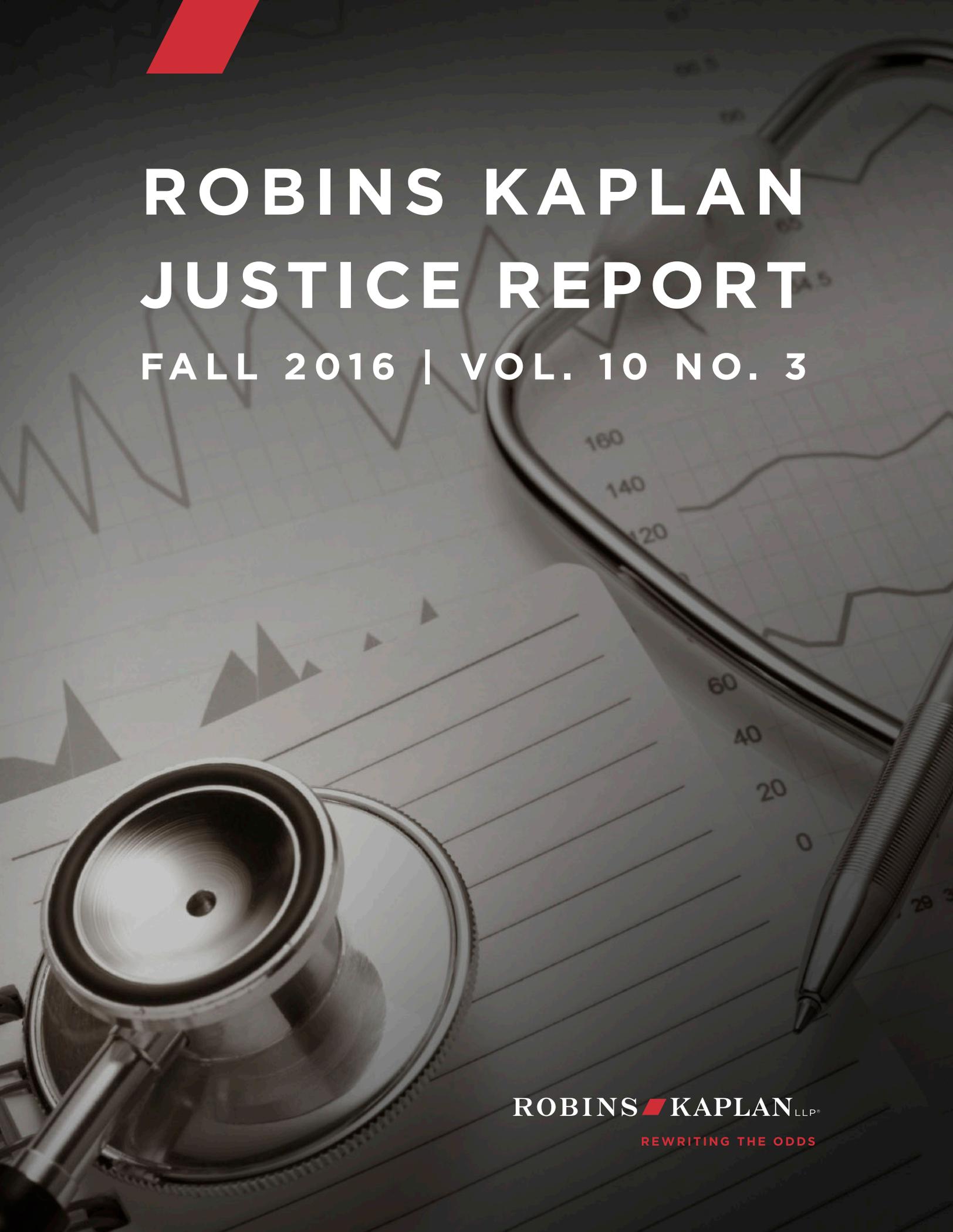




ROBINS KAPLAN JUSTICE REPORT

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ROBINS  KAPLAN^{LLP}

REWRITING THE ODDS

INSIDE THIS ISSUE

2. THE FALLACY OF TORT REFORM

7. INTRODUCING ELIZABETH M. FORS

4. SELECTED RESULTS

7. PARALEGAL SPOTLIGHT: LISA BIRCHEN

5. ANTITRUST VIOLATIONS AND YOUR CLIENTS - THREE THINGS TO KNOW

7. UP & COMING ATTORNEYS AND UNSUNG LEGAL HEROES

6. DRUG AND DEVICE INVESTIGATIONS

THE FALLACY OF TORT “REFORM”

