

# PROFESSIONAL NEGLIGENCE LAW REPORTER

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# PROFESSIONAL NEGLIGENCE LAW REPORTER

AMERICAN ASSOCIATION FOR JUSTICE  
Formerly the Association of Trial Lawyers of America (ATLA6)

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# RECENT CASES

## DENTISTRY

### Prosthodontist provides improper treatment for patient's TMJ

*Marino v. Donatelli*, Ga., DeKalb Co. St., No. 08A86750, Sept. 30, 2009.

Christine Marino, 34, suffered from temporomandibular joint dysfunction (TMJ). She was referred to prosthodontist Herman Donatelli, who treated the problem by affixing 16 temporary crowns to Marino's posterior teeth. After the treatment, Marino suffered spasms and pain and was unable to relax her jaw muscles. She consulted a new health care provider, who attempted a complete reconstruction of the work previously performed by Donatelli, including placement of permanent crowns. Additionally, Marino required 16 root canals over the next four months.

Marino sued Donatelli, alleging he negligently attempted to correct her TMJ by placing the temporary crowns. The plaintiff charged that the defendant should have corrected her bite within its natural dimension.

The jury awarded \$81,000.

*Plaintiff's Counsel*

**Lloyd N. Bell**, Atlanta, Ga.

**J. Marcus Howard**, Atlanta, Ga.

*Comment:* For another TMJ case, see *Libson v. Stack*, 14 PNLN 148 (Oct. 1999), alleging use of aggressive splint therapy to treat TMJ. Mark D. Cummings and Tracy L. Brandt, both of Arlington, Va., represented the plaintiff.

A document in *Libson* is available through the Court Documents section at p. 76, courtesy of counsel.

## HOME HEALTH CARE

### Home health aide continues medication refill procedure despite signs of overdose

*Hall v. I.V. Care of Middle Ga., Inc.*, Ga., Bibb Co. St., No. 59967, Jan. 28, 2010.

Mearline Hall, 66, received regular in-home nursing care from home health aides employed by I.V. Care of Middle Georgia, Incorporated. During a visit to Hall's home, an I.V. Care aide was refilling the medications Fentanyl and Marcaine into a pain pump that was

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implanted into Hall's back. As the aide injected the medications, Hall complained of tingling fingers. Nevertheless, the aide continued injecting the medications.

Hall subsequently lost consciousness and was later taken to a hospital by ambulance. She remained comatose for 25 days before her death. Hall is survived by her husband and two adult children.

Hall's husband, individually and on behalf of her estate, sued I.V. Care, alleging its aide administered an overdose of the medications by using an improperly sized needle to inject them into the pump. The plaintiffs claimed that there was nothing defective about the pain pump that was implanted in Hall's back and, therefore, her death resulted from a drug overdose.

The jury awarded \$1 million plus about \$278,300 in prejudgment interest.

*Plaintiffs' Counsel*

**James J. Sadd**, Atlanta, Ga.

**Timothy K. Hall**, Macon, Ga.

## LAW

### Convicted defendant must show actual innocence to prove legal negligence against postconviction attorney

*Kuehne v. Hogan*, \_\_\_ S.W. 3d \_\_\_, 2010 WL 2265158 (Mo. App. W. Dist. June 8, 2010).

A Missouri appellate court held that actual innocence is a required element of a legal malpractice claim against an attorney who provides postconviction relief to a criminal defendant.

Here, Christopher Kuehne was charged with statutory rape and statutory sodomy of his daughter. His defense was that the allegations were untrue and that the child's mother had a history of fabricating false allegations of sexual abuse. Nevertheless, the jury convicted Kuehne. He moved for postconviction relief, asserting that he had received ineffective assistance of counsel in that his lawyer failed to call four witnesses who would have supported his defense theory. The court denied the motion.

An appellate court reversed and remanded for a hearing.

On remand, public defender Susan Hogan served as Kuehne's postconviction attorney. At the hearing, Hogan did not call any of the four witnesses, and the court affirmed the denial of Kuehne's motion. Subsequently, Kuehne sued Hogan for legal negligence, alleging she failed to call the four witnesses at the motion

hearing. Had the attorney done so, Kuehne argued, he would have prevailed at the hearing. Hogan moved to dismiss for failure to state a claim. The trial court granted Hogan's motion.

Affirming, the appellate court noted that to survive a motion to dismiss, Kuehne must prove facts supporting the required elements of a legal negligence claim and show that but for the attorney's negligence, the result of the underlying proceeding would have been different.

The court acknowledged that whether a plaintiff may bring a malpractice claim against his postconviction attorney is a novel issue in Missouri but added that there are several state law cases addressing the elements necessary to bring a negligence action against trial counsel. Citing case law, the court found that where a plaintiff has been convicted of a crime and later sues his attorney for professional negligence, factual innocence of the underlying criminal charge is a necessary element of the cause of action. To hold otherwise would allow a convicted criminal to profit from his own wrongdoing, the court said, adding that this goes against public policy, shocks the public conscience, and engenders disrespect for the courts.

Applying these principles here, the court found that similar public policy concerns prevail in the context of attorneys providing postconviction relief. Thus, Kuehne's proof of innocence is essential to satisfying the causation element of his legal negligence claim. Although he asserts in his petition that he is innocent, these are merely bare assertions without factual support. Kuehne must instead show that but for his postconviction attorney's actions, he would have been acquitted at a new trial. The testimony of the proposed witnesses could have, at best, impeached the mother's testimony, the court found.

