

Woman settles over failure to diagnose cancer

By **FRED HORLBECK**, Senior Staff Writer

A Beaufort County woman who claimed a health clinic failed to diagnose her breast cancer for 14 months has settled a medical-malpractice suit for \$575,000 in federal district court.

Ruth Simmons sued the U.S. government under the Federal Tort Claims Act, claiming that the federally supported Beaufort-Jasper-Hampton Comprehensive Health Services, Inc., was negligent, said her lawyer, Nathan Hughey of Mount Pleasant.

In a related action in the Beaufort County Court of Common Pleas, the plaintiff settled for \$5,000 with a Beaufort hospital, Hughey said.

Both suits were settled in July and reported to South Carolina Lawyers Weekly last week.

The federal action, brought in the U.S. District Court of South Carolina, was *Simmons v. United States of America*, C.A. 9:08-3511-2B.

In the federal case, the plaintiff complained that a December 2004 exam found abnormalities in her left breast and that clinic employees failed to properly diagnose the cause until March 2006.

In its answer, the government denied the complaint and asserted that, if there was any liability, the plaintiff was contributorily negligent.

A lawyer for the government, Assistant U.S. Attorney Lee E. Berlinsky of Charleston, said the case went to mediation because the plaintiff was ineligible for a jury trial under the Federal Tort Claims Act, which also precludes punitive damages.

"What makes this different was that the case was originally brought in state court against the clinic and the doctors involved. But it's because this was a federally funded clinic through the Department of Health and Human Services, the case could only be brought in federal district court against the United States," Berlinsky said.

"In other words, under the Federal Tort Claims Act, you can't bring an action individually against a facility or a federally employed doctor," he said.

Berlinsky declined to comment on the issues at stake in mediation. But Hughey said the dispute focused on whether earlier diagnosis and treatment would have alleviated or cured the plaintiff's cancer.

"In these cancer cases, the question is always what difference did the delay make?" Hughey said.

For Simmons, it made a huge difference, he said.

The clinic could have limited her cancer to "easily treatable" levels if she had received immediate treatment, the plaintiff claimed. Instead, she contracted Stage III breast cancer, underwent surgery for removal of both breasts and suffered more than \$980,000 in total financial losses.

An employee of the Beaufort public school system, the plaintiff was in her mid-40s when clinic employees noticed a lump in her breast in 2004. Their first mistake was ordering a screening mammogram instead of a diagnostic mammogram, an ultrasound and a biopsy, according to the complaint.

"The doctor just sort of nonchalantly ordered a screening mammogram. And a screening mammogram just means that the person that is doing the mammogram doesn't know that there's been an abnormal finding," Hughey said.

"So the person doing the mammogram said, 'Well, there's some dark areas but I can't really see anything.' And so nobody told anything," he said.

The plaintiff's next visit in March 2005 was the "real key to the whole case," Hughey said.

In that visit, a doctor ordered an ultrasound but never followed up on the results, even though the hospital that performed the test faxed a report, he said. "But it never made it to the doctor. i% and that led to a one-year delay."

No biopsy was conducted until March 9, 2006, after a February 2006 appointment in which a doctor recorded that the breast lump had grown, according to the complaint.

The plaintiff underwent breast-removal surgery, chemotherapy and 70 radiation treatments.

Hughey said an expert estimated that Simmons would have had a 90 percent chance of surviving if she had received treatment even as late as March 2005.

"He now says that her chance of living more than 10 years is less than 50 percent," Hughey said.

Hughey also noted the disparity between the plaintiff's \$580,000 recovery in both cases and her \$980,000 loss.

"The reason for that amount versus her settlement was, of course, them arguing what treatment would she have had to have anyway," he said. "In other words, their argument i% became 'You can't state that she wouldn't have needed this treatment anyway.'"

Would a jury trial have made a difference?

"This was one of those cases where, had it been one you could get in front of a jury, i% we really felt like we could really ring the bell on it," he said. "But, unfortunately, you don't have that opportunity under the Federal Tort Claims Act."

