KASSEL McVEY
ATTORNEYS AT LAW

Ready to Make a Difference

1330 Laurel Street/PO Box 1476,
Columbia, South Carolina 29202

ON THE PLAINTIFF'S SIDE

John D. Kassel, Esq. Theile B. McVey, Esq. | June 2014 | Volume 5, No. 2

Nursing Home case — The J.F. Hawkins Nursing Home in Newberry County, the site of a case in which an elderly patient died after repeated falls.

Nursing home fall case results in $382K verdict for family

An 84-year-old resident of the J.F. Hawkins Nursing Home in Newberry County woke up at about 5 a.m. on the morning of July 10, 2009, to go to the bathroom.

She made it to the doorway and fell. As a result of the fall, she fractured her pelvis and struck her head. The resulting golf-ball-sized knot that she suffered on her head led to a brain injury that contributed to her death on September 4, roughly two months after her fall.

Kassel McVey, which represented the nursing home resident's daughter in a lawsuit stemming from her death, found that the resident had fallen a number of times in the nursing home. A jury ultimately awarded $382,000 in survival and wrongful death damages in the case.

The first time the resident fell was at 5 a.m. on June 4, the morning following her first night in the nursing home. As was the case a month later, the resident woke up to go to the bathroom, hit her head and suffered a bump on her right forehead. But while nurses were there to get her back in bed, no one assessed her risk of falling.

Staff at the nursing home recognized on the day of her arrival that the resident was at high risk for falls. But the nursing home put only minimal fall precautions in place. They put her bed in low position with raised half side-rails that went from head to waist.

Even after the resident's first fall on June 4, no re-assessment of her fall risk was done. And while nursing home personnel met three times to discuss her case, no additional fall precautions were put in place.

See HOME, p. 3

The View from Here

A Giant of Civil Rights

By John Kassel

On April 11, I was standing in the warm sunshine in the park adjacent to the Charleston federal courthouse.

I was part of a diverse crowd that had come to remember the courageous actions of the former United States District Court judge, J. Waties Waring. Judge Waring served as the resident district court judge in Charleston from 1942-52, after a career as a corporate lawyer. The son of a confederate soldier, he issued ground-breaking civil rights opinions that ostracized him and his family from Charleston society. Some 60 years later, the gathering in the park was dedicating a statue to the jurist.

The event was organized by Judge Richard Gergel, our newest district court judge in Charleston. U.S. Attorney General Eric Holder spoke at the ceremony

See VIEW, p. 3

In This Issue

Robotics-based surgery case results in settlement

Kassel McVey recently represented a man with prostate cancer who elected to have the removal of his prostate performed by robotic surgery. The procedure was performed by a surgeon using the da Vinci robotics system introduced by Intuitive Surgical, Inc. in 1999.

The da Vinci robot involves a machine with four arms, which are connected to trocars or tubes and surgical tools that are then placed into the body. A high-definition video camera is also used. The surgeon, who sits at a console located at a distance from the operating table, grasps wrist controls and places his or her feet on pedals and looks into a monitor.

While robotics-based surgery is marketed as minimally invasive and more precise than traditional surgery, it requires training and has a significant learning curve. In our client's case, only seven grams of prostate tissue was actually removed following the surgery. The majority of the prostate remained and continued to express PSA (prostate-specific antigen, a potential marker for cancer).

The surgeon reacted to the continued PSA as evidence of residual cancer. He ordered radiation therapy to kill the remaining cancer. The eight-week course of radiation, on top of the trauma of surgery, caused urinary obstruction and permanent impotence. After months of agonizing episodes of obstruction, the client underwent a major diversion surgery, which involved removal of his bladder and creation of a "pouch" for urine collection made from his bowel. The client must catheterize himself four to six times per day through a hole in his abdomen in order to urinate.

We presented evidence in the trial indicating that the surgeon lacked experience in robotics surgery and was improperly supervised. A reasonable settlement was achieved for our client from the surgeon. At trial, the supervising surgeon received a defense verdict.

Robotics-based surgery involves making small incisions only large enough to pass tubes into the body. A tiny video camera is passed through these tubes or trocars, and cutting and grasping tools are passed through the tubes as well. The surgeon manipulates the surgical tools outside the body while viewing the action inside the body on a TV monitor.