Thus, the court concluded, Kuehne has failed to state a legal malpractice claim against Hogan.

## MEDICINE

### Statute requiring 90 days' notice of intention to file medical negligence suit violates separation of powers

*Waples v. Yi*, \_\_\_ P.3d \_\_\_, 2010 WL 2615576 (Wash. July 1, 2010).

The Washington Supreme Court held that Wash. Rev. Code § 7.70.100(1) (2006), which mandates that a plaintiff provide a health care provider with 90 days' notice of his or her intent to file a medical negligence suit, is an unconstitutional violation of the state's separa-

ration of powers principles.

The court acknowledged that Washington's constitution does not possess a formal separation of powers clause, but found that the division of state government into separate branches has been presumed throughout the state's history. At issue here, the court found, is whether § 7.70.100(1) conflicts with relevant court procedural rules and whether the statute involves procedural or substantive law.

Comparing § 7.70.100(1) with Civil Rule 3(a), the rule for commencing a civil action, the court concluded that the statute adds an additional step for commencing suit beyond those outlined in CR 3 (a), and that the failure to provide the notice required by § 7.70.100(1) results in a lawsuit's dismissal, even where it was properly filed and served. Citing case law, the court found that if a statute and a court rule cannot be harmonized, the court rule will prevail in procedural matters and the statute in substantive matters. Section 7.70.100(1), which involves the operation of the courts, involves procedural law and will not prevail over CR 3(a), the court found. Consequently, the court held that the notice requirement of § 7.70.100(1) unduly conflicts with the commencement requirements of CR 3(a) and is unconstitutional because it conflicts with the judiciary's power to set court procedures.

As such, the court reversed dismissals based on non-compliance with § 7.70.100(1) in consolidated cases alleging dental and medical negligence.

*Plaintiffs' Counsel*

**Jerald D. Pearson**, Snoqualmie, Wash.

Edward C. Harper, Kirkland, Wash.

George A. Steele, Shelton, Wash.

*Amicus Curiae Counsel*

Bryan P. Harnetiaux, Spokane, Wash.

George M. Ahrend, Moses Lake, Wash.

### **Hospital discharges unstable patient to inappropriate mental health facility**

*DiMilla v. Fairfield*, Mass., Plymouth Co. Super. Ct., No. CV2005-00941, Feb. 10, 2010.

When John DiMilla, 36, experienced suicidal thoughts and depression, he went to a hospital emergency room. A physician there ordered DiMilla's transfer to a secure, inpatient psychiatric facility. The physician signed a blank discharge order and transfer papers; however, DiMilla remained at the hospital overnight because there was no bed immediately available at another facility.

When a secure psychiatric placement was still unavailable the following morning, DiMilla was discharged to

the Family Continuity Program (FCP)—an unsecured inpatient mental health program. After spending the night at FCP, DiMilla left the facility and suffered fatal injuries when he stepped in front of an oncoming truck. He is survived by his parents.

DiMilla's estate sued the hospital and FCP, alleging failure to properly hospitalize a suicidal patient. Among other things, the plaintiff charged that DiMilla should have been kept in a secure facility that was equipped to handle his condition. The plaintiff did not claim lost income.

FCP settled before trial for a confidential amount. The jury awarded about \$338,400, finding the hospital solely liable.

*Plaintiff's Counsel*

Robert D. Stewart, Boston, Mass.

Deborah A. Concepcion, Boston, Mass.

### **Child suffers Erb's palsy after obstetrician mishandles shoulder dystocia during delivery**

*Bennet v. Yusaf*, N.Y., Queens Co. Sup., No. 26138/06, Apr. 29, 2010.

Jayden Bennet's mother was admitted to a hospital for his delivery. The fetus's birth weight was estimated to be seven pounds. Bennet's mother was administered Pitocin and remained in labor for about nine hours. When shoulder dystocia occurred, obstetrician T.ricia Yusaf applied the corkscrew maneuver and a sweeping motion to dislodge the baby's shoulders.

Shortly after Bennet's delivery, he was diagnosed as having suffered Erb's palsy. After several years of physical therapy, his injuries have resolved.

Bennet's mother, on his behalf, sued Yusaf, the hospital, and an attending resident, alleging failure to perform a cesarean section, mishandling of the shoulder dystocia, and misestimation of the fetal weight, which was actually 11 pounds, 14 ounces. Among other things, the plaintiff claimed the defendants (1) should have timely discontinued the Pitocin, which she claimed led to or worsened the shoulder dystocia; (2) failed to perform the McRoberts maneuver by pushing her thighs to her shoulder; (3) used excessive traction to relieve the shoulder dystocia; and (4) failed to perform a sonogram to estimate Bennet's fetal weight.

The hospital and resident settled before trial for

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## RECENT CASES

\$25,000. The jury subsequently awarded the plaintiff \$485,000 against the obstetrician.

*Plaintiff's Counsel*

Andrew D. Leftt, New York, N.Y.

### Use of vacuum extractor, fundal pressure injures baby during delivery

*Brown v. St. Joseph's Regl. Med. Ctr.*, N.J., Passaic Co. Super., No. PAS-L-4314-07, Mar. 24, 2010.

During Sean Brown's delivery at a hospital, the fetal monitor showed signs of fetal distress, including persistent variable decelerations. A resident, who was being supervised by obstetrician Mahipa Pallimulla, was given permission to attempt a vacuum extraction. As the resident applied the vacuum extractor, Pallimulla applied fundal pressure.