BY ELIZABETH FORS



ELIZABETH FORS

The tortfeasor lobby and insurance industry say there is a “medical malpractice crisis” and that our tort system needs to be “reformed.” Nothing could be further from the truth. Tort “reform” (more accurately: “deform”) does almost nothing to decrease health care costs, and it limits Americans’ access to justice in courts, particularly for women, minorities, and the poor. Those who want to deny people justice say medical malpractice cases must be limited to stop defensive medicine and reduce insurance costs.¹ The fundamental basis of their anti-justice advocacy is founded on the false pretense that medical malpractice lawsuits are a major reason for high insurance rates and the costs of defensive medicine.

The anti-justice advocates’ most common tactic is pushing damages caps, which limit how much plaintiffs can be compensated when a negligent health care provider harms them or kills their loved one. Their substantial financial contributions to lawmakers have been quite successful. At least 30 states have passed laws that substitute politicians’ judgment for the jury’s when determining how best to compensate people harmed by malpractice.² However, did insurance costs go down after the adoption of caps? Did patients receive better care?

NO SIGNIFICANT HEALTH CARE SAVINGS

In 2009, the Congressional Budget Office, a nonpartisan department supporting the U.S. Congress and public, reported “even if the country enacted an entire menu of extreme tort restrictions, it could go no farther than to find an extremely small percentage of health care savings, about 0.5 percent, far lower than advocates have estimated.”³ In 2013, the U.S. spent about \$3 trillion on health care – about \$9,523 per person.⁴ That equals a savings of \$4.76 per person. One researcher concluded, “*recent evidence finding zero or small effects suggests that it is time for policymakers to abandon the hope that tort reform can be a major element in healthcare cost control.*”⁵

NO INCREASED PATIENT SAFETY

Medical error is the third leading cause of death in the United States. In fact, preventable malpractice kills 251,454 people per year.⁶ That is comparable to about five Boeing 737s crashing every day. Only heart disease (611,000) and cancer (585,000) kill more Americans.⁷ These preventable and deadly errors cost Americans between \$17 billion and \$29 billion per year.⁸ Even health care executives such as Dr. David Mayer, a vice-president at MedStar Health in Maryland, admits, “Way too many people are being harmed by unintentional medical error and it needs to be corrected.”⁹

FEWER SEEK JUSTICE

The truth is, the number of malpractice suits filed seriously underestimates how big a national problem preventable malpractice is to society. A 1991 Harvard study reviewed about 30,000 New York hospital records.¹⁰ They found conclusive evidence of serious injury from medical malpractice in the records of 280 patients. But, only eight of the 280 patients, less than 3 percent, ever brought a claim.¹¹ This is borne out by how few malpractice cases are filed. The National Center for State Courts found a 23 percent decline in medical malpractice filings between 2001 and 2010.¹²

MALPRACTICE VICTIMS ARE UNDERCOMPENSATED

Due to the damages caps, medical malpractice victims receive far less compensation than previously awarded for their injuries. Studies show that a malpractice victim will receive 30 percent less in total damages because of the non-economic damages cap, that women suffered a greater reduction than men, and that individuals over 65 years of age had damages reduced by 67 percent.¹³ Thus, a male banker harmed by malpractice will receive more compensation than his homemaker wife simply because the banker earns more income (a loss not capped) than his wife. Statutes capping compensation punish members of society who earn low incomes and favor those who make lots of money. Even more offensive, these caps cause the greatest injustice to the most severely harmed by malpractice.

