

# The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2011

PHILADELPHIA, WEDNESDAY, APRIL 20, 2016

An **ALM** Publication

## Court Won't Overturn \$10.1M Award Against CHOP

**BY MAX MITCHELL**

*Of the Legal staff*

A Philadelphia judge has denied the Children's Hospital of Philadelphia's bid to overturn a \$10.1 million verdict awarded last year over a child's delayed meningitis diagnosis.

Philadelphia Court of Common Pleas Judge Denis P. Cohen last week denied post-trial motions in *Tillery v. Children's Hospital of Philadelphia*, which resulted in the third largest verdict out of the Philadelphia Court of Common Pleas last year. The ruling additionally awarded the plaintiffs delay damages, increasing the award by \$1.25 million.

**Andy Stern** of Kline & Specter, who handled the case for Shamir Tillery, said Cohen's 37-page opinion meticulously -addressed all the issues raised on appeal.

"Judge Cohen's comprehensive and well written opinion effectively addressed the defendants' meritless post-trial motions, as well as their opposition to our petition for delay damages," Stern said in an emailed statement. "On behalf of this young boy, who suffers from profound deafness and brain injury for

the rest of his life, we are very pleased with this outcome."

In November, a 12-member jury found the hospital and one of three defendant emergency room doctors liable for failing to promptly diagnose 11-month-old Tillery's bacterial meningitis during repeated emergency room visits.

The jury found CHOP 60 percent -liable for Tillery's injuries, which included -hearing loss, central language disorder, developmental and learning delays, and a loss of balance due to bone growth that affected his vestibular nerve. The jury also found the attending physician, Dr. Monika Goyal, 40 percent negligent for her conduct during Tillery's second trip to the ER.

Two other defendants were found not to be liable, but they were also stipulated to have been agents of the hospital.

Cohen's April 13 ruling denied requests for a judgment notwithstanding the verdict, a new trial, or remittitur.

"The plaintiffs produced weeks' worth of expert testimony explicitly stating what the standard of care was, that the defendants' failure to timely diagnose and treat the meningitis breached that standard of care, and, consequently, the breach

was a factual cause of the minor-plaintiff injuries," Cohen said.

The defendants' post-trial arguments focused mostly on the fairness of the expert testimony during trial, contending, among other things, that the testimony was cumulative, or outside the scope of the experts' reports.

Arguments that the jury should have been given a "two schools of thought" instruction was "little more than a red herring," Cohen said, adding that the experts had not presented differing schools of thought, but instead testified about "the contours of the standard of care" when it comes to the use of steroids for treating bacterial meningitis.

Cohen also rejected arguments that the plaintiff's experts were unqualified. In a footnote, he said courts have routinely -rejected the high standard for expert qualification advocated by the defendants.

"It is worth noting that the defendants' objections as to qualifications, taken together, make it virtually impossible for any expert to testify at all," Cohen said in a footnote. "They seek to preclude a pediatric emergency medicine expert from testifying because he is not a neurology expert, while simultaneously seeking to preclude a -neurology expert from testifying

because he is not a pediatric emergency expert."

The defendants had also argued Cohen should not have admitted testimony from experts about an evaluation of Tillery, but Cohen said the defendants had failed to perform their own re-evaluation to rebut the testimony.

"Defendants had two weeks before trial began to have their own experts reevaluate minor-plaintiff or prepare a rebuttal report," Cohen said. "Defendants elected instead to ignore the report for those two weeks and instead seek its preclusion via motion in limine filed on the eve of trial."

The defendants also pointed to testimony from an expert in which the expert -mentioned he suffered meningitis as an infant and had been treated with steroids. The defendants contended the testimony inflamed the jury to the extent that the only proper curative measure was a new trial.

Cohen noted that, after argument outside the presence of the jury, he had rejected a motion for mistrial, and instructed the jury to ignore the testimony. Cohen again rejected the argument that the testimony mandated a new trial.

"This court decided to give the jury more credit than to think that they would completely ignore all the expertise of the other doctors and experts because they were so swayed by this comment," Cohen said.

Benjamin A. Post of Post & Post, who represented the defendants, did not return a call for comment.