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THURSDAY, JULY 23, 2009  
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# DAIRY REPORT

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**INRECESS**

David Cox compares the rough world of rugby to calendar call in the courtroom, where he has appeared with a black eye. **Page 9.**

An incisive media publication

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Smaller endowments have forced cutbacks at schools like Yale, which has trimmed 600 jobs.

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Caroline Baum: Health care reform has to address the misuse and overuse of medical services.

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## Newsreel

### Troutman Sanders cuts associate pay

Troutman Sanders announced Wednesday that the firm will cut associate pay, effective Aug. 1, for the remainder of the year—but the pay cut will vary for each associate. The total salary reduction will be 10 percent, said Robert W. Webb Jr., the firm's chairman.

"If we do increases that are merit-based, then we should do decreases that are merit-based," Webb said, noting that Troutman raises salaries based on merit, not by lockstep.

"The easy way would be to just cut pay by 10 percent across the board. We do not think that's fair to the people who've been working really hard," he said.

Webb declined to say how much Troutman will save by reducing associate compensation for the final five months of the year. The firm employs about 300 associates. It pays starting salaries of \$145,000 in Atlanta, Richmond, Va., and Raleigh, N.C., and \$160,000 in Washington, New York, Chicago, San Diego and Orange County, Calif., but Webb declined to give salaries for senior associates.

"What we are trying to do is get back to where we perceive the market to be," Webb said.

"There has been an avalanche of [pay cut] announcements by firms in the top 150," he said, referring to the nation's top-grossing firms, as ranked by The American Lawyer, a *Daily Report* affiliate. "The market has changed."

Webb noted that Troutman was one of the firms that gave associates raises at the beginning of the year. The firm will not make any decisions about 2010 associate compensation until the end of the year, he said. "We will look at the market and the firm's budget."

Year-end bonuses are not affected by the salary reduction, he added.

Troutman reported 2008 revenue of \$350.4 million and profit per equity partner of \$591,954.

Several other Atlanta-based firms have cut associate pay, including Alston & Bird, Kilpatrick Stockton and McKenna Long & Aldridge.

—Meredith Hobbs



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Julie Johns, of Hurf, Powell & Bailey, said it would have been "groundbreaking" if the plaintiff had prevailed over her client, a Newton County obstetrician-gynecologist.

## Birth defect case splits court

### COURT OF APPEALS RULES doctor not liable for alleged failure to advise woman to take folic acid before conception

BY ALYSON M. PALMER

A PANEL OF THE state Court of Appeals has split 4-3 in favor of an obstetrician sued by a woman who claims he didn't advise her to take folic acid before she got pregnant, a measure that might have prevented her daughter from suffering severe birth defects.

The case appears to have been a Georgia appellate court's first opportunity to decide whether doctors can

be held liable to a child based on care provided to the mother before the child was conceived.

The court said defendants can be held liable for so-called preconception torts. But in this case, the majority said the doctor had too tenuous a relationship with the woman to be held responsible for her not taking folic acid, a common instruction to women planning to get pregnant.

See *Folic acid*, page 7

## Gay marriage became case of lawyer's lifetime

### PRO BONO FIGHT in Iowa changed the nation's legal landscape—and Dorsey & Whitney partner's worldview

BY VIVIAN CHEN

DENNIS JOHNSON WAS SITTING in his Des Moines office in 2003 when he got a call from Lambda Legal, asking him to represent six same-sex couples in challenging Iowa's gay marriage prohibition.

A litigation partner at Dorsey & Whitney at the time (he's now of counsel) and a former solicitor general of Iowa, Johnson says the call came "out of the blue; I was surprised." Not only was gay marriage

not on his radar screen ("I had no prior experience with gay rights or any activist movement," he says), Johnson's pro bono history had been "nothing big—I had not handled any pro bono lawsuits."

Two days later, after consulting with his partners, Johnson signed on as the pro bono counsel in *Varnum v. Brien*. What started as just another legal matter on Johnson's plate ended up being the case of his lifetime and a watershed moment

See *Marriage*, page 8

## Former K&S colleagues re-team for Falcons deal

### LAWYERS WORK BOTH SIDES OF contract to bring in four new minority investors to Atlanta football franchise

BY JANETT L. CONLEY

YOU KNOW HOW YOU like to gather a group of buddies in front of the flat-screen TV with some good beer and a plate of nachos to watch the game?

