



ROBINS  KAPLAN^{LLP}

JUSTICE REPORT

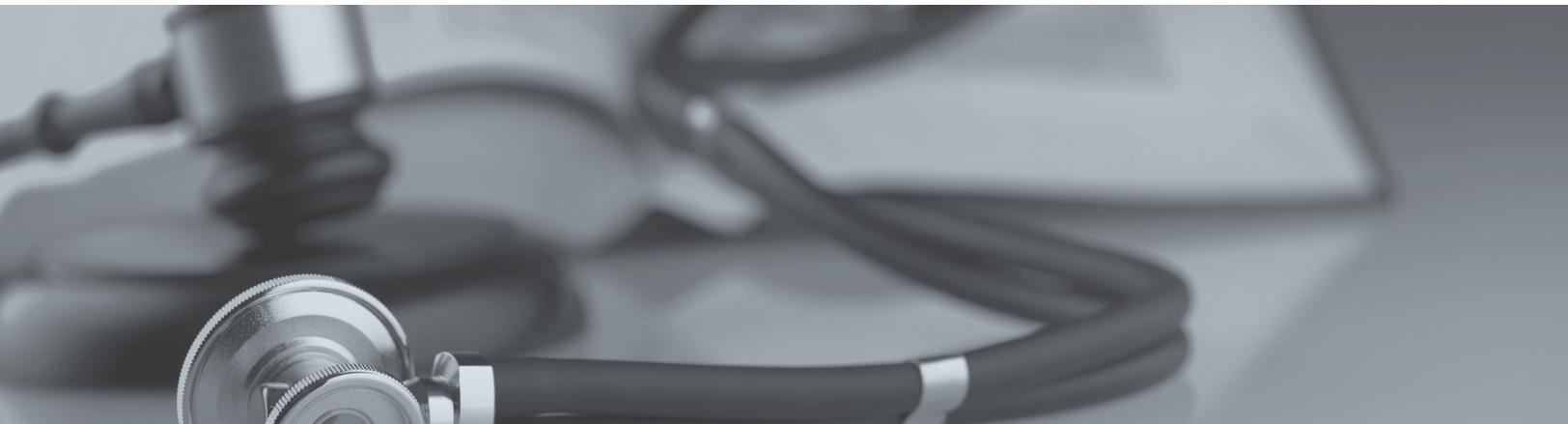
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REWRITING THE ODDS TO ADVANCE ACCESS TO JUSTICE

BY JASON DEPAUW AND SETH ZAWILA



JASON
DEPAUW



SETH
ZAWILA

Robins Kaplan is often called on to help parties and their counsel advance complex, and often novel, issues of law that advance access to justice. Our role in a particular case can be direct—we are often retained to brief and argue at both the trial and appellate court level. Our role in a particular case can be far more indirect—we are often retained to advise counsel on the merits of a particular issue and invite them in to moot their arguments in our state-of-the-art courtroom. And our role is often to support the party and their counsel by advancing their position as an amicus participant at the appellate level. Recently, our team at Robins Kaplan has secured victories on behalf of our clients and those parties we supported in our role as an amicus participant, ensuring the courthouse doors remain open in the pursuit of justice.

Marquardt v. Schaffhausen, 941 N.W.2d 715 (Minn. 2020), for example, is a medical malpractice action where Patricia Marquardt suffered a brain injury when she developed an untreated infection after undergoing a knee replacement surgery. Mrs. Marquardt’s trial counsel secured a hard-fought and well-deserved verdict against her orthopedic surgeon. After the verdict, the doctor moved for a directed verdict on the grounds that Mrs. Marquardt’s experts lacked foundation to testify as to the cause of her injuries. The district court denied those motions, but the court of appeals reversed and remanded for a new trial on the grounds that the experts were not qualified to testify as to causation.

Robins Kaplan was retained by the plaintiff’s counsel to brief and argue the case before the Minnesota Supreme Court. Ultimately, the Supreme Court agreed with our client that the district court properly exercised its broad discretion as the gatekeeper of expert evidence to admit the experts’ testimony as to whether the knee surgery

caused Mrs. Marquardt's brain injury. The Supreme Court reversed and remanded to the court of appeals for consideration of the other issues the doctor raised on appeal. On remand, the court of appeals rejected all of the doctor's four other arguments and ruled in favor of Mrs. Marquardt, affirming the trial court's decisions, thus allowing Mrs. Marquardt's verdict to stand.

