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ROBINS  KAPLAN^{LLP}

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JUUL AND THE YOUTH VAPING EPIDEMIC

BY HOLLY DOLEJSI



HOLLY DOLEJSI

Twenty years after Robins Kaplan LLP entered into the historic settlement with big tobacco, and after steadily declining teen tobacco use rates, the country again faces a tobacco addiction epidemic.¹ New and regular tobacco use has increased for the first time in 17 years, fueled by a jump in e-cigarette use by teens over the past three years.² This reversal of the trend can be traced to the incredible increase in popularity of JUUL, which has become so pervasive that “to JUUL” is now a verb.³ Just as Robins Kaplan was called to action 20 years ago to address the first tobacco epidemic, the firm has again committed to taking on this new threat and is actively litigating against JUUL.

The FDA has declared that the United States is in the middle of a youth vaping epidemic.⁴ E-cigarette use increased 78% among high school students (11.7% to 20.8%) and 48% among middle school students (3.3% to 4.9%) from 2017 to 2018.⁵ Among middle and high school students, 3.62 million were current users of e-cigarettes in 2018.⁶ JUUL is the most popular brand of e-cigarette in the United States, with 75% of the market.⁷ Its dramatic rise in popularity, especially among young people, has caused the Food and Drug Administration, U.S. Federal Trade Commission, and the House Subcommittee on Economic and Consumer Policy to scrutinize its marketing practices.⁸ The House Subcommittee concluded that:

JUUL deployed a sophisticated program to enter schools and convey its messaging directly to teenage children; JUUL also targeted teenagers and children, as young as eight years old, in summer camps and public out-of-school programs; and JUUL recruited thousands of online “influencers” to market to teens.⁹

DOCTORS OWE A DUTY OF CARE WHENEVER THERE IS A FORESEEABLE RISK OF HARM TO A PATIENT

BY PATRICK STONEKING



**PATRICK
STONEKING**

In April, the Supreme Court of Minnesota issued its opinion in *Warren v. Dinter*, 926 N.W.2d 370 (Minn. 2019), clarifying the legal standard in Minnesota under which a doctor would owe a patient a duty of care and explaining how that duty is based on foreseeability of the harm. The underlying case involved a claim against a hospitalist who spoke over the phone with a nurse practitioner (NP) who was seeking to have her patient admitted to the hospitalist's facility. The hospitalist listened to the clinical situation, told the NP that he did not think the patient should be admitted, and gave direction on an alternative treatment. The patient and the hospitalist never spoke to each other – but after the patient's hospital admission was declined, she died from sepsis.

The decision drew a lot of attention because the Supreme Court rejected an argument that many might have simply assumed was well-founded – that a doctor cannot be liable to any patient unless there has been an express physician-patient relationship established between them. The plaintiff and the Minnesota Association for Justice argued that vaguely defined relationship was never actually a requirement for a medical negligence case in this state and that the appropriate test for a doctor's duty is whether there exists a foreseeable risk of harm that could result from negligent care. In other words, whether the defendant hospitalist met or talked to this patient should not matter, because the medical decision not to admit was determinative and a significant factor in causing her death.

The defendant had the support of an amicus brief filed by the Minnesota Hospital Association, the Minnesota Medical Association, and the American Medical Association. It was argued that extending a legal duty to the hospitalist who declined admission of a patient without seeing her or speaking to her directly would have a chilling effect on informal, or "curbside," consultations between doctors, which are commonplace in good medical practice. But, in the end, the Supreme Court could not agree that was an appropriate description of this case, where the defendant heard the clinical information and was primarily responsible for a significant treatment decision, declining the patient's admission to a hospital. Looking back on decades of case law, the Minnesota Supreme Court confirmed that the real question in this case should be whether that risk of harm was foreseeable. And, whenever physicians reasonably foresee that their actions will affect patients, they should act according to accepted standards of care.



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.

- **JUUL** - Investigating cases of JUUL users who were unaware of the addictive nature of JUUL when they began using it, who subsequently became addicted. We are also investigating cases of people who suffered serious injury after using JUUL.
- **Premature Hip Implant Failures** - Litigating cases involving premature hip failures, such as Stryker Rejuvenate and Stryker LFIT COCR V40.¹
- **Roundup** - Exposure to Roundup® has been linked to an increased risk of cancer, including Non-Hodgkin's lymphoma, hairy cell leukemia, multiple myeloma, B-cell lymphoma, and lymphocytic lymphoma.²
- **Taxotere** - Studies and reports have associated permanent hair loss (alopecia) with the use of chemotherapy drug Taxotere (docetaxel).³
- **Tribal Opioid Claims** - Litigating on behalf of Native American Tribes claims against the manufacturers and distributors of prescription opioids for their alleged role in creating the opioid epidemic.
- **Viagra** - Use is associated with increased risk of melanoma.⁴
- **Zofran** - This anti-nausea drug prescribed "off label" for morning sickness is associated with increased risk of cleft palate and congenital heart defects.⁵

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

2. ARC Monographs Volume 112: evaluation of five organophosphate insecticides and herbicides, 2015.

3. 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).

