

CHRISTOPHER HURLEY ARGUES WRONGFUL BIRTH CASE BEFORE THE ILLINOIS SUPREME COURT

On March 11, 2010, **Christopher Hurley** argued the wrongful birth case of *Clark v. Children's Memorial Hospital* before the Illinois Supreme Court. Wrongful birth is a legal cause of action in which the parents of a congenitally diseased child claim that their doctor failed to properly warn of their risk of conceiving or giving birth to a child with serious genetic or congenital abnormalities. Thus, the plaintiffs claim that the defendant prevented them from making a truly informed decision as to whether or not to have the child.

In the *Clark* case, **Chris Hurley** and **Mark McKenna** filed suit against Children's Memorial Hospital and one of its geneticists, alleging that negligent genetic counseling led the parents to believe that their first child did not carry the inherited genetic disorder Angelman Syndrome. Angelman Syndrome is a permanent genetic disorder that primarily affects the nervous system and results in severe developmental delay, intellectual disability, severe speech impairment, and problems with movement and balance. The defendants' negligent genetic counseling led the parents to believe that the chances of having a second child with Angelman Syndrome were less than one percent. In fact, their chance of having a second child with the devastating disability was 50 percent. The disorder can be confirmed through specific laboratory tests; however, the defendants failed to obtain the test results confirming the presence of the inheritable disorder. Based on the advice of the defendants, the parents conceived another child with Angelman Syndrome. Both children require constant care and supervision, and neither



Chris Hurley

will be able to work or live independently.

The trial court dismissed the case with prejudice, relying on *Siemieniec v. Lutheran Gen. Hosp.*, 117 Ill.2d 230 (1987). The trial court held that based on the prior Supreme Court ruling, the expenses associated with caring for the child conceived as a result of the negligent genetic advice were not available under Illinois law once the child reached the age of majority—18 years old. The trial court further held that emotional-distress damages were also unavailable to the parents. Hurley and McKenna convinced the Illinois Appellate Court to reinstate the case, with the Appellate Court holding that the parents “may plead a cause of action for wrongful birth against a tortfeasor to recover damages for the extraordinary costs of caring for their unemancipated, disabled child beyond the age of majority” (*Clark v. Children's Memorial Hospital*, 391 Ill.App.3d 321, 330). The Appellate Court also reversed the dismissal of emotional-distress damages, holding that the parents “adequately pleaded that they fall within the zone-of-danger rule and therefore have stated a cause of action for negligent infliction of emotional distress.”

In argument before the Illinois Supreme Court, Hurley asked the court to find, for the first time in Illinois, that parents in a wrongful birth case are entitled to seek damages for the extraordinary cost of caring for a disabled child beyond the age of majority, and that the same parents be permitted to seek damages for the pain, suffering, and emotional distress associated with raising a profoundly disabled child if they can prove negligent genetic counseling occurred.



Mark McKenna

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312-553-4900

www.hurley-law.com

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**Hurley McKenna &
Mertz**
Attorneys At Law
AV Rated

33 North Dearborn Street
Suite 1430
Chicago, IL 60602
312-553-4900
FAX: 312-553-0964
email:
cthurley@hurley-law.com
Web site:
www.hurley-law.com

OFFICE HOURS
Monday-Friday
8:30 a.m.-5:00 p.m.
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How our civil justice system helps protect patients

A large part of the ongoing health-care reform debate will focus on cutting costs by controlling the driving factors behind them, such as reducing or eliminating preventable medical errors.

Case in point: In the late 1990s, administrators at Bridgeport Hospital in Bridgeport, Connecticut, became aware of multiple, serious infections caused by unsanitary conditions.

Attempts to identify possible causes and solutions were ignored, partly for financial reasons. Eventually, a staph outbreak resulted in a series of deaths.

Investigations for lawsuits filed as a result of these unnecessary deaths uncovered a range of dangerous practices in the hospital, such as doctors not washing their hands before surgery and wearing nonsterile clothes in the operating room.

When the hospital embarked on a \$30-million renovation, it upgraded its air-filtration system and hand-washing stations, and made changes to staff practices, such as a prohibition on doctors wearing scrubs home.

These improvements drastically cut infection rates, from 22 percent of cardiac surgery patients to nearly zero.

