

## **Jury Awards \$400,000 to Deaf Patient for Denial of Interpreter Services**

Mary Pat Gallagher  
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A Hudson County jury's \$400,000 verdict for a deaf patient whose doctor refused her an interpreter may be a wake-up call for all professionals -- including lawyers -- that they risk liability for disability discrimination.

Worse, malpractice liability insurance does not usually cover such liability, says plaintiff's attorney Clara Smit.

Smit's client, Irma Gerena, claimed she repeatedly asked Jersey City rheumatologist Robert Fogari to hire an American Sign Language interpreter. Fogari said that as a solo practitioner, he couldn't afford the estimated \$150 to \$200 per visit an interpreter would cost.

Fogari treated Gerena for lupus for about 20 visits, stretched out over 20 months. He would sometimes exchange written words with her civil union partner, Lourdes Torres, who had better written English skills, and he also communicated with Gerena through the couple's 9-year-old daughter.

But Gerena claimed that for the most part, she was deprived of the opportunity to participate in and understand her medical situation and the treatment Fogari provided, including the attendant risks and alternative approaches. She kept seeing Fogari because her primary care physician had referred her to him; she was not sure of the nature of her illness and fearful about her worsening symptoms; and she could not just pick up the phone and find another doctor.

Gerena allegedly tried to get Fogari to change his mind, giving him an interpreter's business card and having the interpreter call him to explain the law to him, all to no avail. She switched doctors after Fogari told her to go to someone else because of her repeated requests, says Smit, an East Brunswick solo.

The new doctor took her off steroid treatments, which were causing her face to swell. Gerena claimed she had not realized the swelling was a side effect of the medicine rather than a symptom of the illness, says Smit.

Gerena sued Fogari under the federal [Americans with Disabilities Act and Rehabilitation Act](#), which applies to recipients of federal funding, including hospitals and doctors whose patients are covered by Medicare and Medicaid. She also sued under New Jersey's Law Against Discrimination.

During a three-week trial before Superior Court Judge Mary Costello, Fogari argued it would have been an undue hardship to pay an interpreter when he was being reimbursed only \$49 per visit by Gerena's insurer, but his tax returns showed he earned over \$400,000 a year, says Smit.

On Oct. 9, the jury found Fogari violated the law by failing to provide Gerena an interpreter and by retaliating against her for requesting one. Half of the \$400,000 verdict was for punitive damages.

Smit says the award is a national record for such a case in the nation. She also says Fogari's malpractice carrier did not defend the case and will not cover the liability because quality of care was not at issue.

Neither Fogari nor his lawyer, Antranig Aslanian of Aslanian & Khorozian in Fort Lee, returned a call for comment.

The leading New Jersey case on the issue is a published Appellate Division decision from 2001, [Borngesser v. Jersey Shore Medical Center, 340 N.J. Super. 369](#), which eschewed a per se rule in favor of a fact-sensitive inquiry. The court differentiated between critical points, when a hospital or doctor must provide "auxiliary aids and services," such as interpreters, video test displays or note takers, to enable "effective communication," and routine care, like a blood-pressure reading, when they might not be needed. Critical points include taking a patient's medical history, explaining a course of treatment and obtaining informed consent. Smit represented the *Borngesser* plaintiffs.

The defense lawyer in *Borngesser*, Michael McGann of Ronan Tuzzio & Giannone in Tinton Falls, says "the law does not require a sign language interpreter every time, just reasonable accommodation for the hearing impaired."

How *Borngesser* translates to lawyer-client interactions is uncertain in the absence of case law.

The Justice Department went after at least one lawyer who failed to provide a deaf client with an interpreter based on a complaint filed by the National Association of the Deaf, on behalf of the client, Carolyn Tanaka.

Joseph David Camacho, of Albuquerque, N.M., was accused of refusing to provide an interpreter to communicate with Tanaka on a lawsuit he was handling for her. Ironically, the suit was against a hospital for failing to provide an interpreter for Tanaka during the admission of her 9-year-old son. Camacho allegedly withdrew from the case, leaving Tanaka without counsel, which led to dismissal of the action for failure to respond to discovery.

Camacho claimed he was able to communicate effectively with Tanaka by written notes, e-mail and telephone relays and through the interpretation provided by her son.

He settled with the department on Aug. 9, 2007, agreeing he would pay Tanaka \$1,000 in damages and his office would adopt a policy of providing interpreters.