

The Federal Jury Verdict Reporter

The Most Current and Complete Summary of Federal Jury Verdicts

October 2005

Nationwide Federal Jury Verdict Coverage

1 FedJVR 1

The Nation's Only Source for Federal Jury Verdicts

Notable Verdicts in This Issue

The Premiere October issue contains more than 100 recent jury verdict reports with forty-five states represented.

Arizona - *False Arrest* - The head of the Arizona ACLU was arrested while protesting during a presidential visit - Zero

Arkansas - *Airport Negligence* - A commercial flight slid off the runway and into a catwalk - \$2,157,265

District of Columbia - *Disability Discrimination* - A lawyer in a wheelchair at the Commerce Department alleged her new boss failed to accommodate her disability - \$3,000,000

Florida - *Products Liability* - A military plane crashed and eighteen National Guardsmen were killed - Defense verdict

Georgia - *Bad Faith* - Adjustment of an injury claim by Allstate - Zero

Hawaii - *First Amendment* - A city worker suffered reprisal when he raised safety complaints - \$1,500,000

Illinois - *Products Liability* - An electrical worker was injured by an exposure to PCBs - Defense verdict

Indiana - *Products Liability* - Catastrophic injury sustained when a Kia rolled over - Defense verdict

Kansas - *Gender Discrimination* - A teenage boy was taunted at school for purportedly being gay - \$250,000

Kentucky - *Products Liability* - A woman was burned when her Sony TV caught fire - \$2,102,221

New York - *Entertainment Management* - The lead singer of Nine Inch Nails alleged his manager breached a fiduciary duty - \$2,927,213

New York - *Products Liability* - Plaintiff blamed a shooting accident on a safety-switch malfunction - Defense verdict

Oklahoma - *Race Discrimination* - A white employee at a black college alleged she was passed over unfairly - \$298,335

Oregon - *Wrongful Death* - A Portland police officer shot an unarmed suspect as she drove away - Zero

Tennessee - *Negligence (Swimming Pool)* - A catastrophic injury was sustained when plaintiff into a shallow apartment pool - \$2,500,000

Texas - *Race Discrimination* - A white courier at Fed Ex alleged reverse discrimination - \$100,000

Texas - *Products Liability* - A toddler was run over by a Ford Expedition and his estate blamed the failure of the vehicle to have a back-up alarm as standard equipment - Zero

Texas - *Sexual Harassment* - Zero - Same sex harassment alleged at a porno shop in San Antonio - Zero

Wyoming - *Religious Discrimination* - A Jehovah's Witness alleged hostility to her religion in the workplace - Zero

Verdict of the Month

NEGLIGENT BUS SECURITY

Tennessee Eastern District - Winchester

Plaintiff was left a paraplegic when a Greyhound bus overturned after a psychotic passenger attacked the driver – her liability theory implicated Greyhound's lack of security to prevent this attack. Greyhound defended that the criminal attack could not have been foreseen or avoided

Caption: *Surles v. Greyhound Lines, 4:01-107*

Plaintiff: Andrew L. Berke and Marvin B. Berke, *Berke & Berke*, Chattanooga, TN, Stanley Jacobs and Jodi J. Aamodt, *Jacobs Manuel & Kain*, New Orleans, LA and Phillip F. Cossich and Walter J. LeBlanc, Jr., *Cossich Sumich & Parsiolo*, Belle Chasse, LA

Defense: Frederick N. Sager, Jr., Mark R. Johnson, Richard H. Hill, II and Thomas Allen, *Weinberg Wheeler Hudgens Gunn & Dial*, Atlanta, GA

Verdict: \$8,000,000 for plaintiff

Judge: H. Bruce Guyton

Date: August 10, 2005

For the full case report including all the details on this trial including experts and damages, see page 29 in this issue..

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The **FedJVR** reported a total of 100 Civil Jury Verdicts

44 States Represented

14 Products Liability Verdicts (4 Automotive)

6 Sexual Harassment Verdicts (32 Employment Overall)

6 First Amendment Verdicts

5 Education/University Tort Verdicts

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***** Introducing the premiere issue *****

The Federal Jury Verdict Reporter

The only complete source for federal jury verdicts

The Federal Jury Verdict Reporter is the *only* publication in the country that presents reports on virtually every civil jury verdict tried in the federal system. The FedJVR's coverage isn't just complete – it's timely with all the details that matter. We focus on the parties, the facts, the causes of actions, the experts and results. Each report also includes a summary of post-trial motions and orders. [Several verdicts in this month's issue were set aside by JNOV.]

