



## WISCONSIN LAW JOURNAL'S

# 2009

# YEAR IN REVIEW

## Largest settlement of 2009 tops \$17M

BY JANE PRIBEK,

*Wisconsin Law Journal*

Plaintiffs' lawyers in Wisconsin will have to keep on waiting for a test case to challenge the \$750,000 statutory cap on noneconomic damages in medical malpractice cases.

Madison lawyer Daniel A. Rottier, of Habush Habush & Rottier SC, believed he had a strong contender last year with *Bomkamp, et al. v. Go, M.D., et al.* But he said it was in the best interests of his client to agree to waive a challenge to the cap and maximize the settlement.

The total settlement in *Bomkamp* is \$17.3 million, the largest sum reported to *Wisconsin Law Journal's* "Verdict & Settlement Reporter" in 2009.

### Cap encourages settlement

Back in 1995, the Legislature set a cap at \$350,000 for noneconomic damages in medical malpractice cases, which was struck down by the Wisconsin Supreme Court in *Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125 (2005).

A year later, lawmakers enacted the current cap.

Rottier says the strongest cases often settle, which has prevented the constitutionality of the cap from being challenged in court.

In the meantime, the *Bomkamp* case does present another important issue for medical malpractice attorneys. Sec. 655.015 Wis. Stats. provides that funds set aside for future medical expenses in excess of \$100,000 shall be paid into the Wisconsin Patients

Compensation Fund. Further, § Ins. 17.26(4) Wis. Admin. Code states that the fund shall reimburse a claimant for medical expenses as they are incurred, and under (f), if the injured person dies before his or her fund is exhausted, the balance reverts to the insurer.

What that means, Rottier said, is that the fund "was allowed to hold back \$8 million and pay it out as it is spent. We feel that that's inappropriate — that we should have total control over it."

He is challenging that result, and the issue is in the briefing stages before the trial court. Rottier expects it to ultimately go before the Wisconsin Supreme Court.

The Fund is represented by David McFarlane, of Bell Gierhart & Moore SC, who declined to comment for this story.

The plaintiff in the underlying case, Shelbey Bomkamp, was 6 years old when she underwent a routine splenectomy performed by Dr. Leonard Go. Go used a surgical instrument for which he had no training or experience during the procedure. Shelbey sustained massive blood loss as a result, prompting cardiac arrest and a severe, permanent brain injury. She is now wheelchair-bound, and cannot talk or feed herself.

It's a "a very tragic case," said Rottier.

Go conceded liability. Physicians Insurance Company of Wisconsin had insured him with a \$1 million policy, which was paid pursuant to plaintiff's summary judgment motion, over the fund's objections.



Dan Rottier

The sum went toward satisfying outstanding medical bills.

The Medical Examining Board is still investigating Go, and has not taken any action against him yet.

As for Shelbey and her parents, Rottier

said they are doing, "as well as they possibly can. It's a horrible situation to go from a perfectly healthy child on one day, other than needing a splenectomy, to suffering such a devastating injury."

PHOTO COURTESY OF HABUSH HABUSH & ROTTIER SC

### 2009 Largest Settlement

**MEDICAL MALPRACTICE:** \$17.3 MILLION

**Injuries:** Permanent brain damage

**Case:** *Bomkamp, et al. v. Go, M.D., et al.*

**Court/case no.:** Dane County, 07 CV 4013

**Judge:** Maryann Sumi

**Verdict or settlement/amount:** Settlement, \$17.3 million

**Date of incident:** June 14, 2007

**Special damages:** Past medical expenses: \$1.25 million; past and future pain, suffering and disability: parents' past and future loss of society and companionship: \$750,000; future loss of earning capacity: \$1,602,000; home modifications: \$400,000; future care needs: \$13,298,000, \$8,204,327.27 of which was set aside in a future medical fund pursuant to § 655.015 Wis. Stats and § Ins. 17.26(4)(f) Wis. Admin. Code.

Pursuant to the settlement agreement, plaintiffs are proceeding with their challenge to the constitutionality and application of § 655.015 Wis. Stats., and § Ins. 17.26(4)(f) Wis. Admin. Code. If the plaintiffs are successful in that litigation, then the entirety of the set aside amount will be paid to Shelbey Bomkamp.

Pursuant to the settlement agreement, the defense paid the entirety of the plaintiff's claims for all damages.

**Plaintiff's attorneys:** Daniel A. Rottier, James M. Fergal, Habush Habush & Rottier SC, Madison

**Defense attorneys:** For Dr. Go, Physicians Insurance Company of Wisconsin: Barrett Corneille, Corneille Law Group LLC, Madison; for the Injured Patients and Families Compensation Fund: David E. McFarlane, Kate Harrell, Bell, Gierhart & Moore SC, Madison

**Insurance carrier:** Physicians Insurance Company of Wisconsin insured Go with a \$1 million policy limit; the Injured Patients and Families Compensation Fund had coverage from \$1 million and above, with no limit for compensatory damages.

**Plaintiff's experts:** Medical experts were primarily her caregivers, including physical medicine and rehabilitation physicians, and numerous therapists. In addition, Robert Taylor of Vocational Diagnostics Inc. was named as a vocational expert and life care planner and Prof. Karl Egge, of Macalester College, St. Paul, was named as an economist.

**Plaintiff counsel's fact summary:** Shelbey Bomkamp, age 6, underwent a laparoscopic splenectomy surgery. The procedure was elective for a congenital problem with her spleen. If the surgery had been performed uneventfully,

Shelbey would have had no residual problems following the surgery.

The surgery was performed by Dr. Leonard Go, a general surgeon employed by Dean Health Systems Inc. The surgeon utilized an instrument, a morcellator, for which he had no training and no experience. The morcellator is a circulating blade and in unskilled hands, it can cause massive destruction. During the procedure, Go transected the infra-renal aorta, cut partially through the inferior vena cava, and caused an injury to the small bowel. There was massive blood loss of approximately 1,900 ml of blood, which is practically the total blood volume of a 6-year-old. As a result, Shelbey suffered a cardiac arrest and an anoxic brain injury during the surgery.

Shelbey has suffered permanent brain damage, she is wheelchair bound, and does not talk. She cannot roll over, much less ambulate, or feed herself. She requires 24-hour care and is fed through a gastrostomy tube. She is able to communicate with her parents and caregivers through eye-blinking. She has suffered significant cognitive impairment in addition to the physical disabilities.