ON-THE-JOB INJURIES UNDERREPORTED

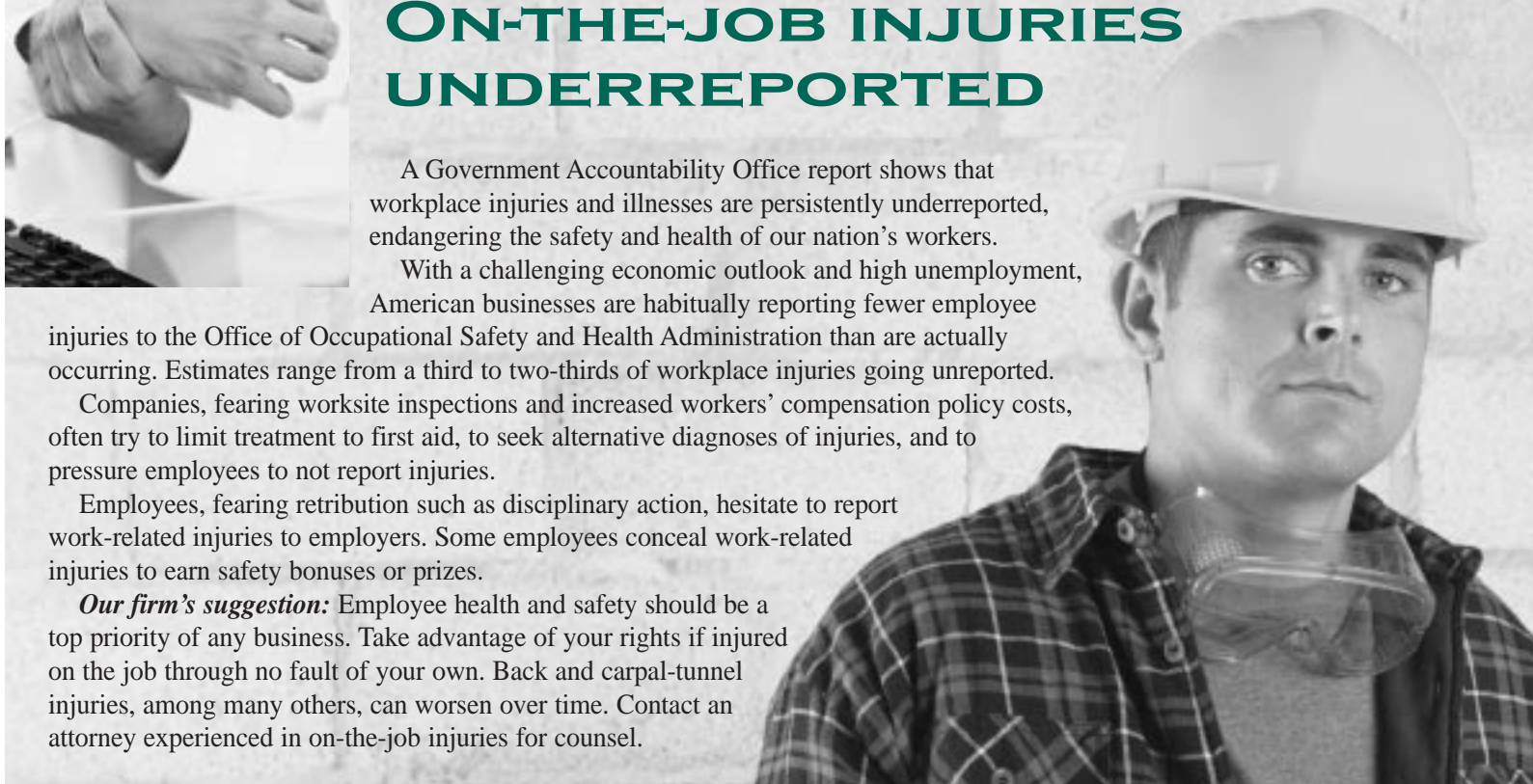
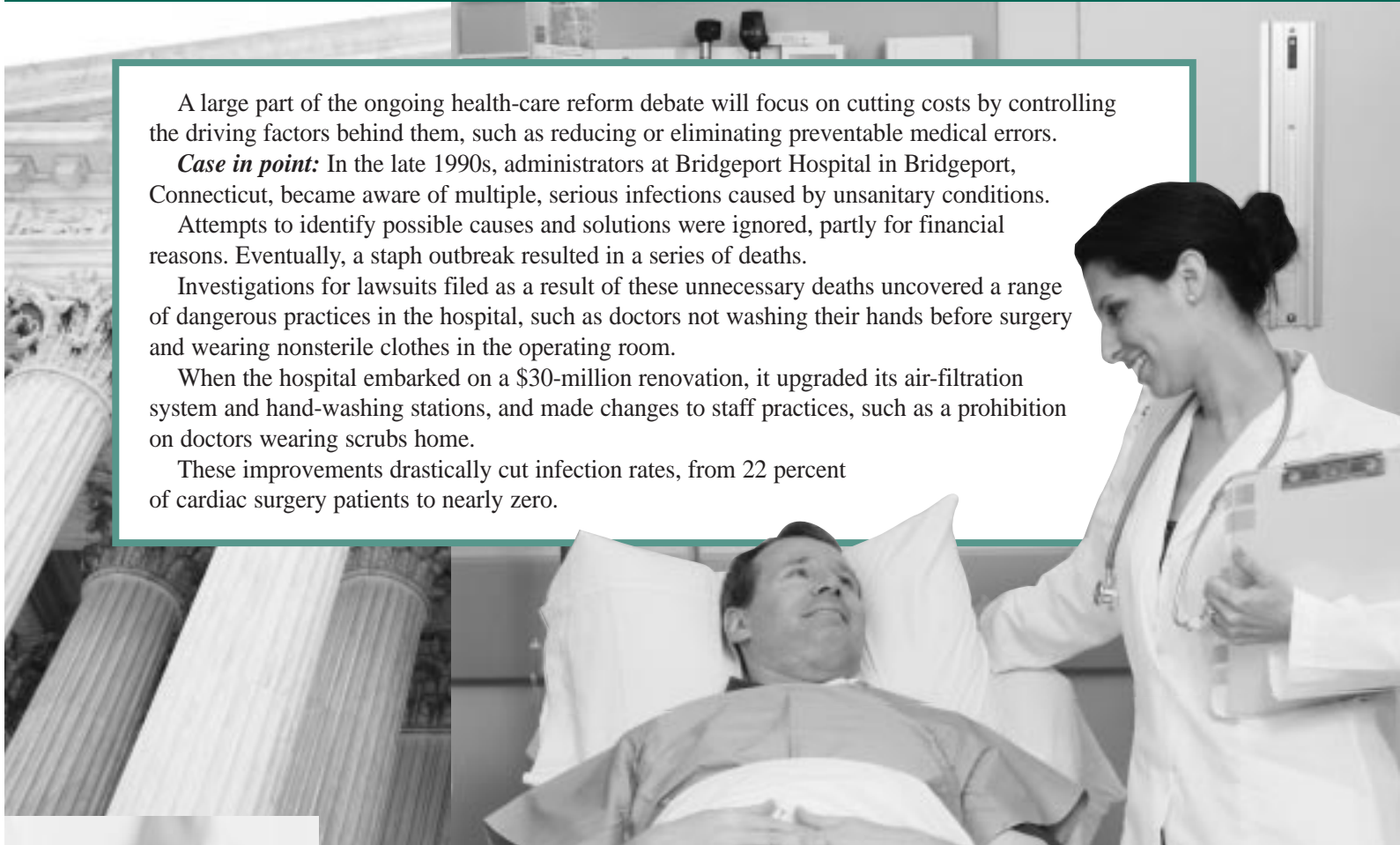
A Government Accountability Office report shows that workplace injuries and illnesses are persistently underreported, endangering the safety and health of our nation's workers.