Among the advantages of smaller incisions are less bleeding, shorter hospital stays, shorter recovery times, and less pain. Learning to perform surgery by watching a TV monitor while manipulating surgical tools takes practice. The traditional sense of feel of a surgeon's hand on the anatomy is largely gone. The view from the monitor can be confusing and there is poor depth perception. It is well known that a learning curve exists in which surgeons get better at the procedure as they do more cases. In the early days of laparoscopic surgery, established surgeons took continuing education courses to learn the new techniques. Now, minimally invasive surgery is part of the curriculum of residency programs and fellowships.

Despite the highly advanced technology of the da Vinci system involved in our case, surgery experience is critical. One leading expert opined that at least 30 to 60 completed surgeries are needed both to achieve a "window of safety" and be proficient in the procedure.

News & Events

McVey argues clause before S.C. Supreme Court

Theile McVey of Kassel McVey appeared before the South Carolina Supreme Court to argue against the enforcement of an arbitration clause in a fatal nursing home injury case.

The nursing home presented the arbitration clause to the family during the admission process. The arbitration clause attempted to eliminate the right to a jury trial for any claims, including wrongful death claims, against the facility.

An arbitration clause is a contractual provision waiving or giving up the right to have the case heard in the courtroom. Nursing homes often present contracts with arbitration provisions to families seeking placement for their loved ones. There is absolutely no advantage to the prospective resident to sign these clauses. Injured persons and their families have a constitutional right to trial by jury.

McVey argued the arbitration provision should not be enforced since the arbitral forum identified in the clause has a policy prohibiting arbitration of post-agreement injuries. The Court is expected to rule in the next several months.

Kassel named to Super Lawyers site

John Kassel of Kassel McVey has been nominated and selected to appear on the 2014 South Carolina Super Lawyers list. Super Lawyers, a Thomson Reuters business, is a rating service of lawyers from various practice areas. Kassel is listed under the personal injury practice area. The Super Lawyers website can be found at http://www.superlawyers.com/index.html.

Asbestos verdict in top 25

A $38 million verdict awarded last September by a Richland County jury to a man who developed a rare form of cancer from working with asbestos-contaminated materials was one of the top 25 verdicts and settlements in South Carolina for 2013, according to *South Carolina Lawyers Weekly*.

Theile McVey of Kassel McVey was co-counsel to the plaintiff in the case. (See article on the case in the January 2014 newsletter.)

The View from Here

VIEW, continued from Page 1

along with several South Carolina district court judges, Judge William Traxler of the Fourth Circuit Court of Appeals, Justice Jean Toal of the S.C. Supreme Court, and others.

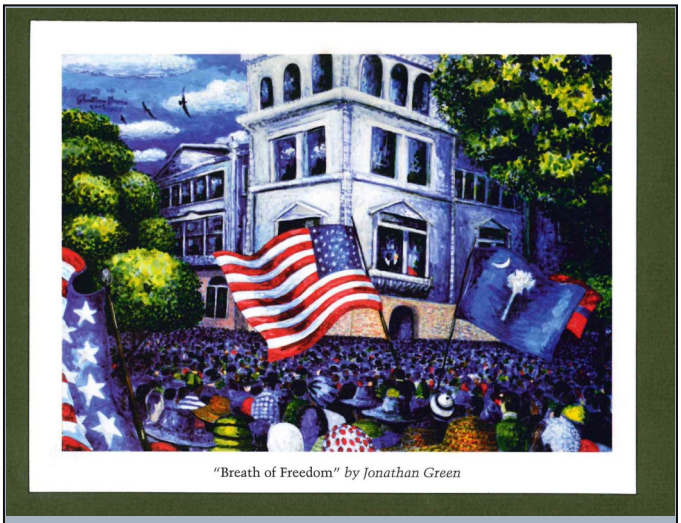
The outpouring of appreciation was in stark contrast to the reception Judge Waring received during his time on the bench. A cross was burned in front of his Meeting Street home. Rocks were thrown through his window. Articles of impeachment were filed against him.

Judge Waring began his judicial career under the shadow of *Plessy v. Ferguson*, the 1896 U.S. Supreme Court decision that established the law of "separate but equal." Segregated facilities for blacks were found to be not in violation of the 14th Amendment as long as the facilities were equal to those enjoyed by whites. In 1944, applying *Plessy*, Judge Waring struck down a pay scale that paid African-American teachers less than similarly educated and experienced white teachers.