In another case before the Minnesota Supreme Court, our team at Robins Kaplan, including Jason DePauw, was called on to serve as an amicus participant on behalf of Minnesota Association for Justice (MAJ) in *Warren v. Dinter*, 926 N.W.2d 370 (Minn. 2019). The Court took up the question of whether a hospitalist's decision to deny a person admission to a hospital could constitute medical malpractice. As amicus, MAJ supported the plaintiff's position that a hospitalist could, in fact, owe a duty to the patient despite no direct physician-patient relationship.

The facts in *Warren* are tragic. Susan Warren sought treatment from a nurse practitioner in a clinic for various symptoms, including abdominal pain, fever, and chills. The nurse practitioner ran tests, which indicated Ms. Warren had an infection and needed to be hospitalized for treatment. The nurse practitioner called the local hospital to seek Ms. Warren's admission, and she spoke with the hospital's hospitalist, Dr. Richard Dinter, whose role was to either admit Ms. Warren to the hospital or advise the nurse practitioner of a different plan. Dr. Dinter, who was the sole gatekeeper to the hospital doors, denied Ms. Warren's admission to the hospital. She was found dead three days later, having died of sepsis caused by

an untreated staph infection. The district court granted summary judgment against the plaintiff, which the court of appeals affirmed. The Minnesota Supreme Court, however, ruled in favor of the plaintiff and reversed the dismissal, finding that Minnesota's well-established standard for whether the doctor owed Ms. Warren a duty was premised on foreseeability, which should be tried to the jury. The plaintiff prevailed, and with our support as amicus counsel, the courthouse doors remain open to many other patients who have been harmed or killed by medical negligence.

In *Ingersoll as Tr. for Ingersoll v. Innovis Health, L.L.C.*, No. A19-1813, 2020 WL 4434605 (Minn. Ct. App. Aug. 3, 2020), Robins Kaplan fought for its client's interests by appealing a premature summary judgment order. In the case, Seth Zawila represented a woman whose husband had been tragically killed from a miscalculated methadone overdose issued by a physician's assistant. At the district court level, the judge granted summary judgment to the defendant by finding that the husband played a superseding role in his own death, because he nasally ingested the methadone. On appeal, Seth argued that no evidence showed the method of methadone intake independently killed the husband, that it had expert support it could not have independently killed the husband, and that ample evidence existed in the fact record as to what instructions the man and his wife received when prescribed methadone. The Minnesota Court of Appeals agreed, holding that the question of superseding cause was a question for the jury and remanded the case for trial.

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In *Jayne v. City of Sioux Falls*, WL 2992164 (D.S.D. June 4, 2020), Robins Kaplan attorneys Brendan V. Johnson, Timothy Billion, Philip Sieff, and Anthony Schrank successfully opposed a motion for summary judgment. The case involves the tragic drowning death of a 5-year-old child in a city park at a location where two drowning deaths had previously occurred. The defendant, the City of Sioux Falls, argued that South Dakota’s recreational immunity statute immunized it from suit in this case and that, despite its knowledge of the dangers of the location, it could not be held liable. Our team argued that such a result was inappropriate and against the text and meaning of the recreational immunity statute. The court agreed and ordered the case to proceed for trial.

In *Jepsen v. Pope County*, we were again called on to serve as an amicus participant on behalf of Minnesota Association for Justice to support the plaintiff’s quest to hold child protection workers accountable for the tragic and entirely preventable death of 4-year-old Eric Dean at the hands of his father’s girlfriend. 938 N.W.2d 60 (Minn. Ct. App. 2019), review granted Mar. 17, 2020. In the short time that Eric was alive, people close to him had allegedly repeatedly reported to child protection workers

that they believed Eric was being neglected and abused at the hands of his father’s girlfriend. The plaintiff alleges that those child protection workers failed to fulfill their duties under the Reporting of Maltreatment of Minors Act to protect Eric from the father’s girlfriend, who ultimately killed him when she threw him against a wall.