After disclosure of plaintiffs' liability experts, Dr. Go, his insurer and the Injured Patients and Families Compensation Fund all admitted to liability on his part.

# VERDICTS & SETTLEMENTS

## TOP 5 VERDICTS FOR 2009

The following are the top five verdicts as reported to Wisconsin Law Journal's Verdict & Settlement Reporter in 2009.

	CASE/COURT	TYPE	AMOUNT	ATTORNEY(S)
1	<i>American Trust and Savings Bank v. Philadelphia Indemnity Insurance Company, et al.</i> , Dane County	Accountant Malpractice/Misrepresentation	\$3 million	Robert J Kasieta, Kasieta Legal Group LLC, Madison
2	<i>Kolinski v. Kobin</i> , Milwaukee County	Personal injury	\$2,395,137	Paul J. Sceptur, Aiken & Sceptur SC, Milwaukee
3	<i>Mellom v. Shindler Elevator, et al.</i> , Rock County	Products liability	\$2,173,074	James D. Wickhem, Meier, Wickhem, Lyons & Schulz, Janesville
4	<i>Woelfel, et al. v. Homestead Mutual Insurance Company</i> , Calumet County	Insurance/bad faith	\$1,503,449 plus interest under §807.01(4)	Scott Lawrence, Lawrence Law Office, SC, St. Nazianz; Greg Cook, Greg Cook Law Offices SC, Milwaukee
5	<i>Johnson, et al., v. Machi, et al.</i> , Milwaukee County	Medical malpractice	\$1,341,027	Patrick O. Dunphy, Kevin R. Martin, Cannon & Dunphy, SC, Brookfield

## 2009 LARGEST VERDICTS

What follows is a summary of the largest verdict listings, which ran in *Wisconsin Law Journal's* 2009 Verdict & Settlement Reporter.

These are reprinted below and edited for space. They are listed in the order of the size of the verdict.

### ACCOUNTANT MALPRACTICE

#### CPAs misrepresent debtor's finances

**Injuries:** Lost loan value and interest/penalties  
**Case:** *American Trust and Savings Bank v. Philadelphia Indemnity Insurance Company, et al.*  
**Court:** Dane County, 07CV1175  
**Judge:** Amy R. Smith  
**Verdict or settlement/amount:** Verdict, \$3 million, seven-day jury trial  
**Offer:** \$500,001  
**Date of incident:** 2003-2005  
**Disposition date:** Nov. 3, 2009  
**Plaintiff's attorney:** Robert J. Kasieta, Kasieta Legal Group LLC, Madison  
**Defense attorney:** Coyne, Schultz, Becker & Bauer SC, Madison  
**Plaintiff's expert:** Greg Junek  
**Defense experts:** Brian W. Mayhew; James G. Johannes  
**Noteworthy evidentiary issues:** The question of what damages to submit to the jury included whether to permit the bank to seek from the CPAs' amounts for interest and penalties on loans lost when the CPAs' client entered receivership.  
**Plaintiff counsel's fact summary:** Plaintiff bank, ATSB, required Shullsburg Creamery to submit annual reviewed (and later, audited) financial statements from an independent CPA in order to underwrite loans to Shullsburg. Defendant Bremser entities are two CPA firms that prepared financial statements upon which ATSB relied in lending to Shullsburg. In 2002, Shullsburg retained Bremser to perform the bank-mandated review. Bremser issued two clean reviews and a clean audit for 2002 through 2004. Then, in 2005, Shullsburg became insolvent and sought receivership protection.  
 The bank presented evidence at trial that each financial statement prepared by the accountants was materially false and inaccurate. Plaintiff's expert on accounting, audit and review testified about how the financial statements were inaccurate and false, and how defendants failed to meet the standard of care for Wisconsin CPAs.  
**Post-trial motions:** Filed on Nov. 23, 2009

### PERSONAL INJURY

#### 'Harmless drink' potentially carcinogenic

**Injuries:** Caustic chemical injuries to mouth, esophagus and stomach

**Case:** *Kolinski v. Kobin*  
**Court/case no.:** Milwaukee County, 05-CV-10176  
**Judge:** Thomas R. Cooper  
**Verdict or settlement/amount:** Verdict, \$2,395,137  
**Special damages:** \$394,735  
**Date of incident:** Nov. 8, 2005  
**Disposition date:** Judgment docketed on Jan. 14, 2009  
**Plaintiff's attorney:** Paul J. Sceptur, Aiken & Sceptur SC, Milwaukee  
**Defense attorneys:** Patrick C. Miller, Miller & Ogorchock SC, Milwaukee; Michael F. Hart, Kohler & Hart LLP, Milwaukee; Sean Kobin, pro se  
**Insurer:** None  
**Plaintiff's experts:** Kulwinder Dua MD  
**Plaintiff's counsel's fact summary:** Defendant Kobin requested Plaintiff Kolinski drink a purportedly harmless mixture in exchange for \$20. The liquid was a combination of water and the caustic component found in concentrated drain cleaners: sodium hydroxide. After taking a drink, Kolinski was lying on the ground in severe pain and vomiting blood. Defendant videotaped the incident.  
 Kolinski suffered severe burns to her lips, mouth, esophagus and stomach. She has undergone numerous surgical procedures, and since the injury, has had 32 dilatations of her esophagus alone. Her doctor stated that her corrosive injuries are permanent and that she has a higher likelihood of developing esophageal cancer as a result of her injuries.