In 1947 Judge Waring found the University of South Carolina School of Law could only deny admission to a black student if there was an equal facility elsewhere for black students. Otherwise the university would have to admit the black student or shut down its law school. The S.C. Legislature moved to fund a new law school for black students at South Carolina State College. In *Elmore v. Rice*, known as the white primary case, Judge Waring shot down South Carolina's all-white Democratic Party primary. He wrote it was "time for South Carolina to rejoin the Union" and "to adopt the American way of conducting elections."

According to Judge Gergel, a keen student of history, Judge Waring's views on race were evolving. Personal experiences affected his legal reasoning. For example, Judge Gergel wrote that a case tried in Judge Waring's courtroom had a dramatic effect upon him. The case involved an excessive force claim against a Batesburg, SC police officer during an arrest of a returning black World War II veteran. The victim was beaten to the point of being blinded in the attack. An all-white jury acquitted the officer.

Waring saw first-hand the deep racial hatred of the



"Breath of Freedom" *by Jonathan Green*

times. It was perhaps at this time that Waring's view of *Plessy* was undergoing an evolution as well. The NAACP's legal strategy had been to accept separate facilities for blacks, but to argue they were not equal. Maybe it was time to take on the constitutionality of the *separate but equal* doctrine itself.

Waring may have been out in front of NAACP legal counsel Thurgood Marshall in this regard. Enter *Briggs v. Elliott*, a case out of Summerton, SC, where plaintiffs were seeking a school bus for African-American students like the bus provided for the white students. The time had come to confront *Plessy* head on. A three-judge panel heard the case. The majority left *Plessy* intact and ordered the school district to equalize the separate school districts. Judge Waring wrote a dissent. He held "segregation in education can never produce equality and that it is an evil that must be eradicated….Segregation is per se inequality."

Ultimately the *Briggs* case went up to the U.S. Supreme Court to be consolidated with similar cases from Kansas, Delaware and Virginia. In 1954, a unanimous Supreme Court essentially adopted much of the Waring dissent and proclaimed "separate educational facilities are inherently unequal." The case was known of course as *Brown v. Board of Education*. The modern civil rights era had begun. Much is owed to a district court judge from Charleston.

Kassel McVey wins verdict in nursing home case

HOME, Continued from Page 1

During the trial, the plaintiff's expert witness as well as the J.F. Hawkins' nurses that were caring for the resident testified that after her first fall on June 4, she needed to be re-evaluated. The testimony showed she needed additional fall precautions including:

- A toileting program (she was getting up at the same time every morning to go to the bathroom)
- Gripper socks
- A bed alarm ,which would sound when she tried to get out of bed

The expert and nurses further testified that not only did the resident need to be evaluated after her first fall, she needed the fall precautions. The testimony was that these fall precautions work and likely would have prevented the fall that ultimately caused her death.

Falls in nursing homes are a serious threat to patient well-being. When an elderly resident falls, it can result in life-threatening health issues. For that reason, after a patient in a nursing home falls, the patient must be evaluated to see what additional fall precautions must be put in place to prevent the patient from falling again. If the precautions are not put in place, and as a result, the patient falls again, the nursing home is responsible for the harm.

KASSEL McVEY
ATTORNEYS AT LAW

1330 Laurel Street
P.O. Box 1476
Columbia, South Carolina 29202
Phone: 803.256.4242
Toll Free: 855.256.4242
Fax: 803.256.1952

PLACE STAMP HERE

Ready to make a difference for you

Newsletter editor: David Kassel, Accountable Strategies Consulting

If you do not wish to receive this publication in the future, please email akaminer@kassellaw.com. We will promptly remove your name from our list.

We are attorneys committed to providing excellent legal service with compassion and respect. We know you have questions about the legal process and that you need answers. Our staff is well trained to help guide you through the steps involved in investigating and prosecuting legal actions. We do not represent insurance companies. We work for injured people to obtain fair compensation.

Call us and let us make a difference for you.

John Kassel and Theile McVey

Our areas of practice include:

Medical Malpractice

Nursing Home Litigation

Products Liability

State and Federal Tort Claims Cases

Insurance Bad Faith

Wrongful Death and Personal Injury

Premises Liability

Motor Vehicle Wrecks

Asbestos Exposure - Mesothelioma