After his birth, Brown's condition deteriorated, and he began suffering seizures. He was diagnosed as having a subgaleal hemorrhage and permanent brain damage. Now 8, he suffers from developmental disabilities and motor delays, and requires special education.

Brown's mother, individually and on his behalf, sued the hospital and Pallimulla, alleging failure to perform a cesarean section and improper use of the vacuum extractor.

The parties settled for \$1.8 million, paid equally by the defendants.

*Plaintiffs' Counsel*

Michael B. Zerres, Chatham, N.J.

### Otolaryngologist fails to timely diagnose Ewing's sarcoma

*Doe v. Roe*, Cal., Orange Co. Super., confidential dkt. no., Apr. 22, 2010.

Doe, 42, suffered from nose bleeds. She underwent a sinus biopsy and was told by Roe, her treating otolaryngologist, that the results were inconclusive. When her symptoms continued over the next several months, Doe returned to the physician. Additional testing revealed a lesion that had eroded her right orbit. Doe then discovered that the final pathology report from the previous sinus biopsy had shown a malignancy but that Roe had not seen the report.

Doe underwent surgery to remove portions of her orbit and her eye and required radiation and chemotherapy. She had been earning about \$70,000 annually as a financial analyst but is now on disability.

Doe sued Roe, alleging failure to timely diagnose Ewing's sarcoma. The defense argued that although the pathology report should have been reviewed, Doe's treatment still would have included removal of her eye.

The parties settled before trial for \$850,000.

*Plaintiff's Counsel*

Daniel M. Hodes, Irvine, Cal.

### Gastric bypass patient discharged despite elevated heart rate

*McChesney v. Steiner*, Ky., Fayette Co. Cir., No. 08-0872, Mar. 11, 2010.

Arthur McChesney, 59, underwent gastric bypass surgery at a hospital. After the surgery, he developed an elevated heart rate and was given Atenolol. Two days after the operation, bariatric surgeon Joshua Steiner discharged McChesney, who was complaining of pain at the time of his discharge.

The following day, McChesney called his treating physician's office and reported scrotal pain. He was told to put on a jock strap. The next day McChesney died at his home. The cause was determined to be peritonitis secondary to a gastric leak. McChesney had been a store manager earning about \$75,000 annually and is survived by his wife and five minor children, two of whom have special needs.

McChesney's wife, individually and on behalf of his estate, and the children sued the hospital and Steiner, alleging failure to detect the leak before discharging McChesney from the hospital. The plaintiffs asserted that in light of McChesney's elevated heart rate and complaints of pain, he should have undergone additional testing, such as a CT scan, to determine the underlying cause.

The hospital settled with the plaintiffs before trial for an undisclosed amount. The jury awarded approxi-

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mately \$2.53 million, finding the hospital 70 percent liable and Steiner 30 percent at fault.

*Plaintiffs' Counsel*

Benjamin L. Kessinger III, Lexington, Ky.  
Shelby C. Kinhead Jr., Lexington, Ky.

### **Internists fail to timely diagnose patient's invasive carcinoma**

*Doe v. Roe Internists*, Mass., confidential dkt. no., May 2010.

Doe, 53, went to an internist, complaining of pain in her left breast. She was referred for a mammogram, which was read as normal and unchanged from a previous study. A year later, Doe consulted a different internist. During this exam, Doe complained of increased sensitivity in the breast. The physician ordered a mammogram, which was again interpreted as normal.

Two years later, Doe returned to the second internist, complaining that her left breast had become bigger, fuller, and more taut and that her nipple was slightly inverted. She was referred to a breast surgeon, who diagnosed Stage 3 invasive carcinoma. Doe underwent a mastectomy and six cycles of chemotherapy.

Two years later, Doe died. She is survived by her husband and two daughters.

Before her death, Doe sued the two internists and their employers, alleging failure to timely diagnose breast cancer. The defendants argued that referral to a breast specialist was not warranted based on Doe's mammogram results and that nothing they could have done would have affected Doe's outcome. The defendants also asserted that Doe had been noncompliant with her follow-up care.

Doe did not claim lost income.

The parties settled before trial for \$1 million.

*Plaintiff's Counsel*

**Philip J. Crowe Jr.**, Boston, Mass.

**Michael J. Harris**, Boston, Mass.

### **Cardiologist fails to rule out rare tumor**

*Stephens v. Bavikati*, Tex., Dallas Co. 101st Jud. Dist., No. 07-13155-E, June 2010.

Darrick Stephens, 32, experienced headaches, heart palpitations, shortness of breath, and chest pains. He consulted cardiologist Neeta Bavikati, who ordered a nuclear stress test. Several days later, Stephens met with the doctor to learn the test results, which were normal.

Several months later, Stephen died of heart failure. An autopsy revealed a pheochromocytoma—a rare adrenal gland tumor that can cause the body to overproduce certain hormones, raise blood pressure, and place stress on the heart. Stephens is survived by his wife and two minor children.

Stephens's wife, individually and on behalf of his estate, sued Bavikati and her employer, alleging failure to timely diagnose the tumor. The plaintiffs claimed that the defendants should have tested the amount of adrenaline in Stephens's bloodstream and tested his urine for the presence of adrenaline. Had the tumor been timely diagnosed, the plaintiffs charged, Stephens could have undergone a laparoscopy that would have cured his medical condition.

The plaintiffs did not claim lost income.

The jury awarded about \$3.55 million. The parties then settled for a confidential amount.

*Plaintiffs' Counsel*

Robert Bodoin, Fort Worth, Tex.

