

DA 21-0313

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 25

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JADE HIGGINS, for the benefit of her minor son, E.A.,

Appellant,

v.

TERESA AUGUSTINE, M.D.,

Appellee.

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APPEAL FROM: District Court of the First Judicial District,  
In and For the County of Lewis and Clark, Cause No. BDV 2018-375  
Honorable Michael F. McMahon, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

John C. Doubek, Doubek, Pyfer & Storrar, PC, Helena, Montana

For Appellee:


Jill Laslovich, Christopher K. Oliveira, Crowley Fleck PLLP, Helena,  
Montana

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Submitted on Briefs: January 19, 2022

Decided: February 8, 2022

Filed:

  
Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Appellant Jade Higgins (Higgins) appeals from the April 1, 2021 Order on Dr. Augustine’s Limine Motions issued by the First Judicial District Court, Lewis and Clark County, and the subsequent defense verdict. We restate the issue on appeal:

*Whether the District Court abused its discretion in excluding portions of Higgins’s expert’s testimony not disclosed in accordance with M. R. Civ. P. 26 and the scheduling order.*

¶2 We affirm.

### **PROCEDURAL AND FACUTAL BACKGROUND**

¶3 Higgins, for the benefit of her son E.A., brought a medical malpractice case against Appellee, Teresa Augustine, M.D. (Augustine). Higgins alleged Augustine was negligent in performing E.A.’s circumcision and sought to recover damages for herself and E.A. Ultimately, the case was tried to a jury, which returned a unanimous verdict in favor of Augustine. This appeal arises from Higgins’s expert disclosure and the discovery related thereto and the District Court’s preclusion of Higgins from offering evidence, allegations, or testimony relating to her retained expert’s opinion that Augustine departed from the standard of care by either using incorrect scissors or by using the correct scissors improperly.

¶4 The Complaint and Demand for Jury Trial filed April 24, 2018 alleged “[Augustine] was negligent by failing to make sure that [E.A.] was secured before she began the circumcision surgery. Such was the proximate cause of the fact that [Augustine] then cut into [E.A.]” The Complaint made no allegations of malpractice related to either using

incorrect scissors or by using the correct scissors improperly. On August 6, 2020, Higgins filed her Notice of Intent to Call Expert Witnesses.<sup>1</sup> The disclosure is limited to one paragraph in which she identified Dr. Valerie J. Flaherman as an expert witness and advised as to her opinion as follows:

Dr. Flaherman performs circumcision procedures and is very familiar with the technique defendant indicated she used. She will opine that had the procedure been done correctly the untoward result in this case would not have occurred. The bleeding injury which occurred was likely the result of a combination of things. If the baby's leg nudged the defendant's hand or arm while she was performing the surgery, which itself could have been prevented, the injury is still unlikely. This suggests a deviation in terms of how the defendant proceeded to do the procedure. This injury would not have occurred in the absence of some deviation from standard care.

This written disclosure was never supplemented. On August 20, 2020, Augustine filed her expert disclosure, asserting Augustine's expert witness, Dr. Jack Elder, would opine Augustine did not breach the standard of care and specifically:

Although secure placement on a Circumstraint immobilizer board helps decrease the risk the baby will move during the course of the procedure, it is impossible for a physician to eliminate all movement. Babies can and do move during circumcision, and that movement can result in inadvertent injury. The simple fact that a restrained newborn's foot moves during the surgical procedure does not mean [E.A.] was not securely restrained nor does it mean the circumcision was improperly performed.

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<sup>1</sup> The Court's original scheduling order provided for Plaintiff to make expert disclosure on or before June 5, 2020, and Defendant to do so on or before June 19, 2020. By stipulation, which was approved by the Court, these deadlines were extended to August 6, 2020, and August 20, 2020, respectively.

Dr. Elder further opined Augustine to be well qualified to restrain newborns for circumcision and her use of the Circumstraint board was consistent with the standard of care.

¶5 In written discovery, Augustine asked Higgins to identify the standards of care from which Augustine allegedly departed. In response, Higgins responded Augustine “failed to adequately secure [E.A.] so she could safely perform the surgery” and “violated standard of care by not securing the baby.”<sup>2</sup> Although Augustine repeatedly attempted to secure Dr. Flaherman’s deposition, Higgins did not make Dr. Flaherman available for deposition for several months—long after the discovery deadline and only a week prior to the pretrial motions deadline.<sup>3</sup>

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<sup>2</sup> More particularly, Higgins responded to interrogatories 6 and 10 as follows:

INTERROGATORY NO. 6: Please describe every act and/or omission of Dr. Augustine Plaintiff alleges constitutes negligence.

ANSWER: Defendant failed to adequately secure Plaintiff’s son, so she could safely perform the surgery.