Settlement Report

Brief statement of claim: Plaintiff Ruth Simmons claimed that her breast cancer was not diagnosed despite multiple appearances at her health clinic over a 14-month time frame, causing her injuries, pain and suffering.

The plaintiff claimed that on Dec. 14, 2004, she had an abnormal breast exam at Beaufort-Jasper-Hampton Comprehensive Health Services. She claimed a physician requested a "screening mammogram," even though the standard of care as a result of an abnormal finding required a diagnostic mammogram and biopsy. This was noted to be a baseline screen, and there was no noted communication to the radiologist that the patient had an abnormal breast exam, according to the plaintiff. No follow-up occurred.

The plaintiff claimed she returned to the clinic on March 14, 2005, for the mammogram results and that a physician ordered a breast ultrasound but again no biopsy. The breast ultrasound was performed on April 5, 2005, for a "lump in left breast." The plaintiff alleged that the ultrasound revealed significant problems which would have warranted immediate breast cancer treatment; that a physician failed to follow up on an

order for an ultrasound; and that the plaintiff never received a follow-up call from anyone concerning her condition. She said she had been told "no news is good news."

The plaintiff also claimed she made a follow-up appointment on her own and went to Comprehensive Health on Feb. 23, 2006. >A physician ordered a diagnostic mammogram and an appointment for a surgical biopsy.

Ultimately, the ailment was identified as advanced left breast cancer, according to the plaintiff. The plaintiff subsequently underwent a vacuum-assisted core biopsy and clip localization at a hospital on March 9, 2006, which revealed infiltrating ductal carcinoma.

The plaintiff said she then underwent neo-adjuvant chemotherapy, which led to complications and hospitalization. She has undergone additional rounds of chemotherapy and radiation treatments.

The plaintiff claimed that, if treatment had been undertaken immediately and the standard of care had been met, she would have had Stage 0 or Stage I cancer. Instead, she said she ended up with Stage III breast cancer requiring additional treatment, the loss of her breasts and a small likelihood of a full life expectancy.

Principal injuries (in order of severity): Modified left radical mastectomy with left axillary sentinel node attempted biopsy; evacuation of left mastectomy hematoma with placement of two new JP drains; back pain; nausea; decreased appetite; weight loss; Port-A-Cath site irritation; fatigue; fever; urinary tract infection; body aches and pains (arthralgias); heat intolerance; neuropathy; lower extremity swelling; neutropenia; severe bone pain; extremity pain; burning in her hands and feet.

Special damages: The plaintiff had total financial loss estimated at \$983,567.

Tried or settled: Settled at mediation; Thomas J. Wills IV was the mediator.

County and court where tried or settled: U.S. District Court for the District of South Carolina.

Case name and number: *Ruth Simmons v. United States of America*, case No. 9:08-3511-SB

Date concluded: July 7, 2009

Name of judge: The Honorable Sol Blatt Jr.

Amount: \$580,000

Insurance carrier: United States of America, Insurance Reserve Fund, S.C. Joint Underwriters Association

Expert witnesses, areas of expertise and hometown: Allen B. Jackson, MD, internal medicine, Charleston; Oliver G. Wood Jr., economist, Columbia; Sarah Lustig, BSN, RN, LNC, CLCP, life-care planner, Mount Pleasant; Allen J. Megling, MD, RVT, radiology, Savannah, Ga.; Barry L. Singer, MD, oncology, Norristown, Pa.; John G. Spangler, MD, internal medicine, Winston-Salem, N.C.

Attorney for plaintiff: D. Nathan Hughey, Hughey Law Firm, Mount Pleasant

Other useful info: The case was governed by the Federal Tort Claims Act because the facility in question receives federal funding, even though it is a private facility. Accordingly, the plaintiff had no right to a trial by jury and no right to receive punitive damages.

Submitted by: D. Nathan Hughey