



# ROBINS KAPLAN JUSTICE REPORT

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ROBINS  KAPLAN<sup>LLP</sup>

REWRITING THE ODDS

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## METHADONE ON MINNESOTA ROADS

BY PATRICK STONEKING

Methadone is a powerful synthetic opioid and a Schedule II narcotic. It acts directly on the central nervous system, slowing the mind and numbing the reflexes. Yet every morning in Minnesota, opiate addicts come into clinics across the state, where they receive a dose of the powerful narcotic before getting behind the wheel of a car.

Methadone is commonly administered by substance abuse treatment facilities to help patients avoid the withdrawal symptoms associated with heroin and other illegal drugs. Proper use of methadone can allow former addicts to recover and live productive, normal lives. But improper use of methadone poses a risk to everyone.

You might take it for granted that methadone clinics would recognize their legal duty to provide safe care to methadone patients who drive on Minnesota roads under the influence of the drugs they provide. But after a Brainerd clinic's patient caused a tragic methadone-related fatal crash in Northern Minnesota, the clinic has claimed that the law cannot hold it responsible. In other words, the Brainerd methadone clinic and others argue that they owe the public no obligation to safely control their patients while under the influence of the powerful drugs they dole out—often at the expense of Minnesota taxpayers.

Robins Kaplan LLP represents the families of two Carlton County workers who were killed when a patient drove from the Duluth area all the way to Brainerd to get her morning doses of methadone. In addition to drinking a dose at the clinic, she received a second dose to take home. As she had been doing for some time, the woman improperly injected this dose in an attempt to get high, then got behind the wheel of her car for the drive home—a distance of approximately 100 miles. Impaired by the methadone, she struck a Carlton County pickup, killing the two young men.

The wrongful death lawsuit includes the methadone clinic as a defendant, alleging that the clinic had ignored all of the warning signs that its patient was abusing the drugs it was giving to her. The methadone clinic responded to the complaint with a motion to dismiss—it claimed that it did not owe these two men (or any members of the general public, for that matter) a duty of care to provide safe oversight of its patients. With a decision that is the first of its kind in Minnesota, the methadone clinic's argument was rejected. The claims of negligence will proceed against the methadone clinic for its role in causing the tragic deaths of these two young men.

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## SELECTED RESULTS

### **\$9.5 MILLION SETTLEMENT FOR VICTIM OF FAILED BEDSIDE TRACHEA PROCEDURE**



**KATHLEEN  
FLYNN PETERSON**



**BRANDON  
THOMPSON**

Kathleen Flynn Peterson and Brandon Thompson represented a 51-year-old woman who suffered a catastrophic brain injury following a failed tracheostomy procedure. The woman had undergone surgery at a Minnesota hospital to repair a brain hemorrhage, which was by all accounts successful though she still required ventilatory support for breathing. About a week after the surgery, doctors in the hospital performed a procedure called a bedside percutaneous tracheostomy to allow for longer-term ventilator support while the woman recovered.

During the procedure a large artery in the woman's neck was severely damaged, leading to massive loss of blood and a global brain injury. She is left catastrophically impaired, blind, and totally dependent on others for round-the-clock care.

The case was vigorously defended, with the defendant hospital retaining top-notch experts to opine that the woman's injury was an unavoidable complication and that her outlook from the original brain hemorrhage was likely poor. We resolved the case at mediation for \$9.5 million.

### **SETTLEMENT FOLLOWING DEATH OF MOTHER OF FOUR**



**PATRICK  
STONEKING**



**PETER SCHMIT**

Patrick Stoneking, Peter Schmit, and local Texas counsel settled a wrongful death case involving a mother of four who developed severe headaches and vision loss following the birth of her last child. Imaging revealed a brain mass that was consistent with an abscess or tumor. The defendant neurosurgeon, while recognizing that brain surgery was needed to relieve pressure, thought it acceptable to wait two weeks, as his opinion favored that the mass was a tumor rather than an abscess. A few days later, she again presented with worsening symptoms. And

despite imaging revealing more midline shift, the defendant scheduled surgery for the next day. Unfortunately, the woman deteriorated further; emergency surgery was then performed. Post-surgery, imaging revealed the remaining abscess. As she deteriorated further, nurses failed to notify anyone, and she eventually herniated and died. Defense focused on causation, indicating that even with earlier intervention, her course could not have been changed. A bigger challenge was Texas' damage caps—the total limit for this married, working mother of four was approximately \$1.5 million. The case settled at mediation for an amount very close to this cap before substantial expert deposition costs were obtained.

