

You can read the Lawyers.com News Blog at <http://blogs.lawyers.com>

## Family Settles with Exterminator whose Poisons Killed their Children

December 19, 2011 By [Heather McGowan](#)



Nathan and Brenda Toone suffered the unthinkable loss of two of their daughters to alleged pesticide poisoning within days after taking care of the seemingly routine home maintenance task of using an exterminator.

The Toones hired Bugman Pest and Lawn, Inc. to take care of [voles](#), which had established themselves in the family's lawn at their Layton, UT home. Bugman employee Cole Nocks buried poisonous Fumitoxin pellets, a phosphide-based rodent killer, in the yard. Within a day, Rebecca, age 4, and Rachel, 15 months, fell ill.

A carbon monoxide alarm went off in the family's home on Friday, February 5, 2010. The fire department found only trace amounts of carbon monoxide and cleared the family to go inside. By Saturday, Rebecca's symptoms

worsened, she developed **breathing problems, then cardiac arrest** at a local hospital. Rachel was in critical condition in a children's hospital by Monday night. Rachel passed away Tuesday, February 9, 2010.

Autopsy results showed the girls had **lung damage** caused by inhaling a dangerous substance with elevated phosphorus levels in their blood. A Hazmat team found dangerous levels of [phosphine gas](#) in the family's home.

### Looking for Answers

The Toones filed a [wrongful death lawsuit](#) against Bugman and Nocks in March 2011, which ended with a settlement in November, 2011. [Terms of the settlement](#) weren't disclosed, but included a stipulation order of dismissal with prejudice, meaning the family can't file another lawsuit. The family declined to issue comments after the settlement was announced.

In a few short days, this family's world was forever changed. Look at the details revealed in the weeks and months after the girls' deaths:

- Pesticide pellets were buried in a pest burrow system within 15 feet of the family's home, **violating EPA rules**
- Bugman employees used Fumitoxin dozens of times, **but *didn't* have a fumigant management plan**
- A **federal indictment** alleged Bugman misused Fumitoxin at two other homes in the Salt Lake City, UT area

Next, the Toones looked to both the civil and criminal courts for justice.

## Wrongful Death, Criminal Charges and Real Change



John Mitchell Jackson

The Toone family filed a wrongful death lawsuit against Bugman, Nocks and others in March, 2010, and sought damages for negligence, infliction of emotional distress, and abnormally dangerous activity. [Mitch Jackson](#) of [Jackson & Wilson, Inc.](#), a California attorney whose practice concentrates on personal injury and wrongful death claims, offered insights on cases such as the Toones's.

Damages for emotional loss may be limited. Jackson explains, "Non-economic damages in cases like this, depending on the evidence, are normally limited to a loss of the child's love, companionship, comfort, care, assistance, protection, affection, society, and moral support. General damages for emotional distress and pain and suffering are normally not allowed. For all practical purposes in the wrongful death cases that I've tried while representing surviving parents, I think the jurors look at these damages as basically being the same thing."

There are several approaches a plaintiff can use to prove a case. A plaintiff can show negligence, meaning the defendant owed and violated a duty to the plaintiff that caused a loss or injury. Jackson points out a related concept, saying, "In civil cases the injured parties may be able to use the violation of a law or regulation as "negligence per se," the legal doctrine whereby an act is considered negligent because it violates a statute or regulation. The ability to make this argument shifts the plaintiff's burden to only having to show that the defendant's wrongful conduct was the proximate cause of the plaintiff's injuries and damages. Simply put, it's makes proving your case easier."

Finally, a claim based on abnormally dangerous activity rests on strict liability. Some activities are so dangerous that there's no need to prove fault, and liability attaches when someone is harmed by those activities.

### Why Do Cases Settle Instead of Going to Trial?

Many people ask about why a case might settle instead of following through with a trial. In this case, [settlement](#) details weren't released, and the family didn't offer comment. Jackson commented, "While I believe in the American jury system and have a great deal of success trying cases, most experienced trial lawyers will tell you that you never know what a jury is going to do. So, a big advantage to a strong negotiated settlement is that the outcome is certain. There are no surprises (good or bad) and your clients are not put through the stress of trial."

### In the Criminal Courts

The criminal courts also answered the call for justice. First, Nocks was charged in state court with negligent homicide. Federal authorities took over the criminal case, and Bugman and Nocks pleaded guilty to unlawful use of a [registered pesticide](#). This crime carries the same penalty possible for the state charge. The [plea agreement](#) recommended a six-month prison term and home confinement for Nocks. Bugman faces a fine and probation, barring the company from selling, using or distributing pesticides for three years. Sentencing is set for December 20, 2011.

Can a related criminal case affect a plaintiff's civil case? Jackson says, "Absolutely! In most states the plaintiff in a civil wrongful death case can use a criminal felony conviction or regulatory violations to help establish liability in the civil case. Most civil lawyers will coordinate their efforts with the criminal prosecution team. Of course, a felony conviction in the criminal case or even the chance of a felony conviction can help move settlement discussion along in the civil case."

In addition to bringing criminal charges in this case, the Environmental Protection Agency (EPA) adopted [new rules](#) restricting Fumitoxin use in residences. Hopefully the changes [protect consumers](#) who strive to keep their homes healthy, and avoid further tragedies.

Heather McGowan is a news reporter for Lawyers.com

**Tagged as:** [Fumitoxin](#), [personal injury](#), [pesticide poisoning](#), [Toone](#), [wrongful death](#)

---

**Disclaimer:** The information provided on Lawyers.com is not legal advice, Lawyers.com is not a lawyer referral service, and no attorney-client or confidential relationship is or should be formed by use of the site. The attorney listings on Lawyers.com are paid attorney advertisements and do not in any way constitute a referral or endorsement by Lawyers.com or any approved or authorized lawyer referral service. Your access of/to and use of this site is subject to additional [Terms and Conditions](#).