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#### TRIAL LAWYERS

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## \$6.5 million settlement of medical negligence case



Chris Hurley and Mark McKenna obtained a \$6.5 million settlement on behalf of a 7-year-old Aurora boy who suffered a brain injury at birth. The suit alleged that on April 7, 2001, during an attempted vaginal birth after a prior cesarean section (VBAC) at Provena Mercy Center in Aurora, Illinois, the attending obstetrician and the hospital's labor and delivery nurse failed to respond to uterine hyperstimulation from Pitocin, and failed to recognize that the fetal heart monitor was detecting maternal rather than fetal heart rate for the entire second stage of labor. When the fetal heart rate reappeared after nearly two hours, severe fetal bradycardia was evident, and an emergency cesarean section delivery was performed.

The baby was born with metabolic acidosis and hypoxic ischemic encephalopathy. The baby has been diagnosed with cerebral palsy and has limited mobility, although he does not need a feeding tube.

The defense claimed a sudden placental abruption, which occurred 15 minutes before delivery, in conjunction with preexisting fetal inflammation, was the sole cause of the boy's hypoxia and brain injury.

The firm found top experts from the United States and Canada who were able to show that the child's injury was caused by the doctor and nurse's careless use of Pitocin during the labor, and their failure to discover the child's dropping heart rate before permanent brain damage occurred. Hurley and McKenna were able to force the defendants to settle after they answered ready for trial and began selecting a jury.

## \$1 million jury verdict for cancer patient

On November 21, 2007, Chris Hurley and Michael Mertz obtained a \$1 million jury verdict for the family of a 76-year-old man who died from lung cancer on September 28, 2003. The man underwent a chest x-ray on March 14, 2003, prior to a cardiac catheterization. The x-ray showed a four-centimeter mass in the upper lobe of the man's left lung. The radiologist identified the mass as bronchogenic carcinoma.

A staff member at the ordering physician's office incorrectly believed that the ordering physician had already seen the result of the x-ray, and filed the report in the man's chart. The report was not seen again until after the man's cancer was diagnosed on September 10, 2003. By the time the cancer was diagnosed, it had already metastasized to the man's liver, pelvis, hip, femur, spine, and shoulder.

In the six months after the x-ray showed cancer, the man's health declined significantly. In March 2003, the man was energetic, still working part-time, and an integral part of his family. Over the next six months, the man began to lose energy, fatigue easily, lose weight, withdraw from family activities, and experience severe pain in his back. Our attorneys presented evidence that the man searched for a

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# Illinois Supreme Court affirms record-setting negligent credentialing verdict against hospital

The Illinois Supreme Court upheld the largest known verdict for a plaintiff in an institutional negligence case ever obtained in Illinois. The case is also the first reported case in Illinois dealing with a hospital's liability for the negligent credentialing of a physician, podiatrist, or other health-care provider.

**Chris Hurley** and **Mark McKenna** obtained the \$7,775,668 verdict in August 2004 for their client, a longtime critical care nurse who went to Silver Cross Hospital in Joliet, Illinois, for removal of a bunion on her left foot. Dr. Paul Kirchner, a podiatrist with surgical privileges at the hospital, performed the procedure in spite of the fact that the patient 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. Hurley and McKenna presented testimony that the podiatrist made an incision near the diabetic ulcer and placed a screw in the patient's left foot. As a result, the bones in the patient's left foot at the site of the screw became severely infected, to the extent that the patient was forced to undergo the amputation of a portion of her left foot. The patient has been unable to return to work as a nurse since the surgery.

During the case, Hurley and McKenna presented evidence to the jury that Silver Cross Hospital granted hospital privileges to Dr. Kirchner in 1992, contrary to the hospital's own bylaws, which 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 the hospital, or in 1998, when he performed surgery on the patient. 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.

Over 40 years ago, the Illinois Supreme Court recognized that a hospital has a duty to use reasonable care in the administration and management of the institution. Hurley and McKenna convinced the trial court and the Illinois Appellate Court that a hospital, for the first time, should specifically be liable for negligently credentialing a physician, podiatrist, or other health-care provider if the hospital failed to use reasonable care in granting staff privileges to that provider, and the physician or podiatrist subsequently commits malpractice resulting in injury.

In this case, the jury agreed that Dr. Kirchner was negligent in performing the initial surgery at the hospital and in failing to properly treat the foot infection, and that Silver Cross Hospital was negligent in giving hospital privileges to Dr. Kirchner to perform the surgery in the first place.

The Illinois Supreme Court recently refused to hear the hospital's appeal of the Appellate Court's ruling. You can find a link to the Illinois Appellate Court's opinion at [www.hurley-law.com](http://www.hurley-law.com).

## \$1 million jury verdict for cancer patient

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reason to explain why he felt so poorly. The evidence showed that the man became extremely frustrated by his repeated inability to obtain a diagnosis or cure for his symptoms.

