ROBINS KAPLAN LLP

ROBINS KAPLAN JUSTICE REPORT

SPRING 2020 | VOL. 14 NO. 2

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BY ELIZABETH FORS

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Safety. As trial lawyers, we know the importance of keeping our communities safe. As trial lawyers, it is our job to shine the light on wrongdoers. It is our job to hold the wrongdoers accountable. Our goal is to make our communities safer - for everyone.

Recently there have been too many tragedies involving young people renting ground floor apartments with sliding glass doors. A typical story involves young women renting their an apartment. The young women keep the front door dead-bolted and exterior sliding glass door "latch" locked – because that is how the landlord instructed. Except one night, an armed intruder grabs the sliding glass door handle, tugs twice, and lifts the locked door open. The unimaginable happens: a masked man terrorizes, robs, and rapes the young women. We know the armed intruder is responsible. However, shouldn't the landlord also have some responsibility?

An intruder can bypass a locked sliding glass door lock within seconds. How? The sliding glass door "lock" is just a latch that hooks into the doorframe. Even inexperienced burglars quickly overcome most of these manufacturer-installed latches. All burglars need to do is lift the door off its track – easy, especially if the door isn't properly maintained and adjusted. That is why most of us grew up with a sawed off hockey stick in the sliding glass door track – the door does not open wide enough for anyone to get in.

Those within the residential property management industry know how easy these latches are to bypass. That is why many landlords install secondary security devices like charley bars or pin locks in the door frames and properly maintain and adjust the doors. Yet, some landlords refuse to spend the extra money for the added layer of safety and additional maintenance.

In order to bring a negligence claim against a residential landlord, tenants must get past two high hurdles: third party liability waivers and the general rule that landlords are not liable for tenant's injuries.

THIRD-PARTY LIABILITY WAIVERS

Most residential leases include third party liability waivers. A typical waiver:

> Act of Third Parties: Management is not responsible for the actions, or for any damages, injury or harm caused by such action, of third parties (such as other residents, guests, intruders, or trespassers) who are not in Management's control.

The language only waives claims caused by the acts of third parties. The waiver is moot if injured residents allege that the landlord is responsible for the landlord's *own* acts, or inactions, not for the *acts* of the third party (the intruder/rapist). In this scenario, if the tenants claim the landlord's inactions, a failure to add a charley bar or warn that sliding glass door locks are unreliable, caused the injuries.

Landlords generally have no duty, and are not responsible for a tenant's injuries, unless an exception applies. The Restatement (Second) of Torts recognizes many exceptions, including the landlord's duty to remedy hidden or concealed defects in the leased property.[1] One such hidden or concealed defect being the improperly maintained and adjusted sliding glass door. Section 358 provides that the landlord is subject to liability for physical harm caused by a condition if:

a. the lessee does not know or have reason to know of the condition or the risk involved; and

b. the lessor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to expect that the lessee will not discover the condition or realize the risk.

In *Francis v. Pic*, the North Dakota Supreme Court determined "reason to know" hinges on whether the landlord had knowledge of sufficient facts such that he would know the condition involved an unreasonable risk of physical harm to persons on the property.[2] "Should know" places a duty on the landlord to ascertain whether the specific condition exists.[3]

It follows, then, that the landlord had a duty to prevent hidden or concealed defects and the landlord can be held liable for damages caused by the defect. In this hypothetical, the landlord knew or had reason to know of the condition (that the improperly maintained and adjusted sliding glass door made it much easier for an intruder to bypass the latch "lock"), realized or should have realized the risk involved, and had reason to expect that the roommates would not discover the defect or realize the risk.

With a little ingenuity, we can shine a bright spotlight on these landlords and make the communities safer for our young people.

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[1] See §§ 357-358, 360 (1965).
[2] 226 N.W.2d 654, 657 (N.D. 1975).
[3] Id. at 657-58.

THE LOWDOWN ON HITECH—THE ACCESS YOUR CLIENTS STILL HAVE TO THEIR MEDICAL RECORDS

BY SCOTT JURCHISIN

SCOTT JURCHISIN

Individuals should have access to their protected health information—after all, it is *their* information. With the advent of electronic medical record systems, individuals' records have become much more accessible—healthcare organizations can now save each of their patients' entire medical record to a CD with a few clicks of a mouse. Despite the ease of providing individuals access to their medical records, healthcare organizations routinely charge an exorbitant *per-page* fee for that *electronic* copy. The truth is, it is not real "access" when individuals have to pay thousands of dollars for their records.

