



# ROBINS KAPLAN JUSTICE REPORT

WINTER 2019 | VOL. 13 NO. 1

INSIDE THIS ISSUE

BEING A MORE MINDFUL ADVOCATE

ROBINS  KAPLAN<sup>LLP</sup>

# INSIDE THIS ISSUE

---

2. BEING A MORE MINDFUL ADVOCATE

3. SELECTED CASE RESULTS

4. MASS TORT INVESTIGATIONS

6. ROBINS KAPLAN FIGHTS FOR TRIBAL VOTING RIGHTS

6. ROUNDUP® LINKED TO CANCER

7. AWARDS



## BEING A MORE MINDFUL ADVOCATE

BY KATHLEEN FLYNN PETERSON



**KATHLEEN  
FLYNN PETERSON**

Among the most pressing concerns for modern professionals are high stress levels and the challenge of finding work-life balance. The work that we do, as meaningful and rewarding as it is, is unquestionably stressful. The adversarial nature of our work carries with it a great deal of stress. It has been long recognized that the long hours, heavy caseloads, and multiple deadlines can lead to overwhelming stress, resulting in fatigue and depression. A recent ABA study validates that our profession faces truly significant challenges regarding attorney well-being. High stress and work-life balance were the two most significant challenges lawyers identified facing in their professional lives. Lawyers, of course, are not alone.

Stress has been defined as the struggle with what is.<sup>1</sup> Stress is a normal reaction of our bodies and minds to the demands that are placed upon us. It is both a physical and a psychological response. A balanced stress level helps us thrive in our challenging world. Too much stress, or distress, predisposes us to physical illness and disease. It impairs our ability to do our work at the highest level. The good news – it is reversible.

Ariana Huffington in her book *Thrive: The Third Metric to Redefining Success and Creating a Life of Well-Being, Wisdom, and Wonder* observes, “One reason we give for allowing stress to build in our lives is that we don’t have time to take care of ourselves. We are too busy chasing a phantom of successful life.” Huffington’s book persuasively argues the way to achieve well-being is to shift our focus from the traditional measures of success (money and power) and focus instead on “thriving.”

# SELECTED CASE RESULTS

## **\$625,000 SETTLEMENT FOLLOWING POST-OPERATIVE FLUID OVERLOAD**



**PETER A. SCHMIT**



**GORTNEY MCLEOD**

In 2012, the decedent was diagnosed with bladder cancer. The cancer recurred two more times and was treated. In 2015, when the decedent was 70 years old, the bladder cancer had spread to the man's kidney. The kidney was removed

by the defendant. The cancer was very aggressive and the doctor gave him about a 20 percent chance of cure. Post-operatively, he began to suffer from unrecognized and untreated fluid overload. By the time he became unresponsive and died, three days after surgery and on the day the doctor was going to discharge him, he was over 7500 milliliters in excess fluids (an entire body holds about 5500 milliliters). In the last several hours of life, the decedent's pain increased, he began to get significant distension, his oxygen saturation dropped, and no doctor came in to see him. The family was told he died of a massive myocardial infarction (MI). The autopsy showed some coronary artery disease but no MI. Our experts opined he died of fluid overload, which most likely caused an arrhythmia. Our oncology expert felt it unlikely that the decedent would have survived and felt the cancer likely would have recurred within a year, requiring additional treatment. The decedent is survived by his wife and two adult sons, who have kept the family business running and profitable since their father's death.

### **\$625,000 settlement at mediation**

## **\$750,000 SETTLEMENT IN AMPUTATION MATTER**

Peter Schmit represented a client who was 36 years old when he began seeing a podiatrist for ongoing ankle instability, right greater than left. He had Ehlers-Danlos syndrome, which is a genetic condition that leads to connective-tissue disorders, including hypermobility spectrum disorders. He had suffered many injuries to each of his ankles, because the hypermobility caused him to frequently roll his ankles. He had tried braces, but they were cumbersome to wear. He was in a lot of pain, making mobility a challenge for him. He agreed to have surgery to fix his right-ankle ligaments. The defendant doctor performed that surgery. Our client continued to have problems with rolling of his right ankle. The doctor eventually performed a tibiototalcaneal fusion surgery. The surgery failed, and our client had malunion of the fusion. The doctor performed a revision surgery, which also failed, resulting in malunion. The doctor had actually fused the foot in the varus position. Due to ongoing pain and instability, our client saw an orthopedic surgeon. They discussed a potential salvage operation with questionable chance for success or a potential below-the-knee amputation. Our client chose the amputation. No wage loss claim was asserted.

