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## Jury Verdicts & Settlements

Defibrillator maker agrees to settle mass tort

June 23, 2008

By: Review staff & VerdictSearch

Case: In re Guidant Corp. Implantable Defibrillators Products Liability Litigation

Case No.: MDL 05-1708

Description: Product liability, mass torts

Filing date: June 3, 2005

Settlement date: Dec. 17, 2007

Judge: U.S. District Judge Donovan Frank, St. Paul, Minn.

Plaintiff attorneys: Lance Harke and Howard Bushman, Harke & Clasby, Miami.

Defense attorney: Deborah Moeller, Shook Hardy & Bacon, Kansas City, Mo.

Settlement: \$240 million.

Details: Eugene Clasby, an English professor at the University of Miami, is one of 8,550 plaintiffs who alleged Indianapolis-based Guidant Corp. failed to notify doctors and the public about a defect in a surgically implanted defibrillator. The defibrillators were manufactured, marketed and distributed to people suffering from an irregular heartbeat and were designed to send an electrical charge to the heart if it stopped.

Clasby's defibrillator case, the second in the nation, was consolidated with similar cases nationally. Harke and Bushman were among a handful of lawyers on a plaintiff steering committee leading the plaintiffs' case in the federal multi-district litigation. Clasby is one of six South Florida plaintiffs represented by Harke and Bushman. Attorney Neil Overholtz of Aylstock Witkin Kreis & Overholtz in Pensacola also was a member of the steering committee.

Plaintiff case: The plaintiffs blamed one death on the alleged defect. The company revised the design twice but continued to sell older models of the product without



Howard Bushman and Lance Harke

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notifying the public. Clasby's complaint said the company did not issue an alert about the risks until a New York Times article was set to be published in 2005.

Even after the company issued an alert, it failed to recommend replacing the faulty devices, Clasby's complaint said. The company eventually recalled the defibrillators. The plaintiffs sought a company-funded program to assess and monitor the medical condition of claimants and if necessary perform surgery to replace the device.

The Guidant case is part of a trend of mass tort litigation related to pharmaceutical and medical devices, Harke said.

"We've seen the use of this multi-district litigation in the mass tort context growing, in part because problems are being identified with many of the drugs and products on the marketplace," he said.

The plaintiff team deposed expert doctors and engineers and used the company's manufacturing protocol as evidence.

Defense case: Moeller, the lead defense attorney, did not respond to calls for comment by deadline. Another defense attorney, Joseph Price of Faegre & Benson in Minneapolis, declined to comment and referred a request for comment to Moeller. In court filings, the company denied the devices were defective and dangerous.

Company witnesses included a team made up of doctors and consultants and the engineers who designed the product. Among Guidant's prospective witnesses was Dr. Robert Myerberg, professor of medicine and physiology at the University of Miami's Leonard M. Miller School of Medicine.

Myerberg served as Clasby's treating physician and was hired by Guidant after the suits were filed to lead an independent review panel. The panel produced a report critiquing the company's manufacturing process and listing recommendations for disclosure.

"Guidant had some of the foremost experts in the country alive on their behalf," Harke said.

Comments: "It wasn't until we got the cases set for trial that the parties started to look at alternative resolution," he said. "This is a complicated mass tort. We were pleased we were able to utilize mediation to accomplish a fair settlement."

Post-settlement: Harke filed an objection in May to an award for attorney fees based on 2,196 hours of work committed by his firm to the mass tort.

— Alana Roberts

**Howard Bushman and Lance Harke photo by Richard M. Brooks**

### School

Miami-Dade Circuit Court

Jury awards for injury inflicted by teacher

A jury awarded \$16,223 to a girl whose humerus was fractured by a teacher who put her in a restraining hold.

Milagros Richard was 11 when she was hurt at Highland Oaks Middle School in North Miami Beach.

The school board conceded liability, and the trial proceeded on damages. Milagros underwent a closed reduction surgery and six weeks of physical therapy. Of her award, \$12,000 was for past pain and suffering.

Case: Richard v. Miami-Dade County School Board

Case No.: 05-2731 CA 23

Plaintiff lawyer: Richard Barron Doyle Jr., Loughren and Doyle, Fort Lauderdale

Defense lawyer: Jeffrey A. Mowers, Pyszka Blackmon Levy Mowers & Kelley, Miami Lakes

### Motor Vehicle

Polk Circuit Court

Driver gets \$1.5 million for brain damage in head-on crash

Publix Supermarket agreed to pay \$1.5 million to a man who sustained a brain injury in a head-on crash with one of its tractor-trailers.

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David Jones, then 43, suffered a closed head injury resulting in brain dysfunction and significant impairment in memory and spatial thinking. He also sustained several fractures and injuries to multiple cervical and lumbar discs.

Jones was driving in Lakeland when the Publix truck lost control rounding a curve and collided with him. The trailer came to rest on top of the cab of Jones' vehicle.

The defense conceded liability, and the trial was held on damages. The case settled after opening statements.

Case: Jones v. Dohering

Case No.: 2005-CA-1149

Plaintiff lawyers: Keith M. Carter and William R. Daniel, Morgan & Morgan, Tampa

Defense lawyers: Michael P. Rudd and Randy J. Lipkien, Michael P. Rudd & Associates, Miami

Escambia Circuit Court

\$1 million goes to driver with back injury from I-10 bridge accident

A jury awarded \$1 million to a man who sustained a lumbar disc injury in a collision on an I-10 bridge.

John Riley underwent a three-level disc fusion eight years after being hit by a vehicle driven by a driver for Commercial Carrier Corp.

Prior to the collision a tractor-trailer had jackknifed, and defense counsel named that truck driver as a Fabre defendant. Defense counsel also maintained Riley was driving too fast for the conditions.

The jury found Commercial Carrier was 100 percent liable.

Case: Riley v. Commercial Carrier Corp.

Case No.: 2003-CA-001022

Plaintiff lawyer: Christopher M. Vlachos, Levin Papantonio Thomas Mitchell Echner & Oricir, Pensacola

Defense lawyer: Alphonse G. Condon Jr., Emanuel Shephard & Condon, Pensacola

### Civil Rights

U.S. District Court, Jacksonville

Jury rejects excessive force claim

A jury rejected an inmate's claim that two guards used excessive force in an altercation where he tried to grab a guard's gun.

Eric Hartley sustained a fractured rib, multiple abrasions, a ruptured eardrum and chipped tooth. He claimed he was beaten by the guards without provocation. One guard punched him, and the other threw him to the ground, where he was punched and kicked.

Defense counsel argued the use of force was justified when Hartley attempted to grab a guard's gun. He struggled and would not allow himself to be subdued. Hartley had previous instances of prison violence on his record, according to defense counsel.

Case: Hartley v. Brady

Case No.: 3:05-cv-00515-VMC-MCR

Plaintiff lawyers: Randall C. Berg Jr. and Joshua A. Glickman, Florida Justice Institute, Miami

Defense lawyers: Diane Cassaro and Jason D. Holbrook, Fulmer LeRoy Albee Baumann Glass, Jacksonville

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