With a challenging economic outlook and high unemployment, American businesses are habitually reporting fewer employee injuries to the Office of Occupational Safety and Health Administration than are actually occurring. Estimates range from a third to two-thirds of workplace injuries going unreported.

Companies, fearing worksite inspections and increased workers' compensation policy costs, often try to limit treatment to first aid, to seek alternative diagnoses of injuries, and to pressure employees to not report injuries.

Employees, fearing retribution such as disciplinary action, hesitate to report work-related injuries to employers. Some employees conceal work-related injuries to earn safety bonuses or prizes.

Our firm's suggestion: Employee health and safety should be a top priority of any business. Take advantage of your rights if injured on the job through no fault of your own. Back and carpal-tunnel injuries, among many others, can worsen over time. Contact an attorney experienced in on-the-job injuries for counsel.



Hurley McKenna & Mertz wins \$9 million verdict

This year, **Christopher T. Hurley** and **Mark R. McKenna** won a \$9 million jury verdict against the County of Cook on behalf of a 20-year-old man who suffered a brain injury during his birth at Cook County Hospital in 1990.

The suit alleged that on January 21, 1990, the boy's mother went to the Cook County Hospital emergency department with labor pains. After hospital personnel admitted the mother to the hospital's labor and delivery unit, a junior resident physician performed an amniotomy, or artificial rupture of the mother's membranes. As a result, an umbilical cord prolapse occurred, resulting in compression of the umbilical cord between the child's head and his mother's birth canal. An emergency cesarean section delivery of the child became necessary, and the child was born severely depressed due to lack of oxygen as a result of the umbilical cord prolapse. The child was later diagnosed at the University of Chicago Hospital as having suffered a brain injury due to the lack of oxygen experienced at birth.

The young man's mother did not seek legal representation until 2005, when the young man was 15 years old. Suit was then promptly filed. At trial, Hurley and McKenna presented evidence that Cook County Hospital's resident physician ruptured the mother's membranes without a proper medical indication—and while the child's head was too high in his mother's birth canal—allowing the umbilical cord to slip down and become trapped between the child's head and his mother's birth canal. Hurley and McKenna also showed the jury evidence that hospital staff failed to deliver the child until 41 minutes after the need for an emergency cesarean section became evident.

