

## SELECT CASES & RESULTS



**KATHLEEN FLYNN PETERSON - ATTORNEY OF THE YEAR (2010) AND CIRCLE OF EXCELLENCE AWARD WINNER, MINNESOTA LAWYER**

\$4.6 million jury verdict to family of a 36-year-old wife and mother who bled to death due to hospital's failure to maintain adequate blood stock.

\$4.5 million settlement for failure to timely perform a cesarean section delivery resulting in a baby suffering severe and permanent neurological damage.

\$750,000 settlement for failure to supervise and use a shower chair's safety devices while showering a developmentally disabled vulnerable adult resulting in her death.

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**PHILIP SIEFF - DISTINGUISHED ALUMNI AWARD, HAMLINE UNIVERSITY**

\$251,000 jury verdict to 53-year-old generally healthy man who developed permanent asthma after he was negligently exposed to anhydrous ammonia for 5-7 minutes when driving past a farm.

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**PETER SCHMIT**

\$1.9 million settlement for failure to timely and appropriately diagnose and treat a postoperative complication.

\$1.3 million settlement for failure to timely identify and treat a vitamin B1 deficiency resulting in Wernicke's Syndrome.

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**WILLIAM MADDIX**

\$850,000 settlement for improper selection of urinary diversion method in complex reconstructive urological surgery in 62-year-old male requiring patient to live with suprapubic catheter for life.

\$700,000 settlement for wrongful death of 11-year-old boy due to improper management of rising intracranial pressure.

## MEDICAL MALPRACTICE TORT REFORM DEVELOPMENTS

By Brandon E. Vaughn



Access to the civil justice system remains under attack. The national and local legislatures are proposing laws that adversely impact injured parties in medical malpractice actions and the right to be fairly compensated in the court room. It is important to be aware, educate the public, and protect patients rights and access to the justice system.

### PROPOSED FEDERAL MEDICAL MALPRACTICE TORT REFORM LEGISLATION AKA H.R. 5

Preempts any state law unless the state law imposes greater protection for health care providers

#### **Damages**

- \$250,000 cap in non-economic damages

#### **Statute of Limitations**

- 3 year statute of limitation for health care lawsuits or 1 year after the time the claimant discovers, or should have discovered the injury

#### **Punitive Damages**

- Must be proven by clear and convincing evidence
- Capped at \$250,000 or 2 times the amount of the economic damages award, whichever is greater
- No punitive award for products that comply with FDA standards

#### **Payments on Future Damages**

- Future damages equaling or exceeding \$50,000 shall be paid out in periodic payments if requested by the defendant

#### **Attorney Fees**

- Attorneys are entitled to:
  - 40% of the first \$50,000 recovered
  - 33 1/3 % of the next \$50,000 recovered
  - 25 % of the next \$500,000 recovered
  - 15% of any amount in excess of \$600,000

### PROPOSED MINNESOTA MEDICAL MALPRACTICE TORT REFORM LEGISLATION

#### **S.F. 432<sup>1</sup>**

- \$250,000 cap on non-economic damages
- \$250,000 limit on punitive damages, and punitive damages are paid to Comprehensive Health Association
- Attorneys fees controlled as outlined in the above H.R. 5
- Adherence to a best practice guideline approved by a medical specialty organization or an organization established for the purpose of developing community-based clinical practice guidelines is an absolute defense for medical care providers

#### **Other Proposed Tort Reform in Minnesota**

- 4 year statute of limitations for tort resulting in personal injury (H.F. 654/ S.F. 373)\*
- Seeks to limit the liability of private ambulance services (H. F. 564/ S.F. 216)\*
- Seeks to eliminate liability for schools for injuries on school property stemming from "recreational activity" (H.F. 1343/ S.F.373)\*

1. Indicates Minnesota Senate Bill Number. There is no companion bill in the House currently.

\* Indicates Minnesota House and Senate Bill Numbers.

# PRODUCT LIABILITY INVESTIGATIONS

## FOSAMAX

Thousands of Americans have been taking the prescription drug FOSAMAX since 1995 for treatment and prevention of osteopenia and osteoporosis. On October 13, 2010, the FDA issued a warning to physicians caring for patients taking FOSAMAX noting that all FOSAMAX and other bisphosphonates have been associated with atypical fractures to the femur.<sup>1</sup> Women are especially at high risk of suffering these fractures.<sup>2</sup> Patients typically require immediate surgery including placement of orthopedic hardware such as plates and screws and are subject to a very slow recovery process. Our attorneys are handling cases involving both jaw problems and femur fractures caused by FOSAMAX.

## DEPUY ASR HIP IMPLANT RECALL - UP TO 49% FAILURE RATE REPORTED

In August 2010, DePuy Orthopaedics and Johnson & Johnson recalled the ASR XL Acetabular Hip System and the ASR Hip Resurfacing System. Approximately 93,000 of these devices have been implanted globally. Many studies report that these implants are failing early and at an alarming rate, requiring patients to undergo revision surgeries.<sup>3</sup> In March 2011, the British Orthopaedic Association and the British Hip Society issued a statement that new data indicates the rate of revisions range from 21% at 4 years and 49% at 6 years after the original implant.<sup>4</sup> *Tara Sutton has been appointed to Co-Chair the Plaintiffs' Law and Briefing Committee in the DePuy ASR MDL. Partner Vincent J. Moccio has been appointed to the DePuy MDL Discovery Committee.*

## DEPUY PINNACLE HIP IMPLANTS

DePuy Orthopaedics, Inc. is also facing public scrutiny regarding the premature loosening and failure of the Pinnacle hip prostheses. Within the past year alone, the FDA has received hundreds of adverse reports regarding failures or other complications related to the Pinnacle device.<sup>5</sup> On May 16th, the Judicial Panel on MultiDistrict Litigation will consider a Petition to create an MDL devoted to litigation concerning the DePuy Pinnacle.<sup>6</sup> Our firm is currently litigating Pinnacle cases.

