

FALL 2004

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.  
Weekends by appointment

## TRIAL LAWYERS

- ¥ Medical negligence
- ¥ Product injuries
- ¥ Automobile accidents
- ¥ Aviation accidents
- ¥ Wrongful death

Join our mailing list.  
If you wish to add  
names to our  
newsletter mailing list,  
please contact us at  
312-553-4900, or  
send an e-mail to  
askus@hurley-  
law.com.

## Record \$7.7 million awarded in hospital negligent- credentialing case

**H**urley McKenna & Mertz won a record \$7.7 million verdict for Crestwood resident Jean Frigo in a case alleging that a local hospital improperly granted surgical privileges to an unqualified podiatrist.

On October 8, 1998, Ms. Frigo, a diabetic with a 30-year career as a critical care nurse, went to Silver Cross Hospital in Joliet for removal of a bunion on her left foot. Dr. Paul Kirchner, a podiatrist with surgical privileges at Silver Cross Hospital, performed the procedure, known as a bunionectomy, in spite of the fact that Ms. Frigo had a diabetic ulcer present at the site of the bunion. Diabetic ulcers are a known source of infections, and podiatric standards generally require that an elective surgery such as a bunionectomy be delayed until the ulcer is completely healed.

During the trial, the jury heard testimony that Dr. Kirchner made an incision near the diabetic ulcer and placed a screw in Ms. Frigo's left foot. As a result, the bones in Ms. Frigo's left foot at the site of the screw became severely infected. No attempt was made to remove the infected screw until February of 1999 at Silver Cross Hospital, and trial testimony indicated that Dr. Kirchner was unable to remove the screw at that time because of his lack of proper surgical training.

As a consequence of the negligent October, 1998, left-foot surgery at Silver Cross Hospital, the bones in Ms. Frigo's left foot became so infected that she was forced to undergo the amputation of her left foot at Loyola University Medical Center on August 30, 1999. Ms. Frigo, now 56 years old, is permanently disabled as a result of the amputation and is unable to return to work as a nurse.

During the case, Ms. Frigo's attorneys

obtained evidence that Silver Cross Hospital granted hospital privileges to Dr. Kirchner in 1992, contrary to the hospital's own bylaws. The hospital's bylaws required all podiatrists seeking surgical privileges at the hospital to have completed either a 12-month podiatric surgical residency program or be board-certified by the American Board of Podiatric Surgery. Dr. Kirchner met neither of these requirements in 1992, when he initially began performing procedures at Silver Cross Hospital, or in 1998, when he performed surgery on Ms. Frigo. During that time period, Dr. Kirchner reapplied several times for continuation of his surgical privileges at Silver Cross Hospital, and each time the hospital's Board of Trustees granted the privileges in violation of its own rules and bylaws.

Illinois law requires hospitals to use reasonable care to determine the qualifications of health-care professionals added to a hospital's medical staff. In Ms. Frigo's case, the jury agreed that podiatrist Dr. Kirchner was professionally negligent in performing the surgery and failing to properly treat Ms. Frigo's foot infection, and that Silver Cross Hospital was negligent in giving hospital privileges to Dr. Kirchner to perform the surgery in the first place. After a 14-day trial, the jury deliberated for two hours before awarding a record \$7,775,668 to Ms. Frigo.

Partners **Christopher T. Hurley** and **Mark R. McKenna** represented Ms. Frigo, with co-counsel James E. Pancratz of Pancratz Law Offices, in Chicago. Cook County Circuit Court Judge Donald O'Brien presided over the jury trial. News about the case and verdict appeared on local news programs, including the 10:00 p.m. CBS local news. To view the news segment, visit our Web site at [www.hurley-law.com](http://www.hurley-law.com).

## HMOs and patient care

To obtain the best care at the lowest cost, HMO members can ascertain their rights and responsibilities from a number of sources.

- At enrollment, members obtain a comprehensive handbook or guide that outlines benefits, treatments, and services the plan covers.
- The HMO plan contract defines benefits, such as deductibles and lifetime limits, with greater specificity.
- The plan's Member Services telephone representatives can advise on what the plan covers, particularly for "out of network" services.
- If HMO coverage is provided through an employer, the company's human resources office can answer questions about plan rules, costs, coverages, appeals, and complaints.
- A state's insurance department can also advise



on HMO patients' rights and responsibilities.

- HMOs customarily pay for services on the basis of specific treatment guidelines, called practice protocols. Members can usually obtain the best medical attention with the highest coverage when participating physicians follow HMO treatment protocols.

