performed a cervical fusion from the occiput to C5. Prior to the surgery, the defendant explained that the plaintiff would have a stiff neck for the rest of her life, but that was the price that had to be paid in order to stop the pain and protect her from death or paralysis. The surgery was successfully performed on Jan. 5, 2002. The post-operative X-rays demonstrated perfect alignment and restoration of the normal lordotic curve. Defense counsel said all bones subsequently healed solidly and the severe pain went away.

The plaintiff filed suit, alleging the defendant was at fault for her stiff neck and that he should have given the halo brace a longer trial before operating.

The attorney who filed the lawsuit on the plaintiff's behalf filed a motion in limine to preclude discussion of the plaintiff's intoxication leading to her fall. The court ruled that the plaintiff's pretreatment intoxication would be appropriately addressed as part of the comparative negligence argument, in accordance with *Shinholster v. Annapolis*, 471 Mich. 540 (2004).

In addition to arguing that the plaintiff's intoxication would be appropriately considered as an element of comparative negligence, the defense also filed a motion for summary disposition based on MCL 600.2955a. That statute provides that it is an absolute defense in an action for the death or injury of a person, where said individual had an impaired ability to function due to the influence of intoxicating liquor, and as a result of that impaired ability, the individual was 50 percent or more the cause of the accident or event that resulted in the death or injury.

Despite the fact that the motion was timely filed months before the scheduled trial date, the court set the hearing on the motion for summary disposition for the day of the trial. In the meantime, plaintiff's counsel tried to encourage his client to dismiss the case voluntarily. The plaintiff refused, and plaintiff's counsel withdrew.

The plaintiff subsequently attended the video trial deposition of one of the defense neurosurgery experts and gave no indication she did not intend to proceed with this case through trial.

On the day of trial, Oct. 11, 2005, the plaintiff failed to appear and Judge J. Richard Johnson granted a judgment of no cause for action for that reason (without hearing the motion for summary disposition). The plaintiff did not file a motion for reconsideration or an appeal.

The defense was prepared to call two neurosurgery expert witnesses — as well as the prior-treating neurosurgeon — all of whom felt that the fixation procedure performed by the defendant was necessary to the plaintiff's well-being and was properly and timely performed. The plaintiff's prior counsel retained two neurosurgery experts, whose position was that halo bracing should have continued for a few more days and would probably have corrected the problem without the need for surgery.

According to defense counsel, plaintiff's counsel had difficulty convincing his client to dismiss this case in part because the case evaluation panel returned an award of \$185,000. It has been defense counsel's experience that the Kalamazoo County case evaluators consistently over-value cases, making settlements (or voluntary dismissals, where appropriate) very difficult to obtain.

Defense counsel said having a completely defensible case helped in winning.

**Type of action:** Medical malpractice

**Type of injuries:** Neck immobility

**Name of case:** Buie v. Fabi, M.D., et al.

**Court/case no./date:** Kalamazoo County Circuit Court; #B03-00-0639-NH; Oct. 11, 2005

**Name of judge:** J. Richard Johnson

**Verdict amount:** \$0 (no cause of action)

**Attorney for the plaintiff:** Withheld

**Attorney for the defendant:** Brian W. Whitelaw

**Name/city of most helpful experts:** David Herz, M.D., Grand Rapids; John Zinke, M.D., St. Clair Shores; Edwin Kremer, Ph.D., Grand Rapids

**Insurance carrier(s):** ProAssurance

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