Well, the team of attorneys who helped structure the deal to bring four new minority investors into Arthur Blank's Atlanta Falcons franchise was kind of like that—minus the TV, beer and nachos and plus a whole lot of paper and phone calls.

That's because many of the lawyers on the deal used to practice together at **King & Spalding**. Michael J. Egan III, who represented Blank, still works there. Lead counsel for the four investors, Tyler B. Dempsey, spent nine years at K&S before

See *Deal Watch*, page 6



PHOTOS BY ALYSON CHURCH  
Michael Egan, right, assisted by Chirag Shah, represented Arthur Blank in the minority investor deal.



Troutman's Tyler Dempsey, a former K&S lawyer, was lead counsel to the four minority investors.

## Birth defect case splits state Court of Appeals

Folic acid, from page 1

The doctor had treated the woman for a previous pregnancy, which she aborted on the doctor's recommendation because a high-resolution ultrasound test indicated that child was expected to have a related problem. The doctor said he explained then that folic acid can prevent such problems, called neural tube defects, and instructed the woman to make an appointment with him after the abortion during which he would have talked to her more about folic acid.

But the woman did not make the appointment and saw him again three years later, only after she was pregnant again.

The woman denies the doctor told her about the importance of folic acid during the first pregnancy, and the judges who dissented said a jury should decide whether the doctor did enough to tell her about folic acid.

### 'Unusual theory'

Although the Georgia Supreme Court has said it's possible for a defendant to be liable for a so-called preconception tort—in the case of a car accident—the case decided last week at the Court of Appeals appears to have been the first Georgia appellate decision to look at the issue in the medical malpractice context.

"It is a fairly unusual theory of liability, and one that we haven't really seen before, although I understand other states have dealt with this," said one of the winning defense lawyers, Julie M. Johns of Atlanta's Huff, Powell & Bailey.

She added that it would have been "ground-breaking" if the plaintiff, Tina Clay, had prevailed over her client, Dr. Lee Rippy of Newton County.

She said Rippy didn't have an opportunity to counsel Clay about taking folic acid in the future because Clay didn't come back for the follow-up appointment. "There is some duty on patients to follow up with their providers," said Johns, "and this was not done in this case."

When Clay went to her county health department in 1999, she was 19 years old and had never been to see a gynecologist. Because she was 11 weeks pregnant, she was referred to Rippy. According to the Court of Appeals ruling, the doctor's records show he put Clay on prenatal vitamins when he first saw her, although Clay has said she could not recall Rippy doing so.

Rippy saw a problem on Clay's ultrasound and referred her to Richard Molina, a specialist at Atlanta Maternal-Fetal Medicine, who performed a high-resolution ultrasound. Molina confirmed that Clay's fetus had a severe neural tube defect, which occurs when the narrow channel that forms a baby's brain and spinal cord doesn't close properly.

Clay went back to Rippy, who told Clay that her baby likely would not survive and recommended an abortion. According to the Court of Appeals decision, Rippy has claimed that at this visit he told Clay about the relationship between folic acid and neural tube defects. But Clay has disputed this testimony.

Clay decided to terminate her pregnancy, and Tyrone Malloy at Atlanta SurgiCenter performed the procedure.

While Clay didn't schedule a follow-up appointment with Rippy, she came to see him three years later when she was pregnant

again. At some point in this pregnancy, Rippy put Clay on prenatal vitamins, but, again, tests confirmed that her child would have serious neurological defects. In November 2002, her daughter was born with spina bifida, a neural tube defect.

### Suing the doctors

Early last year, Clay sued Rippy, Molina, Malloy on behalf of her daughter. Her medical expert said in an affidavit that following the 1999 abortion, her doctors should have prescribed for Clay a daily regimen of 4 milligrams of folic acid.

Because about half of pregnancies in the United States are unplanned, the Centers for Disease Control and Prevention recommends all women of childbearing age take 0.4 milligrams (400 micrograms) of folic acid daily. It recommends women who have had a pregnancy involving a neural tube defect talk to their doctor about the desirability of following the 1991 U.S. Public Health Service guideline that says they should take 10 times that much beginning one month before they start trying to get pregnant and continuing through the first three months of pregnancy.

Folic acid is found in multivitamins, folic acid pills and foods such as fortified breakfast cereals. The CDC estimates taking folic acid before and during early pregnancy can prevent about 50 percent to 70 percent of two common neural tube defects, spina bifida and anencephaly. But the CDC's Web site emphasizes that being prepared is key, as these birth defects occur three to four weeks after conception, before most women know they are pregnant.