### PRODUCT LIABILITY

#### Industrial elevator causes auto worker's death

**Injuries:** Death  
**Case:** *Mellom v. Shindler Elevator, et al.*  
**Court/case no.:** Rock County, 06 CV 1517  
**Judge:** James Welker  
**Verdict or settlement/amount:** Partial settlement with the architect and inspectors before trial on Pierringer releases: \$150,000; verdict against elevator companies after 7-day trial: \$2,173,074. The jury assessed 50 percent against each of the elevator companies. The jury found plaintiff, the inspector and the maintenance company not negligent. The jury found GM negligent, but not causally negligent.  
**Original amount sought:** \$2.5 million  
**Original offer:** No offer from elevator companies  
**Date of incident:** Oct. 30, 2003  
**Disposition date:** Oct. 28, 2008

**Plaintiff's attorney:** James D. Wickhem, Meier, Wickhem, Lyons & Schulz, Janesville  
**Defense attorneys:** For Shindler: James Greer, Whyte Hirschboeck Dudek SC, Milwaukee; for Minnesota Elevator Company: R. Scott Ritter, Sizemore & Associates, Brookfield  
**Plaintiff's experts:** Ralph Barnett, engineer; Karl Egge, economist  
**Defense experts:** John Donnelly, elevator expert; Patrick Carrajat, elevator expert; G. Richard Meadows, economist  
**Plaintiff counsel's fact summary:** Plaintiff was killed when he fell from an industrial elevator at the General Motors plant in Janesville. The elevator was manufactured and installed by Schindler Elevator Company and Minnesota Elevator company in 1998. No guardrails were placed around the top of the elevator. Approximately three years after installation (and about a year and a half before the death), the code was changed to require guardrails. The elevator companies did nothing to alert GM or retrofit the elevator.  
 GM as the employer couldn't be held responsible because of Worker's Compensation immunity. An elevator inspector, the project architect and an elevator maintenance company were also accused of negligence but settled before trial.

### INSURANCE

#### Insurer to appeal bad-faith finding

**Case:** *Woelfel, et al. v. Homestead Mutual Insurance Company*  
**Court/case no.:** Calumet County, 07-CV-219  
**Judge:** Donald A. Poppy  
**Verdict or settlement/amount:** Verdict, \$1,503,449 plus interest under §807.01(4)  
**Original amount sought:** \$500,000: offer of settlement for all three plaintiffs  
**Original offer:** Zero dollars  
**Date of incident:** Sept. 16, 2006  
**Disposition date:** Feb. 24, 2009  
**Plaintiff's attorneys:** Scott Lawrence, Lawrence Law Office SC, St. Nazianz; Gregory J. Cook, Greg Cook Law Offices SC, Milwaukee  
**Defense attorney:** Erik J. Pless, Everson, Whitney, Everson & Brehm SC, Green Bay; W. Thomas Terwilliger, Terwilliger, Wakeen, Piehler & Conway SC, Wausau

## 2009 LARGEST VERDICTS

CONTINUED FROM PAGE 7

**Insurer:** Homestead Mutual Insurance Company, Larsen

**Plaintiff's experts:** Plaintiffs' local construction and maintenance experts, Peter Ahrens and David Tennesen; Alfred Szews PhD, forensic fire/explosion investigator; Mark Beavers, fire investigation; Michael Behr PhD, agricultural economist; Kris Woelfel, plaintiff, dairy farmer and construction

**Defense experts:** Bruce Johnson, silo construction; Timothy Grocholski, civil engineer; Robert Schroeder PhD, fire investigation; Wayne Knoblauch PhD, agricultural economics; Bernard McCartan J.D., Timothy Wiedmeyer, insurance bad faith

**Plaintiff counsel's fact summary:** A poured concrete silo failed on plaintiffs' dairy, destroying the barn and killing 13 head of cattle. Defendant insurer denied coverage, claiming that neither explosion nor fire coverage applied.

The jury returned a verdict finding that the failure had resulted from an explosion, and that the insurance company handled the claim in bad faith. It awarded compensatory

damages totaling \$171,514 and punitive damages of \$700,000.

An appeal is pending.

### MEDICAL NEGLIGENCE

#### Overuse of drug causes severe skin reaction

**Case:** *Johnson, et al. v. Machi, et al.*

**Court/case no.:** Milwaukee County, 06-CV-12609

**Judge:** Dennis P. Moroney

**Original amount sought:** \$1 million

**Highest offer:** \$250,000

**Verdict or settlement/amount:** Verdict, \$1,341,027

**Special damages:** Past pain and suffering: \$766,000; future pain and suffering: \$277,000; past wage loss: \$16,048; past medical expenses: \$223,079; future medical expenses: \$58,800

**Disposition date:** July 31, 2009

**Plaintiff's attorneys:** Patrick O. Dunphy, Kevin R. Martin, Cannon & Dunphy SC, Brookfield

**Defense attorneys:** For Dr. Machi and Physicians Insurance Company: Mark E. Larson, Gutglass, Erickson,

Bonville & Larson SC, Milwaukee; for the Wisconsin Injured Patients and Families Compensation Fund: Michael P. Russart, Hinshaw & Culbertson LLP, Milwaukee

**Plaintiff experts:** Frederick Goodwin MD, psychiatry; Bruce Stevens MD, treating psychiatrist; Daniel Ochalek MD, treating burn surgeon; Steven Koenig MD, treating ophthalmologist; Steven Donatello MD, treating pain management; Debra Slack-Finn MSW, treating psychotherapist

**Defense experts:** Gary Sachs MD, psychiatry; James Troy MD, dermatology

**Plaintiff counsel's fact summary:** Plaintiff Johnson sought treatment from psychiatrist Dr. Machi, who diagnosed bipolar disorder, panic disorder, post traumatic stress disorder and attention deficit hyperactivity disorder.

Machi treated him with Lamictal for the bipolar disorder. Lamictal's manufacturer published dosing guidelines of a five-week titration up to 200 mg per day. After plaintiff was at 200 mg per day for one week, Machi increased the dosage to 300 mg per day and, three days later, to 400 mg per day.

Approximately 10 days after the dosage increase, Johnson was hospitalized for treatment of Stevens Johnson Syndrome/Toxic Epidermyl Necrolysis, a severe skin reaction.

## VERDICTS & SETTLEMENTS

### TOP 5 SETTLEMENTS FOR 2009

The following are the top five settlements as reported to *Wisconsin Law Journal's* Verdict & Settlement Reporter in 2009.

CASE NAME	TYPE	AMOUNT	ATTORNEY(S)
1 <i>Bomkamp v. Go, et al</i>	Medical negligence	\$17.3 million	Daniel A. Rottier, James M. Fergal, Habush Habush & Rottier SC, Madison
2 <i>Confidential</i>	Personal injury	\$6.9 million	David E. Rapoport, Paul D. Richter, Rapoport Law Offices, Chicago; Keith R. Clifford, Terrence M. Polich, Clifford & Raihala SC, Madison; Robert F. Foss, Baum, Hedlund Law Firm, Los Angeles
3 <i>Miller v. Buchanan and Struck &amp; Irwin Paving</i>	Auto accident	\$6 million	Timothy S. Trecek, Habush Habush & Rottier SC, Milwaukee
4 <i>Hart, et al. v. Kawasaki Heavy Industries Ltd., et al.</i>	Personal injury/product liability	\$5.5 million	Patrick O. Dunphy, Sarah F. Kaas, Cannon & Dunphy SC, Brookfield
5 <i>Patton v. Brilla, et al.</i>	Medical negligence	\$4.5 million	Lynn R. Laufenberg, Laufenberg Law Group SC, Milwaukee



[www.wislawjournal.com](http://www.wislawjournal.com)

Stay on top of Wisconsin's latest appellate decisions and legal news stories with WLJ Today – Wisconsin Law Journal's daily e-mail news service. Visit [www.wislawjournal.com](http://www.wislawjournal.com) and sign up today!

