



# PERSONAL INJURY LITIGATION NEWS

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## PRODUCT LIABILITY

### Calif. federal judge limits device maker's access to inmate's files

*Crayton v. Rochester Medical Corp.*, No. 1:07-cv-1318, 2010 WL 1812594 (E.D. Cal., Fresno May 5, 2010).

A U.S. magistrate judge has limited a medical device maker's access to the medical records of a California inmate who says he was severely injured by one of its external catheters.

Judge Gary Austin of the U.S. District Court for the Eastern District of California agreed with the plaintiff that the request for all packaging related to his use of the Ultraflex silicone self-adhering male external catheter between 2005 and 2010 was "overbroad."

(See *PRODUCT LIABILITY* on page 7)

## MEDICAL MALPRACTICE

### Illegal settlement clause damaged reputation, doctor charges

*Barnett v. Hillyard et al.*, No. CGC-10-499560, *complaint filed* (Cal. Super. Ct., S.F. County May 6, 2010).

A California plastic surgeon claims he has suffered professional harm because his lawyer inserted an illegal nondisclosure clause into a malpractice settlement agreement.

According to the complaint filed in the San Francisco County Superior Court, Dr. Andrew Barnett retained attorney Steven D. Hillyard in January 2007 to defend him in a malpractice action filed by a patient who claimed an instrument-related injury.

(See *MEDICAL MALPRACTICE* on page 8)

# WEST®

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## ABUSE & NEGLECT

### Family sues over patient's transfer to understaffed nursing home

*Christie v. Wilkinson Corp. et al.*, No. 30-2010 00374704, *complaint filed* (Cal. Super. Ct., Orange County May 21, 2010).

An Orange County nursing home caused the death of a high-risk resident by knowingly transferring him to a neighboring facility plagued by safety violations and a scabies epidemic, a California state court lawsuit alleges.

Edward E. Christie's family claims the owners and operators of area nursing homes Valley View Gardens and Fullerton Gardens committed fraud by representing that Fullerton Gardens could meet his health and personal care needs.

The injuries Christie suffered as a result of the nursing homes' negligence caused his death, the suit alleges.

According to the complaint filed May 21 in the Orange County Superior Court, Christie entered Valley View in June 2009. He paid about \$5,000 a month for assistance with daily activities such as eating, bathing, using the toilet and administering medications.

The nursing home's executive director recommended Christie move out of the facility after he experienced several falls during his four-month residency. She suggested Fullerton Gardens would be better equipped to meet the needs of residents like Christie who had a high risk for falls, the complaint says.

Defendant Wilkinson Corp. owns both homes.

Christie transferred to Fullerton Gardens, where he fell out of bed several months later and fractured his hip. He died at a hospital less than a month later from cardiovascular disease secondary to the hip fracture, the suit says.

The state's Department of Social Services later issued a citation and fined Fullerton Gardens for neglecting and causing Christie harm, the complaint says.

Christie's wife, Jacqueline, and their three children filed a lawsuit alleging wrongful death, elder abuse, negligence, and fraud against both nursing homes, Wilkinson Corp., and Good Neighbor Care Gardens LLC, the operator of Fullerton Gardens.

They also named as defendants Valley View Gardens' executive director and subsidiaries of Wilkinson Corp.

The complaint alleged the defendants knew Fullerton Gardens was ill-equipped to meet Christie's needs, as it recently incurred

citations from DSS for neglecting residents and failing to maintain sufficient staffing levels.

The defendants also neglected to inform Christie and his family that multiple residents at Fullerton Gardens suffering from scabies infection at the time he entered the facility, the complaint says.

According to the suit, the defendants violated Cal. Code Regs. tit. 22, § 87572 by failing to provide Christie with appropriate care and treatment to meet his needs.

The defendants intentionally put profits over people by underfunding and understaffing the nursing home in order to maximize earnings, the Christies claim.

According to the complaint, Fullerton Gardens and its owners and operators committed elder abuse under Cal. Welf. & Inst. Code § 15610 by failing to take reasonable precautions to prevent Christie from suffering falls and a scabies infection.

In addition the defendants fraudulently represented that they would provide Christie with continuous care and supervision and assist him with his personal needs, his family alleges.

The Christies are seeking general damages for Christie's injuries and death and for the loss of his society and comfort. They also are seeking special and punitive damages.