INTERROGATORY NO. 10: If Plaintiff contends that Dr. Augustine violated a statute, ordinance, rule, or regulation, and is a factor to be considered in establishing negligence, state the full citation for each such statute, ordinance, rule or regulation and the factual basis of each such claim.

ANSWER: She violated standard of care by not securing the baby.

<sup>3</sup> On August 20, 2020, Augustine’s counsel sent Higgins’s counsel an email indicating a desire to depose Dr. Flaherman. Augustine’s counsel indicated concern there was only two months remaining to complete discovery and requested dates to depose Dr. Flaherman be provided and requesting Higgins supplement her discovery responses. The record does not show a response from Higgins’s counsel to this email and Higgins did not at any time supplement her discovery responses to Interrogatories 6 and 10. On October 5, 2020, Augustine’s counsel reminded Higgins’s counsel he was supposed to contact Dr. Flaherman and provide available dates for her deposition. On October 19, 2020, Augustine’s counsel again requested to depose Dr. Flaherman

¶6 At her deposition, Dr. Flaherman, for the first time, opined that the injury that occurred in this case did not seem to her to be consistent with the use of the correct tools used in the correct way—she opined either incorrect scissors were used or the correct scissors were used improperly by Augustine during the subject surgical procedure. Dr. Flaherman acknowledged this opinion was not based on any notation in the record and her expert disclosure contained no such disclosure. Following the deposition, Augustine moved in limine to exclude evidence that Augustine departed from the standard of care by either using incorrect scissors or by using the correct scissors improperly as Higgins failed to timely disclose this expert opinion. The District Court agreed, finding Higgins “utterly failed” to timely disclose Dr. Flaherman’s opinion that Augustine departed from the

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and sought dates for such. A few days later, on October 22, 2020, Augustine’s counsel sent a follow-up email to Higgins’s counsel suggesting Dr. Flaherman be deposed in November or December to which Higgins’s counsel indicated he would “try and get some dates from my expert.” On November 5, 2020, Augustine’s counsel again sought information as to potential dates to depose Dr. Flaherman without response. On November 13, 2020, Augustine’s counsel again sought “update on your expert’s availability for deposition” from Higgins’s counsel to which Higgins’s counsel again indicated he would “try and get some dates from my expert.” On November 20, 2020, Augustine’s counsel sent Higgins’s counsel an email expressing concern that she had been trying to set up Dr. Flaherman’s deposition since August, expressing concern that the deposition would not be complete by the motions deadline, and indicating she had not yet received any potential dates to depose Dr. Flaherman. Higgins’s counsel then represented Dr. Flaherman to be available for Zoom deposition on January 18, 2021, if that worked for Augustine’s counsel. Augustine’s counsel then attempted to confirm this date with Higgins’s counsel via emails of December 9 and 18, 2020, to which Higgins’s counsel responded Dr. Flaherman would be available the week of January 25, 2021. On December 22, 2020, Augustine’s counsel again, via email, attempted to confirm Dr. Flaherman’s deposition could occur on January 28, 2021. Discovery closed October 9, 2020. The parties, however, stipulated that various depositions including that of Dr. Flaherman, could occur after the close of discovery. Dr. Flaherman was deposed on January 28, 2021.

standard of care by either using incorrect scissors or using the correct scissors inappropriately and precluded presentation of this scissors-related evidence.

### **STANDARD OF REVIEW**

¶7 We review a district court’s evidentiary rulings, including rulings on the admissibility of expert testimony, for an abuse of discretion. *Reese v. Stanton*, 2015 MT 293, ¶ 17, 381 Mont. 241, 358 P.3d 208; *Daley v. Burlington N. Santa Fe Ry.*, 2018 MT 197, ¶ 3, 392 Mont. 311, 425 P.3d 669; *Larchick v. Diocese of Great Falls-Billings*, 2009 MT 175, ¶ 52, 350 Mont. 538, 208 P.3d 836 (reviewing a district court’s grant of a motion in limine for an abuse of discretion). A district court abuses its discretion only if it acts arbitrarily without employment of conscientious judgment or exceeds the bounds of reason resulting in substantial injustice. *Larchick*, ¶ 39.

### **DISCUSSION**

¶8 On appeal, Higgins asserts her expert disclosed before her deposition that the surgery had been improperly performed and then disclosed the issue further upon deposition. Higgins asserts Dr. Flaherman’s deposition testimony merely amplified how the procedure had been improperly performed and was sufficient to meet the underlying policy to eliminate surprise and promote effective cross examination of expert witnesses. Contrarily, Augustine asserts the late disclosure of the “scissors opinions” violated M. R. Civ. P. 26, violated the Scheduling Order, and caused her prejudice, warranting the limited sanction of precluding evidence of the “scissors opinions.” Augustine further asserts the exclusion of this evidence should be upheld as it is based entirely on speculation.