## 2009 LARGEST SETTLEMENTS

What follows is a summary of the largest settlement listings which ran in Wisconsin Law Journal's Verdict & Settlement Reporter in 2009. The largest settlement of the year was reported by attorneys Daniel Rottier and James Fergal, Habush Habush & Rottier, and can be found on page 6, accompanying a feature story about the case. The remainder are reprinted below and edited for space. They are listed in order of the size of the settlement.

### MOTOR VEHICLES

#### Semi collision kills two, injures one

**Court:** Dane County

**Judge:** C. William Foust

**Verdict or settlement/amount:** Settlement, \$6.9 million

**Date of incident:** Aug. 17, 2004

**Disposition date:** July 23, 2009

**Plaintiff's attorneys:** David E. Rapoport, Paul D. Richter, Rapoport Law Offices, Chicago; Keith R. Clifford, Terrence M. Polich, Clifford & Raihala SC, Madison; Robert F. Foss, Baum, Hedlund Law Firm, Los Angeles

**Defense attorney:** Jay R. Starrett, Whyte Hirschboeck Dudek SC, Milwaukee

**Plaintiff's experts:** Robert Huntington MD; Gerald Lang MD; Frank Ochberg MD

**Plaintiff counsel's fact summary:** A semi-tractor-trailer rear-ended plaintiffs' car while it was stopped in traffic, killing two occupants and seriously injuring a third. Plaintiffs were a couple in their fifties and their four-year-old granddaughter. The grandfather, who survived, suffered a fractured left tibia and fibula repaired with intramedullary nailing and post-traumatic stress disorder. His wife died instantly. Their granddaughter died from traumatic asphyxiation as the car was crushed.

#### Impact with semi sends jeep airborne

**Injuries:** Right ankle fracture; herniation of the stomach and colon lodged into the abdomen; bilateral collapsed lungs; brain hemorrhage; cervical spine dislocation with bleeding into the cervical spinal cord; ligament disruption; nerve root injury at cervical and thoracic levels

**Case:** *Miller v. Buchanan and Struck & Irwin Paving*

**Court:** Washington County

**Verdict or settlement/amount:** Pre-suit settlement, \$6 million

**Original amount sought:** \$12 million

**Special damages:** Past medical expenses: \$979,469; past wage loss: \$75,000

**Date of incident:** May 23, 2007

**Plaintiff's attorney:** Timothy S. Trecek, Habush Habush & Rottier SC, Milwaukee

**Defense attorney:** Gerald G. Schmidt, Schmidt, Darling & Erwin, Milwaukee

**Insurance carrier:** West Bend Mutual Insurance

**Plaintiff's experts:** Dennis Skogen, reconstruction; Carl Rieken, trucking; Helen Woodard, life care planner; David Stopper, trucking

**Plaintiff counsel's fact summary:** Plaintiff Miller was driving her Jeep Grand Cherokee eastbound on STH 33 near Addison, Wis. Defendant Buchanan was operating his semi-tractor trailer westbound on STH 33 at the same time. The collision occurred when Buchanan lost control of his truck and crossed the centerline into the path of Miller's Jeep. According to witnesses, the impact of the Jeep striking the truck was so sudden and severe that it caused the rear of the Jeep to become airborne. Plaintiff's theory was negligent management and control.

### PRODUCT LIABILITY

#### Jet Ski explosion causes severe injuries

**Injuries:** Fracture dislocation of spinal cord at T12-L1 and other spinal cord injuries causing paraplegia; other personal injuries

**Case:** *Hart, et al. v. Kawasaki Heavy Industries Ltd., et al.*

**Court:** Racine County, 07CV1548

**Judge:** Joseph McDevitt, mediator

**Verdict or settlement/amount:** Settlement, \$5.5 million

**Date of incident:** July 15, 2005

**Disposition date:** July 13, 2009

**Plaintiff's attorneys:** Patrick O. Dunphy, Sarah F. Kaas, Cannon & Dunphy SC, Brookfield; James A. Pitts, Schoone, Leuck, Kelley, Pitts & Knurr SC, Racine

**Defense attorneys:** For the Kawasaki defendants: Daniel J. LaFave, Christopher Meadows, Quarles & Brady LLP, Milwaukee; for Main, Marine & Ski and Sentry Insurance: Kevin A. Christensen, Leib & Katt SC, Milwaukee; for plaintiff Robert Jacobsen: Thomas M. Devine, Hostak Henzl & Bichler SC, Racine, and Chubb insurance; for Progressive Northern

Insurance Co.: Frederick J. Strampe, Borgelt, Powell, Peterson & Frauen, Milwaukee

**Plaintiff's experts:** Gregory Davis, marine engineer; Greg Binversie, Phillip Dindinger, Michael Burleson, engineering; Anand R. Shah, materials engineer

**Defense experts:** J. Paul Frantz, Kevin C. Breen, Robert K. Taylor, Donald E. Duvall, engineering

**Plaintiff counsel's fact summary:** Plaintiff Hart was seated on plaintiff Jacobsen's 1998 Kawasaki Sport Tourer Jet

SETTLEMENTS, Continued on page 12

## Invaluable Resource & TRUSTED PARTNER

- + Group\* & Individual Health Insurance
- + Professional Liability, Office Protection, & Workers Compensation Insurance
- + Disability, Life, & Long Term Care Insurance
- + Auto, Homeowners, & Personal Umbrella Insurance

Providing quality insurance programs is just the beginning — our friendly, knowledgeable staff has been on hand to provide the same kind of expertise, service, and support that you extend to your clientele.