Hurley and Mertz retained oncology and hospice medicine expert witnesses during the trial. The expert witnesses testified that these symptoms were caused by the man's cancer, known as the constitutional symptoms of cancer. The expert witnesses testified that the man could have been made comfortable while he underwent treatment for his cancer if he had been diagnosed and treated beginning in March 2003.

Our attorneys also demonstrated that with a diagnosis and treatment, the man likely would have survived his illness far longer than the six months he actually survived without a diagnosis or treatment. Because of the delayed diagnosis, the man also lost a 10 to 15 percent chance of becoming a long-term survivor.

The bulk of the jury's verdict, \$700,000, was for the man's pain and suffering. The jury's verdict reflects the fact that the man's suffering was significant and unnecessary, and would have been avoided if the man had had the benefit of modern medicine.

## \$6.8 million recovery due to medication error

**Chris Hurley** and **Mark McKenna** obtained a total \$6.8 million recovery on behalf of an 81-year-old Alsip woman who suffered permanent kidney injuries after a medication error at a local hospital. Hurley and McKenna alleged in the case that a hospital nurse erroneously discharged the patient, who was recovering from a MRSA infection in her knee, from the hospital to a nursing home on a prolonged course of the antibiotic gentamicin after the nurse incorrectly listed gentamicin on a patient-transfer form. The unnecessarily prolonged course of gentamicin resulted in the patient suffering permanent renal failure. She now needs kidney dialysis for the rest of her life.

The hospital refused to admit liability or offer any amount of settlement money for the error, so Hurley and McKenna took the case to trial. Based on an erroneous interpretation of the law, the trial judge refused to allow the jury to award the plaintiff any money for her substantial medical expenses, especially her dialysis bills, because she was a Medicare recipient. In spite of this roadblock, Hurley and McKenna convinced the Cook County Circuit jury to

## \$3.5 million settlement from Joliet hospital for birth injury

Our attorneys won a \$3.5 million settlement from a Joliet hospital for a Joliet family whose son was injured during his late 1990s birth. After a Joliet attorney had turned the case down, the family contacted **Hurley McKenna & Mertz**.



**Chris Hurley** and **Mark McKenna** discovered from their review of the medical records and the fetal heart monitor strips that the boy had an excessively high heart rate (fetal tachycardia) for almost three hours prior to his birth. Hurley and McKenna then deposed the attending obstetrician, who did not arrive until delivery was imminent. The obstetrician admitted that the nurse never communicated the tachycardia, as required by hospital rules, and that if that information had been conveyed, the

obstetrician would have come to the hospital and possibly delivered the baby much sooner. The nurse's failure to report the baby's tachycardia earlier to the obstetrician resulted in a lost chance to deliver the child earlier and possibly avoid his permanent brain damage.

The hospital offered to settle the matter before any trial date was set. This was one of the larger settlements for this type of case in Will County.

## Settlement from local hospital for

award the plaintiff \$3.2 million.

Hurley and McKenna appealed the trial judge's ruling on the plaintiff's medical bills. In an important decision, *Kunz v. Little Company of Mary Hospital*, 373 Ill.App.3d 615 (1st Dist. 2007), they persuaded the Illinois Appellate Court to reverse the trial judge's decision and remand the case for a new jury trial to decide the value of the plaintiff's medical bills only. After the ruling of the Illinois Appellate Court, the hospital offered to settle the entire matter for a total of approximately \$6.8 million.



## Firm argues one of the first cases on wrongful birth since landmark decision

On February 5, 2009, **Chris Hurley** and **Mark McKenna** argued before the Illinois Appellate Court, First District, in the case *Clark v. Burton*. The *Clark* matter addresses the damages available to parents in so-called "wrongful birth" cases, and the plaintiffs alleged that a genetic counselor rendered negligent advice regarding the risks of having a child with a disability. The plaintiffs argued, among other things, that when a geneticist gives negligent advice, parents should be entitled to recover the extraordinary costs necessary to raise and care for the disabled individual for the duration of his life.

The *Clark* case is one of the first cases to address the topic of wrongful birth since the Illinois Supreme Court's landmark decision in *Siemieniec v. Lutheran General Hospital*. A decision in the *Clark* case is expected in the coming months.

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## **Michael Mertz singled out as "Rising Star"**

Congratulations to our partner, **Michael Mertz**, who was selected as an "Illinois Rising Star 2009" 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.

## **HURLEY MCKENNA & MERTZ SPONSOR FIRST "SPA FOR THE COURAGEOUS"**

Hurley McKenna & Mertz was a lead sponsor for the first "Spa for the Courageous," held October 3-4, 2008, by the Chicago Church Networking Ministry at the First Baptist Church in Geneva, Illinois.

The "Spa for the Courageous" was an event to encourage, support, and strengthen women who have sacrificed their lives to provide 24-hour-a-day care for family members with severe disabilities. The event, which was organized by one of the firm's clients, featured inspirational speakers, networking, fellowship, and beauty and spa services for attendees.

