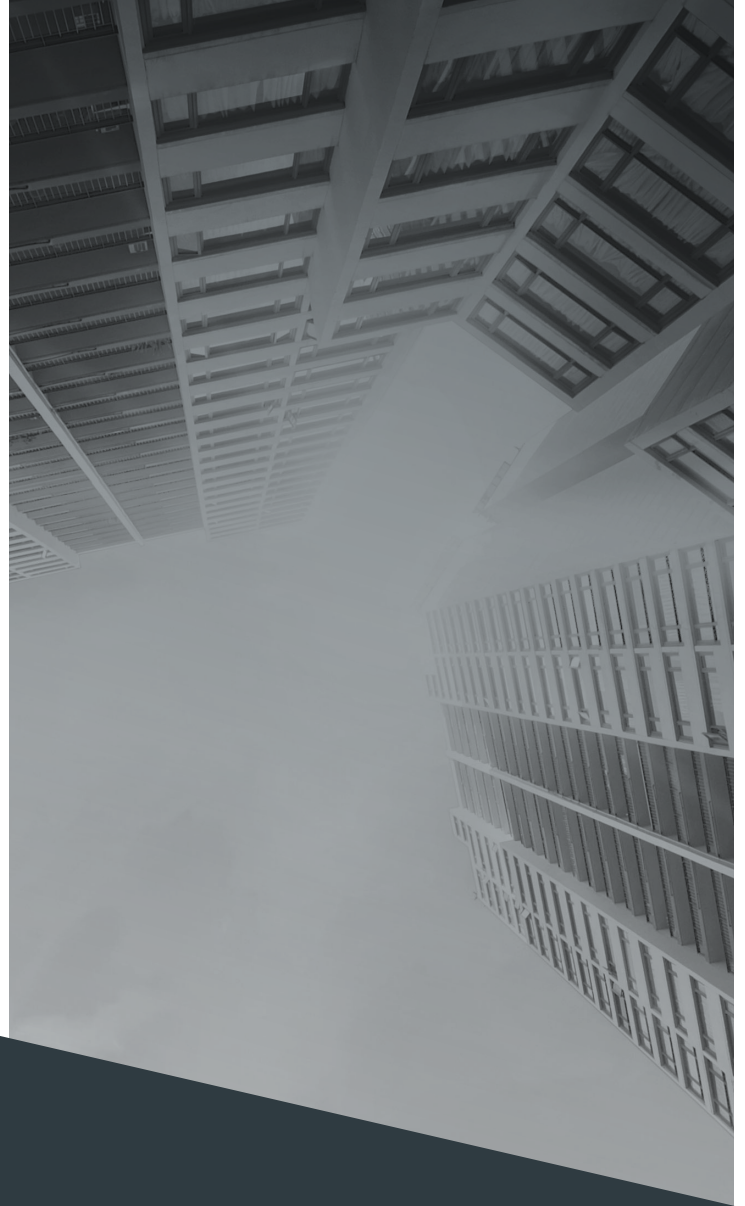


ROBINS   
KAPLAN<sub>LLP</sub>



# ROBINS KAPLAN JUSTICE REPORT

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**AN EPIDEMIC OF INDIFFERENCE**

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## AN EPIDEMIC OF INDIFFERENCE

BY ROBERT BENNETT, KATIE BENNETT, ANDREW NOEL, AND MARC BETINSKY



ROBERT BENNETT



KATIE BENNETT



ANDREW NOEL



MARC BETINSKY

*“About the same you’d get with a paper cut...I don’t see little cuts.”*

*“He’s going to get out in a couple days. He can go see his own doctor.”*

*“He looked like any seg inmate.”*

This is testimony from three state-actors regarding inmates with serious medical or mental health needs. The testimony came in cases handled by the Civil Rights and Police Misconduct Group at Robins Kaplan LLP. Robins Kaplan is conducting numerous lawsuits and investigations to enforce the government’s obligation to provide medical care for those it punishes by incarceration. Prison and jail officials have a constitutional duty via the Eighth Amendment to “ensure that inmates receive adequate food, clothing, shelter, and medical care.”<sup>1</sup> Liability attaches when state

<sup>1</sup> *Farmer v. Brennan*, 511 U.S. 825, 832 (1994)

actors are deliberately indifferent to these needs. It is an exacting standard requiring proof of a state of mind beyond negligence.<sup>2</sup>

The first quote came in a pending lawsuit with a recent summary judgment success for our client. All three are examples of a dangerous and pervasive mindset in correctional medical and mental health care.

