Effort to help out gets plaintiffs firm booted from E. coli case

A prominent Seattle law firm that represents plaintiffs in food-borne illness cases has been ousted from a Colorado E. coli lawsuit because of a conflict.

The Colorado Supreme Court on February 4 disqualified attorneys at Marler Clark from representing the family of a girl who alleged that she was made sick by a salad she ate at a restaurant in Pueblo, Colo.

The en banc ruling, over two dissenting votes, denied Marler Clark temporary admission to the Colorado court system because one of its associates had spoken with defense counsel about the case before Marler Clark began representing the family.

Marler Clark, with five attorneys, represents plaintiffs in cases alleging injuries from the wholesale and retail distribution of contaminated foods including peanut butter, cantaloupe, ground beef, spinach and cheese. Defendants have included Wal-Mart Stores Inc., McDonald's Corp., Nestle USA Inc. and other corporate giants.

The Colorado justices, denying Marler Clark's motion to appear pro hac vice in Pueblo County District Court on behalf of Emily Liebnow's family, found that communication between Marler Clark associate Drew Falkenstein and Karen Wasson, an attorney representing the owner of Giacomo's restaurant, created a conflict of interest that "would compromise the fairness of the proceedings." Such a conflict, the court found, was one that the plaintiffs could not waive.

Writing the opinion was Justice Michael Bender. Filing amicus briefs were the Colorado Bar Association, at the request of the court, and the Colorado Defense Lawyers Association, for the defense.

The ruling stemmed from correspondence Wasson initiated with Falkenstein after the child's family filed the lawsuit using local Colorado counsel. When contacted by Wasson, Falkenstein checked to make sure Marler Clark wasn't involved in the case. Since it wasn't at that time, the two attorneys discussed a theory of liability aimed at a local petting zoo instead of the restaurant; the use of a specific trial expert; and the addition of a lettuce distributor as a defendant. Subsequently, Wasson abandoned the petting zoo theory based on Falkenstein's advice and hired the expert Falkenstein had suggested.

When Marler Clark later filed a motion for admission to represent the family in the Colorado court, Wasson objected, asserting that Marler Clark had obtained confidential information about the case through her correspondence with Falkenstein.

The court, in denying Marler Clark's motion, first determined that Wasson had not contacted Marler Clark in order to disqualify the firm later. But because Marler Clark had only five attorneys, Falkenstein's knowledge about the case could be imputed to the other attorneys, the justices said.

Dissenting were justices Gregory Hobbs and Allison Eid. "The majority mistakenly deprives the plaintiff, a child who became seriously ill allegedly after eating a salad at the defendant's restaurant, of her counsel of choice — one of the most prominent food-borne-illness law firms in the country," Eid wrote. In addition, that the majority ruling would create a "chilling effect" on "casual consultations" among attorneys.
Attorney William Marler said that he had to "respect what the court did," but has changed the way he communicates with attorneys on the defense side of food-borne illness matters. "I get phone calls all the time and have been willing to help defense lawyers," he said. "I now have a policy that says, 'Sorry, I can't help you.' "

Wasson said the court made a "proper decision" but added: "The only qualm I have about the decision was that this guy [Falkenstein] wanted to be a helpful."

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