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October 5, 2009

South Carolina Lawyers Weekly



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Article of the week from *South Carolina Lawyers Weekly*:

## Man's wife settles suit over Legionnaires infected tub

### Husband died from related disease

By **FRED HORLBECK**, Senior Staff Writer

The wife of a man who died of a rare respiratory fungal infection has settled for \$970,000 in a federal premises liability suit in which she claimed a whirlpool tub at a North Charleston hotel contributed to his death.

Judith Burman of Minneapolis sued in the U.S. District Court of South Carolina for negligence, wrongful death, survival, loss of consortium and negligent hiring, supervision and retention.

The parties agreed to the settlement in late August and finalized it on Sept. 25, said the lead lawyer for the plaintiff, David Yarborough of Charleston.

The case is *Burman v. Soleil Group Inc.*, case No. 2:08-2650-PMD.

A lawyer for the defendants, Steve Darling of Charleston, said the plaintiff demanded \$7.5 million in damages.

Darling said it was the first such case he'd seen in South Carolina.

Cases involving Legionnaires' disease are infrequent, but both lawyers said claims involving the disease as a contributing factor in a death from another ailment are even more unusual.

They happen "very rarely," Darling said, "because usually and Mr. Burman actually did this someone would get appropriate treatment. They're sick as they can be for a number of weeks É and then over time they get better with the proper antibiotics and such. So very rarely do you see a death claim."

Burman claimed her husband, John L. Burman, was exposed to legionella bacteria when he sat near a hot tub at the hotel in 2005. He contracted Legionnaires' disease and "pretty much made a full recovery," Yarborough said. Eighteen months later, he died of mucormycosis.

His wife sued the hotel and its management company, claiming hotel employees' failure to prevent the bacteria contributed to the death.

"Had he not acquired the Legionnaires' disease originally, he never would have gotten the second disease," Yarborough said.

Burman was among 18 hotel guests who fell victim to an outbreak of Pontiac fever and Legionnaires' disease in October 2005, according to a report by the S.C. Department of Health and Environmental Control.

Yarborough said he and co-counsel Fred Pritzker of Minneapolis believed that improper maintenance "had allowed substrate and bacteria to build up in the pipes in the filtration system to the hot tub that, ultimately, resulted in the development of a cluster of legionella bacteria in the hot tub."

The bacteria can cause two types of infections. The more serious form is Legionnaires' disease, which includes pneumonia. The less serious type is Pontiac fever, a respiratory ailment that resembles influenza.

The plaintiff contracted Pontiac fever, Yarborough said. Her husband spent 13 days in a hospital after falling ill from Legionnaires' disease.

Burman's medical costs were \$80,000 for his Legionnaires' treatment, Darling said. Yarborough said Burman incurred about \$100,000 in past medical bills from Legionnaires' disease.

### **Chain of causation**

Showing that improper tub and pool maintenance contributed to Burman's death was a matter of tracing a chain of causation extending over 18 months.

"It was going to be a battle of the experts," Darling said. "The plaintiff had an expert who was going to say it was related. We had a couple of experts who were going to say it was not related. So that was clearly going to be a jury issue and a matter of who the jury believed.

"We felt good about that and felt that our experts would prevail on the death not being related to the Legionnaires'," Darling said.

For the plaintiff, a big issue was the cause of the outbreak. A DHEC report cited by the plaintiff said evidence "strongly suggests" the hot tub was the source. Throughout October 2005, levels of disinfectants such as chlorine and bromine were below levels necessary to "continuously kill bacteria," the report said.

Darling disagreed.

"The hotel had a certified pool operator, as required by DHEC. The certified pool operator operated the pool pursuant to the DHEC regulations, and the history of the pool and the hot tub operation was that it generally complied with those standards except for one or two rare occasions," he said.

"So our defense on liability would have been that the hotel was operated properly within the DHEC standards and therefore the hotel maintained a duty of reasonable care," he said.

Another issue was how Burman could have contracted Legionnaires' disease when he had never entered the hot tub or the pool.

Yarborough said Burman sat in a chair next to the hot tub and "breathed in the vapors."