***“About the same you’d get with a paper cut... I don’t see little cuts”***

This is how the Morton County Correctional Center’s (“MCCC”) Health Care Administrator—a medical doctor—described a complex, self-inflicted neck wound requiring sutures. John Nadeau was admitted to MCCC after this suicide attempt. The doctor never saw him despite another suicide attempt that occurred at MCCC a couple of weeks after the first attempt. John was incarcerated at MCCC for about a month and a half before committing suicide by hanging.

On July 2, 2020, the United States District Court for the District of North Dakota issued an Order denying the doctor’s and most other defendants’ motions for summary judgment. Judge Daniel M. Traynor’s Order described some

<sup>2</sup> *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)





of the doctor's testimony and his decision to not see John as follows: "This appears to be consistent with [his] generally dismissive attitude toward MCCC inmates, who he believed were not entitled to the same level of care as patients in his clinic." The court also held that there was evidence to support "a claim for either a practice or custom that evidences a deliberate indifference to mental health needs by MCCC."

***"He's going to get out in a couple days. He can go see his own doctor."***

This was a nurse's response to a correctional officer's plea that Marchello McCaster be seen by nursing staff. Marchello had active tuberculosis and infected 108 inmates and 42 guards at the Ramsey County Correctional Facility. He lost over 40 pounds in his 54 days at the facility. The officer testified that Marchello had "death in his eyes" and appeared he could "die any minute." Trial in federal court resulted in a December 2012 jury verdict for Marchello and a total recovery in excess of \$2 million. Prior to trial, a federal class action settlement was approved and justice was served for the infected inmates.

***"He looked like any seg inmate."***

This was the answer of a prison psychologist in October 2002 at trial in the United States District Court for the Eastern District of Wisconsin. Matthew Sanville was incarcerated at Waupun Correctional Institution and experienced a severe mental health crisis, ultimately committing suicide. Matthew was on a hunger strike and was dangerously thin; he was 5'9" and 112 pounds when he died. Matthew was housed in disciplinary segregation ("seg"). The psychologist let the jury see his deliberate indifference on full display with that dehumanizing answer to a simple question: "Did Matthew look like he was OK?" The jury awarded his family \$1,825,000 and additional attorneys' fees and costs were paid post-trial.

Our recent results in correctional/institutional deliberate indifference cases include the following:

- January 2020: \$425,000 settlement for the family of Diana Balderas, who committed suicide by hanging at the Waseca County Jail.
- March 2019: \$2,000,000 settlement for the family of Darren Benais, who committed suicide by ingesting windshield washer fluid while in custody of correctional officers at the Cass County Jail.
- December 2018: \$1,800,000 settlement for the family of Brett Huber, Jr., who committed suicide by hanging at the Todd County Jail.

In an attempt to obtain justice through results and reform, many of the group's Eighth Amendment cases have caused reform at correctional institutions. Robins Kaplan is fighting for aggrieved victims whether the misconduct is committed by correctional officers, supervisory officials, health care providers, or private for-profit correctional medical corporations, such as MEnD Correctional Care.

# EXPLORING THE LIMITS OF RECREATIONAL IMMUNITY

BY TIM BILLION AND TONY SCHRANK



TIM  
BILLION



TONY  
SCHRANK

occurring on their property. Many legislatures have attempted to mitigate that risk by enacting recreational immunity statutes.

Traditionally, a landowner's duty to a property user (to keep the premises in reasonably safe condition and to warn of dangerous conditions, among others) depended on whether the user was an invitee, a licensee, or a trespasser. Although the specifics of recreational immunity vary by state, the core concept of recreational immunity is to modify the common-law responsibilities to encourage private landowners to open land to the public for recreational use, making the landowners immune for liability from injuries that occur on their property.

Accordingly, recreational immunity creates a significant hurdle for an injured recreational user to obtain damages from a landowner. Most recreational immunity statutes do not extend immunity to intentional, reckless, or willful and wanton misconduct by a landowner. Often, though,

Among many changes to modern life, the COVID-19 pandemic has highlighted the value of outdoor recreation. The proliferation of outdoor recreation, however, can increase the potential for landowner's liability in the event of an injury

application of those concepts can be difficult in practice. Whether a landowner acted with willful and wanton misconduct can depend on, among other things, the normal use of the property, whether the design of the property furthered its intended use, and whether the landowner knew about the recreational use and the specific hazard that caused the injury.