In 2009, Congress passed the Health Information Technology for Economic and Clinical Health Act (HITECH), in part, to address overcharging for medical records. The Act (and its progeny) allowed individuals to obtain a physical copy of their medical records for a reasonable, cost-based fee, which should be around $6.50. It also allowed individuals to have those records sent directly to a third party, including an attorney investigating a claim, for the same rate (instead of the individual having to deliver them). The common practice for attorneys was to have the client sign a HITECH request for medical records to be sent directly to their attorney.

But in a 2020 opinion (*Ciox v. Azar*, No. 18-CV-00040 (APM)), a federal district court held that when the records are sent directly to a third party, the reasonable, cost-based fee provision no longer applies. So patients having legal claims reviewed by medical malpractice and personal injury attorneys are no longer able to benefit from the fee limitation when the patient directs the organization to produce the records to the law firm.

Within days of that opinion, medical record copy services started citing the opinion in their letters to law firms denying these requests at HITECH rates. They are using the opinion to justify their per-page charges and dictate how individuals can use their protected health information.

The bottom line is that the fees do not make sense, but they do make dollars for the medical record copy services. As plaintiffs' attorneys, we can—and should—expect the copy services to put up a fight at every turn as this battle over HITECH requests continues. We also must continue to try to find the best solution for our clients to obtain their medical records and exercise their civil rights. For now, healthcare organizations will only apply HITECH's fee provision when the individual requests and receives the records themselves.

CONSUMER PROTECTION CLASS ACTIONS AND INVESTIGATIONS: ZF-TRW AIRBAG DEFECT

On March 6, 2020, Stacey P. Slaughter was appointed to the Plaintiffs Steering Committee in the multidistrict litigation class action lawsuit against airbag manufacturer ZF-TRW Automotive Holdings Corp. and vehicle manufacturers FCA, Honda, Hyundai, Kia, Mitsubishi, and Toyota. The suit alleges that the defendants knew or should have known that the airbags manufactured by ZF-TRW, which were installed in over 12 million vehicles in the United States, are defective and fail to operate during crashes. The suit also alleges that the defendants failed to take timely steps to protect consumers or inform the National Highway Safety Administration of the defect. For more information, please see the Robins Kaplan website:

https://www.robinskaplan.com/services/class-action-litigation/defective-airbag-class-action-litigation

The current list of affected vehicles include:

FCA

2010 Chrysler Sebring
2015 Chrysler 200
2013-2019 Dodge Avenger
2010-2011 Dodge Nitro
2009-2012 Dodge Ram 1500
2010-2012 Dodge Ram 2500
2010-2012 Dodge Ram 3500
2011-2012 Dodge Ram 4500
2011-2012 Dodge Ram 5500
2012-2019 Fiat 500
2010-2017 Jeep Compass
2010-2012 Jeep Liberty
2015-2017 Jeep Patriot
2010-2018 Jeep Wrangler

Honda

2014-2019 Acura RLX
2014-2019 Acura RLX Hybrid
2012-2014 Acura TL
2015-2017 Acura TLX
2012-2014 Acura TSX
2012-2014 Acura TSX Sport Wagon
2013-2015 Honda Accord
2014-2015 Honda Accord Hybrid
2012-2015 Honda Civic
2012-2015 Honda Civic GX
2012-2015 Honda Civic Hybrid
2012-2015 Honda Civic SI
2012-2016 Honda CR-V
2012-2017 Honda Fit
2013-2014 Honda Fit EV
2012-2014 Honda Ridgeline

Hyundai

2013-2019 Hyundai Sonata
2013-2019 Hyundai Sonata Hybrid

Kia

2010-2013 Kia Forte
2010-2013 Kia Forte Koup
2013-2019 Kia Optima
2012-2016 Kia Optima Hybrid
2014 Kia Sedona