800-637-4676 | 414-277-0154 | pip@execpc.com

[www.insuranceformembers.com](http://www.insuranceformembers.com)



## PROFESSIONAL INSURANCE PROGRAMS, INC.

6737 West Washington Street / Suite 2360, West Allis, Wisconsin 53214

\*Endorsed by the State Bar of Wisconsin

## 2009 SIGNIFICANT DEFENSE VICTORIES

The following are defense victories reported to Wisconsin Law Journal's Verdict & Settlement Reporter in 2009.

For all the cases below, the defendants left the courthouse owing plaintiffs zero dollars. They have likewise been edited for space.

### FRAUD

#### Trucker exonerated in high-stakes kickbacks case

**Case:** *S.C. Johnson & Son Inc. v. Morris, et al.*

**Court/case no.:** Racine County, 04-CV-1873

**Judge:** Wayne J. Marik

**Verdict or settlement/amount:** Defense verdict, zero dollars

**Disposition date:** June 17, 2009

**Plaintiff's attorneys:** Jeffrey L. Willian, Donna M. Welch, Kirkland & Ellis LLP, Chicago; Mark A. Cameli, Reinhart Boerner Van Deuren SC, Milwaukee

**Defense attorneys:** For Bay Darnell: Timothy S. Knurr, Schoone, Leuck, Kelley, Pitts & Knurr SC, Racine, Leonard J. Lewensohn, Lewensohn Law Office, Milwaukee; for David Eggleston and All Modes Inc.: Kenneth B. Ross, Sean B. Crotty, Coleman Law Firm, Chicago

**Defense counsel's fact summary:**

Plaintiff S.C. Johnson learned there was inappropriate conduct within its transportation department with regard to rates, kickbacks, etc. The investigation culminated with the firing of the head of its transportation department, defendant Morris, and a civil suit against him and others. Plaintiff later added All Modes Logistics, David Eggleston and Wilbur "Bay" Darnell.

Plaintiff asserted fraudulent misrepresentation, conspiracy to commit fraud, violation of WOVCA, common plan and scheme to commit fraud, violations of Sec. §134.05, etc.

At the same time the civil action was proceeding, the U.S. Attorney's office began investigating Morris and others. They were indicted and charged. All but one have admitted wrongdoing and have entered into plea agreements.

Counsel for Darnell, Eggleston and All Modes moved to bifurcate the case. The trial was severed. The first trial resulted in a jury verdict of approximately \$140 million. In the second trial, the jury completely exonerated Darnell, Eggleston and All Modes.

### MEDICAL NEGLIGENCE

#### Hospital, insurer not responsible for brain injury

**Injuries:** Anoxic brain injury; wheelchair confinement

**Case:** *Nelson v. Dr. W.*

**Court/case no.:** Milwaukee County, 04-CV-001361

**Judge:** Charles F. Kahn

**Verdict or settlement/amount:** Defense verdict for the hospital and insurer (zero dollars); jury returned a \$2,109,717 plaintiffs' verdict against Dr. W. and Wisconsin Injured Patients and Families Compensation Fund.

**Original amount sought:** \$2 Million in claimants' request for mediation; plaintiffs filed a statutory offer of settlement for the hospital and insurance company for \$1.64 million.

**Original offer:** None

**Breakdown of damages awarded:** \$994,717 for health care expenses; \$1 million for past and future pain and suffering;

\$50,000 was awarded to Jeanne Nelson for loss of society and companionship; \$65,000 for loss of society and companionship to Miles Nelson

**Date of incident:** Oct. 18, 2000

**Disposition date:** April 23, 2009

**Plaintiff's attorney:** J. Michael End, End, Hierseman & Crain LLC, Milwaukee; for Jeanne Nelson: James Peter End, First Albrecht & Blondis SC, Milwaukee

**Defense attorneys:** For the hospital and insurer: Barrett J. Corneille, Colleen L. Meloy, Corneille Law Group LLC, Madison

**Plaintiff's experts:** Robert Eilers MD, Richard Bonfiglio MD, physical medicine and rehabilitation

**Defense expert:** Ruth Kleinpell RN

**Defense counsel's fact summary:**

Plaintiff contended hospital employees and a resident physician delayed in responding to plaintiff's respiratory problems due to a mucous plug in his tracheostomy tube. Plaintiff alleged that when he had difficulty breathing, the inner portion of his tracheostomy tube should have been removed or that the tracheostomy tube should have been replaced. Plaintiff also claimed that a code should have been called earlier. Plaintiff's counsel argued the jury should find both the hospital and doctor negligent and apportion liability 70 percent and 30 percent, respectively. Plaintiff's counsel requested an award of \$1 million in past medical expenses and additional "millions" in pain and suffering.

The jury found no negligence on the part of the hospital staff.

#### Neurosurgeon didn't cause patient's paraplegia

**Case:** *Nett v. Dr. W.*

**Court/case no.:** Winnebago County, 05-CV-642

**Judge:** Thomas Gritton

**Verdict or settlement/amount:** Defense verdict, zero dollars

**Disposition date:** June 24, 2008

**Plaintiff's attorney:** Shawn R. Crain, End Hiersman & Crain LLC, Milwaukee

**Defense attorneys:** For Dr. W. and the Doctors Company/OHIC Insurance: Barrett J. Corneille, Mark T. Budzinski, Corneille Law Group LLC, Madison; for the Wisconsin Injured Patients and Families Compensation Fund: Jeremy T. Gill, Nash, Spindler, Grimstad & McCracken LLP, Manitowoc

**Plaintiff's experts:** George Fueredi MD, radiology/standard of care; Jerome Lerner MD, physiatrist; Marshall Matz MD, neurosurgery/standard of care; Glen Rooyackers DC, chiropractic

**Defense experts:** James Ausman MD, Joseph Cusick MD, neurosurgery

**Defense counsel's fact summary:**

Defendant neurosurgeon was alleged negligent in failing to identify a spinal epidural abscess, leading to plaintiff being rendered a paraplegic and wheelchair-bound.

The defense was that this was a difficult diagnosis and that even though the neurosurgeon had identified the abnormality on the films, a reasonable neurosurgeon would not have made an earlier diagnosis of the cause of the abnormality.