At trial, the Cook County State's Attorney's Office defended the conduct of the hospital personnel by arguing that an amniotomy was necessary to place an internal fetal heart monitor inside the mother to better monitor fetal heart rate, since the mother had no prenatal care and thus was a high-risk patient. The County's attorneys also contended that the cord prolapse was inevitable due to the preexisting location of the umbilical cord, and that the cesarean section was accomplished in 16 minutes. The County's attorneys further contended that the baby's rapid recovery after delivery, normal brain MRI and CT scans, and lack of seizures indicated that any brain injury occurred as a result of an unknown maternal illness in the days and weeks before the delivery.

Today the young man has limited mobility and cognitive deficits. He is cared for at home by his mother in Chicago.

After several days of deliberation, the Cook County Circuit Court jury found in favor of the plaintiff, and awarded him \$9 million. A noteworthy feature of the case was that Cook County Hospital produced labor and delivery records for the mother and child, but not the fetal heart monitor strips, which are critical records that would have confirmed the baby's heart rate throughout labor. The strips would also have confirmed whether the County physician had a legitimate reason for rupturing the mother's membranes, when the physician ruptured the membranes, and how long it took to actually perform the emergency cesarean section. Hurley and McKenna found evidence that the hospital's own policies required that personnel preserve all fetal heart monitor strips and place them with the mother's chart. At trial, the hospital claimed that the strips had simply been misplaced in a move a few years before suit was filed in 2005. However, Chris Hurley forced the hospital's Keeper of Records to concede at trial that her department did not misplace the strips, and that hospital delivery room personnel never placed the strips in the chart on the date of the delivery. Hurley and McKenna successfully convinced the trial judge to give the jury an I.P.I. 5.01 missing evidence jury instruction at the end of the case.



Hurley McKenna & Mertz sponsors Second Annual SkyRise Chicago

Hurley McKenna & Mertz was a sponsor of the Second Annual SkyRise Chicago, benefitting the Rehabilitation Institute of Chicago (RIC). SkyRise Chicago, the world's tallest indoor stair climb, took place November 14, 2010, at the Willis Tower (formerly the Sears Tower). This urban climb, involving 2,109 steps, offered two modes of participation—a stair climb and hand-cycling option—making it the only event of its kind in the world.

Among the participants in last year's climb was Hurley McKenna & Mertz client Mark Stephan, someone who has been an inspiration to our firm and to the world for his fearless spirit and sheer determination to rise above a tragic injury. In August 2007, Mark was riding his bicycle when the front wheel detached and he plunged headfirst into the pavement, fracturing his neck and becoming a minimally functional quadriplegic. Although his doctors told him that he would never walk again, Mark refused to accept that fate. In December 2009, Mark stunned friends and family by completing the entire climb up Willis Tower. *NBC Today with Mike Leonard* documented the inspiring story in a video segment, which can be viewed on our Web site (www.hurley-law.com).

Michael Mertz singled out as "Rising Star"

Congratulations to our partner, **Michael Mertz**, who was selected for the second consecutive year as an "Illinois Rising Star 2010" by *Super Lawyers Magazine*.

This honor recognizes the top up-and-coming attorneys in the state—those who are 40 years old or younger, or who have been practicing for 10 years or less.



Michael Mertz

Christopher Hurley heading key Loyola School of Law efforts

Firm founding partner **Christopher Hurley** is serving as the 2010-11 president of the Loyola School of Law Alumni Board of Governors. The Alumni Board of Governors promotes a closer relationship between law alumni and Loyola University Chicago School of Law and fosters and maintains the honor, dignity, and integrity of the profession of law. Hurley is also chairing Loyola's annual giving campaign for the second year.

RECORD \$5.3 MILLION SETTLEMENT REACHED IN DUPAGE COUNTY MEDICAL NEGLIGENCE CASE

Christopher Hurley and **Michael Mertz** successfully represented the husband and 6-year-old son of a Carol Stream woman who died as a result of the failure of local physicians to diagnose the woman's stroke at Central DuPage Hospital. Hurley and Mertz alleged that the woman's physicians failed to properly diagnose her stroke and failed to begin treatment that would have saved her life. As a result, the woman languished in the hospital until the next morning, when she became stuporous and slipped into a locked-in state. Later efforts to remove the clot lodged in the woman's basilar artery were unsuccessful, and she died 16 days later.

Hurley and Mertz obtained evidence during the case that the defendant radiologist, while testifying in his deposition that he had never been asked by hospital personnel to review MRI films of the woman's brain, had in fact reviewed the films and incorrectly reported the results as "normal." This radiologist's error and resulting delays in diagnosis and treatment cost any chance to medically or surgically treat the woman's deadly blood clot.

The settlement obtained by Hurley and Mertz in August 2010 on behalf of their clients is the largest medical malpractice settlement and the largest wrongful death settlement in DuPage County history.