



ROBINS KAPLAN JUSTICE REPORT

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ROBINS  KAPLAN_{LLP}

REWRITING THE ODDS

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BORN FROM TRAGEDY: A MOVEMENT TO REFORM HOME BIRTH POLICIES

BY COLIN PETERSON

Minnesota law permits a small group of health care providers—traditional midwives—to independently manage home births without a license from the state or any malpractice insurance. The concerning lack of oversight and accountability in the traditional midwife community is a threat to patient safety. The public has no say in the level of care expected of these midwives, and when tragic mistakes happen during home births, families often will not have the financial resources necessary to pick up the pieces and move forward with their lives.

Our clients endured a heart-breaking tragedy during a home birth managed by traditional midwives. By sharing our clients' story, we hope to build support for strengthening the legal protections for families choosing home births.

In the fall of 2012, a young couple in Minneapolis was expecting their first child. After researching various options for childbirth, they decided to deliver at home with two traditional midwives. In the early morning hours on the day of delivery, the midwives came to the couple's home and stayed for several hours while contractions continued. Based on their vaginal examinations, the midwives assessed the baby's position as head-down and fully engaged in the pelvis, but thought that labor was stalled. Both midwives then left the home and planned to check in later in the day.

Shortly after the midwives left, however, the mother's labor progressed rapidly. Within an hour, the father saw a foot deliver—the baby was breech.

The couple desperately called the midwives and then 911 for help. The baby had delivered to his armpits, but his head was entrapped. No one was around to free his head and complete the delivery. With each passing moment, the baby's fragile brain was being dangerously starved of oxygen.

An ambulance arrived and left 15 minutes after the 911 call, before the midwives could get back to the home. An obstetrician delivered the baby upon arrival at the hospital, but the baby boy had suffered an overwhelming neurological injury. Less than three weeks later, the parents made the painful decision to say goodbye and remove life support.

The parents' trust in their midwives to provide safe and competent care was tragically misplaced. Had the midwives correctly identified the breech presentation, the parents could have gone to a hospital where the baby could have been safely delivered. Instead, the parents endured this horrifying experience all alone, and they lost their son as a result.

The parents came to our firm seeking to use the civil justice system to hold the midwives accountable. But because the midwives did not carry malpractice insurance, they were essentially judgment-proof. We agreed to represent the parents *pro bono* to try to bring changes to these midwives' practice and to bring awareness to the lack of oversight and accountability of traditional midwives in Minnesota.

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SELECTED RESULTS

\$5.075 MILLION SETTLEMENT FOR SEVERE INJURIES FOLLOWING SURGICAL MISHAP

Brandon Thompson, Kathleen Flynn Peterson, and Brian Aleinikoff represented a 43-year-old woman who suffered a catastrophic injury after what should have been a relatively simple surgical procedure. The woman lost all use of her dominant arm, developed an unrelentingly painful nerve disorder, and was forced to withdraw from her Ph.D. program at the University of Minnesota. Due to the nerve disorder and pain, the woman will require millions of dollars in care for the rest of her life.

\$1 MILLION SETTLEMENT FOR DEATH FOLLOWING MINIMALLY INVASIVE BACK SURGERY

Peter Schmit settled a Northern Minnesota wrongful death case of a 50-year-old wife and mother of adult children. The woman died following minimally invasive back surgery. During surgery, the iliac artery was lacerated. The facility did not have the resources to repair the injury, and there was a delay in diagnosing and referring. The claim settled for \$1 million on a Pierringer basis. As part of the settlement, the defendant neurosurgeon signed an affidavit indicating he was not informed of post-op signs of deterioration. That claim is now being pursued.

\$850,000 SETTLEMENT FOR DEATH OF 42-YEAR-OLD WOMAN

LD v. ND Hospital and Doctor. Peter Schmit settled a wrongful death case of a 42-year-old wife who was over-prescribed pain medications and not properly monitored. The case settled for \$850,000. North Dakota has a non-economic damage cap of \$500,000.

\$850,000 SETTLEMENT FOLLOWING DEATH OF 55-YEAR-OLD MAN

Peter Schmit settled a Central Minnesota wrongful death case of a 55-year-old man who died within hours of being seen at an ER for chest pain and shortness of breath. We claimed the EKG was not properly read and that immediate referral/transfer was needed. Causation was disputed, since there was very little time to accomplish transfer/treatment. The claim settled for \$850,000.

\$300,000 SETTLEMENT RESULTING FROM NEGLIGENT NURSING HOME CARE

Terry Wade, Brandon Vaughn, and Brian Aleinikoff represented a 56-year-old man who was required to undergo a below-the-knee amputation after a wound on his foot became badly infected. In 2010, the client was admitted to a nursing home in Duluth after having a transmetatarsal amputation (surgery to remove part of the forefoot). While in the nursing home, the man's wound dressing became wet, a condition that went unreported for days. By the time he was finally evaluated by his physician, his surgical wound had become so necrotic and infected that amputation was the only option. The case was challenging, because our client struggled with managing his diabetes and the defendant nursing home argued that, because of the poorly controlled diabetes, he would ultimately have required a below-the-knee amputation even if they were not negligent.