DeKalb County State Court Judge Janis C. Gordon granted summary judgment to the defendants. She found the link between the doctors' conduct and the child's medical problem was "too remote."

The plaintiffs appealed, arguing that Georgia should follow several other states that have permitted liability in an arguably analogous situation.

Courts have found that doctors can be held liable for failing to administer a RhogAM injection to a woman after she carries a child whose blood Rh factor is incompatible with the mother's blood. The only beneficiary of such a shot is a child the woman may have in the future, said Clay's lawyer, Daniel S. Weinstock of Philadelphia.

"We thought that was an outstanding analogy," said Weinstock. The plaintiffs' appellate brief argued that the only state to draw a bright line rule against a preconceptional duty in medical malpractice cases was New York, although the defendants pointed to a Massachusetts ruling the plaintiffs argued was distinguishable.

In March, the parties presented oral argument at the appeals court to Chief Judge M. Yvette Miller. Presiding Judge Gary B. Andrews and Judge Anne Elizabeth Barnes. Three-judge panels at the appeals court that cannot come to a unanimous decision call in four more judges to decide the case, so Presiding Judges Edward H. Johnson and G. Alan Blackburn and Judges Charles B. Mikkell Jr. and John J. Ellington joined the case.

Johnson and Mikkell joined Miller and Andrews to form a majority favoring the defendants.

Blackburn and Ellington joined Barnes' partial dissent that agreed with the decision to grant summary judgment to Molina and Malloy but would have allowed the case to go forward against Rippy.

### The rulings

Andrews' opinion for the majority agreed with Clay on the threshold issue in the case—that under "proper circumstances, a cause of action could exist in Georgia for preconception torts."

For that point, he cited a 1983 wrongful death case in which a woman was rendered paraplegic in an automobile accident and later became pregnant, and the child died shortly after birth due to complications caused by the mother's paraplegia. Citing a handful of decisions from other states, the state Supreme Court in that case allowed that in some cases a defendant could be said to owe some legal duty to a child not yet conceived, although it ultimately ruled the defendant driver wasn't liable for the child's death.

The Court of Appeals majority said the problem for Clay was that she didn't go back for a follow-up appointment with Rippy after she terminated her pregnancy in 1999. Even if Rippy didn't advise Clay about the need for folic acid back then, wrote Andrews, Rippy's undisputed testimony was that he intended to discuss that with her and make recommendations during a follow-up visit.

Andrews noted that Rippy had testified that the May 1999 visit in which he discussed with Clay whether she should terminate her pregnancy was not the time to counsel her on future pregnancies, as she was crying and facing a difficult decision.

"In light of this," wrote Andrews, "we conclude that there is no evidence that Rippy violated his duty of care. Rippy did not know this was the last time he would see Clay. Clay terminated the physician-patient relationship after this visit. Even if the duty of care survived this termination, it became impossible to satisfy because Clay did not make an appoint-

ment for follow-up care, as instructed."

In her dissent, Barnes wrote that a jury should decide whether Rippy had a duty to tell Clay about the link between folic acid and neural tube defects when he saw her in May 1999 or could put it off until later. Arguably, she said, Clay's youth, apparent lack of sophistication and emotional state made it even more likely that she would not return for a follow-up visit after she terminated her pregnancy.

Using the word that President Barack Obama used to describe what he was looking for in a Supreme Court justice—to the derision of some conservatives—"Miller wrote a separate concurrence to express her "empathy" for Clay. She wrote that a doctor unquestionably has a general duty to tell his patients about the need to take folic acid, and she suggested that Clay might have gotten expert testimony about the timing of that obligation in order to make her case. But, said Miller, Clay's expert affidavit fell short.

Weinstock, Clay's lawyer, said Tuesday night he had yet to speak with his client, so he couldn't say whether he would seek further appellate review.

Still, Weinstock said, "there is a bright note, and that is the appellate court made it clear that there is such a thing as a preconception duty." At the trial court, he said, that issue was vigorously contested.

The successful defense team also included Atlanta lawyers H. Andrew Owen Jr. for Malloy, R. Christina Wall for the Atlanta SurgiCenter and Terrell W. "Chip" Benton III for Molina.

The case was *Clay v. Rippy*, No. A09A00681. Alyson M. Palmer can be reached at [alyson.palmer@incisivemedia.com](mailto:alyson.palmer@incisivemedia.com) or (404) 419-2842.

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