Mitsubishi

2013-2017 Mitsubishi Lancer
2013-2015 Mitsubishi Lancer Evolution
2014-2015 Mitsubishi Lancer Ralliart
2013-2016 Mitsubishi Lancer Sportback
2013 Mitsubishi Outlander

Toyota

2012-2018 Toyota Avalon
2013-2018 Toyota Avalon Hybrid
2011-2019 Toyota Corolla
2017-2018 Toyota Corolla IM
2011-2013 Toyota Corolla Matrix
2012-2017 Toyota Sequoia
2012-2019 Toyota Tacoma
2012-2017 Toyota Tundra

Robins Kaplan LLP is continuously investigating new potential consumer protection class action cases. Please contact our Consumer Protection team if you have any questions or know of any individuals whose case should be evaluated via our case evaluation form at https://www.robinskaplan.com/services/class-action-litigation/defective-airbag-class-action-litigation #or by phone at: 1.800.206.9683

ELMIRON-RELATED EYE INJURIES AND VISION PROBLEMS

Robins Kaplan LLP is investigating cases of individuals diagnosed with eye injuries or vision problems following use of the drug Elmiron, the brand name for pentosan polysulfate sodium. Elmiron is the only FDA-approved oral agent for treatment of interstitial cystitis (also known as painful bladder syndrome). It is manufactured by Janssen, a Johnson & Johnson pharmaceutical company.

Recently, four peer-reviewed medical journals have linked Elmiron use with certain eye injuries. Specifically, articles in Ophthalmology,[1] JAMA Ophthalmology,[2] the British Journal of Ophthalmology,[3] and Review of Ophthalmology,[4] have

[1] Pearce WA, Chen R, Jain N. *Pigmentary Maculopathy Associated with Chronic Exposure to Pentosan Polysulfate Sodium*. Ophthalmology. 2018 Nov;125(11):1793-1802.
[2] Hanif AM, Armenti ST, Taylor SC, et al. *Phenotypic Spectrum of Pentosan Polysulfate Sodium-Associated Maculopathy: A Multicenter Study.* JAMA Ophthamol. 2019 Sep 5. Doi: 10.1001/jamaophthalmol.2019.3392. [Epub ahead of print].
[3] Jain N, Li AL, Yu Y, VanderBeek BL. *Association of macular disease with long-term use of pentosan polysulfate sodium: findings from a US cohort*. Br J Ophthalmol. 2019 Nov 6. Doi: 10.1136/bjophthalmol-2019-314765. [Epub ahead of print].
[4] Hanif AM, Jain N. *Clinical Pearls for a New Condition: Pentosan polysulfate therapy, a common treatment for interstitial cystitis, has been associated with a maculopathy.* Review of Ophthalmolgy. 2019 July 10.

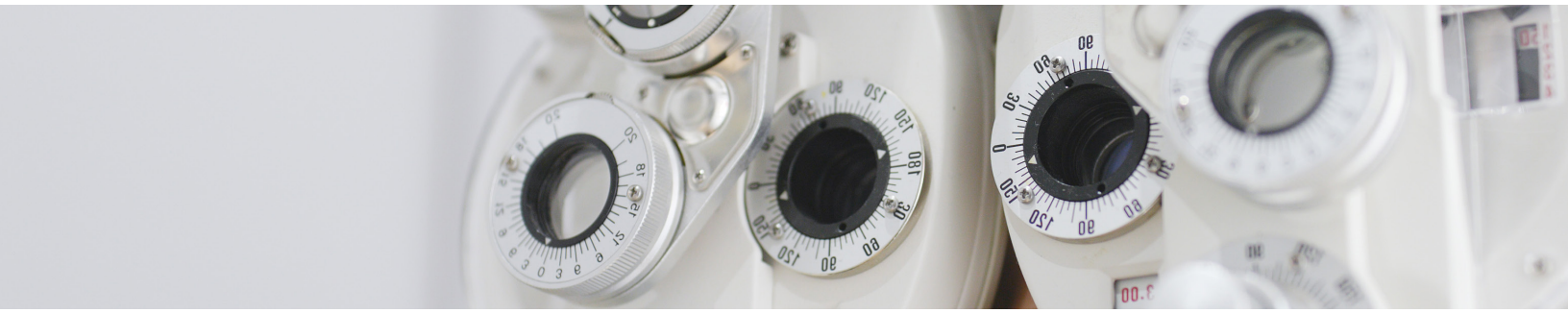
all linked long-term Elmiron use with maculopathy (a degeneration of the central part of the retina, which permanently impairs vision).