ROBINS KAPLAN LLP TAKES LEADING ROLE IN EXPANDING LITIGATION OVER BENICAR

Olmesartan medoxomil is a popular prescription blood pressure medication marketed as Benicar®, Benicar HCT®, Azor®, or Tribenzor®. In July of 2013 the FDA issued a safety announcement warning that the drug can cause intestinal problems known as sprue-like enteropathy and required the manufacturer to change its label to warn of this potential injury.¹

Symptoms of sprue-like enteropathy include chronic diarrhea, weight loss, nausea, and vomiting.² These symptoms can be so severe that they require hospitalization for dehydration, kidney failure, and malnourishment.³ An August 2012 Mayo Clinic study found a possible association between the drug and sprue-like enteropathy, and further found that, when removed from the drug, all of the patients' symptoms decreased, and/or resolved completely.⁴ Since that time, a nationwide French study was published and concluded that olmesartan "causes a severe and potentially life threatening enteropathy," which is much more common with olmesartan than with other drugs in the same class.⁵

Robins Kaplan LLP has filed dozens of cases against the manufacturer in both federal court and New Jersey state court. In April of 2015, the federal court cases were consolidated into an MDL (multidistrict litigation) in the District of New Jersey before the Honorable Robert Kugler.⁶ In one of the court's first orders, Judge Kugler appointed Robins Kaplan partner Tara Sutton to the Plaintiff's Executive Committee. Tara will also chair the Science Committee. Other Robins Kaplan members appointed to leadership positions include Gary Wilson, Science Committee; Rayna Kessler, State Court Liaison; and Holly Dolejsi, Bellwether Selection Committee. Most recently, Robins Kaplan educated the court on the scientific principles underlying this case. On May 8, 2015, Tara Sutton gave a Science Day presentation to the judges presiding over the state and federal court litigations.

1. www.fda.gov/Drugs/DrugSafety/ucm359477.htm

2. www.ncbi.nlm.nih.gov/pubmed/22728033

3. Id.

4. Id.

5. L. Marthey, G. Cadiot, et al. Olmesartan-associated Enteropathy: Results of a National Survey. *Ailment. Pharmacol. Ther.* (Aug. 2014).

6. www.jpml.uscourts.gov/sites/jpml/files/MDL-2606-Initial_Transfer-03-15.pdf



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Represented by Kathleen Flynn Peterson, Brandon Thompson, and Colin Peterson, the parties recently reached a resolution in which the midwives agreed to certain changes in their practice aimed at improving patient safety. For widespread change to occur, however, legislative action is necessary.

Traditional midwives are allowed to practice in Minnesota with very little oversight and without any safety net for families when midwives make terrible mistakes. Though Minn. Stat. § 147D purports to regulate the profession, licensure under the statute is completely voluntary. We believe that requiring licensure as a condition of practicing traditional midwifery is a necessary first step to improving home birth policy. Minnesota requires a license to provide various services, from cutting hair to applying nail polish, but not to deliver babies. This must change. Mandatory licensure will ensure that all traditional midwives are held to a high standard of care and accountability.

Of course, even with increased regulation and improved training, mistakes will inevitably occur. Because of the potentially devastating consequences of mistakes made during childbirth, traditional midwives should be required to carry malpractice insurance. If our clients' son had lived, his permanent and profound neurological injuries likely would have necessitated millions of dollars of care throughout his life. No family should be made to bear a crushing financial burden of injuries caused by another's negligence.

Our society must protect our most vulnerable. Commonsense policies can protect babies without limiting parents' freedom to choose how children are brought into the world. We will carry this message to the legislature and will continue to tell our clients' story until change occurs.

OTHER MASS TORT 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.

- **GranuFlo and Naturalyte Dialysis Products** – Recalled products used in kidney dialysis that can cause metabolic alkalosis, which can lead to cardiopulmonary arrest and death.¹
- **Hip Implants** – Metallois and premature device failure with damage to bone or tissue can occur with certain hip implants.² Litigating cases involving DePuy ASR, DePuy Pinnacle, Stryker Rejuvenate, Wright Profemur, Wright Conserve, and Biomet M2a-Magnum.
- **Invokana; Farxiga, Jardiance** – These Type 2 Diabetes drugs can cause ketoacidosis – very elevated blood acid levels – which may require hospitalization.³
- **Power Morcellator** – Surgical tool used in hysterectomies and fibroid removal procedures that may promote the spread of undetected uterine cancer.⁴
- **Viagra** – Use associated with increased risk of Melanoma.⁵
- **Zofran** – Anti-nausea drug not FDA-approved for use during pregnancy, but often prescribed “off label” for morning sickness, is associated with increased risk of cleft palate and congenital heart defects.⁶