Medical malpractice “accounted for about 0.11 percent (i.e. one-tenth of one percent) of national health care costs in 2013.”¹⁴ Taken as a whole, “the only clear effect [of tort reform] has been to lower insurance payouts [to victims of medical malpractice].”¹⁵ When the compensation is reduced, victims may be forced to seek additional coverage from state and federal programs to cover their increased financial burden. “[I]t is grossly unfair to expect hardworking taxpayers to foot the bill while allowing the insurance companies ... to shirk their responsibilities.”¹⁶

DOCTORS AND INSURANCE COMPANIES BENEFIT

In 2014, premiums for medical professional liability insurance (medical malpractice insurance) rose slightly (0.3 percent) for the first time in almost 10 years.¹⁷ The medical liability insurers enjoyed the ninth straight year of underwriting profits. “Payments made to victims of medical malpractice are down, lawsuits filed against doctors and hospitals continue to plummet, and the industry ... posted an underwriting profit.”¹⁸

IMPACT IN MINNESOTA

In 1990, Minnesota eliminated non-economic damages caps. Between 2006 and 2015, malpractice victims filed just 1,068 malpractice lawsuits, compared with 392,607 cases filed by all other types of civil cases.¹⁹ This small number results mainly from the “stringent statutory requirement that attorneys secure support from a medical expert prior to filing a malpractice suit.”²⁰ Minnesota’s doctors enjoy the second lowest malpractice insurance premiums in the nation, at \$12,517 per year, just about \$200 more than the lowest.²¹ The evidence in Minnesota makes it clear: No one can legitimately make the case medical malpractice litigation is a driver for increasing health care costs.

The biggest problem with malpractice is that negligent health care providers are harming and killing Americans in astonishing numbers. “Reforming” the tort system to limit justice to those innocent victims harmed would do nothing other than add insult to their preventable injuries. At least for those of us in Minnesota, we can be thankful that lawmakers have seen the truth and have not placed barriers to citizens seeking justice at the courthouse doors.

1. DeVito S. and Jurs, A., “Doubling Down” for Defendants: The Pernicious Effects of Tort Reform, 118 Penn State L. Rev. 3, 596 (2014).

2. *Supra* note 1 at 566.

3. Congressional Budget Office, *CBO’s Analysis of the Effects of Proposals to Limit Costs Related to Medical Malpractice (“Tort Reform”)*, October 9, 2009, at 4.

4. Centers for Medicare and Medicaid Services, *National Health Expenditures 2014*.

5. Myungho Paik et al., “Will Tort Reform Bend the Cost Curve? Evidence from Texas,” *Journal of Empirical Legal Studies* (June 2012).

6. Markary, M.A., *Medical error – the third leading cause of death in the US*, *BMJ*, 2016; 353:i2139

7. *Id.*

8. Institute of Medicine, *To Err is Human: Building a safer health system*, November 1999, available at <http://www.nap.edu/books/0309066871/html>

9. Allen, M., *How Many Die from Medical Mistakes in U.S. Hospitals?* ProPublica (September 19, 2013).

10. Tom Baker, *The Medical Malpractice Myth*. Chicago: University of Chicago Press (2005) at 112-113 (citations omitted).

11. *Id.*

12. *Supra* note 1 at 588

13. *Id.*, at 593

14. Public Citizen, *Medical Malpractice Payments Remained at Historic Low in 2013 Despite Slight Uptick* (October 2014) at 3, 7

15. *Supra* note 1 at 596

16. Messerly, C. and Warwick, G., *Nowhere to Turn: A Glance at the Facts Behind the Supposed Need for Tort “Reform,”* 28 *Hamline L. Rev.* 3, 505 (2005)

17. Medical Liability Monitor, *Medical Liability Monitor Annual Rate Survey Indicates First Medical Malpractice Premium Rates Increase in Eight Years*, October 9, 2015, discussing *Annual Rate Survey Issue*, Medical Liability Monitor (October 2015)

18. Cary Spivak, *Malpractice insurance business is booming in Wisconsin and nation Huge profits are a change from previous decades*, *Milwaukee Journal Sentinel*, June 28, 2014