Robins Kaplan recently defeated a summary judgment motion based on recreational immunity in *Jayne v. City of Sioux Falls* on the premise the landowner knew the specific hazard existed and did nothing about the hazard—essentially alleging the landowner's lack of action despite knowledge of a hazard was willful and wanton misconduct. In 2018, five-year-old Maggie Zaiger (Jayne) drowned in Falls Park in downtown Sioux Falls after she fell into a large pile of foam obscuring the river bank, thinking it was snow. In 2013, an eerily similar incident resulted in two drownings after a young boy fell into a large pile of foam in the same location. The City moved for summary judgment, claiming it enjoyed recreational immunity. The court denied the City's summary judgment motion because enough evidence existed to create a jury question as to whether the City's failure to act after the 2013 drownings equated to willful and wanton misconduct.

When analyzing a recreational immunity case, it is crucial to carefully analyze the exceptions to recreational immunity in applicable state law to determine whether the conduct alleged could fall outside the scope of that immunity.

# NEW YORK LOOK BACK WINDOW EXTENDED FOR CHILD SEX ABUSE CLAIMS

BY RAYNA KESSLER AND IAN MILLICAN



RAYNA  
KESSLER



IAN  
MILLICAN

Originally, the window was closing on August 14, 2020, one year after the window opened for the first time ever in the state. The deadline to bring these claims was extended by the New York legislature after taking into consideration that the COVID-19 pandemic was limiting the ability of survivors to file claims within the allotted time. Now, survivors have an additional year to bring a claim to hold their

On August 3, 2020, New York Governor Andrew M. Cuomo signed legislation (27082/A9036) extending the look back window for survivors of child sex abuse to bring claims until August 14, 2021, regardless of when the abuse occurred.

perpetrators and the institutions that have shielded them accountable. To date, over 3000 claims have been filed in New York alone. In January 2020, a similar window took effect in New Jersey allowing for two years to bring claims under their look back window, which will remain open until December 1, 2021.

Attorneys and staff in Robins Kaplan's New York office are dedicated to representing survivors of child sex abuse, and have filed dozens of clergy sex abuse cases under the CVA and New Jersey's look back window. Survivors should be fully informed of their legal options, and our team is available to discuss confidentially on the phone, by email, or in-person. Please contact Ian Millican or Rayna Kessler directly, by dialing 212.980.2334 or emailing [RK\\_CSAIntakeTeam@RobinsKaplan.com](mailto:RK_CSAIntakeTeam@RobinsKaplan.com).



# OUR COMMITMENT TO ADDRESSING RACIAL INEQUALITIES

The senseless killings of George Floyd, Breonna Taylor, Ahmaud Arbery, Tony McDade, and countless others have sparked a much-needed global conversation about anti-Black racism, racial justice, and the responsibility that each of us has to make our communities more equitable. These events have also prompted our firm to look for opportunities to listen to our communities of color, increase our understanding of the structural challenges they face, and take meaningful action. As such, the firm's working groups have done the following to work towards these goals:

## LGBTQ WORKING GROUP

The firm's LGBTQ working group conducted a pride month fundraiser for non-profits focused on promoting racial justice as well as LGBTQ equality. We raised well over \$11,000 for the Center for Black Equity, Lambda Legal, and the National Black Justice Coalition. The group also organized a CLE on LGBTQ legal issues, which included a discussion on the intersection of the movements for racial justice and LGBTQ equality.

## PARENT RESOURCE WORKING GROUP

The firm's Parent Resource Working Group held a meeting in the wake of the Floyd murder to discuss how to talk about race and inequality with kids and families. The group also circulated and recommended resources (websites, TV shows, picture books, and webinars) to help both kids and parents alike better understand and discuss racism and raising anti-racists.

## RACIAL AND ETHNIC DIVERSITY WORKING GROUP

The Diversity Committee and the Racial & Ethnic Diversity Working Group have collaborated on a number of initiatives to address racial injustice in the workplace and the community. These efforts include:

- Creating a Black Firm Member Resource Group to build community, provide support, and contribute to greater inclusion of our Black firm members.
- Developing a series of programs to engage allies in discussions of police brutality, racial inequities, and how each of us can help as allies and firm members.
- Organizing the donation of over \$100,000 by the firm and our firm members to organizations dedicated to racial justice, legal services to underserved communities, and nonprofits serving our local communities of color. These organizations include the NAACP Legal Defense and Educational Fund, Equal Justice Initiative, Lawyers Committee for Civil Rights Under Law, the West Broadway Business and Area Coalition, and the Lake Street Council.
- Developing new pro bono and volunteer partnerships with legal services and advocacy institutions to ensure all of us have equal access to justice.