1. *Dialysate Concentrates Used in Hemodialysis: Safety Communication – Alkali Dosing Errors*, available at www.fda.gov

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

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

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

5. 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)

6. 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)

MEET OUR NEWEST ATTORNEYS



TERESA FARISS MCCLAIN

Teresa Fariss McClain joined the firm as Of Counsel in the Medical Malpractice and Personal Injury Group in Minnesota. Teresa has more than 13 years of experience originating, managing, and trying complex medical malpractice and medical device product liability cases. A registered nurse in obstetrics and adult critical care, Teresa has secured numerous six- and seven-figure verdicts and settlements on behalf of her clients. Teresa has previously been named a 2014 “Lawyer of the Year” by *Minnesota Lawyer* and a 2014 - 2015 “Super Lawyer” in the area of plaintiff’s medical malpractice by *Super Lawyers* magazine.



RAYNA KESSLER

Rayna Kessler joined the firm as an Associate in the Mass Tort Litigation Group in New York. Rayna focuses her work on defective drugs and medical devices, mass torts, medical malpractice, and other catastrophic personal injury. Rayna received her J.D. from Temple University Beasley School of Law and her B.A., *magna cum laude*, Phi Beta Kappa, and with University Honors and Distinction, from Ohio Wesleyan University.

TWO FORMER U.S. ATTORNEYS JOIN ROBINS KAPLAN LLP



TIM
PURDON



BRENDAN
JOHNSON

Brendan Johnson, former U.S. Attorney for the District of South Dakota, and Tim Purdon, former U.S. Attorney for the District of North Dakota, have joined Robins Kaplan LLP. They are leading the firm’s two newest offices in Sioux Falls, S.D., and Bismarck, N.D., where they will lend their extensive legal experience to the Personal Injury, Government and Internal Investigations, and American Indian Law and Policy groups.

Both attorneys were nominated for the position of U.S. Attorney by President Barack Obama and unanimously confirmed by the U.S. Senate, Brendan in 2009 and Tim in 2010. They each spent time in private practice before joining the Department of Justice.

ACHIEVEMENTS

BRANDON THOMPSON NAMED PARTNER



Robins Kaplan LLP is proud to announce that Brandon Thompson has been named a Partner of the firm. A trial attorney in the firm’s Medical Malpractice and Personal Injury groups, Brandon represents individuals and families who have been harmed by the wrongdoing of others. He handles all types of malpractice cases and has a special focus on those involving children who suffered injuries at birth.

A lifelong Minnesotan, Brandon brings compassion and a strong work ethic to every case he handles. In 2013 and 2014, Brandon was named a “Minnesota Super Lawyer” by *Super Lawyers* magazine.

2015 SUPER LAWYERS AND RISING STARS ANNOUNCED

Attorneys in our Mass Tort, Medical Malpractice, and Personal Injury groups were recently honored as 2015 “Minnesota Super Lawyers and Rising Stars.” These awards, presented by *Super Lawyers* magazine, acknowledge the recipients’ strong ethical standards, career achievements, and recognition among their peers.

2015 MINNESOTA SUPER LAWYERS

- John Eisberg
- Teresa Fariss McClain
- Chris Messerly
- Kathleen Flynn Peterson
- Peter Schmit
- Philip Sieff
- Tara Sutton
- Brandon Thompson
- Terry Wade

2015 MINNESOTA RISING STARS

- Holly Dolejsi
- Megan McKenzie
- Patrick Stoneking
- Troy Tatting
- Brandon Vaughn
- Melissa Wendland

PHIL SIEFF ELECTED TO THE AMERICAN BOARD OF TRIAL ADVOCATES



Phil Sieff, a partner in the Minneapolis office of Robins Kaplan LLP, was recently elected to the Minnesota Chapter of the American Board of Trial Advocates (ABOTA).

ABOTA’s purpose is to foster improvement in the field of advocacy so individual litigants can receive more effective representation. It pursues this goal in many ways, notably by advancing the skills of its own members and by seeking improved methods of procedure in the current trial court system.

A highly selective organization, ABOTA only admits attorneys who have accumulated extensive trial experience and have demonstrated high personal character and reputation. Currently, Phil is one of just 189 members in the state of Minnesota.

TARA SUTTON RECEIVES HONORS



Firm partner and Mass Tort Chair Tara Sutton was recently selected for recognition by two respected journals, *The National Law Journal* and *The Minneapolis/St. Paul Business Journal*.

Tara was selected as a recipient of the 2015 “Women in Business Award” by the *Minneapolis/St. Paul Business Journal*. Each year, the “Women in Business Award” is presented to 50 local professionals in recognition of their career achievements, their leadership qualities, and their overall contributions to their local communities.

Tara was also named one of *The National Law Journal*’s “Outstanding Women Lawyers” for 2015, a recognition given to 75 of the most accomplished female attorneys working in the legal profession today.

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