#### Timing of preemie's delivery at issue

**Injuries:** Hypoxic ischemic encephalopathy leading to cerebral palsy causing permanent cognitive and neurologic damage

PROFESSIONAL LIABILITY INSURANCE

Meeting the needs of your law firm

Den Boer & Associates specializes in providing professional liability insurance for attorneys and law firms of all sizes. We help your firm succeed with a review of your current coverage. We work with you to determine your exact protection requirements, including any unique features of your practice. We then match those requirements with professional liability insurance underwriters that will best meet your firm's specific coverage needs. For more information please contact Rod Den Boer, Jane Meekma or Harry Stoll at 877.522.4441 or 262.522.4000.

www.dbains.com

db|a  
den boer & associates

SPECIALTY INSURANCE PRODUCTS

Riverwood Corporate Center I  
N19 W24400 Riverwood Drive Suite 385  
Waukesha, WI 53188  
Office 262.522.4000  
Toll Free 877.522.4441  
Fax 262.522.4010

## 2009 SIGNIFICANT DEFENSE VICTORIES

**Case:** *Shepherd v. Dr. D. and hospital*  
**Court/case no.:** Dane County, 04-CV-3971

**Judge:** James Martin

**Verdict or settlement/amount:** Defense verdict, zero dollars

**Disposition date:** Nov. 7, 2008

**Plaintiff's attorney:** Euel W. Kinsey, McKeen & Associates, Detroit

**Defense attorneys:** For Dr. D. and Physicians Insurance Company: Barrett J. Corneille, Colleen L. Meloy, Corneille Law Group LLC, Madison; for the hospital and The Doctors Company/OHIC: Emile H. Banks, Vicki L. Arrowood, Emile Banks & Associates LLC, Milwaukee; for the Wisconsin Injured Patients and Families Compensation Fund: David McFarlane, Bell, Gierhart & Moore SC, Madison

**Plaintiff's experts:** Russel Jelsema MD, Fredrick Gonzalez MD, obstetrics/perinatology; Robert Lerer MD, developmental pediatrics/child neurology; William Zinser MD, pediatric neurology; Robert Naidich MD, pediatric neuroradiology; Ocean Berg RN; Patricia Dodson Brown RN, life care planner; Robert Niendorf, economist

**Defense experts:** Katharine Wenstrom MD, obstetrics/perinatologist/genetics; Frank Manning MD, obstetrics/perinatology; Jay Goldsmith MD, neonatology; Richard Towbin MD, pediatric radiology; Sinisa Dovat MD, pediatric hematology; Gordon Sze MD, neuroradiology; Theonia Boyd MD, placental pathologist; Richard Colan MD, pediatric neurology; Susan Farrell MD, neurodevelopmental pediatrics; Mark Lewis MD, neuro-psychology; David Jones, economist

**Defense counsel's fact summary:** Plaintiff's mother was appropriately monitored up until the date of delivery in a "high risk" pregnancy. Immediately prior to the delivery, the patient's condition drastically changed. Plaintiff contended this change required a more expeditious delivery than what occurred.

The defense responded that the timing of delivery met the standard of care, and that the defendant physician was entitled to assess the basis for the change in status and balance the risks of delivery of a premature infant versus the risk of further assessment of the situation. The defense also contended that the permanent neurologic injuries resulted from a combination of rare genetic factors that resulted in injury to the fetus days to weeks before the delivery.

### Hernia repair was properly performed

**Injuries:** Chronic, continuing groin pain

**Case:** *Gray v. Dr. C.*

**Court/case no.:** Rock County, 06-CV-305

**Judge:** Daniel T. Dillon

**Verdict or Settlement/amount:** Defense verdict, zero dollars

**Plaintiff's attorney:** Marc T. McCrory, Carney, Davies & Thorpe LLC, Janesville

**Defense attorneys:** For Dr. C. and Physicians Insurance Company of Wisconsin: Barrett J. Corneille, Carley Pelch-Kiesling, Corneille Law Group LLC, Madison

**Plaintiff's experts:** Mark Marzolf DO

**Defense experts:** David DeAngeles MD, cardiovascular surgery; Robert Baker MD, surgery

**Defense counsel's fact summary:** Plaintiff contended that defendant surgeon improperly performed a hernia repair. Defendants relied upon testimony from the surgeon regarding his extensive experience with, and performance of, this type of surgery, and testimony from two surgeons who testified that defendant met the standard of care, and it was unlikely that plaintiff's symptoms were caused by any act or omis-

sion by him. The defense also presented testimony from the surgical assistant who assisted the operation, who testified to the surgeon's experience with the surgery, as well as her belief that the surgery was properly performed.

### Physicians not liable for cardiac arrest

**Case:** *Weborg v. Jenny, et al.*

**Court/case no.:** Door County, 07-CV-59

**Judge:** Todd Ehlers

**Verdict or settlement/amount:** Defense verdict, zero dollars

**Highest offer:** The parties stipulated to \$1 million in damages.

**Disposition date:** Oct. 16, 2009

**Plaintiff's attorney:** J. Michael End, End, Hierseman & Crain LLC, Milwaukee

**Defense attorneys:** For Dr. Rebhan: Mark T. Budzinski, Corneille Law Group LLC, Green Bay; for Dr. Borgnes: William F. Bauer, Coyne, Schultz, Becker & Bauer SC, Madison; for Dr. Jenny: David J. Colwin, Sager, Colwin, Samuelsen & Associates SC, Fond du Lac

**Insurer:** Physicians Insurance Company of Wisconsin

**Plaintiff's experts:** Richard Lewan MD, family practice; Gary Dillehay MD, radiology; Jeffrey Breall MD, Karyl VanBenthuyzen MD, cardiologists.

**Defense experts:** Alan David MD, Keith Ness MD, family practice; Marc Kaye MD, radiology; Matthew Wolff MD, cardiology

**Defense counsel's fact summary:** Plaintiff complained of chest pain to his family physician, Dr. Rebhan, who performed a resting EKG and then referred him for an exercise stress test. After reviewing its results, Rebhan sent plaintiff for a cardiology consult with Dr. Jenny. Jenny's impression was that plaintiff's complaints were likely caused by musculoskeletal chest wall pain.

At plaintiff's next physical, Rebhan referred him to physical therapy. Rebhan next prescribed a 10-day trial of Nexium. Before the next office visit, plaintiff died of a sudden cardiac arrest at age 42, leaving a widow and three sons.

Plaintiffs alleged Jenny should have sent him to the cath lab based on the prior testing, and that Rebhan failed to send him back to a cardiologist after continued complaints of chest pain.