See Haning, Flahavan & Kelly, CAL. PRAC. GUIDE: PERSONAL INJURY (The Rutter Group 2009):

3:32; 3:286.1 (wrongful death)

3:255.4q; 3:255.7d; 3:282.20 (elder and dependent adult abuse with health care provider defendant)

3:16.19 (Section 15610)

## APPORTIONMENT OF FAULT

### Asbestos fault can be allocated to Navy, appeals court says

*Collins et al. v. Plant Insulation Co.*, No. A124268, 2010 WL 2197697 (Cal. Ct. App., 1st Dist. June 3, 2010).

A percentage of fault for noneconomic damages may be apportioned to the U.S. Navy in an asbestos suit, despite its immunity from liability, a California appeals court has ruled.

The 1st District Court of Appeal's ruling means a jury must reconsider its fault allocations and include the Navy among defendants in the suit, potentially

reducing damages that appellant Plant Insulation Co. must pay.

The jury initially found Plant 20 percent liable for the lung cancer death of Ulysses Collins, a welder who worked at two naval shipyards. The jury allocated the remaining 80 percent of fault to four other parties, excluding the Navy.

Judge Harry R. Sheppard of the Alameda County Superior Court presided over the trial.

Collins worked at Hunters Point Naval Shipyard from 1960 to 1973 and Mare Island Naval Shipyard from 1976 through 1994.

He died in 2005.

The jury awarded his wife and daughter \$1.8 million in total noneconomic damages, which covered the plaintiffs' claims of pain and suffering, loss of consortium, and wrongful death.

Each defendant was liable to pay a part of the total corresponding to its percentage of fault.

Based on federal sovereign immunity, Judge Sheppard granted the plaintiffs' motion to exclude the Navy from the list of entities to which the jury could allocate responsibility.

Plant appealed the judgment.

The Court of Appeal noted there was no dispute that the Navy is immune from liability in the case.

Plant nevertheless argued that "the Navy's immunity is essentially one from suit and does not mean the service owes no duty of care ... and thus cannot be characterized as 'tortfeasor.'"

The appeals court agreed, saying the Navy is properly included among those entities to which fault may be apportioned in an asbestos case.

The court based its ruling on *Taylor v. John Crane Inc.*, 113 Cal. App. 4th 1063 (Cal. Ct. App., 1st Dist. 2003).

In *Taylor*, a case involving a former sailor who developed mesothelioma, the jury allocated 13 percent fault to the Navy. The 1st District Court of Appeal said the trial court correctly assigned fault to the Navy despite its immunity.

Fault may be allocated to a government agency even though it cannot be required to pay for its tortious acts, the *Taylor* court ruled.

The appeals court in this case ordered a retrial limited to apportionment of fault among the Navy, Plant and the other defendants already found liable.

See Haning, Flahavan & Kelly, CAL. PRAC. GUIDE: PERSONAL INJURY (The Rutter Group 2009):

2:644.3; 3:26.2; 3:236-236.3; 3:242-244; 3:283.2g (apportionment of damages in comparative negligence)

3:334.1-334.2 (comparative negligence in wrongful-death case)

2:767.2; 2:984; 2:984d; 5:180.2 (causation for asbestos-related injury or death)

2:6; 2:252; 3:8.2 (*Taylor*)

## NONECONOMIC DAMAGES

### California appeals court reduces noneconomic damages in Navy exposure case

*Davis et al. v. Leslie Controls Inc. et al.*, No. B205984, 2010 WL 2197685 (Cal. Ct. App., 2d Dist. June 3, 2010).

An award of \$35 million in noneconomic damages for a couple suing for lung cancer in a Navy exposure suit was excessive, and the defendants are entitled to a new trial on the issue, a California appeals court has ruled.

In an unpublished opinion the 2nd District Court of Appeal said that if the plaintiffs agreed to a steep reduction in the award, a new trial could be avoided.

John and Anna Davis brought the suit in the Los Angeles County Superior Court. They alleged he was exposed to asbestos products while serving in the Navy from 1951 to 1955 and later while working for Shell Oil Co. and at the Idaho National Engineering & Environmental Lab.

At the close of trial, Leslie Controls Inc. and Warren Pumps LLC were the only remaining defendants.

The jury assigned 7.1 percent liability to each company and awarded John Davis \$100,000 in economic damages and \$25 million in noneconomic damages. It awarded Anna Davis \$10 million in noneconomic damages.

After reducing the verdict based on the jury's fault allocation, Superior Court Judge Mark V. Mooney entered judgment against each defendant for about \$2.57 million.

He denied the defendants' motion for a new trial, and they appealed.

Leslie Controls and Warren Pumps argued that the trial court incorrectly declined to instruct the jury on the

"sophisticated user" defense and that the noneconomic damages award was unjustified and shocked the conscience.

The appeals court said it is unclear how the sophisticated-user doctrine should apply when the employer (the Navy), rather than the plaintiff, is the sophisticated user.