4. 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)

5. 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. *Phar-macoepidemiology and Drug Safety.* (Oct. 2013).



Studies have shown that JUUL's e-cigarette device and e-liquid "pods" deliver more nicotine into the bloodstream than traditional combustible cigarettes.¹⁰ In addition to revealing the product's addiction potential, numerous studies report that nicotine exposure to individuals under the age of 26 can harm the developing brain, which can impact learning, memory, and attention.¹¹

Reports have also emerged of serious lung injuries, seizures, and cardiovascular injuries potentially associated with the use of e-cigarettes.¹² The CDC has reported 215 possible cases of severe pulmonary disease associated with the use of electronic cigarette products.¹³ The injuries resulted in significant hospitalizations, sometimes requiring the use of ventilators.¹⁴ Four of the reported cases have resulted in death, including one in Minnesota.¹⁵ At the same time, the FDA is investigating reports of seizures (127 received so far) potentially related to e-cigarette use.¹⁶

We are currently prosecuting a case on behalf of a nationwide class of minors against JUUL Labs, Inc. for false advertising in violation of consumer protection statutes, common law fraud, strict product liability (failure to warn), and negligence. We are seeking damages for exposure to toxic substances, increased risk of various harms, medical monitoring, education and cessation counseling, restitution (the cost of the products), and various types of injunctive relief (labeling, warnings, changes to prevent easy accessibility). In addition, we are currently evaluating cases of young people who became addicted to nicotine after using JUUL, as well as severe injuries associated with using JUUL e-cigarettes.

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1. Belluck, *Tobacco Companies Settle a Suit With Minnesota for \$6.5 Billion*, NYTIMES (May 9, 1998), available at <https://www.nytimes.com/1998/05/09/us/to-bacco-companies-settle-a-suit-with-minnesota-for-6.5-billion.html>; https://www.cdc.gov/mmwr/volumes/68/wr/mm6806e1.htm?s_cid=osh-vs-mmwr-full-001
 2. MN Department of Health, *New survey shows Minnesota youth tobacco use rising for the first time in 17 years* (February 15, 2018), available at <https://www.health.state.mn.us/news/pressrel/2018/youthtob021518.html>; https://www.cdc.gov/mmwr/volumes/68/wr/mm6806e1.htm?s_cid=osh-vs-mmwr-full-001
 3. U.S. Food and Drug Administration, *Statement from FDA Commissioner Scott Gottlieb, M.D., on new steps to address epidemic of youth e-cigarette use* (Sep. 12, 2018), available at <https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-new-steps-address-epidemic-youth-e-cigarette-use>; https://www.cdc.gov/mmwr/volumes/68/wr/mm6806e1.htm?s_cid=osh-vs-mmwr-full-001; <https://www.nytimes.com/2018/08/27/science/juul-vaping-teen-marketing.html>
 4. <https://www.fda.gov/news-events/press-announcements/fda-takes-new-steps-address-epidemic-youth-e-cigarette-use-including-historic-action-against-more>
 5. <https://www.fda.gov/tobacco-products/products-ingredients-components/vaporizers-e-cigarettes-and-other-electronic-nicotine-delivery-systems-ends>
 6. *Id.*
 7. <https://truthinitiative.org/research-resources/emerging-tobacco-products/behind-explosive-growth-juul>
 8. <https://www.bloomberg.com/news/articles/2019-08-29/juul-devices-cited-in-seizure-reports-that-triggered-fda-probe>
 9. <https://oversight.house.gov/news/press-releases/new-documents-show-juul-deliberately-targeted-children-to-become-the-nation-s>
 10. Goniewicz ML, Boykan R, Messina CR, et al. *High Exposure to Nicotine Among Adolescents who use JUUL and Other Vape Pod Systems*. Tob Control Epub ahead of print. doi:10.1136/tobaccocontrol-2018-054565. See also, Benowitz, et al., *Nicotine Chemistry, Metabolism, Kinetics and Biomarkers*, 192 Handbook of Experimental Pharmacology 29-60 (Oct. 13, 2010), available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2953858/>; Pulvers, et al., *Tobacco Consumption and Toxicant Exposure of Cigarette Smokers Using Electronic Cigarettes*, Nicotine & Tobacco Research, 2018, 206-214; Omaiye et al., *High-Nicotine Electronic Cigarette Products: Toxicity of JUUL Fluids and Aerosols Correlates Strongly with Nicotine and Some Flavor Chemical Concentrations*, CHEM. RES. TOXICOL. 2019, 32, 1058-1069 (2019); and Pankow, J., et al., *Benzene Formation in electronic cigarettes* (2017) PLoS ONE: 12(3):e0173055 (reporting 61.6 mg/ml of nicotine in JUUL).
 11. *Surgeon General's Advisory on E-Cigarette Use Among Youth* (2018) available at <https://e-cigarettes.surgeongeneral.gov/documents/surgeon-generals-advisory-on-e-cigarette-use-among-youth-2018.pdf>. See also Musso F et al., *Smoking impacts on prefrontal attentional network function in young adult brains*, Psychopharmacology (Berl). 2007 Mar;191(1):159-69. Epub 2006.
 12. <https://med.stanford.edu/news/all-news/2019/05/e-cigarette-use-and-flavorings-may-increase-heart-disease-risk.html>
 13. https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html
 14. *Id.*
 15. <https://www.nytimes.com/2019/09/04/health/vaping-death-lung.html> ; <http://www.startribune.com/minnesota-reports-vaping-injury-death/559591192/>
 16. <https://www.fda.gov/news-events/fda-brief/fda-brief-fda-encourages-continued-submission-reports-related-seizures-following-e-cigarette-use>