### **\$450,000 SETTLEMENT FOR NEGLIGENT NEUROSURGERY**

Peter Schmit settled a North Dakota survival action involving negligent neurosurgery on a 42-year-old disabled man. The man, who lived in a group home setting, was born with LEOPARD syndrome, involving multiple deficits in cardiac, respiratory, and cognitive function. After he collapsed at a restaurant, imaging revealed a benign brain tumor that needed to be removed. Defendant neurosurgeon attempted extraction and failed. The client was then sent to Mayo Clinic. Post-surgery, he had extensive vision loss and balance difficulty. Mayo doctors noted a path of destruction from the prior approach and were able to remove the remaining tumor. Unfortunately, his vision loss did not abate, and due to that and balance issues, the client was unable to return to his former home. He required more care, and he was less happy. Twenty-two months later, he died of an unrelated cause, so the case was a survival action concerned with special damages and the pain and suffering incurred during those months. Subrogated medical expenses of \$72,000 were incurred. The case settled for \$450,000.

## **INVOKANA®, FARXIGA™, AND JARDIANCE® LINKED TO KETOACIDOSIS**

On May 15, 2015, the FDA issued a Safety Alert warning that the use of canagliflozin (Invokana), dapagliflozin (Farxiga), and empagliflozin (Jardiance) may lead to ketoacidosis.<sup>1</sup> Ketoacidosis is a serious condition and may require hospitalization. It occurs when the body produces high levels of blood acids called ketones.<sup>2</sup> While somewhat common for patients with Type I diabetes, it is rare for those with Type II diabetes, the condition for which this class of drugs is indicated.<sup>3</sup> In addition to ketoacidosis, a number of other possible injuries have been identified as potentially linked to these drugs, including kidney failure, cardiovascular injury, bladder cancer, and bone fractures.<sup>4</sup>

See endnotes on page 5 >

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## **OFF-LABEL ZOFRAN USE DURING PREGNANCY LINKED TO BIRTH DEFECTS**

Ondansetron (brand name: Zofran) is a popular anti-nausea drug, developed to treat nausea and vomiting after cancer treatments. It is currently FDA-approved for use after chemotherapy, radiotherapy, or surgery. Ondansetron is not FDA-approved for nausea and vomiting associated with pregnancy—yet is commonly prescribed for “morning sickness.”

When a drug is prescribed for a non-FDA approved use, it is called an “off-label” use. While doctors can legally write off-label prescriptions, drug manufacturers are generally prohibited from promoting or marketing drugs for off-label uses.

However, the United States Department of Justice (DOJ) sued GlaxoSmithKline (GSK) for illegally marketing Zofran (among other drugs) off label from 1998 to 2004. The DOJ claimed GSK promoted Zofran for morning sickness and offered kickbacks to doctors for prescribing it. GSK eventually settled the civil suit—and a related criminal suit involving other drugs—for a record-breaking \$3 billion.<sup>5</sup>

Unfortunately, several studies have linked Zofran use during pregnancy to birth defects. For example, one study found that women who took Zofran were twice as likely to have a child with cleft palate.<sup>6</sup> Another study surveying 897,000+ births in Denmark found a two-fold increased risk of heart defects for women who took ondansetron during pregnancy, a risk which led to an overall 30% increased risk of major malformation.<sup>7</sup>

Over 35 cases have been filed across the country against GSK related to Zofran. In October, the Judicial Panel on Multi-District Litigation will hear arguments to determine whether the cases should be consolidated in one Multi-District Litigation. Robins Kaplan LLP is investigating cases where a child has developed heart defects, cleft lip, cleft palate, as well as other birth defects, following Zofran use in the first trimester.

