

BERMAN & WALTON, LLP

ATTORNEYS AT LAW

Practicing throughout the State of California

Spring/Summer 2004

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Berman & Walton, LLP

Areas of Practice:

- Serious Personal Injury
- Wrongful Death
- Nursing Home Litigation
- Construction Site Accidents
- Automobile/Motorcycle
- Products Liability
- Burn Injuries
- Slip & Fall

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Senior Care Facility Agrees to Pay \$953,500 to Settle Elder Neglect Lawsuit

The family of 85-year-old K.C. (last name withheld for family's privacy) believed they had found a safe, comfortable facility to care for their father during the day, while they were at work running a busy distribution outlet in San Diego. To ensure their father had personal attention and a comfortable environment amongst people with whom he could socialize, the family contracted with a local San Diego Residential Care Facility for the Elderly ("RCFE"). They worked out an arrangement with the RCFE where they could drop off Dad on their way to work Monday through Friday, then pick him up every night so he could eat dinner with the family and sleep in the comforts of the family home. K.C. would also spend every weekend at home with his family. Assured that the facility could meet K.C.'s needs, the family admitted K.C. into the facility.

Several years went by without incident. By all accounts, the facility seemed nice. It was kept clean and the staff seemed pleasant. The food, albeit not five-star cuisine, was tasty. And K.C. developed relationships with many of the staff and other residents. Indeed all seemed to be going well, that is, until November 7, 2003.

Unbeknownst to his family, on that day K.C. was taken off facility property for a group outing by a facility staff-member. K.C.'s family was not only unaware of this trip, but did not consent to this trip. Yet for some reason, K.C. and five other residents were taken over 40 miles away from the facility to a casino in East San Diego County.

Once at the casino, K.C., who walks with the assistance of a cane, was directed to enter the casino through a

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Consumer Alert: Be Cautious of Wooden Play Structures

The Consumer Product Safety Commission (CPSC) released a report last year warning that millions of children and adults face an increased risk of bladder and lung cancer from playing on or chewing wooden playground sets and decks. In its study, the CPSC found that since the early 1970's, the majority of wood used in residential playground equipment has been

treated with chromated copper arsenate (CCA) to preserve and protect the wood from rotting. After some environmental groups petitioned CPSC to ban the use of the CCA preservative, CPSC conducted a study to determine whether there were any risks of harm associated with exposure to this chemical. CPSC issued a report of its findings, concluding that exposure to CCA-treated wood increases a person's probability of developing lung or bladder cancer over their lifetime. Children are most at risk of exposure



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Settlement *(continued)*

revolving door. While attempting to walk through the revolving door, K.C., who was unassisted, fell and sustained a severe fracture to his left hip.

Despite being in obvious pain and medical distress, the bus driver who had taken the facility residents on the outing declined medical treatment for the non-English-speaking K.C. by signing a release on his behalf, against the medical advice of the casino paramedics. Even more astonishing, despite the serious injury sustained by K.C., the bus driver allowed the remaining residents to gamble at the casino while K.C., who was expressing signs of severe pain, was placed in a wheelchair and made to wait.

Later, while attempting to board the facility van, K.C. again expressed his obvious pain. In fact, the bus driver needed to seek help to lift K.C. into the van because the man was unable to move on his own due to the pain. Yet despite these clear signs of severe injury, the bus driver continued to refuse medical assistance for K.C.

Upon their return to the care facility at approximately 4:30 p.m., the bus driver reported K.C.'s complaints of pain to the head administrator and other staff. However, no attempt was made that day to notify K.C.'s family, his primary care physician, or any other medical personnel regarding K.C.'s serious injury. Instead, facility administration and staff left K.C. to sit in a wheelchair with a broken hip in extreme pain for several hours. In fact, the head administrator even left the facility for the weekend without asking any care giver to check on K.C. In doing so, the head administrator stated

that if need be she would summon medical attention for K.C. upon her return to work the following Monday morning.

