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# REPORT

A SMART READ FOR SMART READERS

**每日管理報導**

**BUSINESS MATTERS**

To cope with labor shortages and slim profits, companies in China's southern provinces are moving to cheaper inland areas. **Story, page 6.**

An ALM Publication

## Newsreel

### Correction

- The April 1 article "PD bill turns into dramatic overhaul" misreported that judicial appointments to the Georgia Public Defender Standards Council would be eliminated under House Bill 238.

The bill would cut the number of council members from 15 to nine and oust all current members, but it would not change who makes the appointments. Currently, the governor, lieutenant governor and speaker of the House of Representatives appoint council members. The state Supreme Court chief justice and the state Court of Appeals chief judge have not had appointment authority since July 1, 2008.

### Republican criticizes Gitmo lawyers

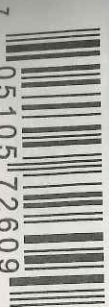
- The chairman of a House appropriations subcommittee said Tuesday that private-sector lawyers aren't doing enough to help the nation's poor with legal problems and shouldn't spend time representing accused terrorists.

U.S. Rep. Frank Wolf, R-Va., is a longtime supporter of funding for civil legal aid, but he said the largest source of such money, the Legal Services Corp., still faces proposed cuts from the House's new Republican majority. LSC and its local partners should turn to resources from large law firms, state bar dues and law schools, he said.

Speaking during a budget hearing, Wolf singled out for criticism the lawyers who represent Guantanamo Bay detainees such as accused 9/11 conspirator Khalid Sheikh Mohammed.

"That's the pro bono work? The pro bono work should be helping poor people here in the United States," said Wolf, the chairman of the House appropriations subcommittee on commerce, justice, science and related agencies. "Some of these people who represent Khalid Sheikh Mohammed ought to consider going into the inner city."

-The Blog of Legal Times



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**1B OPINIONS**

Read summaries of recent opinions from Georgia's high court and Court of Appeals.

**CORPORATE EMAIL**

California case establishes privacy guidelines. More at DailyReportOnline.com.

**10 TOYOTA LAWSUIT**

Toyota found not liable in first acceleration claim to go to trial because car was not defective.

**9 DRUG WARNING LABELS**

Drug manufacturer may be liable for punitive where evidence suggests it withheld information from FDA.



From left: Robert Mornak, Timothy Bendin, Kristin Hiscutt, Daniel Huff and Melissa Johnson represented the defense, which included two physicians and Dekalb Medical Center.

## \$10M med-mal verdict averted

### PLAINTIFFS CLAIMED DOCTORS' FAILURE TO PERFORM C-section caused baby's cerebral palsy, brain damage

JANET L. CONLEY | jconley@a1m.com

A DEKALB COUNTY JURY heard testimony for 10 days but took just 100 minutes to reject claims that could have made two physicians and Dekalb Medical Center Inc. liable for about \$10 million in damages related to the birth of a brain-damaged baby.

Jurors in the case viewed the child in his wheelchair in the courtroom for about 10 minutes during voir dire and while his mother testified. Now 6 years old, the boy suffers from what one of the defense lawyers called catastrophic cerebral palsy.

In a case where jurors' natural sympathies could have warred with their objectivity, defense counsel directed their attention toward the paramount legal issues in the case — causation and the standard of care. Their tactics included teaching jurors to read fetal heart monitoring strips, noting that the plaintiffs' lawyers reused their out-of-town experts in cerebral palsy cases around the country and asking that the child be present during jury selection — not just to discern potential jurors' inability to be objective, but also to avoid having jurors' sympathies jump-started by seeing

See *Med-mal*, page 5

## Bill's backers envision a reformed PD council

### BUT OPT-OUT SUGGESTION could put strain on smaller counties, council chairman says

GREG LAND | gland@a1m.com

OFFICIALS INVOLVED with the state's shaky public defender system are weighing the effects of several proposed changes being considered in the last days of the General Assembly.

Supporters of changes in the Georgia Public Defender Standards Council power structure say they would smooth the way for funding help from lawmakers who have often been critical of the cash-strapped agency.

More jarring is a request from Fulton County that it and a few other large counties be permitted to leave the system altogether and run their own independent public defender offices. The chairman of the PD council said letting big, single-circuit counties exit the system could cause

See *Council*, page 8



ZACHARY D. PORTER/DAILY REPORT

## WellStar letter tells why it ousted GC, CEO

### COMPANY SAYS their relationship created 'unhealthy' work climate; their attorney calls letter 'despicable'

BY SUE REISINGER | sreisinger@a1m.com

SEVEN MONTHS AFTER abruptly ousting its general counsel and firing its CEO, WellStar Health System Inc. of Marietta has issued a public statement explaining why.

The letter from the board of trustees says then-CEO Gregory Simone's "very close personal and professional relationship with the

then-general counsel [Bonnie Wilson] was adversely impacting operations at WellStar Health System, creating an unhealthy and dysfunctional climate on the senior leadership team, and threatening to damage the reputation and image of WellStar."