### MOTOR VEHICLES

#### Jury absolves driver from fault

**Injuries:** Neck, right shoulder, lower back and right knee injuries

**Case:** *Matelski, et al. v. ACUIITY, a Mutual Insurance Company, et al.*

**Court/case no.:** Milwaukee County, 06 CV 8499

**Judge:** Timothy G. Dugan

**Verdict or Settlement/amount:** Defense verdict, zero dollars

**Original amount sought:** \$2 Million

**Original offer:** \$150,000

**Date of incident:** Sept. 16, 2003

**Disposition date:** Jan. 22, 2009

**Plaintiff's attorney:** Molly C. Lavin, Habush Habush & Rottier SC, Waukesha

**Defense attorney:** Michelle D. Johnson, Arthur P. Simpson, Simpson & Deardorff SC, Milwaukee

**Plaintiff's experts:** David Coran MD; Dennis Sullivan MD

**Defense expert:** David Haskell MD

**Defense counsel's fact summary:** Three vehicles were heading eastbound, stopped at a red light. After the light changed, defendant Lemberger accelerated.

Intending to make a U-turn at an upcoming median, she claimed she activated her left-turn signal. As she began to turn, she was hit from behind. Plaintiff's vehicle did not rear-end Lemberger's. Plaintiff claimed she was then hit from the rear by another vehicle driven by defendant Schreiber, which pushed her vehicle into Lemberger's.

Plaintiff filed suit against both of them, and settled with Schreiber and his insurer prior to trial. Plaintiff proceeded to trial against Lemberger and her insurer based on the claim that Lemberger did not use her turn signal and short-stopped the vehicles behind her.

### BREACH OF CONTRACT

#### Masonry contractor offers to repair cracked concrete

**Injuries:** \$1 million in cost of repair, lost profits

**Case:** *Accord Manufacturing v. Design 2 Construct and Graff Masonry*

**Court/case no.:** Washington County, 04 CV 10

**Judge:** Andrew Gonring

**Verdict or settlement/amount:** Defense verdict after 7-day trial, zero dollars

**Original amount sought:** \$1 million

**Original offer:** \$275,000

**Special damages:** \$1 million dollars in cost of removing equipment, downtime and replacement of factory floor

**Date of incident:** 1999-2000

**Disposition date:** Jan 14, 2009

**Plaintiff's attorney:** Michael T. Hopkins, IP Special Counsel Ltd., Milwaukee

**Defense attorney:** Wayne W. Seisennop, Seisennop & Sullivan, Milwaukee; Gregory J. Cook, Greg Cook Law Offices SC, Milwaukee

**Insurers:** Acuity, CNA

**Plaintiff's expert:** Louie Baddredine

**Defense experts:** Thomas Whittow; Terrence Patrick

**Defense counsel's fact summary:** Accord contracted to build a new manufacturing facility in Jackson, Wis. with D2 Construct as the general contractor. Graff was the masonry subcontractor.

Concrete was poured in bad weather and crushed concrete was substituted for the base with the permission of the general contractor. While all concrete cracks, an inordinate number of cracks occurred here,

some due to lack of sealing that plaintiff had agreed to do. The owner complained of the cosmetic issue and wanted a new floor. Defendants offered to repair or cut out bad sections. Accord refused.

In closing, attorney Siesennop said (with a straight face), "This case is not really what it is cracked up to be." There were a few sly smiles from the jury.

Pre-trial motions: Insurance coverage denied for Graff. This was appealed and affirmed so Graff proceeded with no indemnity.

### PRODUCT LIABILITY

#### Fire's cause puzzles experts

**Injuries:** Property damage

**Case:** *Society Insurance, et al. v. LG Electronics USA Inc., et al.*

**Court/case no.:** U.S. District Court, Eastern District of Wisconsin, 2006-CV-01075-WEC

**Judge:** Magistrate Judge William E. Callahan Jr.

**Verdict or settlement:** Defense verdict after five-day jury trial, zero dollars

**Original amount sought:** \$700,000

**Date of incident:** Sept. 8, 2003

**Disposition date:** June 26, 2009

**Plaintiff's attorney:** Wendy G. Gunderson, Smith Gunderson & Rowen SC, Brookfield

**Defense attorneys:** Paul D. Cranley, Travis West, Whyte Hirschboeck Dudek SC, Madison

**Plaintiffs' experts:** Chris Korinek; Rich Relien

**Defense experts:** Samuel Sudler; Lawrence "Bud" Eastman

**Defense counsel's fact summary:** Plaintiff alleged a microwave oven manufactured and sold by the defendants started a fire, causing extensive damage to plaintiff's business. Although plaintiffs had no direct evidence of a specific defect, they argued at trial that a defect could be inferred because non-defective microwave ovens should not start fires.

Defendants argued that other possible causes could not be eliminated. Rather than relying on subjective interpretations of the burn patterns, the defense presented the testimony of an electrical engineer who analyzed the remains of the microwave oven and found no evidence of electrical causation. The jury was apparently convinced by this testimony, and found that the fire did not start inside the microwave.

## Atempo LLC

**Nancy Nie**  
 RN, CCM, CNLCP, CLNC  
 Medical Legal Consultant

**Specialty Areas:**  
*Malpractice, Elder Law,  
 Life Care Planning,  
 Work Comp., Personal Injury*

3917 Partridge Rd.  
 DeForest, WI 53532  
 (originating from  
 Madison area)

cell: 608-335-8218  
 ph/fax: 608-846-9369  
 nancynie@chorus.net

**THIS WEEK'S  
 FEATURED  
 AD:**

## 2009 LARGEST SETTLEMENTS

What follows is a summary of the largest settlement listings which ran in Wisconsin Law Journal's Verdict & Settlement Reporter in 2009. The largest settlement of the year was reported by attorneys Daniel Rottier and James Fergal, Habush Habush & Rottier, and can be found on page 6, accompanying a feature story about the case. The remainder are reprinted below and edited for space. They are listed in order of the size of the settlement.

CONTINUED FROM PAGE 9

Ski. Jacobsen pressed the start button and it exploded. Hart was propelled into the air and landed on a nearby pier.

Plaintiffs' theory was that an earlier Kawasaki recall and subsequent repair performed on the fuel system of the Jet Ski caused the primary fuel pump diaphragm to contact the aluminum cover plate of the fuel pump, causing a fatigue failure in the diaphragm, and causing gasoline to leak into the hull of the Jet Ski while it sat on a lift for several weeks. As a result of a loose battery cable, when the Jet Ski was started a spark from the battery that was located in the engine compartment ignited accumulated flammable vapors inside the Jet Ski hull.