19. Minnesota Judicial Branch, *Statewide Civil Filings, 2006-2015*

20. *Supra* note 14 at 495

21. Medical Liability Monitor, *Annual Rate Survey Issue* (October 2015)

SELECTED RESULTS



**BRANDON
VAUGHN**

\$175,000 SETTLEMENT FOR FAILURE TO PROVIDE MEDICATION

Brandon Vaughn secured a \$175,000 settlement for an 80-year-old woman who did not receive her blood-thinning medication while admitted to a nursing home for over a week, which resulted in the development of a large number of blood clots in her legs. Treatment of the blood clots required surgery on both legs. The client died of causes unrelated to the negligence in the midst of litigation, leaving past medical expenses as the only recoverable damages. The client was unable to recover for the pain and suffering associated with the nine months of wound care, additional hospitalization, and trips to the doctor to treat her legs.



**PHIL
SIEFF**

SETTLEMENT ON BEHALF OF 14-YEAR-OLD VICTIM OF FATAL ACCIDENT

Brandon Vaughn and Phil Sieff represented the family of a 14-year-old girl who was killed in a single motor vehicle crash. The teenage girl was survived by her parents, grandparents, older brother, and twin brother. The settlement is confidential. A portion of the settlement proceeds will be contributed to a scholarship in the name of the teenage girl who died.



**TERESA FARISS
MCCLAIN**

\$1.4 MILLION VERDICT IN UNDERINSURED MOTORIST CASE

A Hennepin County jury returned a \$1.4 million verdict in an underinsured motorist case tried by Teresa Fariss McClain on behalf of a client who was sideswiped by a driver who crossed two lanes of traffic, leaving the client with a whiplash injury that resulted in chronic daily headaches. The injury is considered permanent, and the only effective treatment is Botox injections every 10 to 12 weeks for life. The at-fault driver was underinsured, and following settlement of that claim, our client sought her \$250,000 underinsured benefits through her insurer, Western National Mutual Insurance Company, who responded by offering \$2,000 at mediation, \$10,000 in a Rule 68 offer of settlement, \$50,000 after expert depositions, and finally \$100,000 mid-trial. This verdict will allow our client to continue to get the treatment she needs.

\$545,000 SETTLEMENT FOR BRAIN INJURY SUFFERED DURING TREATMENT

In October 2014 a 46-year-old woman seeking help for an injury to her hip was brain dead within 58 minutes of arriving at the emergency department of a Minnesota hospital. The brain injury was the result of the administration of an excessive amount of a narcotic drug and the failure to monitor for and respond to symptoms of respiratory depression. Because of the hospital's negligence, she suffered irreversible anoxic brain damage and died two weeks later. The woman was married with no children, unemployed, and had a complicated medical history, including Type I Diabetes from childhood and end-stage renal disease, and was on dialysis awaiting a kidney transplant. She had a history of two prior failed kidney transplants and a pancreas transplant. The case was settled for \$545,000.



ANTITRUST VIOLATIONS AND YOUR CLIENTS: THREE THINGS TO KNOW

BY HOLLIS SALZMAN AND KELLIE LERNER



HOLLIS
SALZMAN



KELLIE
LERNER

Robins Kaplan LLP's antitrust attorneys have earned a national reputation for recovering substantial settlement amounts on behalf of those affected by violations of the antitrust laws. In recent years, the firm has recovered billions of dollars in civil antitrust cases involving various industries, including health care, electronics, shipping services, credit cards, and automobile parts. Significantly, our clients in these cases are not just large corporations but also include individuals and small, family-owned businesses. Simply stated, antitrust violations affect everyone. Therefore,

chances are high that many of your clients either have been or will be affected by antitrust violations in one form or another. Below are three things you should know to help your clients determine what recourse is available to them.

I. DETERMINE WHETHER YOUR CLIENT HAS BEEN AFFECTED

The first step is to determine whether your client has been affected by an antitrust violation. Robins Kaplan sends alerts to its network of referring attorneys to inform them of potential antitrust cases that the firm is investigating. If you would like to receive these alerts, please reach out to the attorneys listed below. Further, our attorneys and team of in-house economists are available to help you determine whether any of your clients were affected by the alleged violation. Robins Kaplan's Antitrust & Trade Regulation Group is dedicated to giving victims of anticompetitive conduct a voice against companies that violate federal antitrust laws.