However, as the jury found "there was a defect in the design of the defendant's product in that it failed to perform as safely as an ordinary user would expect," the court said the sophisticated-user doctrine would not apply in any event.

However, the appeals court did agree that the noneconomic damages award "was excessive as a matter of law."

The appellants argued that John Davis' age, 74, means the most severe pain and suffering he would have to endure would be for 14 months. They also said that although Anna Davis would be without her husband's comfort for about eight years, the \$10 million damage award was excessive.

The court said that based on a reasonable noneconomic award of \$5 million, which was suggested at trial, each company should conditionally be liable for only \$355,000 in noneconomic damages, meaning the plaintiffs would have to agree to remit about \$2.1 million to each defendant. If the plaintiffs do not agree, the case will be remanded for a new trial on the issue of noneconomic damages.

See Haning, Flahavan & Kelly, CAL. PRAC. GUIDE: PERSONAL INJURY (The Rutter Group 2009):

2:767.2; 2:984; 2:984d; 5:180.2 (causation for asbestos-related injury or death)

10:23-28; 10:88-92; 10:102-105.1 (excessive damages as grounds for new trial)

## PRODUCT LIABILITY

### Court finds no evidence that utility vehicle owner spoiled evidence

*Knight v. Deere & Co.*, No. 2:08-cv-01903-GEB-EFB, 2010 WL 1948311 (E.D. Cal. May 11, 2010).

A California federal judge has refused to preclude testimony about the condition of the brakes on a John Deere utility vehicle, finding no proof that the plaintiff owner spoiled any evidence.

U.S. District Judge Garland E. Burrell Jr. of the Eastern District of California also denied defendant Deere & Co.'s motion to exclude plaintiff Shirley Knight's proposed expert witness.

The litigation stems from a fatal accident involving a 1991 John Deere model AMT 622 utility vehicle owned by Homer and Marlene Fagan.

In September 2006 the Fagans were using the vehicle to lead a pony from their residence to the nearby home of Julie Stevens. Marlene was driving the vehicle, and Homer sat in the tailgate, leading the pony.

According to court records, the Fagans encountered Stevens and her daughter on the road. Stevens climbed into the passenger seat of the vehicle, and her daughter sat on the tailgate with Homer.

While traveling down a private gravel road, the vehicle's brakes allegedly failed. It flipped, throwing three of the passengers from the vehicle and fatally injuring Stevens.

Three days after the accident, court records say, the California Highway Patrol inspected the vehicle and concluded the brakes were not properly maintained.

Knight, the guardian of Stevens' daughter, and the Fagans sued Deere & Co. over the allegedly faulty brakes.

Homer Fagan testified in deposition that he had replaced the braking mechanisms on the utility vehicle after the Highway Patrol's inspection. However, several weeks after the repairs, he could not locate the discs and pads that he allegedly removed.

The defendant asserted the Fagans' failure to preserve the brake pads constituted spoliation of evidence and the court should preclude any evidence about the condition of the brakes at the time of the accident.

The company also sought to bar the testimony of plaintiffs' engineering expert Russell Darnell on the grounds that he was unqualified and his opinions were based on speculation and conjecture.

Darnell opined that hydraulic fluid had caused the right brake to fail, the inclusion of a front brake on the vehicle could have prevented the accident and the vehicle was defective because it lacked a second front wheel.

Judge Burrell rejected both of the defendant's requests.

He noted the parties disputed which brake pads remained on the utility vehicle and which ones Fagan had removed and lost.

Fagan testified he removed the pads from the left side of the vehicle, but the defendant's spoliation claim centered on the right-side pads and discs, the judge said.

Finally, the judge concluded Darnell's knowledge, skill, education, training and experience sufficiently qualified him to offer his opinion on vehicle design defects.

See Haning, Flahavan & Kelly, CAL. PRAC. GUIDE: PERSONAL INJURY (The Rutter Group 2009):

2:151.2; 2:155 (criminal liability for spoliation of evidence)

6:410; 8:170 (demand to exchange expert witness information and writings)

2:1008 (use of experts in product liability case)

2:608-609 (design defect liability in strict liability case)

## PRODUCT LIABILITY

### Suit: 'defective' Firestone tire caused accident

*Quezada v. Bridgestone Americas Tire Operations LLC*, No. BC438605, *complaint filed* (Cal. Super. Ct., L.A. County May 27, 2010).

A man injured in the rollover of a pickup truck says a defective Firestone Firehawk ATX tire caused the accident.