Daniel Sullivan, Fort Worth, Tex.

### **OB patient with sickle cell trait suffers paralysis after nurse fails to timely summon doctor**

*Doe v. Roe Hospital*, D.C., D.C. Superior Court, No. 2007 CA 002022M, Sept. 2009.

Jane Doe, 22, carried the sickle cell trait, which became a complicating factor in her pregnancy. Consequently, when she was admitted to a hospital to deliver her child, orders were put in place to call for a doctor if Doe's blood pressure fell below a certain level.

After the delivery, Doe's blood pressure dropped precipitously. She was administered phenylephrine, but her blood pressure fell a second time. After her blood pressure finally stabilized, she was moved to the recovery floor, where it was noted that she could not move her legs. Doe has since been diagnosed as suffering from paraplegia.

She sued the hospital, alleging its nurse failed to timely call a doctor when her blood pressure plummeted postdelivery. The plaintiff argued that the blood pressure drop caused a lack of adequate blood flow and proper perfusion which, in turn, caused an infarction in her spinal cord that led to the paralysis.

Doe did not claim lost income.

The parties settled before trial for a confidential amount.

*Plaintiff's Counsel*

**Barry J. Nace**, Washington, D.C.

**Christopher T. Nace**, Washington, D.C.

## RECENT CASES

### Infant sustains oxygen deprivation after midwife applies fundal pressure

*O'Come v. Sherman Health Sys., Ill.*, Cook Co. Cir., No. 04 L 5058, Apr. 15, 2010.

Helen O'Come was admitted to a hospital to deliver her child. Midwife Mary Traub was attending to O'Come under the sponsorship of obstetrician Jae Han, who was out of the country during the delivery. As the labor progressed, the baby's heart rate dropped. Traub applied fundal pressure while O'Come continued to push. This caused compression of the umbilical cord, which resulted in oxygen deprivation during the last 15 minutes of the delivery.

As a result, O'Come's son has been diagnosed as having severe cerebral palsy. Now 13, he suffers spastic, involuntary movements and requires a wheelchair. He is also unable to speak.

O'Come's son, through a guardian, sued Traub's employer, Han, and the hospital, alleging mishandling of the delivery and the fetal distress. Among other things, the plaintiff argued that Traub negligently applied fundal pressure and allowed O'Come to continue pushing instead of discontinuing this and applying intrauterine resuscitation when fetal distress occurred. Additionally, suit claimed the labor and delivery nurse should have applied intrauterine resuscitation. The lawsuit alleged that both Traub and the nurse should have consulted an obstetrician when the fetal heart rate dropped and that the hospital failed to have adequate policies and procedures in place to provide a physician readily available for midwife support.

Finally, the plaintiff claimed that Han was liable for Traub's negligence.

The parties settled for \$9.5 million. The hospital paid \$7.5 million, and the obstetrician and Traub's employer paid \$1 million each.

The plaintiff's experts included Frank J. Bottiglieri, obstetrics, Towson, Md.; Pamela Kelly, obstetrics and midwifery, Tampa, Fla.; Laura Mahlmeister, obstetrical nursing, Belmont, Cal.; Howard Stein, neonatology, Toledo, Ohio; and Robert Zimmerman, neuroradiology, Philadelphia, Pa. The defendants' experts included Fred Harlass, maternal-fetal medicine, El Paso, Tex.; Elisabeth D. Howard, nurse midwifery, Providence, R.I.; Marcia Patterson, obstetrical nursing, Naperville, Ill.; Stephen Glass, pediatric neurology, Woodinville, Wash.; and James Smith, obstetrics, Arlington Heights, Ill.

*Plaintiff's Counsel*

**Barry R. Chafetz,**  
**Margaret M. Power,** and  
**Shawn S. Kasserman,** all of Chicago, Ill.

### Baby suffers catastrophic injuries after improperly handled delivery

*N. Trust. Co. v. Ghia, Ill.*, Cook Co. Cir., No. 04 L 7500, Sept. 30, 2009.

When she was more than 41 weeks pregnant, Alecia Owen was admitted to a hospital to deliver her child. She was administered Pitocin and an epidural, and continued in labor over the course of a morning. Early that afternoon, a labor and delivery nurse called obstetrician Nirali Ghia several times to report intermittent fetal heart decelerations. The physician ordered an amnioinfusion and reportedly later told several attending nurses that Owen did not require a cesarean section.

Later that afternoon, the decelerations became more prolonged, and the baby's heart rate began to drop. More than an hour later, Ghia attempted an unsuccessful vacuum delivery and then ordered an emergency cesarean section.

Owen's son was born in a depressed condition and had Apgar scores of zero at one and five minutes. Now 7, he has been diagnosed as having spastic quadriplegia and cerebral palsy. Additionally, after the delivery, placental pathology allegedly revealed a 6-cm umbilical cord hematoma consistent with surgical trauma.

The child's parents sued the hospital and Ghia, alleging failure to properly handle fetal distress and perform a timely cesarean section.

Additionally, the plaintiffs claimed that the hospital nurses failed to properly implement the chain of command to effect an earlier delivery, and that the hematoma resulted from trauma sustained during the cesarean section.

The defendants argued that an earlier delivery was not medically indicated and that the hematoma happened spontaneously before the delivery.

The parties settled at trial for \$9.5 million, including a structured settlement with a present cash value of \$4.75 million and an expected payout of \$15.2 million, which fully funds the child's life-care plan. The hospital contributed \$7.5 million, and the obstetrician paid her \$2 million policy limits.