II. DETERMINE WHAT YOUR CLIENT SHOULD DO

If your client has been affected by an antitrust violation and a class action lawsuit is pending, the next step is to determine whether your client should step up and become a class representative, step back and enjoy the benefits of being an absent class member, or step out and bring a separate lawsuit. Each client's particular circumstances vary. There are occasions when it makes sense to step forward as a class representative. Class representatives are at the forefront of the litigation and assist class counsel in many aspects of the case. Alternatively, if your client would prefer to remain in the case without expending additional time or expense, that client could step back and enjoy the benefits of being an absent class member. Finally, some clients may consider "opting out" of the class and bringing a separate lawsuit. Doing so gives your client greater control over the litigation and may result in a much greater recovery.

III. DETERMINE WHETHER YOUR CLIENT IS ENTITLED TO SETTLEMENT PROCEEDS

Most antitrust cases settle. Generally, a claim form is sent sometime after the notice of the settlement. Many people ignore these claim forms because of the mistaken belief that they are not worth the time to complete. Yet, in a recent distribution of combined settlements in a high-profile antitrust case, the average monetary recovery was \$67,850.42. Moreover, class counsel and the claims administrator are always available to assist class members with the claims process at no charge. Bottom line, it is quick and easy to respond to antitrust claim forms, and doing so may lead to a substantial recovery.

If you would like further information about how we can be of assistance to you, please contact Hollis Salzman (HSalzman@RobinsKaplan.com) or Kellie Lerner (KLerner@RobinsKaplan.com).

DRUG AND DEVICE INVESTIGATIONS

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

- **Abilify** – Health Canada recently issued a Safety Alert advising that this atypical antipsychotic—used to treat a variety of disorders, including schizophrenia, bipolar, and depression—may cause impulse-control behaviors, including compulsive gambling. While the drug sold in Canada is now labeled with this warning, no such warning exists on the drug sold in the United States.¹
- **Benicar** – Popular blood pressure medication can cause intestinal problems known as sprue-like enteropathy, with chronic diarrhea, weight loss, nausea, and vomiting.²
- **Hip Implants** – Metallosis and premature device failure with damage to bone or tissue can occur with certain hip implants.³ Litigating cases involving DePuy ASR, DePuy Pinnacle, Stryker Rejuvenate, Wright Profemur, Wright Conserve, and Biomet M2a-Magnum.
- **Invokana, Farxiga, and Jardiance** – These Type 2 Diabetes drugs can cause ketoacidosis—very elevated blood acid levels—which may require hospitalization.⁴
- **Power Morcellator** – Surgical tool used in hysterectomies and fibroid removal procedures that may promote the spread of undetected uterine cancer.⁵
- **Taxotere** – Studies and reports have associated permanent hair loss (alopecia) with the use of chemotherapy drug Taxotere (docetaxel).⁶
- **Viagra** – Use is associated with increased risk of melanoma.⁷
- **Xarelto** – Anticoagulant (blood thinner) linked to serious bleeding complications, intracranial hemorrhaging, gastrointestinal bleeding, wound infections from inhibited clotting, and lack of effectiveness in preventing dangerous clotting.⁸
- **Zofran** – This anti-nausea drug is not FDA-approved for use during pregnancy but is often prescribed “off label” for morning sickness and is associated with increased risk of cleft palate and congenital heart defects.⁹

1. <http://healthycanadians.gc.ca/recall-alert-rappel-avis/hc-sc/2015/55668a-eng.php>

2. <http://www.fda.gov/Drugs/DrugSafety/ucm359477.htm>; <http://www.ncbi.nlm.nih.gov/pubmed/22728033>

3. *Concerns about Metal-on-Metal Implants*, available at www.fda.gov

4. <http://www.fda.gov/drugs/drugsafety/ucm446845.htm>

5. FDA discourages use of laparoscopic power morcellation for removal of uterine fibroids, available at www.fda.gov

6. 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).