Maculopathy causes, among other symptoms, the following:

- Central vision loss
- Blurred, dimmed, or spotty vision
- Difficulty reading
- Difficulty adjusting to low light
- Eye pain

While age-related macular degeneration is common, the authors of the journal articles have used modern retinal imaging techniques to observe a "distinctive clinical phenotype"[5] of "a unique pigmentary maculopathy in the setting of chronic PPS exposure."[6] Therefore, a retinal image taken by an ophthalmologist may become important causation evidence in an Elmiron case. Janssen does not include the risk of maculopathy or its associated symptoms in the Elmiron package insert.

Please contact Ian Millican and Rayna Kessler from our Mass Tort team to learn more about our ongoing investigation. Contact information: **1.800.610.7562**



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]
- **Taxotere** – Studies and reports have associated permanent hair loss (alopecia) with the use of chemotherapy drug Taxotere (docetaxel).[2]
- **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.
- **Zofran** – This anti-nausea drug prescribed "off label" for morning sickness is associated with increased risk of cleft palate and congenital heart defects.[3]

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1. Concerns about Metal-on-Metal Implants, available at www.fda.gov
2. 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).
3. 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).

RECOGNITION

TARA SUTTON NAMED TO LAWDRAGON "500 LEADING LAWYERS IN AMERICA" LIST

TARA SUTTON

Robins Kaplan is pleased to announce that Tara Sutton has been named to Lawdragon's "500 Leading Lawyers in America" list. According to Lawdragon, the list is the leading guide to the nation's best lawyers and judges. It is comprised of private lawyers from a wide range of practices, as well as in-house counsel, law professors, judges and neutrals, government attorneys, and public interest lawyers. Those named to the list represent less than one-half of one percent of the legal profession, placing them among the most elite group of legal professionals.

