



ROBINS  KAPLAN^{LLP}

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FOCUS ON FORESEEABILITY**

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DUTY TO THIRD PARTIES: FOCUS ON FORESEEABILITY

BY JASON DEPAUW AND RASHANDA BRUCE



**JASON
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**RASHANDA
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Foreseeability is the foundation of duty in many states, and Minnesota is no different. With a series of cases starting in 2017, the Minnesota Supreme Court has made a point to reaffirm this long-standing principal. Minnesota common law principles are clear: Defendants may owe a duty of care to third parties based on the foreseeability of the third party's harm. This is true regardless of whether the tortfeasor had a direct relationship with the injured plaintiff. Over the last few years, Robins Kaplan has helped secure victories on behalf of clients and amicus parties in cases concluding that defendants may owe a duty to third parties based on a foreseeability analysis.

Warren v. Dinter,
926 N.W.2D 370 (MINN. 2019)

Warren has appeared on the pages of the Robins Kaplan Justice Report before. The facts in *Warren* are tragic. Susan Warren sought treatment from a nurse practitioner in a clinic for various symptoms. The nurse practitioner called the local hospital to seek Ms. Warren's admission and spoke with Dr. Richard Dinter. Dr. Dinter denied Ms. Warren's admission, and three days later she was found dead due to 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, reversed the dismissal and found 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. Our team at Robins Kaplan, including Jason DePauw, served as counsel for amicus participant Minnesota Association for Justice. With our support, the courthouse doors remain open to many other patients who have been harmed or killed by medical negligence, even if they didn't have direct contact with the negligent provider.

Smits v. Park Nicollet,
955 N.W.2D 671 (MINN. CT. APP. 2021)

Robins Kaplan is honored to represent the Trustee in this case. *Smits v. Park Nicollet* involves the tragic deaths of five people due to Park Nicollet's alleged medical malpractice in providing mental health treatment to a patient, Brian Short. Mr. Short sought mental health treatment from several providers at Park Nicollet, who diagnosed and treated him with "major depression, single episode, severe, without psychosis, as well as generalized anxiety disorder and panic disorder." Less than three months after his first appointment, Mr. Short was found dead in his home, having fatally shot his wife, three teenaged children, and himself.

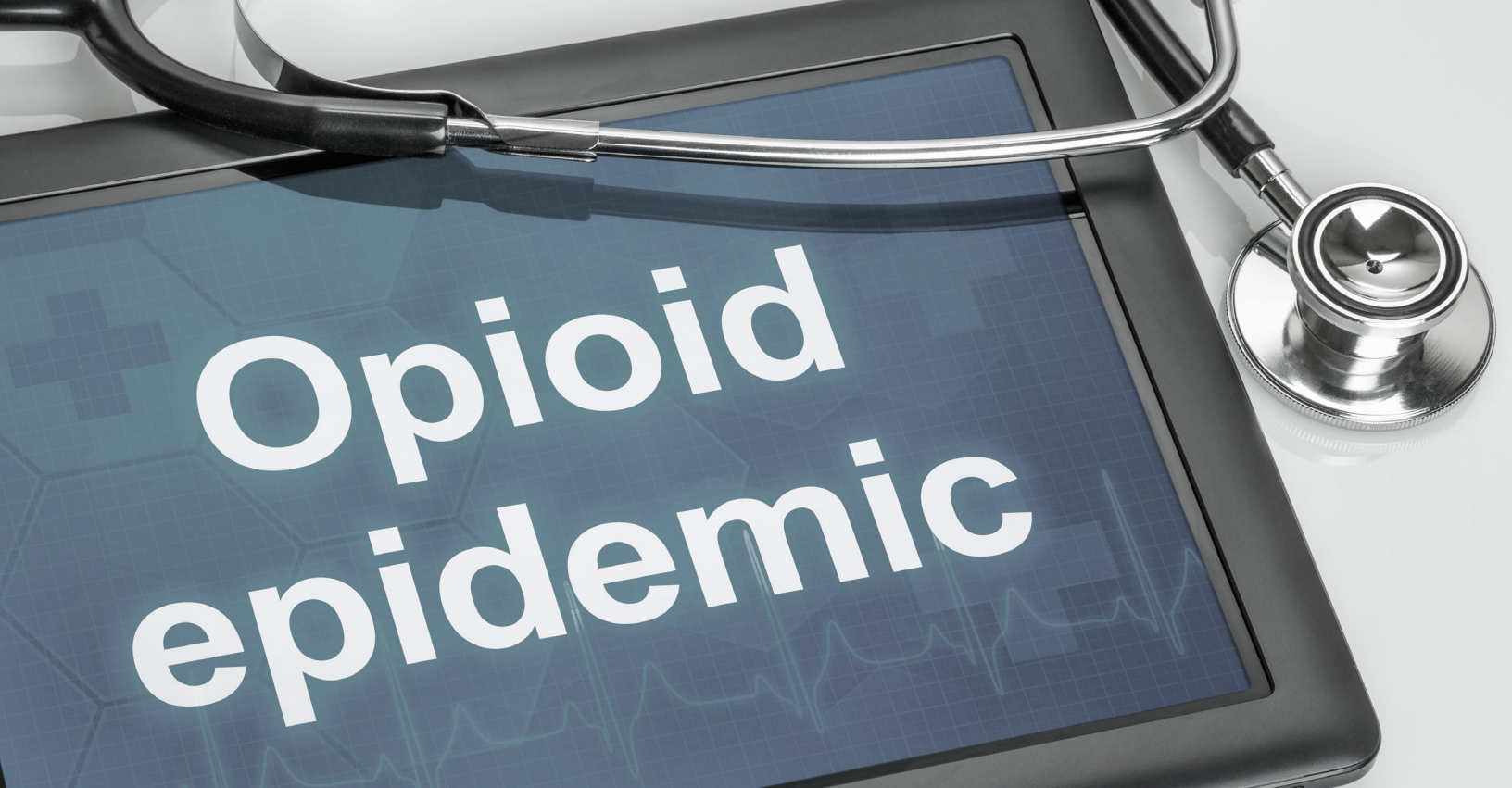
The district court dismissed the plaintiff's case, finding no duty to Mr. Short's family members as a matter of law. In a precedential opinion, the Minnesota Court of Appeals reversed, concluding that Park Nicollet could have owed a duty to Mr. Short's family members under "settled common-law principle" of foreseeability of harm. The question of whether the risk of harm to the Short family was foreseeable has been sent back to the district court for the jury to decide.