## OTHER PRODUCT LIABILITY INVESTIGATIONS

We are investigating other hip implant products, including the Zimmer Durom Cup, Wright Profemur, and Saint-Gobain femoral head components, as well as claims involving the Zimmer NextGen knee implant and the pharmaceutical Topamax.

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1. U.S. Food and Drug Administration, *Possible Increased Risk of Thigh Bone Fracture with Bisphosphonates* (October 14, 2010), available at <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm229171.html>.
  2. Laura Y. Park-Wyllie, PharmD, MSc, et. Al., *Bisphosphonate Use and the Risk of Subtrochanteric or Femoral Shaft Fractures in Older Women*, JAMA, Vol. 305, No. 6 (Feb. 23, 2011).
  3. See e.g., DePuy Orthopaedics Inc. Recall Notice, August 24, 2010, available at <http://www.depu.com/usen>; G. Steel et al., *Early Failure of DePuy ASR XL Total Hip Arthroplasty*, Am. Academy of Orthopaedic Surgeons Annual Meeting Feb. 2011, Poster No. P076, available at [www.aaos.org](http://www.aaos.org) (finding ASR total hip replacement has 4 times the risk of revision compared to other conventional total hip replacements).
  4. *J&J Hip Failure Rate as High as 49 Percent, U.K. Doctors Say*, Bloomberg News, March 9, 2011, available at: <http://www.bloomberg.com/news/2011-03-09/j-j-hip-replacement-failure-rate-may-be-49-u-k-orthopedists-group-says.htm>.
  5. See FDA MAUDE Database, available at [http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfMAUDE/TextResults.cfm?dls=101&q=Pinnacle&pf=Data\\_Date\\_Year:2011,Data\\_Date\\_Year:2010&pn=10&sc=](http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfMAUDE/TextResults.cfm?dls=101&q=Pinnacle&pf=Data_Date_Year:2011,Data_Date_Year:2010&pn=10&sc=).
  6. See United States Judicial Panel on Multidistrict Litigation, Notice of Hearing Session, available at [http://www.jpml.uscourts.gov/Hearing\\_Order-5-16-11.pdf](http://www.jpml.uscourts.gov/Hearing_Order-5-16-11.pdf).

## MASS TORT EMAIL ALERTS

If you would like to receive breaking news related to defective medical devices and pharmaceuticals, please let us know via the attached reply card or email [kldirks@rkmc.com](mailto:kldirks@rkmc.com).

### APPELLATE ISSUE AT THE MINNESOTA SUPREME COURT



Terry Wade



Brandon Thompson

Terry Wade and Brandon Thompson are handling an appeal to the Minnesota Supreme Court involving the interpretation of Minn. Stat. 145.682, which governs expert witness requirements in medical malpractice cases. The Court of Appeals has significantly limited the "safe harbor" provision of the statute, which will result in some claims being summarily dismissed early in the proceedings, even if they have merit. This is an important case for people throughout Minnesota who have been injured by medical negligence, and Terry and Brandon are fighting to have the Supreme Court interpret the statute as the legislature intended: in a way that gets rid of frivolous lawsuits while at the same time making sure that plaintiffs with legitimate claims are not thrown out of court on a technicality.

### OUR PEOPLE



Craig Sieverding

#### CRAIG SIEVERDING, ASSOCIATE

Craig is a New Jersey native and he and his twin are the youngest of five brothers. From early on, his mother instilled in him a focus on hard work, education, and public service. These attributes carried him to Duke University and then to the University of California Law School -- Berkeley. With an ongoing interest in new places, Craig clerked for the Alaska Court of Appeals and then worked at the Iowa Attorney General's Office as Assistant Attorney General.

Craig moved to Minnesota and joined Robins, Kaplan, Miller & Ciresi L.L.P. in 2006. He has represented clients in individual and complex cases involving personal injury, medical malpractice, and products liability. He has gained great experience working hand-in-hand with the many skilled and accomplished trial lawyers in the firm, from the initial investigation of a matter through its close at trial. In addition to his practice, Craig has provided pro bono representation to clients in the areas of mortgage foreclosure, unlawful detainers (eviction), immigration, and family law and has served on several local pro-bono committees and task forces involving consumer's rights and protection.

Craig resides in Minneapolis with his wife Emily and young son Charlie. In his spare time, Craig enjoys staying active (open water swims and triathalons included), cooking, working in the yard, and spending time with his family.

\* Past results are reported to provide the reader with an indication of the type of litigation in which we practice and does not and should not be construed to create an expectation of result in any other case as all cases are dependent upon their own unique fact situation and applicable law. This publication is not intended as, and should not be used by you as, legal advice, but rather as a touchstone for reflection and discussion with others about these important issues. Pursuant to requirements related to practice before the U. S. Internal Revenue Service, any tax advice contained in this communication is not intended to be used, and cannot be used, for purposes of (i) avoiding penalties imposed under the U. S. Internal Revenue Code or (ii) promoting, marketing or recommending to another person any tax-related matter.