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## New Trial Ordered Against Hospital and Doctor That Escaped \$25 Million Verdict

August 31, 2020

Romanucci & Blandin, LLC, a national personal injury firm primarily based in Chicago, is proud to announce that, in a divided opinion, the First District Appellate Court has ordered a new trial against St. Alexius Medical Center and radiologist Dr. Jeffrey Chung.

According to lead plaintiff's counsel, Robert Baizer, the 2018 jury rendered a \$25 Million verdict against an obstetrician in favor of Jesse Perez and his then 4-year-old twins, but found Dr. Chung and St. Alexius not liable. Plaintiff collected a total of \$3.125 million from the obstetrician and others.

"As the Appellate Court found, there were multiple prejudicial errors justifying a new trial," said Attorney Robert Baizer.

### BRIEF HISTORY

In June of 2013, Marilyn Perez gave birth to twin boys by cesarean section. At the birth, her abdomen and pelvis were rife with cancer. The cancer originated from a teratoma (ovarian cyst) which had ruptured. Marilyn, a PhD social worker and the 2011 Illinois School Social Worker of the Year, died seven months later, leaving her husband Jesse and the two little boys.

In August of 2012, Marilyn had gone to the St. Alexius emergency room with severe abdominal pain. She was not then pregnant. After a CT read by another radiologist diagnosed a tennis ball-sized teratoma, Dr. Chung read an ultrasound study and failed to note the teratoma, noting instead normal ovaries and no mass.

"The obstetrician then relied on Dr. Chung's report, and authorized her to proceed with in vitro fertilization. The rest is history," said Baizer.

### THE 213

Dr. Chung's 213 ultrasound report noted "no comparison," meaning that he didn't look at the CT while studying the ultrasound, so he then wouldn't have known about the CT finding of teratoma. "And that was what he went with at trial," said Baizer. "He claimed he didn't know about the CT, so he couldn't look at it. But that led to the first of the reversible errors found by the Appellate Court."

In his own Rule 213 disclosure, Dr. Chung said the exact opposite: “Dr. Chung will ... testify that based on his custom and practice he would have reviewed the CT scan ... and would have been aware of ... the teratoma. Further... it was also his custom and practice to compare the ultrasound to the CT. He will testify that even though the report states there was no comparison, it was his custom and practice to compare the films, and likely did so in 2012.”

The Trial Court, citing possible attorney client privilege, refused to allow plaintiff to introduce the 213 as an evidentiary omission and refused to allow plaintiff’s counsel to impeach Dr. Chung with it. The Trial Court found a distinction between a 213 disclosure for a party as opposed to an expert.

The majority opinion commented: “We consider it an absurd result to hold as the trial court did, that Chung’s expert witness that could be confronted with the disclosure but Chung could not.”

The Court at great length discussed how plaintiff was prejudiced by not being allowed to confront Dr. Chung on cross examination, even though plaintiff was able to bring out the 213 through an expert.

Emphasizing the power of cross examination, the Court noted: “Plaintiff should have been able to confront Chung with the stark contrast between that statement and his trial testimony.”

#### THE ACR GUIDELINE

The American College of Radiology guideline provides that if there is a prior exam of the same body part, a radiologist should compare the current exam with the prior one. Plaintiff’s radiology expert testified that the guideline was “a good, safe, prudent standard.”

The Trial Court barred plaintiffs from cross examining Dr. Chung, since he was not a member of the ACR, further emphasizing the importance of cross examination. The Court held: “As to prejudice we find that the Court’s ruling barred plaintiff’s from asking Chung ... to explain his decisions in light of the guideline... Plaintiff was not allowed to confront Dr. Chung with the guideline.”

#### APPARENT AGENCY

##### IPI 105.10

IPI 105.10 “made no mention of agency but referred strictly to whether Chung was an employee.” The trial court refused plaintiff’s modified IPI 105.10 adding the word “agent.” The Appellate Court noted that the 2019 revision of IPI 105.10, adding the word ‘agent’ renders it consistent with case law. The Court found that the erroneous instruction was likely to give undue weight to Chung’s testimony that he was not an employee.

#### THE CONSENT FORM

The St. Alexius consent form provided that “any or all physicians, residents or medical students... are not agents or employees.” The Court found “any or all” to be ambiguous, in that some or all or none of the physician are independent. With that in mind, the court found “that the failure to modify IPI Civil No. 105.10 as requested by plaintiff was a reversible error.”

The opinion discusses several other issues, including denying the defendants contention that the two-issue rule should bar plaintiff’s recovery, because the jury could have determined no proximate cause. The Court found the rule inapposite since the jury is instructed that the jury must first have determined whether Dr. Chung was negligent then whether that negligence was a proximate cause. Here the jury was denied evidence of Dr. Chung’s negligence.

“Although we are certainly gratified with the ruling, it is sad that Jesse Perez must be put through this ordeal again,” Baizer said.

Along with Baizer, the plaintiff was represented by Joseph Kolar and David Neiman, formerly of the law firm of Baizer Kolar Neiman, which merged into Romanucci & Blandin in 2019. If any questions please contact Robert Baizer at 847-970-8988.