McDougall v. CRC Industries, Inc.,
2021 WL 810635 (JRT/LIB)
(D. MINN. MAR. 3, 2021)

Chairez v. AW Distributing, Inc. et al.,
CASE NO. 20-CV-1473 (NEB/TNL)
(D. MINN. APR. 23, 2021)

These separate cases involve the tragic death of one woman and the serious injuries to a mother and daughter who were struck by drivers who were high on keyboard dusting sprays. Robins Kaplan proudly represents the deceased woman's surviving husband in his role as wrongful death trustee in the *McDougall* matter and the two seriously injured women in the *Chairez* matter. The keyboard dusting spray manufacturers — like Dr. Dinter and Park Nicollet before them — argued that the cases should be dismissed because Cynthia McDougall and the Chairezes were third parties to whom they could not owe a duty as a matter of law. But Chief Judge John Tunheim and Judge Nancy Brasel concluded in their respective orders that product makers such as the keyboard dusting spray manufacturers may owe a duty to protect those who might be injured by the foreseeable harm caused by foreseeable use or misuse of the product — including innocent bystanders such as Cynthia McDougall and the Chairezes.

In both cases, the plaintiffs adequately alleged that the keyboard dusting spray manufacturers knew or should have known that people inhaled their keyboard dusting sprays to get high. They also allegedly knew or should have known that people operated motor vehicles while high on keyboard dusting sprays and could subsequently lose control of their vehicles and crash into innocent bystanders — such as Cynthia McDougall and the Chairezes — often resulting in catastrophic injuries and death. Both courts denied the dusting spray manufacturers' motions to dismiss based on the foreseeability of harm caused by their products, and these cases are proceeding into discovery.



PURDUE BANKRUPTCY – OPIOID UPDATE

HOLLY DOLEJSI



**HOLLY
DOLEJSI**

Mass tort cases do not usually bankrupt the defendant. But, in the National Prescription Opiate Litigation, three of the defendants have so far declared bankruptcy. The litigation involves the claims brought by thousands of cities, counties, tribes, and other plaintiffs, all consolidated into multidistrict litigation in the Northern District of Ohio (the “MDL”). Their damages, caused by the opioid epidemic, total in the trillions of dollars.

Purdue Pharma, often considered the creator of the opioid epidemic, declared bankruptcy in September of 2019, resulting in a stay of all opioid litigation against it in the MDL and in various state court proceedings across the country. But the fight did not stop there; it instead continued in bankruptcy court. There, Purdue, states’ attorneys general, the Plaintiff’s Executive Committee of the MDL, the Tribal Leadership Committee, and many other stakeholders participated in numerous mediations to attempt to resolve just how Purdue’s bankruptcy estate (valued at \$10 billion, including \$4.275 billion from the Sackler family – the owners of Purdue) would be allocated.

Tara Sutton, partner at Robins Kaplan LLP and member of the Tribal Leadership Committee, participated in these mediations, advocating that the tribal allocation should exceed the tribal share of the U.S. population, in light of the disparate impact the opioid epidemic has had on tribes, and the lack of abatement infrastructure available to many tribes.

After months of negotiations, an allocation agreement was reached. On March 15, 2021, Purdue Pharma submitted a proposed Plan of Reorganization to the federal Bankruptcy Court in the Southern District of New York. Under the plan, tribes will be allocated approximately 3% of the public entity allocation, which exceeds their share of the U.S. population. “The tribes are disproportionately impacted by the opioid epidemic, and this settlement is an acknowledgement of the unique damage suffered by the tribes,” said Sutton. Robins Kaplan is proud to have achieved this result for tribes.