The letter also claims that Wilson accused Simone of sexually harassing her. The trustees gave the letter to the *Marietta Daily Journal*,

which published it Saturday. Benton Mathis Jr., attorney for both Simone and Wilson, called the letter "a despicable act by WellStar, filled with inaccuracies, false statements, and out of context events." Mathis, managing partner of the Atlanta law firm Freeman Mathis & Gary, was reached on vacation over the weekend.

See *WellStar*, page 4

## \$10M med-mal verdict averted in DeKalb Medical case

Med-mal, from page 1

the child for the first time at trial.

Defense lawyer Daniel J. Huff of Huff, Powell & Bailey, who represented the physician who delivered the baby, said winning the case probably turned on establishing the standard of care required of the doctors and the hospital, rather than showing what caused—or didn't cause—the child's cerebral palsy.

"They were not out long enough to have sort-ed through causation," Huff said of the jurors. He said that a crucial aspect of the trial was teaching jurors to read fetal heart rate monitoring strips, which showed periodic decelerations in the baby's heart rate during labor. Such decelerations may, in certain instances, be preceded and caused by oxygen deprivation which could have contributed to causing cerebral palsy.

The plaintiffs' lawyers argued that the strips indicated such severe problems that the physicians quickly should have performed a Cesarean section instead of waiting to deliver the baby vaginally. The defense countered that the strips did not show a worrisome deceleration pattern and that doctors acted within the standard of care in delivering the child.

To help teach jurors to read the strips, defense lawyers created a 20- to 25-foot-long piece of paper with a continuous heart rate tracing, and also converted the strip to a colorized scrolling exhibit projected on a movie screen that their expert witnesses, most of them physicians, could use as an illustration during testimony.

"I think at the end of the trial, the jurors could interpret the fetal heart rate monitors themselves," said Huff. "They were taught so much about fetal heart rate monitoring that they were able to reach their own conclusions about strips independent of the testimony."

Huff added that beyond the \$75,000 the defense spent on five or six expert witnesses, including an obstetrician and various pediatric specialists, he believed that the credibility of the defendant doctors and nurses was more persuasive to the jury.

Huff and his partner Julie M. Johns represented the doctor, John L. Carter Jr., who delivered the baby.

Lawyers Robert P. Monyak and Melissa B. Johnson of Peters & Monyak represented Stephanie C. Carmichael, the doctor who monitored the mother's labor until Carter took over. Both physicians were sued for medical malpractice.

Timothy H. Bendin and Kristin L. Hiscutt

of Bendin Sumrall & Ladner represented DeKalb Medical Center and its related entities, which were sued under vicarious liability theories including agency claims that the nurses should have called the physicians earlier, and apparent agency claims related to whether the plaintiffs believed the hospital was holding out the doctors as its employees when they were not. Because of the defense verdict, jurors never reached a decision on the agency-related claims.

The child's parents, Pauline and Charles Chacha—the father at one point was a nurse at DeKalb Medical—were represented by Frank W. Spector and Mark C. Kopec of Spector & Kopec in Baltimore, a medical malpractice firm known for handling birth-injury cases including those involving cerebral palsy. Local counsel Gregory B. McMenemy Jr. of Miller McMenemy referred comment to Spector, who did not return a reporter's call.

The case was before DeKalb State Court Judge Johnny N. Panos.

### Child's injuries

The child, a boy, was born on the morning of Jan. 9, 2005, after his mother had been in labor at the hospital for approximately 12 and a half hours.

During that time, according to the defendants' fact summary in the pretrial order, Pauline Chacha was given Pitocin to stimulate contractions. The baby's heart rate fell, and the Pitocin was stopped. When the heart rate returned to normal, the Pitocin was restarted, but the heart rate fell again, so the Pitocin was discontinued permanently. Chacha pushed unsuccessfully for about two hours, then rested. When Carmichael went off duty, the other physician, Carter, took over and delivered the baby.

According to the complaint, the baby was flaccid with no muscle tone and required resuscitation at birth. The complaint said he "suffered permanent and catastrophic injuries secondary to hypoxic ischemic encephalopathy"—brain damage.

The plaintiffs alleged that the physicians failed to recognize and respond to the signs of fetal distress by performing a C-section earlier in labor. The defendants alleged that the fetal heart rate monitoring strips, despite the decelerations, showed "reassuring" heart rate patterns up until the last 10 minutes of labor, at which time, according to defense lawyer Huff, it was too late for a C-section.

Defense lawyer Monyak said his team introduced evidence at trial from expert witnesses and practice bulletins published by the American College of Obstetricians and Gynecologists showing what the standard of care was,

and that the defendant physicians had followed that standard.

The plaintiffs, Monyak said, called an obstetrician from the Washington area who said the fetal heart monitoring strips "were highly non-reassuring and that a C-section should have been done earlier."

"He was simply contradicted by so much evidence that I imagine the jury was unpersuaded," Monyak added.

He also said his team used the plaintiffs' expert in a strategic sense, pointing out to the jury that the plaintiffs' lawyers had hired him as an expert on four or five other cases, and that they also reused two other physician experts for this case. The point, Monyak said, was to show the jury that these experts testified the same way regardless of the underlying case.