The legal issue at the heart of this case is whether the child protection workers are entitled to raise a broad, oftentimes absolute common law immunity defense or whether they are entitled only to the immunity set forth in the Reporting of Maltreatment of Minors Act itself, which is based on a “due care” standard. This novel statutory abrogation question has never before been addressed by a Minnesota court. Before joining Robins Kaplan, Jason DePauw represented the plaintiff in this case and raised this issue on a partial judgment on the pleadings, which the district court denied and the court of appeals affirmed. The Minnesota Supreme Court granted review of this important question, and Jason is continuing his pursuit of justice for Eric Dean’s death by representing MAJ as an amicus participant. Oral arguments for this case are set for the Supreme Court’s December calendar, and a decision is expected sometime in 2021.





COVID IMMUNITY: NO, NOT THAT KIND OF IMMUNITY

BY HOLLY DOLEJSI



**HOLLY
DOLEJSI**

As COVID-19 barrels through Minnesota and the nation, the people of our state look for a vaccine to provide immunity. At the same time, some of our state legislators have seized on this opportunity to obtain a different type of immunity—immunity from liability. In Minnesota, a number of COVID-19 immunity bills were introduced toward the end of the regular legislative session. If passed, they would have provided broad immunity for employers, medical providers, nursing homes, and other businesses.¹

While no immunity bill has passed in Minnesota so far, thanks in large part to the good work done by the Minnesota Association for Justice (MAJ), one bill of particular interest to our practice area saw some traction. SF 4603, a medical immunity bill, received a hearing in the Health and Human Services Senate Finance and Policy Committee. At the hearing, Joel Carlson (an MAJ lobbyist) and Chris Messerly (Robins Kaplan Partner) testified against the bill.

Describing the bill, Chris Messerly explained, “Hospitals and healthcare providers want a ‘get out of jail free’ card for harming Minnesotans. They are trying to take advantage of the pandemic to deprive Minnesotans of their constitutional right to a jury trial based on a claim that healthcare providers are incapable of consistently providing adequate medical care during the pandemic.” The bill is so broad it would make medical providers immune from criminal, civil, and administrative liability for harm or damages caused to patients.

Joel Carlson’s testimony highlighted the bill’s effect of stripping away the constitutional right to a jury trial, and Chris Messerly explained to the committee that the law in Minnesota takes into account the circumstances within which care is provided, negating the need for this type of immunity bill.

Bipartisan opposition to this extreme bill was such that its author was unable to pass it out of her own Republican-controlled Senate committee. “In that committee, this anti-consumer bill died the death it deserved,” said Chris Messerly. As the pandemic rages on, however, there are ongoing efforts to get the governor to issue an executive order giving immunity during the peacetime emergency. To date, his office has put Minnesotans’ rights ahead of wrongdoers and has not been willing to issue such an order. Continued diligence to prevent the implementation of COVID-19 liability immunity is therefore necessary so that the constitutional rights of Minnesotans are not compromised.

1. https://www.revisor.mn.gov/bills/text.php?number=SF4603&version=latest&session=ls91&session_year=2020&session_number=0,
https://www.revisor.mn.gov/bills/text.php?number=HF4664&type=bill&version=0&session=ls91&session_year=2020&session_number=0

MASS TORT INVESTIGATIONS

Robins Kaplan LLP is currently investigating many new potential cases. Please contact our Mass Tort Group if you have any questions or know of any individuals whose case should be evaluated.

Elmiron: For the first time, in June 2020 the manufacturer of the painful bladder syndrome drug Elmiron updated its labeling to warn that pigmentary changes in the retina have been identified with long-term use of the drug.¹ Nearly two years prior to this label change, *Ophthalmology*, the journal of the American Academy of Ophthalmology, had published an article already linking Elmiron with pigmentary maculopathy.² Pigmentary maculopathy may cause difficulty reading, slow adjustment to changes in lighting, and blurred vision. These changes may be irreversible.

Injectafer: This intravenous iron supplement prescribed to patients with iron deficiency anemia has been linked to severe hypophosphatemia—a dangerously low level of phosphorus in the blood that can cause life-threatening complications.³

Keyboard Dusting Sprays: After huffing keyboard dusting spray, drivers have lost control of their vehicle, resulting in deaths and injuries to innocent bystanders.