## WOMEN OF ROBINS KAPLAN WORKING GROUP

The next Women of Robins Kaplan's virtual meeting will include a presentation on the topics of anti-racism, intersectionality of race and gender, and a question and answer session with a nationally recognized speaker. The Women of Robins Kaplan recognize that equality is something to strive for in all ways, not just with respect to gender.



# MASS TORT INVESTIGATIONS

Robins Kaplan 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.

- **Elmiron** – For the first time in June 2020, the manufacturer of the painful bladder syndrome drug Elmiron updated its labeling to warn that pigmentary changes in the retina have been identified with long-term use of the drug.<sup>1</sup> Nearly two years prior to this label change, the American Academy of Ophthalmology Journal had already published an article linking Elmiron with pigmentary maculopathy.<sup>2</sup> Pigmentary maculopathy may cause difficulty reading, slow adjustment to changes in lighting, and blurred vision. These changes may be irreversible.
- **Keyboard Dusting Sprays** – Deaths and injuries to innocent bystanders as a result of a person losing control of their vehicle after huffing keyboard dusting spray
- **Premature Hip Implant Failures** – Litigating cases involving premature hip implant failures, such as the Stryker Rejuvenate and Stryker LFIT COCR V40.<sup>3</sup>
- **Taxotere** – Studies and reports have associated permanent hair loss (alopecia) with the use of chemotherapy drug Taxotere (docetaxel).<sup>4</sup>
- **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.<sup>5</sup>

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1. U.S. Food and Drug Administration, June 16, 2020 Supplemental Elmiron Package Insert. DRUGS@FDA, available at [https://www.accessdata.fda.gov/drug-satfda\\_docs/label/2020/020193s014lbl.pdf](https://www.accessdata.fda.gov/drug-satfda_docs/label/2020/020193s014lbl.pdf).
  2. William A. Pearce et al., Pigmentary Maculopathy Associated with Chronic Exposure to Pentosan Polysulfate Sodium. *OPHTHALMOLOGY*. E. Pub. May 22, 2018, available at <https://doi.org/10.1016/j.ophtha.2018.04.026>.
  3. Concerns about Metal-on-Metal Implants, available at [www.fda.gov](http://www.fda.gov)
  4. 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).
  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).

## INJECTAFER LINKED TO SEVERE HYPOPHOSPHATEMIA

BY KATE JAYCOX

Injectafer (ferric carboxymaltose) is an iron deficiency anemia treatment, given via intravenous infusion, that has been linked to severe hypophosphatemia (HPP)– a dangerously low level of phosphorus in the blood that can cause life-threatening complications.

Symptoms of severe HPP include extreme fatigue, muscle weakness and confusion, and left untreated, severe HPP can cause seizures, respiratory failure, heart failure, rhabdomyolysis, and osteomalacia.<sup>1</sup> Complications can even lead to coma and death.<sup>2</sup>

Clinical studies involving Injectafer overwhelmingly point to Injectafer’s propensity to cause severe HPP at rates drastically higher than its competitors. A February 2020 study found that 73-74% of those given Injectafer developed hypophosphatemia (measured as a serum phosphate level of 2.0 mg/dL or less), while only 8% of those given another iron infusion drug called Monoferric developed hypophosphatemia.<sup>3</sup> Severe hypophosphatemia (serum phosphate measured at 1.0 mg/dL or less) occurred in 11.3% of those treated with Injectafer, but did not develop in those treated with Monoferric.<sup>4</sup> A 2018 study reported that over half of those treated with Injectafer developed severe hypophosphatemia (serum phosphate measured 2.0 mg/dl or less) and 10% developed extreme hypophosphatemia (serum phosphate measured at less than 1.3 mg/dl), while less than 1% of those treated with Feraheme developed severe hypophosphatemia and none developed extreme hypophosphatemia.<sup>5</sup>

Despite the medical studies demonstrating the disproportionate rates of severe HPP among Injectafer users, it was not until February 2020 that the label was updated to include a warning for “Symptomatic Hypophosphatemia.”<sup>6</sup> The label still does not warn of the severity or the high rate of hypophosphatemia that Injectafer can cause.