### MEDICAL NEGLIGENCE

#### Caregivers missed obvious signs of stroke

**Injuries:** Total, permanent disability

**Case:** *Patton v. Brilla, et al.*

**Court/case no.:** Sheboygan County, 07-CV-376

**Judge:** James Bolgert; mediator: Charles Stierman

**Verdict or settlement/amount:** Settlement, \$4.5 million

**Date of incident:** May 20, 2004

**Disposition date:** April 23, 2009

**Plaintiff's attorney:** Lynn R. Laufenberg, Laufenberg Law Group SC, Milwaukee

**Defense attorneys:** For Dr. Brilla: Mark Larson, Gutglass, Erickson & Bonnville SC, Milwaukee; for Dr. Siddique: Michael P. Malone, Hinshaw & Culbertson, Milwaukee; for the Wisconsin Injured Patients and Families Compensation Fund: Jeremy Gill, Nash, Spindler, Grimstad & McCracken LLC, Manitowoc

**Plaintiff's experts:** Candice Perkins MD, Axel Rosengart MD, stroke neurology; Robert Peyster MD, neuroradiology; Gaston da Costa MD, general neurology; Henry Alba MD, physical medicine and rehabilitation; Rick Ruvlin, home modifications; Ross K. Lynch PhD, vocational rehabilitation; David Ward PhD, economist

**Defense experts:** Daniel Labovitz MD, stroke neurologist; Stephen Futterer MD, Victor Haughton MD, neuroradiology; Leonard Berlin MD, radiology; Lawrence Dineen, life care planning and vocational rehabilitation; Jubin Merati PhD, economist

**Plaintiff counsel's fact summary:** Patton is totally disabled by the effects of a stroke not timely diagnosed or treated.

Dr. Brilla, a neurologist, was negligent in failing to recognize the symptoms were evidence of brain stem transient ischemic attacks due to posterior circulation insufficiency. Dr. Siddique, a radiologist who read his MRI results, was negligent in failing to confirm that his claimed "stat report" of MRI findings was received and acted upon.

Plaintiffs' experts testified that another MRI or other study of the vessels of the brain should have been done earlier and would've shown significant narrowing of the basilar artery. They believe the brain stem stroke could probably have been prevented with the use of anti-coagulants, close monitoring and, if necessary, stenting of the artery.

## 2009 SIGNIFICANT DEFENSE VICTORIES SUMMARY

Plaintiffs in the high-stakes controversies below left the courthouse empty-handed.

■ Several of Wilbur "Bay" Darnell's co-defendants in a civil fraud/kickbacks case had entered into plea agreements and were facing significant jail time in separate criminal proceedings (of which Darnell was not a part). But Darnell's attorney, **Timothy S. Knurr** of Schoone, Leuck, Kelley, Pitts and Knurr SC in Racine, believed strongly that his client had engaged in no wrongdoing. He convinced a Racine County Circuit Court to sever the case. The strategy succeeded when a jury found Darnell not liable in *S.C. Johnson & Son Inc. v. Morris, et al.* In the bifurcated civil case, the other defendants were slapped with a \$140-million verdict.

■ As usual, the Corneille Law Group LLC, headquartered in Madison, was well represented in the "Verdict & Settlement Reporter" with its successful defense of health care providers in several medical malpractice cases. The firm's named partner, **Barrett J. Corneille**, reported four defense verdicts where his clients were facing potentially

devastating outcomes, in *Nelson v. Dr. W., Nett v. Dr. W., Shepherd v. Dr. D. and hospital*, and *Gray v. Dr. C.* The firm often takes a team approach, with **Colleen L. Meloy**, **Carley Pelch-Kiesling** and **Mark T. Budzinski** serving as co-counsel from time to time.

Speaking of Budzinski, he also reported a major defense verdict in *Weborg v. Jenny, et al.*, a medical malpractice wrongful-death case.

■ In *Matelski, et al. v. ACUITY, a Mutual Insurance Company, et al.*, a defendant driver was forced to go it alone at trial when her co-defendant from a three-car collision settled. The plaintiff had made a demand of \$2 million, so the stakes were huge. But defense attorneys **Michelle D. Johnson** and **Arthur P. Simpson**, of Simpson & Deardorff SC in Milwaukee, confidently proceeded to trial, and obtained a defense verdict.

■ When attorney **Wayne W. Seisennop**, of Seisennop & Sullivan, Milwaukee told a jury during closing argument, "This case is not really what it is cracked up to be," the few sly smiles he saw suggested to him and co-counsel

**Gregory J. Cook**, of Greg Cook Law Office in Milwaukee, that there would be a defense verdict coming in *Accord Manufacturing v. Design 2 Construct and Graff Masonry*. His suspicions proved correct, as jurors rejected the plaintiffs' demands for \$1 million in this breach-of-contract dispute regarding concrete flooring installed by a masonry contractor.

■ It was a battle of the fire origin experts in *Society Insurance, et al. v. LG Electronics USA Inc., et al.*, a case involving major property damage allegedly valued at \$700,000.

Central to the controversy was a microwave oven manufactured and sold by the defendants that purportedly started the fire. But the defense testimony of an electrical engineer, who analyzed the remains of the oven and found no evidence of electrical causation, swayed the federal court jury to conclude that the fire did not start inside the microwave. Defense counsel was **Paul D. Cranley** and **Travis West** of Whyte Hirschboeck Dudek SC, Madison.



## Fraud and Litigation Support Practice

Dave Friedman and Paul Rodrigues head up a team of five CFEs who are experts at uncovering fraudulent activities and offering litigation support.



CHORTEK & GOTTSCHALK, LLP  
CPAs AND BUSINESS ADVISORS SINCE 1947

#### Milwaukee Area

23217 West Stoneridge Drive  
Suite 350  
Waukesha, WI 53188  
262/522.8227  
Headquarters

550 Bay View Road  
Suite E  
Mukwonago, WI 53149  
262/363.2930

#### Chicago Area

707 Skokie Boulevard  
Suite 450  
Northbrook, IL 60062  
847/504.0450

#### Los Angeles Area

8906 West Olympic Boulevard  
First Floor  
Beverly Hills, CA 90211  
847/404.2826