Despite continuing to show signs of extreme pain, K.C.'s injuries were not addressed until his daughter came to the facility to pick him up at approximately 8:20 p.m. that evening. She immediately recognized that her father was in severe pain and demanded an ambulance be called. At the hospital, K.C. was diagnosed as having suffered a severe hip fracture, which subsequently required extensive surgery and rehabilitation to repair the injury.

The family of K.C. retained *Berman & Walton, LLP* to file suit against the facility, seeking damages to satisfy the extensive medical bills that were incurred as well as to compensate their father for his pain and suffering. Four months after filing suit, *Berman & Walton, LLP* was able to obtain an astounding \$953,500.00 cash settlement on behalf of K.C.

Unfortunately for K.C. and his family, there is no real happy ending to this bizarre story. He has been hospitalized since the incident and currently resides in a 24-hour skilled nursing facility. The family has been advised that K.C. will never fully recover from the resulting injuries and will require 24-hour skilled care for the remainder of his life, costing several thousand dollars per month. This is just another sad but true example of a family trying to provide their elderly father with the best care possible only to have their trust abused and their father's health irreparably compromised by senseless neglect. ★

Recent Results of Interest

Dental Malpractice — Following six hours of extensive dental surgery, a 38-year-old *Berman & Walton, LLP* client was left alone and unattended in the surgical room while still under the effects of general anesthesia. While awakening from the sedation, the patient toppled from the surgical chair. Unable to break his own fall because of the anesthesia, the patient struck his head on the hard floor and began to bleed. After hearing the noise caused by the patient's fall, the anesthesiologist and oral surgeon returned to the surgical room, assisted in placing the patient back in the chair, and sutured the laceration on the patient's forehead. In addition to the deep laceration, the patient sustained further dental complications which required additional dental surgery to repair. *Berman & Walton, LLP* litigated this case against the oral surgeon and anesthesiologist involved in the patient's care and was able to obtain a \$330,000.00 combined result on behalf of their client.

Elder Abuse Litigation — \$953,500.00 cash settlement for fall injury to 85-year-old resident of Residential Care Facility for the Elderly; *See full story on Front Page.*

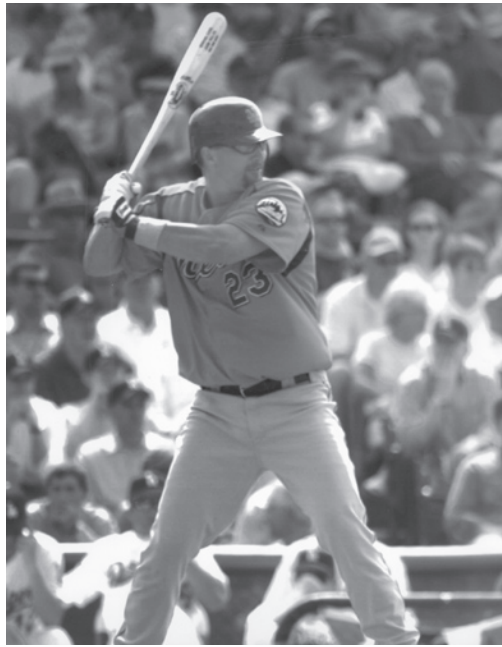
Professional Negligence — *Berman & Walton, LLP* represented the interests of an elderly woman who was admitted into a Southern California skilled nursing facility for rehabilitation therapy following a scheduled hip replacement surgery. Her stay at the skilled nursing facility was only anticipated to last up to six weeks, whereupon she planned to return home to care for herself. Upon admission, the

patient was assessed as being at high risk for falls. Despite this assessment, the facility failed to implement proper fall prevention protocol, including the use of proper bed rails. The patient fell from her hospital bed fracturing her recently replaced hip, which subsequently required reparative surgery. In a claim pursued as one for professional negligence against defendant's nursing staff, *Berman & Walton, LLP* was able to settle the case six weeks before trial, with the exact amount of the settlement being subject to provisions of confidentiality.