### **\$750,000 pre-suit settlement**



## 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.

- **Abilify** – This atypical antipsychotic—used to treat a variety of disorders, including schizophrenia, bipolar, and depression—may cause impulse-control behaviors, including compulsive gambling.<sup>1</sup>
- **Benicar** – Popular blood pressure medication can cause intestinal problems known as sprue-like enteropathy, with chronic diarrhea, weight loss, nausea, and vomiting.<sup>2</sup>
- **Premature Hip Implant Failures** – Litigating cases involving DePuy ASR, DePuy Pinnacle, Stryker Rejuvenate, Stryker LFIT COCR V40, Wright Profemur, Wright Conserve, and Biomet M2a-Magnum.<sup>3</sup>
- **Invokana, Farxiga, and Jardiance** – These Type 2 Diabetes drugs can cause ketoacidosis—very elevated blood acid levels—which may require hospitalization.<sup>4</sup>
- **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.<sup>5</sup>
- **Stockert 3t Heater-Cooler Device** – This device used during open-heart surgery has been linked with a specific type of rare, nontuberculous mycobacterium infections, which can occur up to five years after exposure.<sup>6</sup>
- **Taxotere** – Studies and reports have associated permanent hair loss (alopecia) with the use of chemotherapy drug Taxotere (docetaxel).<sup>7</sup>
- **Viagra** – Use is associated with increased risk of melanoma.<sup>8</sup>
- **Zofran** – This anti-nausea drug prescribed “off label” for morning sickness is associated with increased risk of cleft palate and congenital heart defects.<sup>9</sup>
- **Whistleblower/False Claims Act** – Cases involving companies who defraud government entities, including unpaid or underpaid obligations, over billing, healthcare, or construction fraud.

<sup>1</sup> <http://healthycanadians.gc.ca/recall-alert-rappel-avis/hc-sc/2015/55668a-eng.php>

<sup>2</sup> <http://www.fda.gov/Drugs/DrugSafety/ucm359477.htm>; <http://www.ncbi.nlm.nih.gov/pubmed/22728033>

<sup>3</sup> Concerns about Metal-on-Metal Implants, available at [www.fda.gov](http://www.fda.gov)

<sup>4</sup> <http://www.fda.gov/drugs/drugsafety/ucm446845.htm>

<sup>5</sup> ARC Monographs Volume 112: evaluation of five organophosphate insecticides and herbicides, 2015.

<sup>6</sup> See <https://www.cdc.gov/hai/outbreaks/heater-cooler.html>

<sup>7</sup> 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).

<sup>8</sup> 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)

<sup>9</sup> 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).



Mindfulness practice is now recognized as a “cure” to life stress. Mindfulness is a balanced awareness in every moment. It is truly having its moment now. No longer seen as simply a spiritual practice, it is now prevalent in therapeutic settings, classrooms, boardrooms, congressional offices, and military bases. Scientific research continues to confirm the physical, cognitive, and emotional benefits of practicing mindfulness.

Mindfulness is a way of being in the world – being present and available. Mindfulness allows us to respond skillfully to life’s challenges rather than simply reacting. In March of 2014, *Harvard Business Review* published an article “Mindfulness in the Age of Complexity.” They concluded that research has shown very specific benefits to being more mindful. Better performance, for one: It is easier to pay attention when attention is your sole task. It also turns out you are more creative, better able to take advantage of opportunities that present themselves, and better at averting danger that has not yet arisen. You like people better. People like you better. You are even more charismatic because you are less evaluative.<sup>2</sup>

If you are interested in seeing specific application of mindfulness to the practice of law, you might want to look at an article in *Harvard Negotiation Law Review* that appeared in the spring of 2002. It is entitled, “The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients.” Professor Leonard Riskin has done a great deal of work to establish his belief that mindfulness meditation can help lawyers alleviate high levels of dissatisfaction and related negative mental and physical stress and prevent lawyers from missing opportunities to provide high-level services to their clients.