Premature Hip Implant Failures: Stryker Rejuvenate and Stryker LFIG COCR V40 implants, among others, have been involved in premature hip failure cases the Mass Tort attorneys may litigate.³

Taxotere: Studies and reports have associated permanent hair loss (alopecia) with the use of chemotherapy drug Taxotere (docetaxel).⁴

Tribal Opioid Claims: The firm is considering litigating on behalf of Native American Tribes' claims against the manufacturers and distributors of prescription opioids for their alleged role in creating the opioid epidemic.

Zofran: This anti-nausea drug prescribed “off label” for morning sickness is associated with increased risk of cleft palate and congenital heart defects.⁵

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1. U.S. Food and Drug Administration, June 16, 2020 Supplemental Elmiron Package Insert. DRUGS@FDA, available at https://www.accessdata.fda.gov/drugsatfda_docs/label/2020/020193s0141bl.pdf.
 2. William A. Pearce et al., Pigmentary Maculopathy Associated with Chronic Exposure to Pentosan Polysulfate Sodium. *OPHTHALMOLOGY*. E. Pub. May 22, 2018, available at <https://doi.org/10.1016/j.ophtha.2018.04.026>.
 3. Concerns about Metal-on-Metal Implants, available at www.fda.gov.
 4. See, e.g., Kluger, Permanent Scalp Alopecia Related to Breast Cancer Chemotherapy by Sequential Fluorouracil/Epirubicin/Cyclophosphamide (FEC) and Docetaxel: A Prospective Study of 20 Patients, *Annals of Oncology* at 1 (May 9, 2012); Prevezas et al., Irreversible & Severe Alopecia Following Docetaxel or Paclitaxel Cytotoxic Therapy for Breast Cancer, *160 Br. J. Dermatology* 883-885 (2009); Tallon et al., Permanent Chemotherapy-Induced Alopecia; Case Report and Review of the Literature, *63 J. Am. Academy of Derm.* 333-336 (2010).
 5. M. Anderka et al. Medications Used to Treat Nausea and Vomiting of Pregnancy and Risk of Selected Birth Defects. *Birth Defects Res A Clin Mol Teratol.* (Jan. 2012); JT Anderson et al. Ondansetron use in Early Pregnancy and the Risk of Congenital Malformations - A Register Based Nationwide Cohort Study. *Pharmacoepidemiology and Drug Safety.* (Oct. 2013).

RECOGNITION

HOLLY DOLEJSI RECEIVES *MINNESOTA LAWYER* DIVERSITY AND INCLUSION AWARD



**HOLLY
DOLEJSI**

Holly Dolejsi received *Minnesota Lawyer's* 2020 Diversity & Inclusion Award. This award recognizes institutions and individuals who have “gone above and beyond in their efforts” to create a more diverse and inclusive legal community.

TERESA FARISS MCCLAIN RECOGNIZED AS ‘WOMAN WORTH WATCHING’ BY *PROFILES IN DIVERSITY JOURNAL*



**TERESA FARISS
MCCLAIN**

Profiles in Diversity Journal named Teresa Fariss McClain to its 2020 Women Worth Watching list, which recognizes women pioneers across the globe who are making a difference in their workplaces and communities. McClain has devoted her practice to helping others—helping the injured seek justice, helping women lawyers to advance in the profession, and helping to create opportunities for those in her community. She has helped to achieve numerous seven-figure results for her clients, including a 2019 jury verdict for over \$3 million.

CHRIS MESSERLY RECOGNIZED BY *BENCHMARK LITIGATION*



**CHRIS
MESSERLY**

Benchmark Litigation recognized Robins Kaplan LLP as a recommended litigation firm in Minnesota and New York and Chris Messerly as a Minnesota Litigation Star.

JASON DEPAUW APPOINTED TO MINNESOTA SUPREME COURT ADVISORY COMMITTEE



**JASON
DEPAUW**

Jason DePauw has been appointed to the Minnesota Supreme Court’s Advisory Committee on the Rules of General Practice. The committee is responsible for monitoring the rules, considering requests for rule changes, and making recommendations to the Supreme Court. The committee also reviews local court rules proposed by the individual judicial districts. Jason will serve a three-year term.

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