

# MICHIGAN LAWYERS WEEKLY

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## No Cause Verdict In Med Mal Suit

Visual Evidence Key To Winning The plaintiff, a 47-year-old woman employed at Pharmacia/Upjohn underwent an anterior cervical discectomy and fusion of C5-6 and C6-7, with instrumentation, for neck and right arm pain. The essence of the plaintiff's claim is that she did not need the surgery and that the defendants should have undertaken a conservative course of treatment instead.

Following the surgery, the plaintiff developed a pseudoarthrosis (failure to fuse). She subsequently underwent a repair procedure involving an anterior and posterior cervical fusion by another physician. The plaintiff alleged constant pain following the surgeries, resulting in her permanent disability.

The defense argued that the plaintiff was an excellent candidate for the recommended surgery. She had not been able to work in the four months prior to the surgery, following a carpal tunnel procedure on the right. After that surgery, she still had disabling hand and arm pain, now bilateral. That caused the hand surgeon to order the MRI and, eventually, to refer the patient to the defendant for a neurosurgical work-up.

The MRI showed a herniated disk at C5-6 and a desiccated disk, with loss of disk height, at C6-7. The defense argued that the nerve roots exiting at C5-6 and 6-7 were leading to pain and disability in the patient's arms and hands. Conservative therapy, such as massage, acupuncture, physical therapy, nerve blocks and the like would not have solved the mechanical problem in plaintiff's cervical spine. It was necessary to restore the disk height by placing bone between the vertebrae in order to widen the neural foramen to permit the nerves to exit the cervical spine without compression. The only way to accomplish this was through fusion. Although the patient developed a bony fusion at C5-6 and a fibrous union at C6-7, after receiving recommendations for no additional surgery from no fewer than three neurosurgeons, the plaintiff found an orthopedic spine surgeon in another state willing to perform a repair procedure. Although the patient claimed to have been "50 percent improved" from the repair procedure, she also claimed she was still in constant pain and permanently unable to work. Pseudoarthrosis is a known complication of any fusion procedure and defendant's surgical technique was not criticized in this case.

The defense stated the key to winning was the use of models, photographs and diagrams which were very helpful in explaining the mechanical nature of the patient's problem to the jury. Once they understood that it was necessary to relieve the pressure on the nerve roots by increasing the disk height at C6-7, the jury also understood conservative therapy would not have worked. The defendant doctor did an excellent job explaining his thought processes on cross and direct examination.

Finally, the plaintiff's credibility came into question when she testified the reason she had a weakened grip and limited extension of the wrist when first seen by defendant was because she was recovering from her carpal tunnel surgery. She inaccurately claimed her hand was still in a bandage or cast as of the time of the first visit with the neurosurgeon. When asked how she filled out the medical history questionnaire, she said she did so with her left hand. When handed a pen and pad of paper and asked to demonstrate writing with her left (non-dominant) hand, she was clearly unable to do so, became very angry and argued that she did not see the relevance of same.

All eight members of the jury found no negligence by defendant on the first vote, resulting in a no cause verdict in several minutes.

**Type of action:** Medical malpractice

**Type of injuries:** Alleged failure to offer conservative therapy prior to two level fusion of the cervical spine. Post-operatively, failed fusion allegedly led to need for re-operation, pain and suffering and total permanent disability in a 47-year-old woman

**Name of Case:** Shepperd v. Fabi, M.D., et al.

**Court/case no./date:** Kalamazoo County Circuit Court; #02-000143-NP; Feb. 13, 2004

**Name of judge:** Richard Ryan Lamb

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

**Allocation of Fault:** N/A

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

**Attorney for the plaintiff:** Withheld

**Name/city of most helpful experts:** Dr. Geoffrey Thomas, neurosurgery

**Insurance Carrier:** ProAssurance

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