Monyak said the defense lawyers also pointed out that 94 percent of cerebral palsy cases have been shown to have nothing to do with labor and delivery. They also offered evidence indicating the child's cerebral palsy and brain damage were caused either by genetic or developmental factors predating labor but were not identifiable on ultrasounds.

The plaintiffs had asked for about \$10 million, including \$5 million for future medical needs based on the child's 19- to 26-year life expectancy, pain and suffering of about \$4 million and other damages, according to Huff.

Monyak said the parties engaged in some early discussions about a high-low agreement, but the plaintiffs rejected their overtures.

All three of the primary defense lawyers, Huff, Monyak and Bendin, said a crucial issue in winning was making sure the jury was able to put aside its sympathies and decide the case based on the facts.

Huff described the child as "catastrophically impaired," in a wheelchair, on a feeding

tube and with spastic quadriplegia, resulting in involuntary arm movements. Although the boy lives at home and is able to attend special education classes at school, Huff said he needs round-the-clock, one-on-one care.

"This is a very damaged child and the natural tendency of anyone, including us, would be to help," said Bendin, the lawyer who represented DeKalb Medical. As a strategic matter, he said he asked the plaintiffs' lawyers to bring the boy to jury selection.

"It helped for us to ... have the jurors see him and see how debilitated he was, so that we could then ask questions about the extent to which the desire to help him might overcome their ability to weigh the evidence and the law," said Bendin.

Ultimately, a jury of seven men and five women was selected. Nine of the jurors were African-American, and three were white. One of the two alternates, both men, was television journalist Dale Russell of Fox 5's I-Team.

Bendin said he spoke with jurors after their verdict. He said the jury's first vote on the agency claims against DeKalb Medical was 12-0 in his client's favor. He said the first vote on Carter, the doctor who delivered the baby, was 11-1 in his favor, but the first vote on Carmichael, the doctor who monitored labor until the end of her shift about 1 and a half hours before the baby was born, was 9-3 in her favor—because, Bendin said, she did not check on her patient before going off duty and turning the case over to Carter.

"While they thought it would have been a better practice for Dr. Carmichael to have come and seen the patient before going off duty," Bendin said, "ultimately, they didn't think it was malpractice."

The case is *Chacha v. Carmichael*, No. 06A60059. ☞

### LEGAL NOTICE CITY OF JOHNS CREEK Notice of Proposed Amendment to the Charter for the City of Johns Creek

In accordance with O.C.G.A. § 36-35-3, notice is hereby given that the Council of the City of Johns Creek is proposing the following amendment to the Charter for the City of Johns Creek pursuant to The Municipal Home Rule Act of 1965 (O.C.G.A. § 36-35-1, et seq.).

**Amendment**  
Section 3.23 of the Charter for the City of Johns Creek is hereby amended by deleting it in its entirety and replacing in lieu thereof the following Section 3.23, which shall henceforth read as follows:

**Sec. 3.23 - City manager; appointment, qualification, compensation; and removal**

(a) The mayor shall appoint for an indefinite term an officer, subject to ratification by the city council, whose title shall be the "city manager." The city manager shall be appointed without regard to political beliefs and solely on the basis of his or her executive and administrative qualifications with special reference to his or her educational background and actual experience in, and knowledge of, the duties of office as hereinafter prescribed.

(b) The mayor or a councilmember may recommend the removal of the city manager from office in accordance with the following procedures:

- (1) In response to such recommendation, the city council shall adopt by affirmative vote of a majority of all its members a preliminary resolution which must state the reasons for removal and may suspend the city manager from duty for a period not to exceed 45 days. A copy of the resolution shall be delivered promptly to the city manager.
- (2) Within ten days after a copy of the resolution is delivered to the city manager, that person may file with the city council a written request for a public hearing. This hearing shall be held within 30 days after the request is filed. The city manager may file with the city council a written reply not later than five days before the hearing, and
- (3) If the city manager has not requested a public hearing within the time specified in paragraph (2) of this subsection, the city council may adopt a final resolution for removal, which may be made effective immediately, by an affirmative vote of a majority of all its members. If the city manager has requested a public hearing, the city council may adopt a final resolution for removal, which may be made effective immediately, by an affirmative vote of a majority of all its members at any time after the public hearing.

(c) The city manager shall continue to receive the city manager's salary until the effective date of a final resolution of removal.

The proposed amendment is on file in the office of Clerk of the City of Johns Creek and in the office of the Fulton County Clerk of Superior Court for examination and inspection by the public. Anyone may, upon written request submitted to the Clerk of the City of Johns Creek, obtain a copy of the proposed amendment. The Mayor and Council will consider this amendment for adoption by ordinance during their regularly scheduled meeting on April 11, 2011, and if approved at said meeting, again at their regularly scheduled meeting on April 25, 2011. City Council meetings are held at Johns Creek City Hall, Council Chambers located at 12000 Findley Road, Suite 300, Johns Creek, Georgia beginning at 7:00pm. All council meetings are open to the public.

This 1st day of April, 2011.

Joan C. Jones,  
City Clerk



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