Mindfulness is not a silver bullet. However, when you speak with those who have genuinely integrated mindfulness into their lives, the phrase they use to describe the effect is “life-changing.” Mindfulness teaches us not to get caught up in the vortex of our stress. It allows us to develop greater compassion and acceptance. Mindfulness won’t eliminate the stress from our lives, but as Jon Kabat-Zinn writes, “There is a way of being, a way of looking at problems, a way of coming to terms with the full catastrophe that can make life more joyful and rich than it otherwise might be.”

## Conclusion

Lawyer well-being contributes to organizational success. Lawyer well-being influences ethics, professionalism, and competence. There are business reasons for focusing on the well-being of the lawyers in an organization. But the bottom line of promoting well-being is that it is simply the right thing to do; and it is also the right thing to do for yourself. I urge you to start today. As the old adage goes, it is always too soon until it is too late. Life is short; you don’t want to run so fast that you miss it.

## Suggested Reading

*Thrive: The Third Metric to Redefining Success and Creating a Life of Well-Being, Wisdom, and Wonder* by Ariana Huffington

*The Mayo Clinic Guide to Stress-Free Living* by Amit Sood, M.D.

*The Reflective Counselor: Daily Meditations for Lawyers* by F. Gregory Coffey and Maureen C. Kessler

“Left Brain Buddha” blog by Sarah Rudell Beach, available at: <http://leftbrainbuddha.com/>

*The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, *Harvard Negotiation Law Review*, Spring 2002

---

<sup>1</sup> Sood, Amit, M.D., M.Sc. “The Mayo Clinic Guide to Stress-Free Living” 2013.

<sup>2</sup> Leonard L. Riskin has collected an impressive body of research on this topic. See Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, VII *Harv.Negot.L.Rev.*1, 8-17 (2002).

# ROBINS KAPLAN FIGHTS FOR TRIBAL VOTING RIGHTS

BY TIM PURDON

Robins Kaplan partner and former United States Attorney for North Dakota Tim Purdon teamed with lawyers from the Native American Rights Fund and the Campaign Legal Center to protect the voting rights of American Indian citizens in North Dakota in the lead up to the 2016 election. Together, Tim and the litigation team sought injunctive relief on behalf of the Spirit Lake Nation and six individual Native American voters who faced obstacles in complying with North Dakota's voter ID law. State law requires that a voter produce a picture ID that contains a street address. Many tribal IDs in North Dakota do not contain street addresses, instead relying on P.O. Box addresses. Implementation of the "street address" requirement had been stayed by the U.S. District Court in North Dakota, but that ruling was upended by the Eighth Circuit Court of Appeals in September 2018. In response, tribes and native voters scrambling to comply with the new requirement faced a variety of related hurdles, ranging from the lack of street addresses for parts of some reservations to absentee ballots being rejected for "invalid addresses" by some county auditors. In a suit filed the week before the election, Tim and the litigation team sought a temporary restraining order (TRO) on grounds that the street address requirement, as applied, violated the First and Fourteenth Amendment of the United States Constitution. While the request for a statewide TRO was denied by the court on the grounds that the election date was imminent and the risk of confusion too great, Tim and litigation team successfully obtained an order that ensured the six individual named plaintiffs' right to vote. Additionally, the litigation brought national attention to the address requirement's disenfranchising impact on American Indian voters, which helped drive record voter turnout across all North Dakota reservations.

Tim founded Robin Kaplan's Bismarck Office in 2015 and litigates in state and federal courts across North Dakota. His work on the Tribal Voting Rights litigation is pro bono.