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The methadone clinic's duty to the general public is based on the common law, Minnesota Supreme Court case law, and decisions from other states recognizing a methadone clinic's duty under similar circumstances. The trial is currently set for this fall, and the lack of oversight that this patient received was truly egregious. Robins Kaplan attorneys Phil Sieff, Pat Stoneking, and Pat Yoedicke look forward to representing the families of these two young men at trial.

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## OTHER 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.

- **Benicar** – Popular blood pressure medication can cause intestinal problems known as sprue-like enteropathy, with chronic diarrhea, weight loss, nausea, and vomiting.<sup>8</sup>
- **GranuFlo and Naturalyte Dialysis Products** – Recalled products used in kidney dialysis that can cause metabolic alkalosis, which can lead to cardiopulmonary arrest and death.<sup>9</sup>
- **Hip Implants** – Metallosis and premature device failure with damage to bone or tissue can occur with certain hip implants.<sup>10</sup> Litigating cases involving DePuy ASR, DePuy Pinnacle, Stryker Rejuvenate, Wright Profemur, Wright Conserve, and Biomet M2a-Magnum.
- **Power Morcellator** – Surgical tool used in hysterectomies and fibroid removal procedures that may promote the spread of undetected uterine cancer.<sup>11</sup>
- **Viagra** – Use associated with increased risk of melanoma.<sup>12</sup>

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1. <https://www.nlm.nih.gov/medlineplus/druginfo/meds/a613033.html> <http://www.fda.gov/safety/medwatch/safetyinformation/safetyalertsforhumanmedicalproducts/ucm446994.htm>
  2. <http://www.fda.gov/Drugs/DrugSafety/ucm446845.htm>
  3. <https://www.nlm.nih.gov/medlineplus/druginfo/meds/a613033.html> <http://www.fda.gov/Drugs/DrugSafety/ucm446845.htm>
  4. <http://www.ismp.org/QuarterWatch/pdfs/2014Q2.pdf>
  5. Department of Justice, *GlaxoSmithKline to Plead Guilty and Pay \$3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data*, DEPARTMENT OF JUSTICE: JUSTICE NEWS (July 2, 2012). Article, additional details, and many documents available at [www.justice.gov](http://www.justice.gov)
  6. Marlene Anderka et al., *Medications Used to Treat Nausea and Vomiting of Pregnancy and the Risk of Selected Birth Defects* 94(1) BIRTH DEFECTS RES A CLIN MOL TERATOL 22 (2011)
  7. JT Andersen et al., *Ondansetron Use in Early Pregnancy and the Risk of Congenital Malformations – A Register Based Nationwide Control Study*, presented at International Society of Pharmaco-epidemiology, Montreal, Canada (2013); Gideon Koren, *Scary Science: Ondansetron Safety in Pregnancy—Two Opposing Results from the same Danish Registry*, THER DRUG MONIT. Vol. 36, No. 1, Feb. 2014; see also Bengt Danielsson et al., *Use of Ondansetron During Pregnancy and Congenital Malformations in the Infant*, 50 REPRODUCTIVE TECHNOLOGY 134 (2014) (finding an increased risk for cardiac septum defect)
  8. <http://www.fda.gov/Drugs/DrugSafety/ucm359477.htm>; <http://www.ncbi.nlm.nih.gov/pubmed/22728033>
  9. *Dialysate Concentrates Used in Hemodialysis: Safety Communication – Alkali Dosing Errors*, available at [www.fda.gov](http://www.fda.gov)
  10. *Concerns about Metal-on-Metal Implants*, available at [www.fda.gov](http://www.fda.gov)
  11. *FDA discourages use of laparoscopic power morcellation for removal of uterus of uterine fibroids*, available at [www.fda.gov](http://www.fda.gov)
  12. 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)

## MEET ROBINS KAPLAN'S APPELLATE ADVOCACY AND GUIDANCE TEAM

In every appeal, different courts, judges, and rules require a fundamental shift in the strategies and skills required to achieve success. Led by former Minnesota Supreme Court Chief Justice Eric Magnuson, the Robins Kaplan Appellate Advocacy and Guidance Group cuts through complexity to provide effective appellate representation. Comprising 10 attorneys, our appellate group handles appeals on a wide range of issues in state and federal appellate courts and has extensive experience before the Eighth Circuit Court of Appeals. Our appellate attorneys also frequently handle cases in state court in Minnesota, Wisconsin, and the Dakotas, among other states, including New York and Florida.