MEDICAL MALPRACTICE GROUP HONORED BY NATIONAL LAW JOURNAL

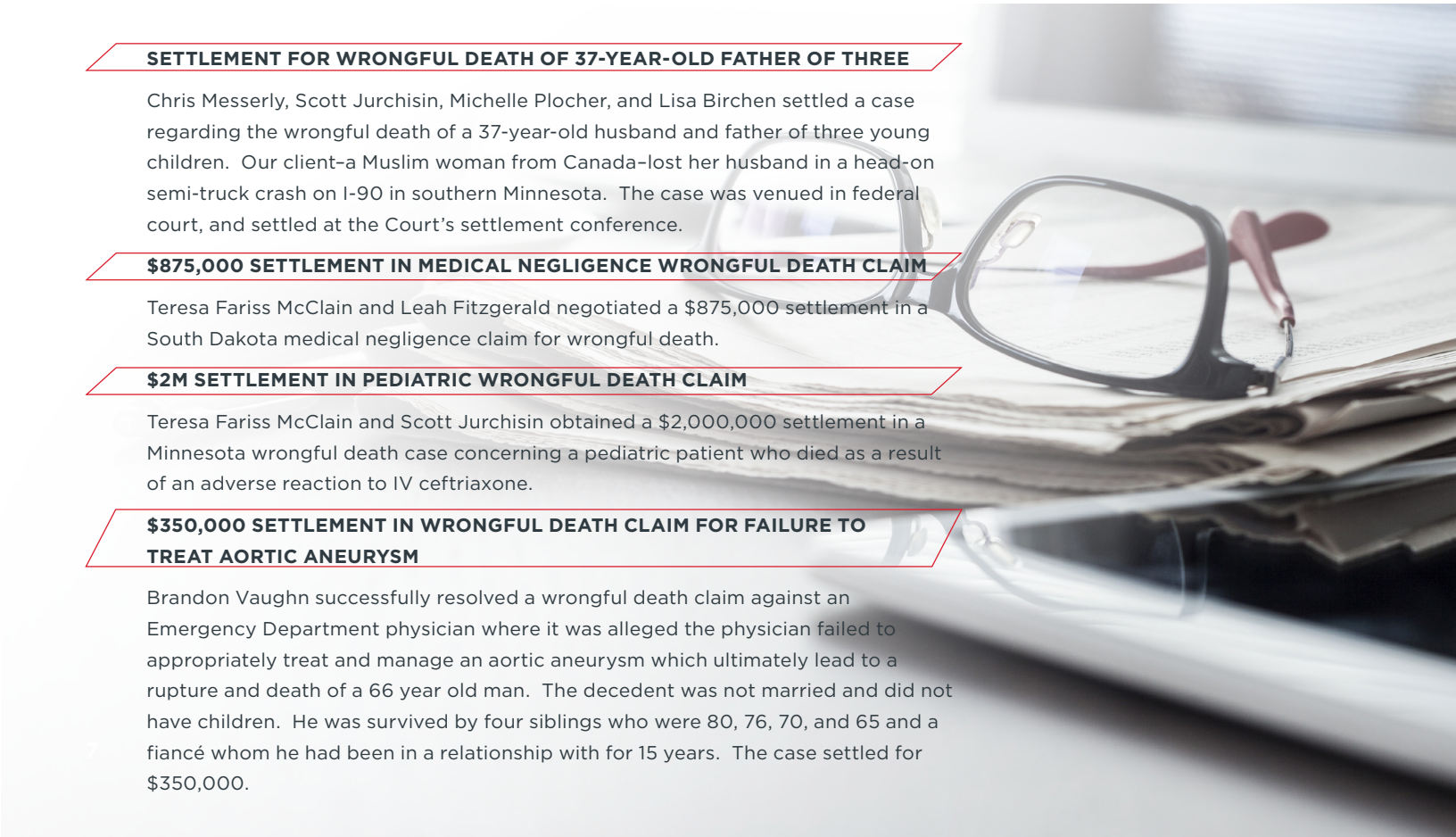
PETER SCHMIT

The firm's Medical Malpractice Group was honored at the National Law Journal's 2020 Elite Trial Lawyers Awards in Miami Beach, Florida.

The firm was named "Law Firm of the Year" for medical malpractice litigation. Robins Kaplan is the sole winner of this nationwide award. Peter Schmit, chair of National Personal Injury and Medical Malpractice Group, accepted the award on the firm's behalf. The firm was also shortlisted for "Law Firm of the Year" in the Mass Tort and Personal Injury categories.

The Elite Trial Lawyer 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 finalists were selected from more than 300 submissions.

CASE RESULTS



SETTLEMENT FOR WRONGFUL DEATH OF 37-YEAR-OLD FATHER OF THREE

Chris Messerly, Scott Jurchisin, Michelle Plocher, and Lisa Birchen settled a case regarding the wrongful death of a 37-year-old husband and father of three young children. Our client–a Muslim woman from Canada–lost her husband in a head-on semi-truck crash on I-90 in southern Minnesota. The case was venued in federal court, and settled at the Court's settlement conference.

$875,000 SETTLEMENT IN MEDICAL NEGLIGENCE WRONGFUL DEATH CLAIM

Teresa Fariss McClain and Leah Fitzgerald negotiated a $875,000 settlement in a South Dakota medical negligence claim for wrongful death.

$2M SETTLEMENT IN PEDIATRIC WRONGFUL DEATH CLAIM

Teresa Fariss McClain and Scott Jurchisin obtained a $2,000,000 settlement in a Minnesota wrongful death case concerning a pediatric patient who died as a result of an adverse reaction to IV ceftriaxone.

$350,000 SETTLEMENT IN WRONGFUL DEATH CLAIM FOR FAILURE TO TREAT AORTIC ANEURYSM

Brandon Vaughn successfully resolved a wrongful death claim against an Emergency Department physician where it was alleged the physician failed to appropriately treat and manage an aortic aneurysm which ultimately lead to a rupture and death of a 66 year old man. The decedent was not married and did not have children. He was survived by four siblings who were 80, 76, 70, and 65 and a fiancé whom he had been in a relationship with for 15 years. The case settled for $350,000.

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

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

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

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

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

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

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

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

ROBINS KAPLAN LLP