



From left: Jessica Palvino, Ray Chester, Kayla Carrick and Andrew Edge of McGinnis Lochridge in Austin

WINNER ■ PRODUCTS LIABILITY

McGinnis Lochridge: Effecting Social Change

by MARY ALICE ROBBINS

McGinnis Lochridge's products liability practice group has a unique philosophy in litigation.

Austin partner Ray Chester, leader of the practice group, said, "We don't just try to win the case for the client; we try to bring about change. ... We're really about effecting social change."

Chester said there are not enough watchdogs in the United States to address public safety concerns.

"I feel like that's one of our roles," he said.

The practice group is small, with only four of the firm's lawyers dedicated full time to product liability matters and another lawyer who spends half his time working in that area, according to Chester.

But despite its small size, the firm wins large verdicts for its clients, including \$15 million for an

Oklahoma City physician and \$6.77 million for a child suffering from cerebral palsy and his parents. Both verdicts came in litigation over Botox, an injectable pharmaceutical first approved by the U.S. Food and Drug Administration in 1989 for treatment of patients with serious debilitating neuromuscular disorders.

In recent years, McGinnis Lochridge has focused its attention on Allergan, the manufacturer of Botox.

Chester said the firm lost its first Botox case, *Spears v. Allergan*, in January 2010 despite spending approximately \$2 million on that litigation. He said the case involved the alleged wrongful death of a 7-year-old child injected with Botox to ease muscle spasms associated with cerebral palsy.

"We were absolutely devastated for the family and us," Chester said.

The U.S. Department of Justice announced on Sept. 1, 2010, that Allergan had agreed to plead guilty and pay \$600 million to resolve its criminal and civil liability for the unlawful promotion of Botox for uses not approved as safe and effective by the U.S. Food and Drug Administration.

Jessica Palvino, an Austin partner in McGinnis Lochridge's product liability practice group, said the group had sent a letter to FDA officials in 2005 detailing concerns about the safety of Botox. She said that when the group learned about the DOJ's investigation, it provided information it had on Allergan's promotion of off-label uses of Botox, the prescription of a medication for other than the uses for which the FDA approved the drug.

Palvino said McGinnis Lochridge had only six to seven weeks between its loss in *Spears* and when it started trying *Helton v. Allergan*, a case that



eventually reached the Oklahoma Supreme Court.

Dr. Sharla Helton said she initially hired a team of lawyers to represent her in a suit against Allergan after she received Botox injections in 2006 for cosmetic reasons and was diagnosed with botulism. Helton said the effects of botulism forced her to give up her obstetrics/gynecology practice.

“The effects of this illness affect every nerve in your body. ... The nerve pain is unrelenting,” Helton said.

One of her main concerns in pursuing litigation, Helton said, was to make the public aware of safety concerns about Botox.

Helton said the first lawyers she retained dropped her case after about year because she was not interested in a settlement, and she experienced difficulty in finding new lawyers.

“Until I met Ray Chester, everybody else had turned me down,” Helton said.

Chester said that because Helton had nonsuited her suit without prejudice, the McGinnis Lochridge team was able to refile the suit under the Oklahoma savings statute, 12.OS §100. The statute gives a party one year to file a new cause of action after it has been dismissed without prejudice, so long as the original suit was filed within the limitations period.

In 2010, an Oklahoma County district court jury found Allergan negligent for failure to warn and awarded Helton \$15 million, a verdict that was affirmed by the Oklahoma Civil Court of Appeals in 2013. The Oklahoma Supreme Court denied Allergan’s petition for certiorari on May 2, 2014.

After the Supreme Court denied its petition, Allergan paid the verdict with interest, which amounted to

about \$18.4 million, Chester said.

Helton said she was impressed with Chester’s passion for the Botox litigation, especially in connection with its use in treating children.

“You could see it in his eyes, in his heart,” she said.

In September 2013, the parents of a then-6-year-old boy injected with Botox for the treatment of lower limb spasms associated with cerebral palsy filed *Drake v. Allergan* in the U.S. District Court for the District of Vermont. Represented by McGinnis Lochridge, Kevin and Lori Drake alleged in their complaint that Allergan failed to warn them or their child’s doctor that the maximum safe dose of Botox is eight units per kilogram of body weight.

As alleged in the complaint, the boy’s doctor first injected him with 6.75 units in 2010 and injected him with 12.7 u/kg in May of 2012. The child has suffered seizures and has required hospitalization and medication since the second dose was administered, according to the complaint.

The parents further alleged that Allergan created and funded organizations to promote the off-label use of Botox and also funded and/or ghostwrote medical articles touting the benefits of Botox for off-label uses.

Palvino said she examined the Drakes’ son when he testified during the two-week trial.

“It was probably the most fun I’ll ever have examining a witness,” Palvino said, recalling that the boy testified that he preferred being in court to school.

On Nov. 20, 2014, the jury found that Allergan was negligent and that the Drakes’ son suffered injuries as a result of that negligence. According

to the verdict form, the jury awarded the Drakes more than \$6.7 million.

On May 22, U.S. District Judge William K. Sessions III denied Allergan’s motions for judgment as a matter of law or a new trial and entered judgment in favor of the Drakes incorporating the jury’s verdict.

In 2014 and early 2015, McGinnis Lochridge also negotiated settlements for families who alleged that their children suffered serious adverse effects after receiving Botox injections. Chester said the settlements in *Jarosch v. Allergan and Ribeiro v. Allergan* were reached before the cases went to trial and are for confidential amounts.

One Austin lawyer praised the McGinnis Lochridge product liability team.

Jeff Otto, managing partner of the Austin office of Thompson, Coe, Cousins & Irons, said he has “the utmost respect” for the McGinnis Lochridge attorneys whom he has faced as opposing counsel. Otto said he recently represented a defendant who reached a settlement with McGinnis Lochridge’s clients in *Campbell v. Polaris Industries*, a product liability case pending in the U.S. District Court for the Western District of Texas in Austin.

“In my experience, their lawyers are known regionally and nationally as some of the best in the business,” Otto said. “They are worthy opponents.”

Otto said the McGinnis Lochridge attorneys always understand the technical issues in their case.

“They know the case very well before they file it,” he said. ■

Mary Alice Robbins is an Austin freelance writer and former senior reporter with Texas Lawyer.