The plaintiffs' experts included Linda Holt, obstetrics, Wilmette, Ill.; Michael Belfort, maternal-fetal medicine, Salt Lake City, Utah; Laura Mahlmeister, labor and delivery nursing, Belmont, Cal.; Eric Eichenwald, neonatology, Houston, Tex.; and Patrick Barnes, neuroradiology, Palo Alto, Cal.

The defendants' experts in the case were Harry Farb, obstetrics, Minnetonka, Minn.; Mark Scher, pediatric neurology, Cleveland, Ohio; Andrew Morgan, pediatrics, Peoria, Ill.; Patricia Witcher, labor and delivery

nursing, Atlanta, Ga.; and Trevor Macpherson, placental pathology, Pittsburgh, Pa.

*Plaintiffs' Counsel*

**Marina E. Ammendola**, Chicago, Ill.

**Henry B. Vess III**, Wheaton, Ill.

### **Emergency room physicians fail to timely diagnose ruptured esophagus**

*Scarpa v. Tyler Meml. Hosp.*, Pa., Lackawanna Co. Com. Pleas, No. 2000-CV-2229, Apr. 19, 2010.

Michael Scarpa, 55, went to a hospital emergency room complaining of right chest pain and a history of vomiting for three days. Emergency room physician Daniel Coster ordered chest X-rays, which he interpreted as normal, and discharged Scarpa with instructions to see his family doctor in two days. Coster then transferred Scarpa's studies to a radiologist for review. This physician noted evidence of possible fluid in the lungs and suggested further studies if Scarpa's symptoms persisted.

The following day, emergency room physician Jeffrey Lubin was on duty but did not call the Scarpas to tell them of the radiologist's findings, which were not yet formally transcribed. A day later, Scarpa collapsed at home. He was taken to the hospital, but efforts to resuscitate him were unsuccessful. An autopsy revealed an ulcerated and perforated esophagus. He is survived by his wife and three children, one of whom is a minor.

Scarpa's wife, individually and on behalf of his estate, sued the hospital, Coster, and Lubin, alleging failure to timely diagnose the perforation. The plaintiffs charged that the hospital's established policy required Lubin to call the Scarpas and tell them that the radiologist's interpretation of the chest X-rays differed from Coster's previous interpretation and that hospital staff failed to follow the established procedures. Additionally, the plaintiffs claimed that since Scarpa had undergone esophageal surgery two years before at the hospital, Coster should have included such a problem in his diagnosis or retrieved the surgical records, which were readily available to him.

The defense countered that the plaintiffs were comparatively negligent for failing to tell hospital personnel about the surgery when Scarpa came to the emergency room. The plaintiffs did not claim lost income.

The jury awarded \$1.2 million, finding the hospital 40 percent liable, Lubin 30 percent at fault, Coster 20 percent responsible, and Scarpa 10 percent negligent.

The plaintiffs' experts were Norman Snow, cardiothoracic surgery, Chicago, Ill.; Robert G. Brueckner, health care management, Joplin, Mo.; and William J.

O'Riordan, emergency medicine, La Jolla, Cal.

The defendants' experts in this case were J. Russell Walsh, health care policy and procedures, Norristown, Pa.; John W. Patterson, emergency medicine, Bethlehem, Pa.; and Matthew R. Astroff, gastroenterology, Allentown, Pa.

*Plaintiffs' Counsel*

**Matthew A. Cartwright**, Plains, Pa.

### **Health plan fails to timely diagnose, treat impending stroke**

*Howard v. Kaiser Found.*, Cal., Judicate W. arb., Nov. 18, 2009.

Timothy Howard, 46, experienced blindness in his right eye. He consulted his primary care physician at a Kaiser health facility, who referred him to ophthalmologist Paul Deiter. Deiter's differential diagnosis included ocular migraine and transient ischemic attack (TIA) of the retina.

Howard's symptoms continued, and he developed headaches, neck pain, and tingling in one of his fingers.

He then consulted Kaiser neurologist Marika Issakhanian. She diagnosed ocular migraine headaches and ordered an MRI and Magnetic Resonance Angiogram of the head and neck to be completed several weeks later. Before undergoing the tests, Howard suffered an ischemic stroke. Physicians later determined that the stroke resulted from a carotid dissection.

While at the hospital following the stroke, Howard acquired an infection that resulted in complications leading to bilateral below-the-knee amputations. He now suffers cognitive deficits, uses a wheelchair, and requires 24-hour care. He had been an assistant principal earning about \$95,000 annually.

Howard and his wife claimed the Kaiser health plan and its affiliated foundation and medical group were liable for the physicians' failure to timely diagnose and treat an impending stroke. The claimants argued that based on Howard's life-threatening symptoms, he should have been evaluated for a TIA or carotid dissection on an urgent basis and administered the clot-busting drug tPA.

The health plan argued that Howard was not a candidate for tPA.

The claimants were awarded \$5 million at arbitration. Of this amount, \$250,000 was awarded to Howard's wife.

The claimants' experts in the case included Michael E. Gold, neurology, Santa Monica, Cal.; Carol R. Hyland, life-care planning, Lafayette, Cal.; Robert W. Johnson, economics, Los Altos, Cal.; Sharon K. Kawai, physical

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rehabilitation, Fullerton, Cal.; and Jeffrey A. Schaeffer, neuropsychology, Los Angeles, Cal.