CHILD SEX ABUSE LITIGATION UPDATE

BY RAYNA KESSLER

On August 14, 2019, Robins Kaplan filed over 100 lawsuits on behalf of adult survivors who were sexually abused as children by Catholic clergy members. These lawsuits were brought under the new Child Victims Act, which was signed into law on February 19, 2019. The New York state law opens a one-year window for survivors of child sex abuse to file civil claims against their abusers and the institutions that failed to keep them safe, regardless of when the abuse occurred. The window will close on August 13, 2020.

In addition to claims brought against Catholic clergy members, Robins Kaplan also has begun filing lawsuits against the Boy Scouts of America. In filing these lawsuits, each survivor is empowered with making the decision to file their name publicly or anonymously. The highly sensitive and private nature of the allegations deserves the utmost respect and care by our law firm, which is why we are committed to ensuring that our clients are fully informed of their legal options before deciding how to proceed.

As part of our commitment to helping survivors, Robins Kaplan is partnering with Jeff Anderson & Associates, P.A., one of the country's premier law firms to represent survivors of childhood sexual abuse, including cases involving clergy abuse in New York and numerous other states. Our firms are now preparing to bring civil claims in other states where look-back windows to bring civil claims will open shortly, including New Jersey and California. Robins Kaplan is proud to support this national movement to provide greater civil justice access for survivors and to better protect children in the future.

CASE RESULTS

SELECTED CASE RESULTS

\$600,000 Settlement for Heart Valve Injury During Cardiac Surgery

Peter Schmit settled a medical negligence claim involving injury to a heart valve during a cardiac ablation. The patient needed valve repair surgery, and her cardiac function has returned to the normal range, although she continues to complain of loss of stamina. Defense contended the loss resulted from underlying spine, knee, and arthritis issues. Case settled for \$600,000.

\$700,000 Settlement for Family of Fatal Drunk-Driving Accident Victim

A young father tragically died, leaving his wife and three small children. A Minnesota bar served an excessive amount of alcohol to the young father's friend and co-worker. Minutes after leaving the bar, the drunk friend crashed his car, and the young father died instantly. This young widow and their children accepted a \$700,000 settlement from the driver and the bar for serving an obviously intoxicated patron. Chris Messerly, Phil Sieff, Pat Yoedicke, and Elizabeth Fors represented the family.

RECOGNITIONS AND AWARDS



**CHRIS
MESSERLY**



**TARA
SUTTON**

CHRIS MESSERLY, TARA SUTTON RECOGNIZED AS 'LAWYERS OF THE YEAR'

Chris Messerly and Tara Sutton have been named 2020 "Lawyers of the Year" by *The Best Lawyers in America*. Chris is recognized for Medical Malpractice Law and Tara for Mass Tort Litigation/Class Actions - Plaintiffs.

The award recognizes one attorney in a major practice area in each metropolitan area. Recipients are selected based on particularly impressive peer-review results gathered from other attorneys in the same communities and the same fields. The recognition stands as a reflection of the recipient's abilities, professionalism, and integrity.



**JENNIFER
LELAND**

JENNIFER LELAND NAMED 2019-2020 PRESIDENT OF THE WOMEN LAWYERS ASSOCIATION OF LOS ANGELES

Jennifer Leland has been installed as president of the Women Lawyers Association of Los Angeles (WLALA). Her yearlong term began with an installation dinner and centennial celebration on September 21. Additionally, Christina Lincoln was installed as co-chair of WLALA's Diversity Committee and Lauren Birkenstock as the incoming co-chair of the Young Lawyers Section.

FIRM EVENTS

Robins Kaplan was pleased to support the 37th Annual Minnesota Association for Justice (MAJ) Convention in August. At this year's conference, Robins Kaplan attorney Elizabeth Fors sponsored a luncheon and spa in partnership with the Women for Justice Section, and Patrick Stoneking gave a presentation on "Surviving the Trial." The firm also hosted a preconvention reception to kick off the activities.



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