## ROUNDUP® LINKED TO CANCER

Glyphosate, marketed by Monsanto as Roundup®, is a broad-spectrum herbicide used in more than 750 different products for agriculture, forestry, urban, and home applications.<sup>1</sup> Its use has increased sharply with the development of genetically modified Roundup Ready® crop varieties.<sup>2</sup>

Exposure to Roundup® has been linked to an increased risk of cancer.<sup>3</sup> On March 20, 2015, the International Agency for Research on Cancer (IARC), an agency of the World Health Organization, issued an evaluation of several herbicides, including glyphosate, the functional ingredient in Roundup®.<sup>4</sup> Individuals exposed to glyphosate showed an increased risk of developing certain cancers, including non-Hodgkin's lymphoma.<sup>5</sup> The IARC classified glyphosate as "probably carcinogenic to humans."<sup>6</sup> People who worked on farms where Roundup® was used commercially may have the highest risk.<sup>7</sup>

Recently, the first case to go to trial alleging that glyphosate caused non-Hodgkin's lymphoma resulted in a jury verdict of over \$289 million.<sup>8</sup>

Robins Kaplan LLP is investigating cases for individuals diagnosed with non-Hodgkin's lymphoma following exposure to Roundup®. We welcome calls from referring attorneys or potential clients at 1-800-553-9910 or at 612-349-8500.

---

<sup>1</sup> *Carcinogenicity of tetrachlorvinphos, parathion, malathion, diazinon, and glyphosate*, LANCET ONCOLOGY, Vol 16:490-91, May 2015.

<sup>2</sup> *Id.*

<sup>3</sup> IARC Monographs Volume 112: *Evaluation of five organophosphate insecticides and herbicides*, 2015.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> <https://www.cnn.com/2018/08/10/health/monsanto-johnson-trial-verdict/index.html>

# AWARDS

## PRACTICE GROUPS AND PARTNERS NAMED ELITE TRIAL LAWYERS



TARA  
SUTTON



HOLLIS  
SALZMAN

The firm has been awarded *The National Law Journal's* 2018 Elite Trial Lawyers award in each of the categories for which we were nominated, including Antitrust and Medical Malpractice. Partners Tara Sutton and Hollis Salzman were awarded the NLJ's inaugural Elite Women of the Plaintiff's Bar Award.

The Elite Trial Lawyers awards recognize U.S. attorneys and law firms that have provided cutting-edge representation and achieved major wins on behalf of plaintiffs. According to the NLJ, the winners were selected from more than 300 submissions.

## PETER SCHMIT INDUCTED INTO THE AMERICAN COLLEGE OF TRIAL LAWYERS



PETER A.  
SCHMIT

Peter Schmit has become a Fellow of the American College of Trial Lawyers (ACTL), a legal association composed of the best of the trial bar from the United States and Canada. Fellowship in ACTL is extended by invitation only – and only after careful investigation – to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility, and collegiality.

Peter joins Robins Kaplan colleagues and ACTL Fellows Marty Lueck, Chris Messerly, Terry Wade, Ron Schutz, and Kathleen Flynn Peterson.



**BISMARCK**

1207 West Divide Avenue  
Suite 200  
Bismarck, ND 58503  
701 255 3000 TEL

**MINNEAPOLIS**

800 Lasalle Avenue  
Suite 2800  
Minneapolis, MN 55402  
612 349 8500 TEL

**SILICON VALLEY**

2440 West El Camino Real  
Suite 100  
Mountain View, CA 94040  
650 784 4040 TEL

**BOSTON**

800 Boylston Street  
Suite 2500  
Boston, MA 02199  
617 267 2300 TEL

**NAPLES**

711 Fifth Avenue South  
Suite 201  
Naples, FL 34102  
239 430 7070 TEL

**SIOUX FALLS**

140 North Phillips Avenue  
Suite 307  
Sioux Falls, SD 57104  
605 335 1300 TEL

**LOS ANGELES**

2049 Century Park East  
Suite 3400  
Los Angeles, CA 90067  
310 552 0130 TEL

**NEW YORK**

399 Park Avenue  
Suite 3600  
New York, NY 10022  
212 980 7400 TEL

---

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.

---