What's in this month's issue?

Q&A with the FedJVR

Is it complete?	100 total verdicts
Which states?	44 states represented
When?	Monthly (12 Issues a year)
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Employment cases?	32 Employment Verdicts 6 Sexual Harassment Verdicts 5 Disability Discrimination 7 Gender Discrimination 7 Race Discrimination 5 School/Education Torts
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Also included are federal actions and patent disputes

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RACE DISCRIMINATION

Alabama Southern District - Mobile

In this reverse discrimination case, a junior college white history instructor alleged she was let go so that she could be replaced by a black instructor

Caption: *Taylor v. Bishop State Community College*, 1:02-309

Plaintiff: Steven L. Terry, Daphne, AL

Defense: Willie L. Huntley, Jr., *The Huntley Law Firm*, Mobile, AL

Verdict: \$300,000 for plaintiff

Judge: Callie V.S. Granade

Date: June 3, 2005

Facts: Sarah Taylor started working in 1999 as a full-time history instructor at Bishop State Community College in Mobile, AL. Taylor is white. In the Spring of 2001, her contract was not renewed. That fall, a black professor took over her classes.

Taylor believed the failure to renew her contract represented illegal reverse race discrimination. She was fired for just one reason -- so that she could be replaced by a black professor. Her best proof was that the black professor immediately took over her course load and up to the her dismissal, her record was excellent.

Bishop State defended this federal lawsuit and explained that race had nothing to do with its decision. It instead cited the school's decision to move from a focus on World History to Western Civilization. [Taylor's speciality in Western Civilization was inconsistent with this goal.] The college also cited performance problems. Then to the job, Bishop State denied Taylor was replaced by a black -- while others covered her course load, the position was not filled until a year later and then by a white instructor.

Taylor countered that the World History versus Western Civilization distinction was phoney -- the courses were essentially the same and even used the same books. She also thought the subsequent hiring of a white instructor was irrelevant as immediately after her firing, the black instructor took over her course load.

Jury Instructions/Verdict: Tried in three days, Taylor prevailed on the discrimination count and took \$100,000 for lost wages, plus \$200,000 for emotional distress. The verdict totaled \$300,000.

Post-Trial Motions: Bishop State has moved for a new trial repeating trial arguments that race had nothing to do with its hiring decisions, focusing that as a non-tenured teacher, Taylor

had no property interest in her employment. Taylor replied and conceded this, but countered it did not provide an exemption for the college from complying with civil rights laws.

CIVIL RIGHTS - PRISONER

Alabama Southern District - Mobile

A female jail inmate alleged she was repeatedly raped by a guard who threatened to send her to state prison – the guard countered that while the jailhouse sex was wrong, it was consensual

Caption: *Crocker v. City of Fairhope*, 1:04-184

Plaintiff: Ivan L. Parker and T. Dwight Reid, Mobile, AL

Defense: Kathryn Knight, *Vickers Riis Murray & Curran*, Mobile, AL

Verdict: Defense verdict on liability

Judge: William H. Steele

Date: May 25, 2005

Facts: Shauna Crocker, then age 19, was in the Fairhope, AL city jail in March of 2003. She'd been convicted of assault, having run over a friend -- she then backed over the friend a second time.

While serving a one-year sentence, she came under the watchful eye of a deputy jailer, Chad Little. Before long, his long glances turned to sexual propositions -- either submit to sex or be transferred to state prison. Ultimately Crocker was raped in the laundry room among other places in the jail.

The nightmare ended on 12-7-03 when everyone but her and Little were at the city's Christmas festival. He raped her again. Crocker reported the rapes and was promptly let out of jail. Little was also fired.

Crocker sued the City of Fairhope and alleged an 8th Amendment violation as well as the tort of outrage. In developing her case, Crocker testified vividly about the rapes and her vaginal bleeding that followed. Her husband presented a consortium claim.