¶9 Here, Higgins appeals a discretionary pretrial discovery ruling. “[T]he authority to grant or deny a motion in limine rests in the inherent power of the court to admit or exclude evidence and to take such precautions as are necessary to afford a fair trial for all parties.” *Daley*, ¶ 7 (quoting *State v. Ankeny*, 2010 MT 224, ¶ 38, 358 Mont. 32, 243 P.3d 391) (alteration in original). “We evaluate a district court’s sanction for an inadequate expert witness disclosure to determine whether the consequences of the sanction relate to the extent and nature of the actual discovery abuse; the extent of prejudice to the opposing party; and whether the district court warned the answering party of the consequences.” *Sharbono v. Cole*, 2015 MT 257, ¶ 12, 381 Mont. 13, 355 P.3d 782. “[W]e generally defer to the district court because it is in the best position to determine both whether the party in question has disregarded the opponent’s rights, and which sanctions are most appropriate.” *Daly*, ¶ 3 (quoting *Spotted Horse v. BNSF Ry.*, 2015 MT 148, ¶ 15, 379 Mont. 314, 350 P.3d 52) (alteration in original).

¶10 M. R. Civ. P. 26(b)(4)(A), in relevant part, provides:

- (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.
- (ii) A party may depose any person who has been identified as an expert whose opinions may be presented at trial.

Here, Higgins filed a rather scant one-paragraph expert disclosure, broadly asserting the surgical procedure was not performed correctly and an untoward result occurred because it was not done correctly. The only particular means by which Higgins asserted the surgery

was not performed correctly—asserted in both the Complaint and expert witness disclosure of Dr. Flaherman—was the failure to properly secure E.A. for the surgery. No allegations of malpractice related to either using incorrect scissors or by using the correct scissors improperly is contained in Dr. Flaherman’s expert disclosure. By itself, Dr. Flaherman’s expert disclosure does not support admission of evidence related to using improper scissors or improperly using scissors during the subject surgical procedure.

¶11 Higgins asserts that before her deposition her expert disclosed the surgery had been improperly performed and then disclosed the issue further upon deposition. We agree with Higgins the purpose of expert disclosures is to avoid trial by ambush and to promote effective cross examination of expert witnesses. *See Reese*, ¶ 32; *Sharbono*, ¶ 12. We also recognize it is not uncommon for an expert to make more thorough and detailed disclosure during the expert’s deposition subsequent to filing of the expert’s Rule 26 disclosure. The issue then is whether under the totality of the circumstances a subsequent deposition disclosure unfairly prejudices the opposing party in addressing any newly disclosed information such that the new information should be excluded. *See Sharbono*, ¶ 12.

¶12 Under the totality of the circumstances here, the District Court did not abuse its discretion in precluding Higgins from presenting evidence as to either using incorrect scissors or incorrect use of scissors during the subject surgical procedure. On its face, Dr. Flaherman’s expert disclosure clearly provides no facts or opinions related to incorrect scissors or incorrect use of scissors being the means by which the surgery had been improperly performed. Higgins failed to supplement her expert disclosure. Higgins’s



response to Interrogatories 6 and 10 also did not identify failure to correctly use surgical scissors as the means by which the surgery had been improperly performed. Higgins also failed to ever supplement her answers to these interrogatories. If it was Higgins's intention to submit a scant expert disclosure and then use her expert's deposition to supplement it, her counsel should have diligently responded to Augustine's counsel to accomplish Dr. Flaherman's deposition with sufficient time for Augustine to be able to assess and prepare to address Dr. Flaherman's deposition-related opinions that were not previously disclosed in discovery responses or in her Rule 26 expert disclosure. Augustine's counsel made initial request to depose Dr. Flaherman in August 2020. Higgins's counsel did not respond for nearly four months—until after the discovery deadline had passed—and then indicated a proposed deposition date another month away. By the time of Dr. Flaherman's deposition, expert disclosure and discovery deadlines had long passed and the pretrial motion deadline was a week away. Augustine had no opportunity at that time to develop contrary evidence to rebut the newly disclosed scissors opinions and also had no opportunity to consult with her own expert to supplement her own expert disclosure or to reopen Dr. Flaherman's deposition for further inquiry after consultation with her own expert. This prejudiced Augustine's ability to prepare for trial and to address the newly disclosed scissors opinions.

¶13 The District Court Scheduling Order properly warned the parties of the potential for sanctions for non-compliance with discovery deadlines. The District Court evaluated the particular prejudice to Augustine of Dr. Flaherman's untimely scissors-related disclosures

and rather than excluding Dr. Flaherman's testimony in its entirety, properly limited the exclusion to the scissors-related opinions, which were untimely disclosed. *See Sharbono*, ¶12. As such, on the record before us, we find no abuse of discretion and affirm the District Court's evidentiary rulings.

### **CONCLUSION**

¶14 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ JAMES JEREMIAH SHEA

/S/ BETH BAKER

/S/ DIRK M. SANDEFUR

/S/ JIM RICE