That could have been enough, the DHEC report said.

"Hot tubs have been implicated in previous outbreaks of both Pontiac fever and Legionnaires' disease," it said. "Previous outbreaks have also revealed that someone does not require immersion in the hot tub to contract disease. All that is needed is being in close enough to inhale aerosolized water."

Third, there was the question of how Burman's battle with Legionnaires' disease could have contributed to his death from mucormycosis.

"Obviously, when you have a second sickness that occurs 18 months later, it's sometimes challenging to prove the causal link between the first and the second disease," Yarborough said.

He said Burman's pulmonologist said the first disease impaired Burman's lung function, causing Burman to become diabetic.

In a June 2006 letter, the doctor told Burman's Minneapolis lawyer that Burman "sustained an injury to his lungs from legionella pneumonia" and that "only time will tell whether his lung function will be permanently impaired."

"There is some medical literature to support that diabetes is either caused or hastened by an impairment in lung function or by acute respiratory illness that affects the iron levels in the body," Yarborough said. "And there is a definite link between diabetes and the second disease that he acquired, mucormycosis."

### **Settlement Report**

**Brief statement of claim:** This was a premises liability case against a North Charleston hotel and its management company. The plaintiff, Judy Burman, alleged improper maintenance and chlorination of the hotel's pool and hot tub. She and her husband, John, while visiting Charleston from Minnesota, were guests at the hotel Oct. 11-14, 2005. The plaintiff claimed they were exposed to legionella bacteria that caused her husband to contract Legionnaires' disease and her to contract Pontiac fever. The plaintiff claimed the source of the legionella bacteria was the hotel's whirlpool/hot tub. The complaint blamed improper maintenance for a legionella cluster outbreak.

**Principal injuries (in order of severity):** John Burman contracted Legionnaires' disease, which is a severe form of pneumonia. He was hospitalized for approximately 13 days with nausea, headaches, body aches, respiratory distress and vomiting. His health recovered over the following six months to the point where his treating physicians declared that his chest CT was normal and clear and his spirometry had returned to normal. His pulmonologist said that the long-term effects of Legionnaires' disease on his lungs were unknown. About 18 months after the disease, Burman developed mucormycosis, a respiratory fungal infection of his lungs, and died. The plaintiff alleged that the Legionnaires' disease caused Burman to become immune-compromised and that it was a contributing factor to Burman's contracting mucormycosis.

**Special damages:** John Burman incurred about \$100,000 in past medical bills from Legionnaires' disease. The plaintiff's counsel was also claiming a future lost wage claim of \$287,000.

**Tried or settled:** Settled

**County and court where tried or settled:** U.S. District Court of South Carolina, Charleston Division

**Case name and number:** *Burman v. Soleil Group Inc.*, case No. 2:08-2650-PMD

**Date concluded:** Aug. 24, 2009

**Name of judge:** Judge P. Michael Duffy

**Amount:** \$970,000

**Insurance carrier:** Zurich

**Expert witnesses, areas of expertise and hometown:** James Martin Barbaree, Ph.D., (microbiology), Auburn University, Auburn, Ala.; Arthur Lawrence Reingold, M.D., (epidemiology), University of California, Berkeley, Calif.; Maria Bella, MAFOIT (pool and hot systems, operation/standard of care), Lancaster, Pa.; Cary E. Fechter, M.D., (pulmonology), Charleston; Oliver G. Wood Jr., Ph.D. (economist), Columbia

**Attorney for plaintiff:** David B. Yarborough Jr., of Pierce Herms Sloan & McLeod, Charleston; and Fred Pritzker, of Pritzker Olsen, Minneapolis

**Other useful info:** The plaintiff claimed that, on the two particular dates of the guests' exposure to legionella bacteria, the hotel's pool logs showed that the chlorine levels fell well below the S.C. Department of Health and Environmental Control's required minimum levels of 1.0 ppm. The defendant's standard-of-care expert said in his deposition he was not aware of any case in which a legionella outbreak had occurred where a hot tub was being properly maintained.

**Submitted by:** David B. Yarborough Jr.

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