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: 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, nearly two after the journal of the American Academy of Ophthalmology published an article linking Elmiron to pigmentary maculopathy (which may cause permanent vision changes, such as difficulty reading, slow adjustment to changes in lighting, and blurred vision).

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.

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 LFIT COCR V40 implants, among others, have been involved in premature hip failure cases the Mass Tort attorneys may litigate.

TRIBAL OPIOID CLAIMS: The firm is litigating claims on behalf of Native American tribes 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.

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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/2020/020193s014lbl.pdf.
 2. William A. Pearce et al., Pigmentary Maculopathy Associated with Chronic Exposure to Pentosan Polysulfate Sodium. OPTHALMOLOGY. 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. 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).



CASE RESULTS

FIRM SECURES FAVORABLE COURT OF APPEALS RULING IN WRONGFUL DEATH LAWSUIT FOR 9-YEAR-OLD DROWNING VICTIM

The Minnesota Court of Appeals ruled in favor of our client in an appeal of motions to dismiss filed by the city of Moorhead and the Minnesota DNR. Grace Betty, our client's 9-year-old daughter, drowned in an artificial pond owned and operated by the Minnesota Department of Nature Resources (MN DNR) while participating in a summer program run by the city of Moorhead and the Moorhead Police Department. The district court dismissed the DNR on immunity grounds but allowed the case to proceed against Moorhead. The city appealed, and we filed a cross-appeal on the DNR dismissal. The court of appeals affirmed the denial of Moorhead's motion to dismiss and reversed the dismissal of the claims against the DNR. Attorneys **Eric Magnuson** and **Kaitlin Ek** briefed and argued the appeal. The case will now proceed to discovery and trial.

\$1 MILLION SETTLEMENT IN WRONGFUL DEATH MEDICAL MALPRACTICE CLAIM

Teresa Fariss McClain negotiated a \$1 million settlement in a wrongful death medical malpractice claim arising from a delay in diagnosis and treatment of a cerebral venous sinus thrombosis, leading to a hemorrhagic stroke in a married mother with three children.

\$700,000 SETTLEMENT IN NEGLIGENCE CLAIM AGAINST TWIN CITIES HEALTH CARE PROVIDER

Phil Sieff, **Teresa Fariss McClain**, and **Pat Yoedicke** confidentially settled a wrongful death medical negligence claim for \$700,000 against a Twin Cities health care provider related to the death of a 62-year-old male in a motor vehicle crash in the Greater Twin Cities area.

\$550,000 SETTLEMENT FOR TBI VICTIM FOLLOWING CAR ACCIDENT

After extensive pretrial motion practice and near trial, **Tony Schrank** and **Tim Billion** obtained a \$550,000 settlement for a client who suffered a TBI after her vehicle was rear-ended in Sioux Falls.

\$350,000 SETTLEMENT IN WRONGFUL DEATH MEDICAL NEGLIGENCE CLAIM

Teresa Fariss McClain and **Brendan Johnson** negotiated a \$350,000 settlement in a South Dakota medical negligence claim for wrongful death.



**ERIC
MAGNUSON**



**KAITLIN
EK**



**TERESA
FARISS
MCCLAIN**



**PHIL
SIEFF**



**PAT
YOEDICKE**



**TONY
SCHRANK**



**TIM
BILLION**



**BRENDAN
JOHNSON**



AWARDS AND RECOGNITION



BRANDON VAUGHN SHORTLISTED FOR CHAMBERS DIVERSITY AND INCLUSION AWARDS

Brandon Vaughn has been shortlisted for the honor of Diversity & Inclusion Lawyer of the Year in the Chambers Diversity and Inclusion awards. The Diversity & Inclusion Lawyer of the Year award honors a law firm partner who has shown dedication and commitment to diversity programs and taken an active role in organizing events helping to further the advancement of one or more strands of diversity and inclusion. Chambers will announce the winner of the award at a virtual awards ceremony on June 17.



ROBERT BENNETT NAMED A MIDWEST TRAILBLAZER

Robins Kaplan LLP is pleased to announce that Partner **Robert Bennett** has been named a “Midwest Trailblazer” by The American Lawyer. The award recognizes agents of change in the practice or business of law in the Midwest. Over the past four decades, Bennett has spearheaded many of Minnesota’s most important police misconduct, civil rights law, jail suicide, and wrongful death matters.



HOLLY DOLEJSI NAMED LEADERSHIP COUNCIL ON LEGAL DIVERSITY (LCLD) FELLOW

Holly Dolejsi has been selected as a member of the 2021 class of Leadership Council on Legal Diversity (LCLD) Fellows — a program established to identify, train, and advance the next generation of leaders in the legal profession. LCLD is a growing organization of more than 290 corporate chief legal officers and law firm managing partners who are personally committed to creating a truly diverse legal profession.

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