Robins Kaplan LLP is investigating cases in which individuals have been treated with Injectafer and subsequently suffered serious side effects related to severe HPP. If you or someone you know has suffered from these side effects, please call us at **1.800.553.9910**.

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1. Ulmel EA, Econs MJ. *Approach to the hypophosphatemic patient.* *J Clin Endocrinol Metab.* 2012;97(3):696-706. doi:10.1210/jc.2011-1319.
  2. Wang et al., *Impact of hypophosphatemia on outcome of patients in intensive care unit: a retrospective cohort study.* *BMC Anesthesiol.* 2019 May 24;19(1):86. doi: 10.1186/s12871-019-0746-2.
  3. Wolf M, et al., *Effects of Iron Isomaltoside vs Ferric Carboxymaltose on Hypophosphatemia in Iron-Deficiency Anemia: Two Randomized Clinical Trials,* *JAMA.* 2020; 323(5):423-443 (Feb. 2020).
  4. *Id.*
  5. Wolf M, et al. *Randomized trial of intravenous iron-induced hypophosphatemia.* *JCI Insight.* 2018;3(23) (Dec. 2018).
  6. Injectafer [package insert]. Shirley, NY: American Regent, Inc. February 2020.

# RECOGNITION

## LIZ FORS NAMED “UP AND COMING ATTORNEY” BY MINNESOTA LAWYER



LIZ  
FORS

Robins Kaplan is pleased to announce that Liz Fors has been named a 2020 “Up & Coming Attorney” by *Minnesota Lawyer*. The prestigious “Up & Coming Attorney” award is given to select lawyers within their first 10 years of practice based on their excellent and distinguishing performance. According to *Minnesota Lawyer*, winners are chosen based on professional accomplishment, leadership service to the community and the profession, or achievement as in-house counsel.

## KATE JAYCOX RECOGNIZED BY AMERICAN ASSOCIATION FOR JUSTICE



KATE  
JAYCOX

Robins Kaplan is pleased to announce that the American Association for Justice has recognized Kate Jaycox with its “Above and Beyond Award” and a Certificate of Recognition in acknowledgment of the exceptional contributions she has made to sustain and strengthen the organization. A longtime member of AAJ, Kate has served on the organization’s board of governors since 2012, and was recently named chair-elect of the AAJ’s Women Trial Lawyers’ Caucus.

## ROBINS KAPLAN ATTORNEYS RECOGNIZED AS 2020 MINNESOTA SUPER LAWYERS AND RISING STARS

*Super Lawyers* recently included several attorneys in the Minneapolis office of Robins Kaplan LLP on the “2020 Minnesota Super Lawyers” and “2020 Minnesota Rising Stars” lists. Two attorneys were also named to a Top List in recognition of their accomplishments and leadership in their fields.

### **2020 Minnesota Super Lawyers**

- Robert Bennett
- John F. Eisberg
- Kate E. Jaycox
- Teresa Fariss McClain
- Munir R. Meghjee
- Chris Messerly, Minnesota Top 100
- Andrew Noel
- Peter A. Schmit
- Philip Sieff
- Tara D. Sutton, Minnesota Top 100, Minnesota Top 50 Women

### **2020 Minnesota Rising Stars**

- Katie Bennett
- Jason DePauw
- Elizabeth M. Fors



## 2020 TRIAL ADVOCACY SEMINAR POSTPONEMENT

We have made the difficult decision to postpone our annual Trial Advocacy Seminar to October 2021. This seminar is a pinnacle event for our firm and the broader plaintiff legal community to come together, share ideas, and enjoy one another’s company, and it is our intention to preserve the format and purpose for our guests. With this postponement, we are excited to announce our 2021 seminar theme: Trial by Twitter: Shaping Your Case and the Media. After 80+ years of providing equal access to justice against all odds, this is not only a timely and exciting seminar topic, but integral to our identity at Robins Kaplan. Events of the past couple of months in Minneapolis and across our nation have emboldened our commitment as a firm and legal community to ensure the right story is told on behalf of our clients, inside and outside of the courtroom. This theme and the conversations to come from it demand our full attention, as well as the opportunity to dialogue with one another about how we can do better. We plan to return stronger than ever in 2021.

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