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## \$53M verdict entered over mistrial ask

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A Cook County jury's \$53 million verdict against the University of Chicago Medical Center from last month will stand after the trial judge dismissed the hospital's contention it was improperly obtained.

In his Daley Center courtroom this morning, Cook County Circuit Judge John P. Kirby entered judgment on the verdict delivered June 29, and he denied the medical center's two motions for mistrial — one alleging plaintiff attorney Geoffrey Fieger wrongly disclosed the source of a special interrogatory and the other alleging he made several improper statements to sway the jury in his client's favor.

Fieger represented 12-year-old Isaiah Ewing's guardian in a medical-malpractice suit that alleged his mother Lisa's physicians failed in 2004 to recognize fetal distress symptoms and order an emergency cesarean section, causing him to suffer cerebral palsy from a lack of oxygen to his brain during labor and delivery.

The defense denied those allegations and instead contended Isaiah's injury was caused by an unidentified infection. The jury reached its verdict after about four hours of deliberation.

The hospital was back in court today to argue Fieger should not have disclosed during his closing argument that the defense wanted the jury to face a special interrogatory during deliberations.

The interrogatory asked whether the sole proximate cause of Isaiah's injuries was "something other than the conduct of the University of Chicago Medical Center physicians and nurses on 4/20/04."

Bryan C. Larsen, an associate at Lowis & Gellen LLP who represented the hospital, argued it was not an issue for Fieger to tell the jury how to answer the special question — but it was problematic to do so while disclosing which party the question came from.

"When you tell someone the source of it, and you tell them how to answer it, that's a little suspect because now the jury knows, 'This is not from plaintiff. Plaintiff doesn't want this answered a certain way,'" he said.

However, Matthew M. Patterson, an associate at Beam & Raymond who also represented the plaintiff, argued that Fieger did not reveal the interrogatory source, let alone even utter the word

“interrogatory.”

And he argued “there is simply no basis in law” for the post-trial relief the hospital sought.

“There is not a single Illinois case that I can find that says referencing the source is grounds for a mistrial,” he contended.

In denying the motion, Kirby noted that case law established a two-tier system by which errors in relaying special interrogatory information can be met — by revealing the source as well as the result of the interrogatory — and that didn’t happen during trial.

Kirby also noted that Fieger asked the jury to make its decision based on the evidence, as he expressed during closing that it wasn’t dealing with a preponderance but rather an “avalanche” of evidence that indicates it should answer “no” to the question.

“That is in compliance with the case law,” Kirby ruled.

The hospital also challenged several other statements Fieger offered to the jury — including one that, in its opinion, suggested the hospital’s defense was bogus.

During his closing, Larsen contended, Fieger offered the sentiment that the medical center based its defense on “a falsehood” that was “outrageously untrue.”

“So, we have plaintiff’s counsel saying there’s no evidence for this infection defense — they’re manufacturing that defense, which is telling the jury that we are somehow fabricating evidence for their consideration,” Larsen said. “That in and of itself is an improper charge.”

But Patterson, indicating that he might have begun to sound like a “broken record,” contended “that just didn’t happen.”

He argued that nothing in Fieger’s closing argument suggested any witnesses or lawyers fabricated evidence for the jury, and what was said was “overwhelmingly” supported by the evidence in the case.

“The references to the lawyers was that they’re the mouthpieces for their client’s case, just as Mr. Fieger is the mouthpiece for Isaiah’s case, and they came in here and sold that untrue defense,” he said. “Mr. Fieger is entitled to argue against it.”

Kirby ruled that there was “no doubt from the very beginning that there was going to be an assault — a frontal attack — on these medical records and what they said, and what they stood for, and how they were created.”

He also noted that an exchange between Fieger and a defense witness opened a path for criticism of the opposing counsel’s actions.

Kirby highlighted when Fieger, during cross-examination, called attention to inconsistencies between a witness’ testimony at trial and his testimony written in a Rule 213 disclosure prior to trial.

When the witness was confronted with the disclosure, Kirby ruled, the witness indicated that the attorneys “wrote a false conclusion” in the document. The witness then said he did and would

not agree with the disclosure's statement that the fetus, in retrospect, suffered a hypoxic injury before Lisa Ewing arrived in the hospital's triage.

"What that did was put the attorneys in the middle of the defense, and any comment, in this court's opinion, was proper," Kirby ruled.

The hospital also argued that Fieger played into the jury's "sense of moral outrage" by aligning himself with the fictional character Atticus Finch from "To Kill a Mockingbird" to draw a parallel between Finch — a white lawyer who represented a wrongfully convicted black man in the book — to his efforts representing a black boy who he believed was wrongfully treated by the hospital.

Larsen argued Fieger's argument was improper, racially charged and designed to draw the parallels for the jury — which included several black jurors — to enhance its verdict.

Kirby held the Atticus Finch sentiments were simply Fieger indicating he was standing up for Isaiah, just as Finch stood up for his fictional client. And he noted the sentiments came during a time in the trial when both parties were offering definitions of justice.

"Each side had the opportunity to use rhetoric, literature, comedy — whatever they wanted to use — to define the terms of justice," he held. "In regards to this verdict being out of whack or excessive, I think it should be noted the plaintiff put on the board \$46 million in non-economic damages, and I'll leave it at that."

Patterson said he agreed with Kirby's ruling and commended Kirby's case law analysis.

"It's obvious that this jury took the time to evaluate all the evidence that was presented to them and rendered a just verdict for Isaiah," he said. "Now we can only hope that that verdict is executed. The defendants have that in their power and control."

Pamela L. Gellen and Jennifer Lewis, partners at Lewis & Gellen, also represented the hospital. The medical center's attorneys quickly left the courtroom and did not stop to provide comment.

The case is *Isaiah Ewing v. The University of Chicago Medical Center*, 13 L 13750.

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