### When an HMO plan errs

Most HMOs deliver members' health services as promised in the contracts. When they do not—or deny or delay treatment—members have legal recourse. A diabetic patient with numerous high-risk factors for cardiac disease suffered a myocardial infarction and died. The patient's wife and estate sued the HMO for delaying stress-testing and not prescribing blood-pressure medications. Their lawyer provided evidence that with timely treatment, the patient would have had a near-normal life expectancy. The jury awarded a wrongful-death verdict and damages.

## Manufacturing, employment, and injuries

It's no secret that our nation's manufacturing sector has declined in scope and size over the past decade as productivity has increased and jobs have moved overseas.

Surviving manufacturing companies know that they must continue to make accommodations to remain efficient and competitive. Management may lay off part of its workforce, which means that the fewer remaining employees pick up more of the work. Purchasers increasingly look for suppliers who can provide needed products and services at lower costs. Supervisors may extend or delay maintenance and replacement schedules to get additional months or years of use out of capital equipment. Some companies overhaul and renovate plant equipment rather than replace it.

### Rebuild...with safety

When a maintenance employee crawled beneath a refurbished conveyor system to make an adjustment, the motor's chain drive crushed his wrist and severed part of his pinkie. Since the injury was to his dominant hand, he sued his employer for loss of future wages and inability to do repair work. His attorney argued that the equipment's rebuilder had failed to incorporate an inner chain guard that would have prevented accidental contact with the chain drive. The parties settled.



## Cosmetic surgery



According to the American Society of Plastic Surgeons (ASPS), in 2003 over 8.7 million procedures were performed on patients who wanted to improve their appearance and manage signs of aging—a 32 percent increase over 2002. Invasive surgical procedures grew 5 percent. Minimally invasive procedures, such as Botox® injections, grew 41 percent.

Like all other surgeries, cosmetic surgery involves risk. Reality programs, such as ABC's *Extreme Makeover*, may cause some patients to fail to appreciate the seriousness of cosmetic surgery as well as potential outcome problems and side effects associated with surgery and medications.

ASPS suggests that patients considering cosmetic surgery...

- insist on a physician board-certified by the American Board of Medical Specialties.
- demand safe surgical facilities.
- require a medical examination and evaluation.
- learn all they can about cosmetic surgery.
- seek ASPS-affiliated physicians.
- ask questions.

### Outcome problems

Cosmetic-surgery patients can seek justice in the courts when physicians make preventable mistakes. Following surgery to lengthen his chin, a patient suffered restricted lip movement. The plaintiff's attorney showed that the patient was not warned of the procedure's risk. A jury awarded a judgment, which a judge reduced. The case will be retried.

©2004 Allergan

## HOME WARRANTIES

Builders who construct new homes usually provide a one-year written warranty through which they agree to correct construction or cosmetic workmanship deficiencies.

In most cases, contractors want to satisfy customers. Many construction companies conduct a premortgage settlement walk-through of a new property, which enables owners to identify contractual omissions or substitutions and final-finish blemishes that builders should repair.

Sometime near the end of the first year, the builder may ask owners for a "punch list" of additional problems to be fixed. This is usually the home buyer's last opportunity to point out serious plumbing, HVAC, electrical, and other concerns. It may take 12 months to discover squeaky floors or steps, drywall screws that have popped up, gutters and downspouts that don't work properly, or more serious issues.

After the first year, some builders will continue to repair problems that they reasonably acknowledge as their responsibility. However, others may feel that the warranty's liability has run its course, noting that defective construction or deficient finish issues have become the owner's maintenance responsibility.

### PERSISTENT PROBLEMS

When problems persist, home owners may find assistance from consumer-protection guidelines or even state liability laws. When these don't solve the problem, home owners have recourse to legal remedies through the justice system. One home owner requested that his builder correct a drainage problem that repeatedly caused flooding and damage to his property. When the contractor refused, the home owner's attorney sued for negligence, breach of warranty, fraud, and nuisance. A jury awarded punitive damages.

## Medical technology and premature babies

Neonatal Intensive Care Units (NICUs) are high-technology hospital departments.

Neonatologists have 24-hour access to computerized physiological data on a high-risk or premature infant's health status. Electronic monitors continually assess and report basics, such as temperature, blood pressure, and respiration. Doctors may request specialized high-tech testing to evaluate a baby's blood oxygenation, cardiac functions, and even vision and hearing capabilities.

Equally important is the time and care that skilled and experienced physicians and compassionate staff give to each infant. Newborns' parents recognize the balance between the masses of high-tech NICU equipment and the quality time caregivers spend touching, talking to, and smiling at babies.

### When errors occur

Although NICUs help many newborns survive, parents have recourse when caregivers make preventable mistakes. A baby was born prematurely at 27 weeks of gestation. The hospital's pharmacy erred in mixing a nutritional glucose solution, which caused the baby to suffer hypoglycemia, seizures, and brain injury. The parents sued for negligence and reached a structured settlement for lifelong care.