7. Wen-Qing Li, et al. *Sildenafil Use and Increased Risk of Incident Melanoma in U.S. Men: A Prospective Cohort Study*. *JAMA Intern. Med.* (June 2014)

8. Lissan, M.R., et al. *Rivaroxaban versus Enoxaparin for Thromboprophylaxis after Total Knee Arthroplasty*. *N. Engl. J. Med.* 2008; 358:2776-86; Kakkar, A.K., et al. *Extended duration rivaroxaban versus short-term enoxaparin for the prevention of venous thromboembolism after total hip arthroplasty*. *Lancet* 2008; 372:31-39; Ericksson, B.I., et al. *Rivaroxaban versus Enoxaparin for Thromboprophylaxis after Hip Arthroplasty*. *N. Engl. J. Med.* 2008; 358:2765-75; Jameson SS, et al. *Wound complications following rivaroxaban administration*. *J. Bone Joint Surg. Am.* 2012; 1554-8

9. 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)



**LIZ
FORS**

INTRODUCING ELIZABETH M. FORS

Liz Fors, the newest associate in the firm’s Personal Injury and Medical Malpractice Group, graduated *summa cum laude* from Hamline University School of Law, now Mitchell Hamline School of Law, where she attended classes while also working full-time as a paralegal. In her role as a paralegal, she gained an interest in personal injury and medical malpractice while assisting those who had been harmed by negligent parties. Now, as an attorney, she helps her clients recover compensation for catastrophic, life-changing injuries.

Liz’s legal career follows a successful career in television. Before attending law school, Liz was an Emmy-nominated producer for live sporting events and live pre-game shows. During her 10 years in the sports industry, she was involved in televising Twins, Timberwolves, Lynx, Brewers, and Bucks games as well as football, hockey, and basketball games at the University of Wisconsin and University of Minnesota.

In addition to her legal work, Liz is an active member of the community, serving on both the Mitchell Hamline Alumni Board and the Dakota County Library Foundation Board.



**LISA
BIRCHEN**

PARALEGAL SPOTLIGHT: LISA BIRCHEN

Lisa graduated from Winona State University in 1981 with a B.S. degree in Paralegal Studies. She started with the firm as an intern, was hired when her internship was completed, and has been at the firm ever since. Today, she practices in the areas of medical negligence and personal injury, where she puts more than 35 years of experience to work on behalf of the firm’s clients.

Lisa enjoys working with the firm’s team of attorneys, medical analysts, investigators, and others to achieve the best possible outcome for each client. She believes the most satisfying part of her job is to see her team’s hard work and compassion result in justice and compensation for her clients. In 2014, Lisa’s experience and skill was recognized when she was named an “Unsung Legal Hero” by *Minnesota Lawyer*.



**BRANDON
VAUGHN**

UP & COMING ATTORNEYS AND UNSUNG LEGAL HEROES

On September 8, *Minnesota Lawyer* recognized two members of the Personal Injury and Medical Malpractice Group, naming Brandon Vaughn an “Up & Coming Attorney” and Jamie Lindahl an “Unsung Legal Hero.”

Brandon Vaughn, an associate who practices in the areas of personal injury, medical malpractice, and product liability, has dedicated his career to helping clients who have suffered a catastrophic injury. His eight years of practice have seen his involvement in several multi-million dollar cases, including a \$4.5 million settlement that will allow a baby who suffered neurological damage during birth to receive the care he needs throughout his life. In addition to managing his legal practice, Brandon is an active member of many professional and community organizations, and he volunteers his spare time by mentoring youth in the Twin Cities.



**JAMIE
LINDAHL**

Jamie Lindahl has been attorney Kathleen Flynn Peterson’s legal administrative assistant for nearly 32 years. As a leader in the firm’s Medical Malpractice Group as well as the legal community at large, Kathleen maintains a busy schedule. Coordinating her many cases, leadership roles, and volunteer activities requires superb organization, attention to detail, and grace under pressure – qualities that make Jamie an Unsung Legal Hero.

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