Automobile vs. Pedestrian Accident — *Berman & Walton, LLP* represented the interests of a 59-year-old woman who was struck by an unobservant driver while she was lawfully in a cross-walk. The driver, who was looking to his left for oncoming traffic, proceeded to enter the crosswalk and strike the pedestrian, who consequently suffered neck and back injuries as well as an injury to her knee which required minor arthroscopic surgical repair. Despite an aggressive defense where it was asserted that the plaintiff's need for knee surgery was solely the result of pre-existing degenerative changes and not as a result of the accident, *Berman & Walton, LLP* was able to obtain a \$92,000.00 gross settlement from the defendant company who employed the negligent driver. In addition, *Berman & Walton, LLP* was able to negotiate down the outstanding medical liens from \$30,000.00 to \$10,500.00, thereby resulting in a much greater than expected net recovery for their client. ★

Client Profile: Meet New York Met Jason Phillips

It's no secret that the attorneys and staff at *Berman & Walton, LLP* are huge fans of baseball, particularly since the firm recently purchased the rights to four seats in the Premier level of the San Diego Padres' new downtown ballpark, Petco Park. But few people know that attorney William M. Berman has been involved as a player agent in professional baseball for as long as he has been practicing law. Of his clients, the first to make it to the major leagues was San Diego native and SDSU graduate, Jason Phillips. Berman has been representing the New York Mets' starting first baseman/catcher since 1998 after meeting Phillips by chance during a visit to Hagerstown, Maryland to meet with another prospective client. Phillips was then playing Class-A ball for the New York Mets affiliate the Capital City Bombers. Although at that time Phillips was not considered a top prospect in the Mets organization, Berman was impressed with the gritty ballplayer, who not only demonstrated sound defensive skills and a good eye at the plate, but more importantly displayed a great work ethic and a true passion for the game. These trademark tools have given Phillips a competitive edge and have carried him all the way to the big leagues.



Jason Phillips at bat.

Last year in his first full season in the major leagues, Phillips posted an impressive .298 batting average in 403 at bats – 23rd overall best in the National League. Among National League rookies, Phillips was second overall with a .373 on-base percentage, third overall in RBI (58) and slugging (.442), tied for third in home runs (11), and fourth overall in batting (.298), multi-hit games (32), hits (120), total bases (178), doubles (25) and walks (39). Based upon these accomplishments, he was selected as the Ted Williams Foundation 2003 National League Rookie of the Year.

While playing professional baseball for the Mets 1997 winter league in Australia, Phillips received an unusual fringe benefit – he met his future wife Kelly, who is a native of Newcastle, Australia. The two were married in Australia in December, 1999.

During his time off from baseball, Jason enjoys spending time with Kelly and their 9-month-old son, Jason, Jr. (“J.J.”). The couple recently purchased a home in Las Vegas, Nevada, and during the off-season they split their time between Las Vegas, San

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Berman & Walton, LLP Attorneys Join Forces with Trial Lawyers Care, Inc.

Since September, 2002, the attorneys and staff of *Berman & Walton, LLP*, have been honored to be involved with Trial Lawyers Care, Inc. This group of trial attorneys, known as TLC, was specifically organized to assist families with the filing, processing and presentation of claims submitted to the federal September 11, 2001 Victim Compensation Fund.

All of the TLC attorneys, including 30 attorneys from San Diego, agreed to work on a pro bono basis and will receive no compensation for their legal services. This unprecedented, collaborative effort on behalf of TLC and its group of volunteer staff and attorneys has made a positive difference for people whose lives were devastated by one of the most tragic events in our nation's history.

Berman & Walton, LLP was first approached by another San Diego law firm, *Hulbert & Bunn, LLP*, about becoming TLC pro bono attorneys. Without reservation, the firm agreed. During a trip to the TLC headquarters in New York City in September, 2002, attorneys from *Berman & Walton, LLP* informed TLC officials that they would like to assist the surviving family of an FDNY firefighter, as a way to pay tribute to those whose heroic efforts saved so many lives before the World Trade Center buildings collapsed. The firm was privileged to be assigned the claim of the family of a seven-year FDNY veteran, who responded to the emergency call even though his shift at the firehouse that day had already ended. The family was also devastated by the loss of its patriarch, who was a

decorated member of FDNY for over 40 years. In the entire history of the FDNY, no two family members have ever lost their lives while responding to a single incident.

