

MISSOURI LAWYERS WEEKLY

Wal-Mart Settles Case over Wrong Prescription

Unique Agreement To Cover Future Damages



Maurice Graham



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BY KELLY KRESS

A Wal-Mart pharmacy in Charleston, Mo., that misfilled a 4-month-old's prescription has settled a negligence lawsuit for \$175,000.

The settlement featured a unique aspect, according to Taylor Lang's attorneys — an additional amount will be paid to Taylor, now 5 years old, if she suffers further medical damages in the future, as determined by a three member medical panel.

Attorney Thomas Neill of St. Louis said both sides in the case faced risk in leaving the issue of future damages up to a jury. Wal-Mart "didn't want to risk having to pay all of her future expenses, and we didn't want to risk receiving no future expenses, so this was an appropriate and creative settlement," Neill said.

Maurice Graham, co-counsel on the case, said, "We're pretty proud of this agreement, it's an

enlightened approach. It's a win-win deal for everybody and meets the ends of justice and fairness."

Graham said there was only a one-in-10,000 chance that Taylor will develop additional damage and that there is no indication of permanent injury.

A settlement report on *Lang v. Walmart Stores East, Inc.*, appeared in the April 7 issue.

Wrong Drug, Wrong Dose

Taylor Lang was 4 months old and suffering from croup when her parents took her to the pediatrician, who prescribed an expectorant, Guaifenesin. The Langs took the prescription to the Wal-Mart in Charleston to be filled.

Instead of the expectorant, Taylor was given a bottle of Grifulvin, an anti-fungal agent used to treat ringworm.

The Langs read the drug information inserted with the medication and became concerned that Taylor was given the incorrect drug. The following morning they called the pharmacy to verify that Taylor's doctor had prescribed Grifulvin. The pharmacist assured the Langs that the prescription was correct and should be given to Taylor as directed. She explained that physicians often use drugs for multiple purposes and that an insert does not always reflect the purpose for which the medication was prescribed.

For the next 20 days Taylor took 125 milligrams of Grifulvin per day, more than twice the appropriate dose for a child of Taylor's body weight.

In addition to her coughing and respiratory congestion, Taylor developed severe diarrhea, stomach cramps and general lethargy. The Langs knew the medication hadn't helped Taylor's symptoms, but didn't think that the medication was actually causing them. Because Taylor was already sick when she began taking the medication, she continued to have those symptoms in addition to the effects of the Grifulvin.

When she started to have dry heaves, the Langs took her back to the pediatrician and brought along the medication. One of the doctor's staff immediately noticed that the pharmacy had given Taylor the wrong drug.

Taylor was tested for liver

damage, a potential side effect of Grifulvin. Initially Taylor had elevated liver enzymes but within a short time her levels returned to normal. Her symptoms subsided once she discontinued the drug. Taylor was given an antibiotic and an expectorant to alleviate the original problem, and she responded well.

Four years later, she appears to have no permanent liver damage. If she were to develop liver damage, it is likely that she would require a liver transplant, according to her attorneys. One of the medical experts explained that Grifulvin is carcinogenic in large doses, and that Taylor will need to be monitored for tumor development in her liver and thyroid for many years.

Settlement

According to Neill, once the possibility of future damages was recognized the parties began to develop their non-traditional solution to resolve the case. He said having a review panel rather than a trial in the future would expedite Taylor's medical treatment. In addition, he said the defense also saw it as a way to keep down court costs.

Maurice Graham said it was clear that the Wal-Mart pharmacist had made a mistake, and Wal-Mart eventually agreed to accept all responsibility as part of the settlement. Experts told them that the pharmacist had failed to meet her standard of care on two separate occasions, once when she gave the Langs the wrong medication and a second time when she told them the Grifulvin was the correct drug in the correct dosage.

"We wanted to make sure Taylor would be protected. Her parents were very concerned about what would happen in the future. All the doctors said there is absolutely no evidence at this point that she has liver damage, but when asked, they couldn't guarantee there would be no future damage," Graham said. "Wal-Mart made a very enlightened settlement. They made a substantial payment now, and rather than have to go back to court, they agreed to pick the panel. Wal-Mart is to be given credit for being willing to step up and take on the long term exposure this settlement brings."

Graham said, "Without Jeff Hine, Wal-Mart's counsel, this would not have been done. He's a great trial attorney, past winner of the Lon Hocker award. He was willing to take an innovative look at this, and then he approached Wal-Mart with the idea. I give a lot of credit to him." Hine declined Lawyers Weekly's request for a comment on the case.

The terms of the settlement provide for a \$175,000 payment to the Langs, with up to \$500,000 available for any future damages that occur before age 20. To collect any future award, Taylor's doctor will have to first determine that she has liver damage related to the Grifulvin. A panel of three doctors, approved by both parties, would then examine her. If the panel determines that the Grifulvin caused Taylor's liver damage, Wal-Mart will admit liability and causation, and Taylor will receive the appropriate medical treatment, including a liver transplant if necessary. The parties will then go to trial on damages only, capped at \$500,000.

Under the settlement, Wal-Mart took all responsibility for Taylor's injuries, and the pharmacist was dismissed from the case.

Neill said not all future liver damage would be covered, only the specific types that are known to be related to a Grifulvin overdose.

Graham said that there was only a one in 10,000 chance that Taylor would develop additional damage, and there is no indication of permanent damage at this time.

Kansas City plaintiff's attorney Paul Kavanaugh said the settlement appeared to be a good result for both sides. "It's a judgment call," Kavanaugh said. "You can get money in hand, maybe additional money now, or protection on the back side of the case."

He said it was unusual for a defendant to agree to long-term exposure as part of a settlement. "The risk of future damages must be infinitesimally small for an insurance company to go for this."