*Claimants' Counsel*

**Robert F. Vaage**, San Diego, Cal.

### Obstetrician fails to recommend full hysterectomy to patient with strong family history of cancer

*Downs v. Trias*, Conn., New Haven Co. Super., No. UWY-CV-07-5009295S (X01), May 19, 2010.

Allison Downs, 46, underwent an elective hysterectomy, which was performed by gynecologist Orlito Trias. Trias did not recommend that Downs have her ovaries removed as part of the operation.

Slightly more than a year later, Downs was diagnosed as having Stage 3 ovarian cancer, necessitating surgery and several rounds of chemotherapy. The cancer initially went into remission but has now recurred, giving Downs a life expectancy of less than five years.

Downs and her husband sued Trias and his professional corporation, alleging the doctor negligently failed to recommend that Downs have a full hysterectomy in light of a strong family history of cancer.

According to the plaintiffs, the doctor should have advised Downs to have her ovaries removed or alerted her to the increased risk of cancer associated with ovary retention.

The plaintiffs did not claim lost income.

The jury awarded \$5 million, including \$1 million to Downs's husband.

The plaintiffs' experts were Scott W. Smilen, gynecology, New York, N.Y.; William P. Irvin, gynecological oncology, Newport News, Va.; and Thomas J. Rutherford, gynecological oncology, New Haven, Conn.

The defendants' experts were Mark R. Laser, gynecology, Trumbull, Conn.; Allan R. Mayer, gynecological oncology, Hartford, Conn.; and Ellen Matloff, genetics, New Haven, Conn.

*Plaintiffs' Counsel*

**Peter M. Dreyer**, Stamford, Conn.

**Richard A. Silver**, Stamford, Conn.

### Triage nurse fails to adequately assess critically ill child

*Doe v. Roe Hosp.*, Cal., Los Angeles Co. Super., confidential dkt. no., Dec. 9, 2009.

Doe, 18 months, experienced diarrhea and vomiting for two days. When his lips turned blue and purple, his

father took him to a hospital emergency room. There, a triage nurse assigned Doe an acuity level of three out of five—which mandates treatment within 60 minutes.

Doe remained in the waiting room for the next three hours, his condition continuing to worsen. When he was called for treatment, nurses and a doctor were unsuccessful in starting an IV. Intraosseous lines were then placed into both of Doe's tibias, but his left foot began swelling.

Doe was subsequently transferred to another hospital, where he was diagnosed as having viral myocarditis. He also required amputation of his left forefoot due to gangrene. Because of future orthopedic problems he might face related to the amputation, he could require multiple additional surgeries, including shortening of the right leg.

Doe filed suit against the hospital and the triage nurse, alleging negligent triage. Had he been seen earlier, the plaintiff argued, he could have been adequately hydrated, his myocarditis would have been diagnosed sooner, and the circulation in his foot would not have been compromised.

The defendants argued that Doe was severely decompensated when he arrived at the hospital.

The parties settled at mediation for \$420,000. The nurse paid \$225,000, and the hospital paid the rest.

*Plaintiff's Counsel*

**Bruce M. Brusavich**, Torrance, Cal.

## NURSING HOME

### Resident dies after home fails to implement fall risk precautions

*Sepp v. Sherman W. Ct.*, Ill., Kane Co. Cir., No. 07 L 210, Apr. 16, 2010.

Else Sepp, 72, suffered from mild dementia and was at high risk for falling. While pushing her wheelchair around the Sherman West Court nursing home, she fell, suffering injuries to her face, head, and elbow. She was transferred to a hospital, where she was diagnosed as having suffered a subdural hematoma.

Sepp died of her injuries the following day and is survived by her two adult daughters.

One of Sepp's daughters, on behalf of her estate, sued the nursing home, alleging it failed to follow fall risk precautions outlined in Sepp's care plan. These included providing adequate assistance and supervision to Sepp while she ambulated around the facility and providing her with a mobility monitor or gait belt.

The defendant argued that Sepp had a reduced life expectancy due to her health issues and deteriorating quality of life at the time of her death.

The parties settled before trial for \$500,000.

*Plaintiff's Counsel*

Joshua L. Weisburg, Chicago, Ill.

### Home fails to prevent, treat resident's pressure sore

*Ivey v. Jewish Home & Hosp. for Aged*, N.Y., Bronx Co. Sup., No. 18057/03, Feb. 23, 2010.

Viola Ivey, an 89-year-old nursing home resident, suffered from dementia and other health problems. She developed a pressure sore on her lower back that progressed from Stage II to Stage IV within several weeks. Despite a debridement procedure, Ivey's condition worsened, and she was transferred to a hospital. There, she developed an infection and died several weeks later. She is survived by her five grandchildren.

One of Ivey's grandchildren, on behalf of her estate, sued the home, alleging failure to prevent and treat the sore. Among other things, the plaintiff claimed that the defendant should have timely repositioned Ivey and provided an air mattress to relieve her condition.

The jury awarded \$150,000.

*Plaintiff's Counsel*

Jason C. Molesso, Mineola, N.Y.

*Comment:* For another case involving pressure sores, see *Schmelzle v. Barry Manor L.L.C.*, 23 PNLN 50 (Apr. 2008). **Thomas P. Cartmell** and **Derrick Potts**, both of Kansas City, Mo., represented plaintiffs. Documents in *Schmelzle* are available through the Court Documents section at p. 76, courtesy of Mr. Cartmell.