To assist them with the preparation of the claim, *Berman & Walton, LLP* called upon Laura Fuchs Dolan, MBA, of the accounting firm of *Mack Barclay, Inc.* Ms. Dolan prepared a detailed economic report which was instrumental in maximizing the award obtained on behalf of the family. The firm was also assisted by Patricia Kempton, Tore Dietrich and Don Amerine of *High Impact Television, Inc.*, who donated their time and services to produce a compelling video montage of the family. Former firm associate Nina Zimmerman, Esq. also spent several hours helping to prepare the claim, including traveling to New York to help obtain important information, documents, and witness statements needed for presentation of the claim.

On March 20, 2004, after over eighteen months of preparation, including several trips back to New York to obtain information and evidence, Attorneys William and Kelley Berman returned to New York to present the family's claim to Kenneth Feinberg, the presidentially-appointed Special Master of the federal 9/11 Victim Compensation Fund.

The attorneys and staff of *Berman & Walton, LLP* are proud to have participated in the Trial Lawyers Care program and to have represented the family in its claim. The firm is also extremely grateful to the many professionals who helped during the process. ★

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Newsletter/Advertisement
For Marketing Purposes

Disclaimer: The receipt of this Newsletter is not intended in any way to form an attorney-client relationship. Furthermore, this Newsletter and its articles are not intended to constitute legal advice, but rather, are provided for informational purposes only. Should you have any legal questions arising from the materials contained herein, please feel free to contact an attorney with the firm Berman & Walton, LLP.

Wooden Play Structures *(continued)*

to CCA, since they are more likely to put their hands in their mouths after touching the wooden structures. Other factors which increase the likelihood of exposure are the cumulative amount of time (i.e., number of days in a year) children play on a CCA-treated playset, the amount of arsenic that is picked up on their hands when they play, and the amount of arsenic they ingest from their hands throughout the day.

The CPSC report was quick to caution that children and adults are also exposed to arsenic from a number of other sources, including food, soil, water and air. Furthermore, CPSC reported that there are “many risk factors which contribute to a person’s risk for developing cancer over their lifetime, such as environment, genetics, diet, and behaviors such as smoking.” However, even after taking these factors into consideration, CPSC staff calculated that the increased cancer risk from exposure to CCA-treated wooden playsets is somewhere between 2 to 100 individuals per one million.

Manufacturers of CCA reached a voluntary agreement with the Environmental Protection Agency (EPA) to end the manufacture of CCA-treated wood for most consumer applications by December 31, 2003. However, the EPA has indicated that some stocks of wood treated with CCA before this date might still be found on shelves until mid-2004.

What can you do to reduce the risk? Parents and caregivers are

instructed to thoroughly wash children’s hands with soap and water immediately after outdoor play and especially before eating. Children should also refrain from eating while on CCA-treated playsets. Some studies have shown that applying certain penetrating coatings, such as oil-based, semi-transparent stains on a regular basis may reduce the amount of arsenic that comes out of the CCA-treated wood.

If you already own a CCA-treated product and would like to remove it from your property, the EPA states that CCA-treated wood should never be burned in open fires, stoves, fireplaces or residential boilers. You can contact the EPA (www.epa.gov) or your state or local solid waste management offices to receive instructions on how to dispose of CCA-treated wood.

If you decide to purchase a non-CCA treated wood product, there are a number of non-arsenic-containing preservatives that are registered by the EPA to pressure-treat wood. These products can be purchased at retail stores and home improvement centers.

For more information, you can view the full CPSC report at www.cpsc.gov. ★

Jason Phillips *(continued)*

Diego where Jason’s family resides, and Australia where Kelly’s family resides. Jason has a younger brother, Kyle, who is a top prospect in the Minnesota Twins organization and is currently playing Class-A ball in the Midwest League.

With the 2004 season underway, Jason hopes to continue his success

during his sophomore campaign where he is slated to split time between first base and catcher with Mike Piazza. It should be enjoyable to watch Jason’s continued success not only this year, but for many years to come. ★