**ERIC MAGNUSON**

Eric Magnuson joined the firm in 2013, bringing with him more than 35 years of experience as an appellate lawyer and jurist. He is a past President of the American Academy of Appellate Lawyers and a founding President of the Eighth Circuit Bar Association. Though also a past President of the Minnesota Defense Lawyers Association, Eric has represented both plaintiffs and defendants before trial courts, as well as in state and federal appeals.



**KATHERINE  
BARRETT WIIK**

The point-person for appeals within the plaintiff's bar in our Appellate Advocacy and Guidance Group is Katherine Barrett Wiik, a former Sixth Circuit law clerk who started her practice at Robins Kaplan nine years ago. Prior to becoming part of the Business Litigation group, Katherine practiced for several years in the Mass Tort group, where she was part of the Mirapex MDL trial team and handled several personal injury and Section 1983 civil rights cases. She has been the primary author of dozens of appellate briefs in both state and federal court, and is a member of the MSBA Appellate Practice Section Council.

Robins Kaplan's appellate group takes a collaborative approach to every case, working with referring attorneys to provide the desired level of support and involvement. Our appellate group frequently works with solo and smaller firm attorneys on state and federal appeals. The group also partners with major law firms from across the country in significant appellate cases. As appellate co-counsel, our firm can play a variety of roles in an appeal, based upon the needs of the referring attorneys and client. One recent appellate win on behalf of a plaintiff-appellant referred by a firm that handled the case in district court is *Rotary Systems, Inc. v. TomoTherapy Inc. et al.*, Case No. A14-0186, where we obtained an opinion from the Minnesota Court of Appeals reversing a grant of summary judgment dismissing trade secret claims brought by a plaintiff manufacturer.

Our appellate team can also serve as an appellate resource to attorneys while their case is still before the trial court. If you have a question about preserving the record, suitability of appeal, or any other issues that may impact your case on appeal, our appellate attorneys are available to provide a short consultation on your appellate issue at no cost.



## PETER SCHMIT ELECTED PRESIDENT OF THE MINNESOTA ASSOCIATION FOR JUSTICE



Peter Schmit was recently elected to serve as President of the Minnesota Association for Justice (MAJ). Peter assumed the presidency on August 14 while attending the association’s annual convention in Alexandria, Minnesota. His term will last one year, ending in August 2016.

The MAJ is an organization dedicated to protecting the constitutional right to justice for everyone. Peter reaffirmed this dedication shortly after taking on the presidency, stating, “Our mission is to protect everyone’s access to the courts, not just powerful corporations. We oppose legislation that takes away our rights.”

Peter also spoke on the importance of mentoring less experienced attorneys. “In addition to our legislative agenda, my presidency will seek to connect our members in more meaningful ways,” said Peter. “Our annual convention theme of Paying it Forward speaks to the need for long-standing members of MAJ to mentor younger attorneys who are just starting out. We all had a mentor that helped us see the importance of this association, and I want to be sure that the tradition continues.”

As Chair of Robins Kaplan’s Personal Injury and Medical Malpractice groups, Peter has extensive experience working on behalf of the injured. Over the course of his 26-year career, he has received regular recognition as a “Minnesota Super Lawyer” by *Super Lawyers*, has been certified as a Civil Trial Specialist by the Minnesota State Bar Association and been inducted into the American Board of Trial Attorneys. He lectures and writes frequently on the topic of medical malpractice.



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**ROBINS  KAPLAN LLP**

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