According to the complaint in the Los Angeles County Superior Court, Conrado Quezada was a passenger in a 1971 Ford pickup truck equipped with Firehawk tires. He says the vehicle went out of control and rolled over when the tread peeled off the left rear tire.

Quezada seeks damages from Bridgestone Americas Tire Operations for negligence and strict liability, claiming the tire was unsafe in design, manufacture, testing, inspection, construction, marketing and sale "in that it was susceptible to detread."

He says Bridgestone "knew that many people would be killed or seriously maimed if the product was used as intended."

See Haning, Flahavan & Kelly, CAL. PRAC. GUIDE: PERSONAL INJURY (The Rutter Group 2009):

2:605; 2:703; 2:717 (strict product liability for manufacturing defect)

2:608-609 (strict product liability for design defect)

2:632-632.3 (strict product liability for failure to warn)

**PRODUCT LIABILITY**

## Federal judge allows wide discovery on tire models

*Albee v. Continental Tire North America Inc. et al.*, No. S-09-1145, 2010 WL 1729092 (E.D. Cal. Apr. 27, 2010).

A California federal judge will not reconsider a federal magistrate judge's discovery order in a personal injury case against Continental Tire, ruling that the company did not show that the information sought included trade secrets.

Judge Lawrence K. Karlton of the Eastern District of California said the question of substantial similarity between the accident tire at issue and other Continental tires could not be answered without the discovery information.

According to the opinion, plaintiff Donald Albee claims his 2002 Ford Explorer rolled over after a loss of control when the tread or belt came off the left rear tire, a General Ameritrac manufactured by Continental Tire North America.

He was severely injured in the crash and he sued Ford Motor Co. and Continental for strict liability and negligence.

A federal magistrate judge ordered Continental to produce discovery material, and the tire maker asked the District Court to reconsider the order.

The discovery dispute concerns the degree of similarity between the accident tire and other Continental tires.

The company argued that Albee sought data on other tire models, including trade secrets, without any showing of relevance.

Judge Karlton, denying the reconsideration motion, found an important distinction between "admissibility at trial and discoverability" in cases in which a threshold question is factually intensive.

"Information necessary to determine whether products are similar will ordinarily be within the control of the manufacturer and/or designer," the judge held. "The rules cannot be read as imposing a 'catch 22' that would require proof of similarity before a party may discover evidence of similarity."

In Judge Karlton's view, the magistrate judge did not abuse his discretion by ordering the discovery.

**Trade secrets**

Continental also maintained that some of the discovery seeks trade secrets, which must be protected unless the data is "relevant and necessary to the prosecution or defense of the case."

The judge said that while the tire maker closely guards its formulas as trade secrets, "Continental has not meaningfully addressed ... the magistrate judge's conclusion that the limited information encompassed by the order to compel does not rise to the level of a trade secret."

See Haning, Flahavan & Kelly, CAL. PRAC. GUIDE: PERSONAL INJURY (The Rutter Group 2009):

2:595-596 (strict product liability)

6:2-39.10; 6:152; 6:154-158 (relevancy limitation on discovery)

6:49.1; 6:101.6-101.9 (trade secrets privilege)

**GENERAL AVIATION REVITALIZATION ACT**

## Court says maintenance manual not a helicopter 'part'

*Rogers v. Bell Helicopter Textron*, No. C061943, 2010 WL 222256 (Cal. Ct. App., 3d Dist. June 4, 2010).

A helicopter maintenance manual was not a "part" of the aircraft for purposes of the General Aviation Revitalization Act's statute of repose, a California appellate court has ruled.

The 3rd District Court of Appeal reversed a lower court ruling that excluded evidence of alleged defects in a maintenance manual.

Alika Rogers brought the suit against Bell Helicopter Textron Inc. in connection with the 2005 crash of a Bell 47D1 helicopter.

Rogers, who was piloting the aircraft, was injured when the helicopter went down near Rancho Murieta Airport.

She sued Bell for negligence, claiming the maintenance manual was defective because it provided improper instructions on balancing the helicopter's tail rotor blades.

The subject helicopter was in operation since 1951, and the maintenance manual was issued in 1969 and last revised in 1975.

A California trial court granted Bell's motion to exclude evidence that the manual was defective and caused the accident. The judge said the manual was "part" of the helicopter and found that GARA's 18-year statute of repose applied.

GARA, 49 U.S.C. § 40101, bars suits against aircraft and component makers more than 18 years after the product is first delivered.

The appeals court disagreed with the trial judge's ruling and reversed the decision.

The 3rd District panel said *Caldwell v. Engstrom Helicopter Corp.*, 230 F.3d 1155 (9th Cir. 2000), supports Roger's argument that the maintenance manual was not an actual part of the helicopter.