### Home fails to prevent resident from pulling out tracheostomy, feeding tubes

*Rissinger v. Roe Nursing Home*, Ill., Kane Co. Cir., No. 09 L 383, Apr. 8, 2010.

Lorena Rissinger, 89, suffered from various medical problems, including swallowing difficulties. She required a tracheostomy collar and a gastrostomy feeding tube and had a history of pulling on and disconnecting them. The day after one such episode, she attempted to disconnect her tubing yet again. Later that day, she was found unresponsive and comatose, with her pulse oximetry monitor

and her tracheostomy and gastrostomy tubes disconnected. She was transferred to a hospital, where she subsequently died. Her death was reportedly attributed to anoxic brain damage.

Rissinger is survived by her adult daughter.

The daughter, on behalf of Rissinger's estate, sued the home, alleging it failed to properly monitor Rissinger and prevent her from disconnecting her tubes. Among other things, suit claimed that the defendant should have administered Haldol to Rissinger, ordered that she be physically restrained, and supervised her more closely after her attempts to disconnect the tubing in the days before her last episode.

The parties settled for a confidential amount before trial.

*Plaintiff's Counsel*

John M. Saletta, Chicago, Ill.

## PHYSICAL THERAPY

### Therapist allows patient to use treadmill without supervision

*Kemmett v. Norwell Physical Therapy & Sports Rehab.*, Mass., Plymouth Co. Super., No. CV2006-00295, Oct. 14, 2009.

Carol Kemmett, 66, suffered from shoulder strain and was receiving physical therapy at Norwell Physical Therapy & Sports Rehabilitation (Norwell PT). When she arrived for an appointment with physical therapist Lynn Putignano, she asked if she could use a treadmill. Putignano, who was attending to another patient, told Kemmett she could use the machine.

As Kemmett set the time and speed on the treadmill, it accelerated suddenly, and she fell, suffering a knee contusion and a compound fracture of her left shoulder. A part-time home health care provider, she missed about a year of work, incurring about \$5,000 in lost income.

Kemmett sued Norwell PT, alleging that its employee had allowed her to use the treadmill without adequate supervision.

The defendant argued that the plaintiff was at fault for getting on the treadmill alone and without adequate supervision.

The jury awarded about \$80,100, finding the plaintiff 50 percent at fault.

*Plaintiff's Counsel*

Gerald Tutor, Newton, Mass.

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## COURT DOCUMENTS

*Documents can be downloaded from the Exchange at [www.justice.org/exchange](http://www.justice.org/exchange).*

### DOCUMENTS \$50

**LIBSON V. STACK**, p. 67 (transcript of a medical review panel hearing in a case alleging that an orthodontist had improperly treated a patient's temporomandibular joint pain with

splint therapy). No. PN621.

### DOCUMENT SETS \$95

**SCHMELZLE V. BARRY MANOR L.L.C.**, p. 75 (expert depositions in a nursing home negligence case alleging inadequate staffing and improper treatment of a patient suffering from dementia and immobility). No. PN814.

## COURT DOCUMENTS BY TOPIC: NURSING HOME

*Documents can be downloaded from the Exchange at [www.justice.org/exchange](http://www.justice.org/exchange).*

### DOCUMENTS \$50

**DOE V. ASHWOOD HEALTHCARE CTR.**, 11 PNLN 93 (June 1996) (expert deposition transcript in a case alleging failure to investigate nursing home employee backgrounds). No. PN513.

**GIBSON V. APPLETON CITY MANOR**, 14 PNLN 93 (June 1999) (deposition of plaintiff's expert on the issue of geriatrics in a case alleging failure to care for a resident's cast). No. PN612.

**KNUTSON V. 1240 PINEBROOK ROAD, L.L.C.**, 20 PNLN 152 (Oct. 2005) (deposition of plaintiff's orthopedic surgery expert in a case alleging failure to properly position a nursing home resident in her wheelchair). No. PN736.

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**BUTLER V. BRIAN CTR. HEALTH & REHAB./ TAMPA, INC.**, 14 PNLN 92 (June 1999) (trial transcripts and expert depositions in a case alleging negligent care and treatment of a nursing home resident). No. PN610.

**DOE V. ROE**, 13 PNLN 12 (Feb. 1998) (motions on whether to introduce evidence of health department surveys and photographs in a case alleging failure to adequately reposition a nursing home resident). No. PN560.

**FOSTER V. EVERGREEN HEALTHCARE, INC.**, 15 PNLN 36 (Mar. 2000) (the parties' briefs in a case holding punitive damages are recoverable under Indiana's survival statute). No. PN628.

**FRIDAY V. TEX. HEALTH ENTERS., INC.**, 12 PNLN 31 (Mar. 1997) (the parties' settlement agreement and plaintiffs' petition, interrogatories, and requests for production and admissions in a case alleging a nursing home was liable for failing to diagnose and treat a resident's bowel obstruction). No. PN539.

**HENRY V. W. MONROE GUEST HOUSE, INC.**, 20 PNLN 91 (June 2005) (plaintiffs' appellate briefs in a case holding that a claim for lost dignity under Louisiana's nursing home residents bill of rights act is not subject to review by a medical review panel). No. PN729.

**RICE V. SKYLINE NURSING HOME**, 11 PNLN 116 (July 1996) (plaintiff's second amended petition, attorney information sheet, and damages summary and analysis in a case alleging improper nursing home care). No. PN522.

