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$50.3M brain-injury verdict reversed

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A state appeals panel reversed a $50.3 million verdict for a boy who allegedly sustained brain injuries during birth.

The 1st District Appellate Court ruled the trial court erred when the judge hearing motions excluded defense arguments about an autism diagnosis because they were filed too close to the trial date.

While the panel ordered a new trial, the plaintiffs' counsel told the Daily Law Bulletin the parties entered a high-low agreement "prior to publication of the opinion." The high and low boundary amounts of the deal were not shared with the Law Bulletin.

The defendant, NorthShore University HealthSystem, hoped to argue at trial that the boy's disabilities came from a chronic condition rather than an injury during birth at Evanston Hospital. But Circuit Judge Irwin J. Solganick excluded evidence regarding autism, finding the supplemental disclosures came within the 60-day window before trial set by Supreme Court rule.

But the disclosures came in response to the plaintiffs' filing 56 days before trial that indicated a doctor's autism diagnosis.

In a 27-page opinion Friday, Justice Sheldon A. Harris wrote the discovery rule should be construed liberally and shouldn't get in the way of fairness. He wrote that affirming the result would be condoning "tactical gamesmanship." Without deciding whose case was stronger on the merits, the panel ordered a new trial.

"The jury heard extensive expert testimony on both sides that led to conflicting opinions as to the cause of Julien's brain injury. Defendants' experts would have used Julien's autism diagnosis as further support for their opinion that his brain injury resulted from a chronic condition, in a case where both sides presented ample medical evidence for their positions," the court wrote.

"It was the jury's function to resolve the conflicting expert opinions and determine the cause of Julien's brain injury, and it was deprived of relevant evidence in making those determinations."

Julien Florez was born in March 2009 with a low heart rate and difficulty breathing. Plaintiffs' experts testified he suffered from hypoxic ischemic encephalopathy, resulting in cerebral palsy and other developmental issues requiring 24-hour supervision, speech and physical therapy.

The experts claimed the doctors and nurses failed to recognize signs of fetal distress prior to birth, that his mother should not have been prescribed Pitocin because it put stress on the baby in the womb and that a C-section should have been conducted sooner.

With 56 days to go before the scheduled trial date, the plaintiffs supplemented their answers to written discovery with a copy of a report conducted by Dr. Crystal Young, one of Julien's doctors at a neuropsychology practice in Grand Rapids, Mich.

Among other things, she found he "meets full diagnostic criteria for Autism Spectrum Disorder," characterized by social and communication impairments and repetitive or stereotyped patterns of behavior.

A few weeks later, the defendants supplemented their answers with expert opinions that the diagnosis supported their belief Julien suffered from a chronic condition before birth rather than an acute injury afterward. They also moved to disclose Young as a witness, but the plaintiffs countered that the disclosures were untimely.

The plaintiffs also filed a motion in limine "barring any reference to autism" which Solganick granted.

The trial itself was conducted before former Cook County Circuit Judge Kay M. Hanlon.

In the appellate court's opinion, Harris noted Supreme Court Rule 213(f)(3) is aimed at preventing surprises at trial, providing that each party has to disclose subject matter, opinions, conclusions and the evidence for expert witness testimony.

Rule 213(i) states each party has a duty to supplement and amend answers or responses when new information becomes available. That rule doesn't provide timelines for answers, but Rule 218(c) does hold discovery should be completed "not later than 60 days" before trial.

Both rules 213 and 218 have language that also states they should be "liberally construed to do substantial justice between or among the parties."

Harris, joined by Justices Mary L. Mikva and Joy V. Cunningham, wrote that strict application of the Rule 218 deadline of 60 days would negate Rule 213's command to adjust based on new information. Harris also wrote that the "mechanical application of Rule 218(c)'s 60-day deadline to defendants under these circumstances would encourage tactical gamesmanship."

He noted that Young's evaluation occurred on June 25, 2018, and plaintiffs' counsel filed it the same day they received it — a month later, on July 25.

"While we acknowledge that plaintiff's counsel tendered the report as soon as they received it, plaintiff gives no reason why they waited a month before presenting Dr. Young's report to their counsel," the court wrote.

"If plaintiff had supplemented their discovery after receiving Dr. Young's report on June 25, 2018, defendants would have had time to file their supplemental answers before the 60-day deadline. Instead, the one-month delay left defendants with no opportunity to respond within Rule 218(c)'s 60-day time limit."

The plaintiffs also argued the defendants could have highlighted autism-associated behaviors before the Young report because they were "well-documented" in Julien's medical records. But the panel disagreed, noting other doctors who testified noted references to autism did not constitute an

actual diagnosis, and that while there were recommendations to get tested for it, Young's evaluation was the first such test and diagnosis.

The panel also rejected the plaintiffs' arguments that a new trial was not warranted because evidence was "overwhelmingly" in their favor.

"While the jury found in favor of plaintiff, thus giving more weight to the testimony of plaintiff's experts, we cannot say to what extent the jury discounted the testimony of defendants' experts," Harris wrote.

"Both parties presented qualified and experienced experts, and we find nothing in the record that would cause the jury to completely disregard the testimony of defendants' experts."

Finally, the panel concluded that even if the jury found autism had nothing to do with a brain injury caused by defendants, it may still be relevant to a damages calculation.

"Autism spectrum disorder may be relevant to, among other things, Julien's speech and language deficits, his need for therapy, his schooling requirements, and his future employment prospects. Damages calculations included the costs of therapy and schooling and the loss of future earnings, but defendants were prevented from establishing whether Julien's autism diagnosis would reduce their damages," the panel wrote.

"Under these facts, we find that exclusion of Julien's autism diagnosis deprived the jury of relevant evidence on the issues of causation and damages and that defendants were prejudiced as a result."

Robert G. Black, of the Law Office of Robert G. Black, P.C., in Naperville, argued for the plaintiffs, along with Patrick A. Salvi II, Mathew L. Williams, Brian L. Salvi and Heidi L. Wickstrom of Salvi Schostok & Pritchard P.C.

"We are disappointed in the decision. Thankfully, we had a high-low in place prior to publication of the opinion." Williams said in a written statement.

J. Timothy Eaton and Jonathan B. Amarilio of Taft Stettinius & Hollister LLP argued for the defendants.

"We are pleased with the outcome, and we believe the appellate court reached the right conclusion," Eaton said.

The case is *Julien Florez v. NorthShore University HealthSystem, d/b/a Evanston Hospital*, 2020 IL App (1st) 190465.