"While federal regulations require that a flight manual must be furnished with each helicopter ... there is no analogous provision for a maintenance manual, at least for a helicopter this age," the panel said.

See Haning, Flahavan & Kelly, CAL. PRAC. GUIDE: PERSONAL INJURY (The Rutter Group 2009):

2:589.5; 2:726.13; 5:117; 5:117.3; 5:117.5-117.6 (49 U.S.C. § 40101)

5:117.4 (*Caldwell v. Engstrom Helicopter Corp.*)

**(PRODUCT LIABILITY continued from page 1)**

The judge instead limited Rochester Medical Corp.'s discovery request to packaging related only to the incident during which the plaintiff claims he was severely injured in March 2006 when attempting to remove the condom-type device.

Timothy Crayton, a wheelchair-bound inmate at the Kern Valley State Prison, says the Rochester catheter defectively designed and carried inadequate instructions for use because it ripped patches of skin from his penis and pubic area when he tried to remove it.

In his suit, Crayton says he endured "excruciating painful personal injury" because the catheter contained an invisible adhesive that was not water-soluble and proved impossible to remove without tearing off his skin.

He seeks compensatory and punitive damages in excess of \$3 million on causes of action for strict product liability, negligent product liability, fraudulent misrepresentation and breach of the implied warranty of fitness.

In his motion to quash what he said was Rochester's overly expansive discovery request, Crayton asked the court for permission to personally search his prison files for the information sought.

He said the files contain data on unrelated legal actions he has pending against prison officials and that he could be prejudiced should prison personnel see the documents.

Judge Austin said that while he lacks authority to order the prison's warden to comply with such a request, he would ask that Crayton be present when the records search is conducted.

See Haning, Flahavan & Kelly, CAL. PRAC. GUIDE: PERSONAL INJURY (The Rutter Group 2009):

2:595-596 (strict product liability)

2:640 (breach of warranty in product liability claims; anticipatory "defect" as theory of recovery)

6:36.1; 6:71-76.1; 6:134-134d (discovery of physical and mental examinations; conditions related to injury discoverable)

**(MEDICAL MALPRACTICE continued from page 1)**

The case ultimately settled in November 2007.

Hillyard drafted a confidential release and settlement agreement that, unknown to Barnett, contained a nondisclosure clause saying the parties could not reveal the settlement terms or the lawsuit's allegations, the suit says.

The patient and her attorney signed the release in December 2007, and the settlement was reported to the California Medical Board in accordance with state law.

In September 2008 the medical board contacted the patient's attorney as part of a routine investigation of malpractice cases, the suit says. The attorney notified Hillyard of the inquiry and told him he intended to cooperate.

According to the complaint, Hillyard invoked the nondisclosure clause and instructed the patient's attorney not to cooperate with the investigation. The attorney then followed Hillyard's directive and declined to cooperate.

The board conducted a hearing in May 2009 on the malpractice case and questioned Barnett about the settlement agreement and nondisclosure clause. He says he told the medical board he was not aware of the clause and had not seen or signed the agreement.

The board determined the clause violated Cal. Bus. & Prof. Code § 2220.7, which says a physician "shall not include or permit to be included" a provision that forbids a party from cooperating with the state medical board.

Following the hearing, the medical board told Barnett that if he did not accept a public letter of reprimand

regarding the nondisclosure clause, it would refer the matter to the state attorney general's office, the complaint says.

In response to the medical board's notification of intent to issue a letter of reprimand, Hillyard signed a declaration in which he accepted responsibility for the improper nondisclosure clause and admitted Barnett was "in no way responsible" for the instruction to the settling patient's attorney not cooperate with the medical board.

Despite Hillyard's admissions, the medical board issued a public letter of reprimand Sept. 25, 2009, which Barnett says will remain "for the rest of his career" on the medical board's website.

The letter also was reported to the National Practitioner Data Bank, which collects information regarding licensure actions against American physicians.

Because of Hillyard's wrongful conduct, Barnett asserts he has:

- Experienced a drop in patient consultations.
- Received embarrassing inquiries from colleagues and hospitals.
- Sustained a marked reduction in invitations to speaking engagements.

Barnett is seeking damages for harm to his medical practice, income, and personal and professional reputation.

See Haning, Flahavan & Kelly, CAL. PRAC. GUIDE: PERSONAL INJURY (The Rutter Group 2009):

4:477-479.2 (reporting requirements for settlement or judgment in medical malpractice actions)

4:503 (confidentiality provision in settlement agreement)

4:479.1 (Section 2220)