## COURT DOCUMENTS BY TOPIC: CONSUMER PROTECTION—FDCPA CASES

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**BASS V. STOLPER, KORITZINSKY, BREWSTER & NEIDER, S.C.**, 40 ATLA L. Rep. 210 (Aug. 1997) (plaintiff's brief in a case holding the payment obligation arising from a dishonored check is a debt under the FDCPA). No. LR3210.

**CLOMON V. JACKSON**, 8 PNLN 105 (July 1993) (plaintiff's brief on whether collection letters implying a lawyer has reviewed them violate the FDCPA). No. PN357.

### DOCUMENT SETS \$95

**AGAN V. KATZMAN & KORR, P.A.**, 20 PNLN 169 (Nov. 2005) (the class notice, as well as plaintiffs' amended complaint and motion and brief for class certification in a class action lawsuit alleging use of improper debt collection tactics in violation of the FDCPA). No. PN741.

**DUFFY V. LANDBERG**, 13 PNLN 65 (May 1998) (plaintiffs' briefs in a case holding that an attorney whose letterhead was used to collect payment on dishonored checks could be liable under the FDCPA). No. PN588.

**ONG V. AM. COLLECTIONS ENTERS., INC.**, 42 ATLA L. Rep. 131 (May 1999) (the parties' memoranda of law on plaintiff's motion for summary judgment as well as defendant's motion to dismiss in a case holding that a written notice requirement for a consumer disputing a debt violates the FDCPA). No. LR3430.

**RYAN V. WEXLER & WEXLER**, 40 ATLA L. Rep. 211 (Aug. 1997) (plaintiff's appellate briefs in a case holding that the FDCPA applies to third-party collectors of dishonored checks). No. LR3253.

**SCOTT V. JONES**, 7 PNLN 186 (Dec. 1992) (plaintiff's appellate briefs on whether a lawyer who files lawsuits seeking collection of debts may be liable as a debt collector under the FDCPA). No. PN332.

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Documents can be downloaded from the Exchange at [www.justice.org/exchange](http://www.justice.org/exchange).

### DOCUMENTS \$50

**DAIGLE V. AMI/ST. JUDE HOSP.**, 39 ATLA L. Rep. 247 (Aug. 1996) (deposition of an oncology expert in a case alleging a radiologist misread a mammogram). No. LR2762.

**DOE V. W. QUEENS COMMUNITY HOSP.**, 42 ATLA L. Rep. 101 (Apr. 1999) (trial transcript excerpts containing the testimony of plaintiffs' breast surgery expert witness in a case alleging misdiagnosis of breast cancer and failure to inform the patient of the option of undergoing a lumpectomy with radiation instead of a mastectomy). No. LR3403.

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**BALL V. SHANAHAN**, 38 ATLA L. Rep. 144 (May 1995) (expert testimony in a case alleging failure to diagnose breast cancer). No. LR2376.

**BENNETT V. MCGRATH**, 39 ATLA L. Rep. 155 (May 1996) (the parties' depositions of defendant's cancer surgeon expert in a case alleging failure to diagnose breast cancer). No. LR2687.

**GORMAN V. LAROCHE**, 38 ATLA L. Rep. 192 (June 1995) (deposition transcripts of plaintiff's and defendant's expert witnesses in a case alleging failure to timely diagnose breast cancer). No. LR2411.

## COURT DOCUMENTS BY TOPIC: OBSTETRICAL NEGLIGENCE

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**BROWN v. H.C.A. HIGHLAND HOSP. SERVS.**, 10 PNLN 148 (Oct. 1995) (plaintiffs' supplemental petition on breach of contract, damages, attorney fees, medical negligence, and loss of consortium in a case in which plaintiffs alleged hospital liability for failure to monitor fetal distress). No. PN462.

**JACKSON v. U.S.**, 13 PNLN 191 (Dec. 1998) (deposition transcript of plaintiffs' perinatology expert in a case alleging the use of excessive traction during a delivery). No. PN590.

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**REECE v. JACKSON**, 9 PNLN 70 (May 1994) (obstetrics expert's deposition in a case alleging failure to recognize that an infant would be macrosomic). No. PN403.

**RODRIGUEZ v. SAN BERNARDINO COMMUNITY HOSP.**, 17 PNLN 196 (Dec. 2002) (deposition of plaintiffs' perinatology expert in an obstetrics case alleging mishandling of a prolapsed umbilical cord). No. PN669.

**WELLS v. MACGREGOR MED. ASSOC.**, 9 PNLN 68 (May 1994) (plaintiffs' appellate brief in a medical negligence case in which plaintiffs alleged that an obstetrician failed to attend a baby's delivery). No. PN405.

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**BROWN v. BEATON**, 18 PNLN 75 (May 2003) (plaintiff's opening and closing arguments to the jury in a case

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**ROMERO v. KAPLAN**, 9 PNLN 48 (Apr. 1994) (plaintiffs' motion to preclude the testimony of defendant's vocational rehabilitation expert and the depositions of that expert and defendant in a case in which plaintiffs alleged failure to diagnose, and negligent delivery of, a macrosomic infant). No. PN397.

**SKONIECZNY v. GARDNER**, 16 PNLN 131 (Sept. 2001) (deposition transcripts of plaintiffs' plastic surgery and neurosurgery experts in a case alleging improper vacuum extraction and mishandling of shoulder dystocia). No. PN655.

**WINGO v. ROCKFORD MEML. HOSP.**, 12 PNLN 8 (Feb. 1997) (depositions of plaintiffs' obstetrics expert and defendants' nursing expert in a case alleging improper discharge of a pregnant woman with ruptured membranes). No. PN538.

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