Little defended and agreed there was sex. However he countered that it was consensual. He remembered that Crocker had been the temptress, showing him his tattoos and favoring her thong underwear at jail instead of prison issue briefs. In denying rape, Little further postured that the vaginal bleeding was related to endometriosis, not rough sex.

Jury Instructions/Verdict: The verdict was for the jail on both the 8th Amendment and outrage claims, Crocker taking nothing.

Interesting Motion Practice: Before trial, Fairhope was concerned publicity would jeopardize its rights, the *Mobile Register* and local television stations running sensational stories about Crocker's claims. While the motion was denied, the government had sought a gag order.

This sample the Federal Jury Verdict Reporter only includes a portion of the complete issue.

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EQUAL PAY/RETALIATION

Alabama Northern District - Birmingham

A female general manager at a Birmingham television station alleged she was paid less than her male counterparts - then when she complained about it, she found herself forced out

Caption: *Kelly v. WIAT-CBS 42, 2:03-2557*

Plaintiff: Heather N. Leonard and James A. Mendelsohn, Birmingham, AL

Defense: E. Barry Johnson, *Johnston Barton Proctor & Powell*, Birmingham, AL

Verdict: \$467,000 for plaintiff

Judge: William M. Acker, Jr.

Date: June 20, 2005

Facts: Susan Kelly first served as the Local Sales Manager for WIAT-CBS 42 television in Birmingham. In April of 2001, she was promoted to General Sales Manager (GSM). WIAT paid her a base salary of \$130,000.

By the fall of 2002, Kelly believed she was being treated unfairly. Particularly, WIAT had paid her male predecessor more for the same work -- J.D. Huey, who previously filled the position, had started at \$140,000. Kelly complained about the pay disparity in an EEOC filing.

Her tenure as GSM would not last much longer. She was fired on 7-1-03. WIAT replaced her with a male GSM, Dave Parker, who was brought in at \$150,000. This job action solidified Kelly's belief that she was (1) the victim of Equal Pay Act violation and (2) that her firing was retaliation for having complained. Kelly filed a federal lawsuit and presented those two counts. If she prevailed, she sought damages in four categories, (1) the pay disparity based on her gender, (2) liquidated damages, (3) lost wages secondary to the retaliation and (4) the imposition of punitives.

WIAT defended the case and first denied any equal pay violation. In this respect, it noted that with bonuses, Kelly actually made more than Huey in her only full year as GSM. Even if it was believed that there was a pay disparity, WIAT was prepared to explain it away.

The television station postured that its salary decisions were functions of the market, experience and prior salary. For instance, Huey was paid more in base salary because that was necessary to recruit him from Atlanta. Similarly, Parker who replaced Kelly, was recruited from the larger Miami market. Plaintiff by contrast, had no large market experience, having coming to Birmingham from Salisbury, MD and Memphis. Thus the alleged comparators, from WIAT's perspective, were distinguishable. [Kelly countered she was more experienced, having served more years as a GSM.]

WIAT also responded to the retaliation claim. The decision to let her go was related to several factors, (1) declining market share, (3) budget problems, and (3) allegations that Kelly was abusive to subordinates. Kelly responded that before she complained, her work at the station had not been criticized.

Jury Instructions/Verdict: Kelly prevailed on both equal

pay and retaliation claims. She took \$28,500 for the equal pay disparity, plus another \$28,500 in liquidated damages on that count. Also prevailing on retaliation, lost wages were \$210,000. Finally this jury awarded her another \$200,000 in punitives. The verdict against WIAT totaled \$467,000. A consistent judgment followed.

FALSE ARREST/EXCESSIVE FORCE

Arizona District - Phoenix

The diminutive director of the ACLU in Arizona was roughed up by police during a visit by the President to Phoenix

Caption: *Eisenberg v. Phoenix Police and Department of Public Safety, 2:03-564*

Plaintiff: Stephen G. Montoya, *Montoya Jimenez*, Phoenix, AZ

Defense: Georgia A. Staten and Jennifer Erickson, *Jones Skelton & Huchuli*, Phoenix, AZ for Martin Kathleen Kerchansky, Assistant Attorney General, Phoenix, AZ for Bottoms

Verdict: Defense verdict on liability

Judge: Lawrence O. Anderson (Magistrate)

Date: July 15, 2005

Facts: It was a big day in Phoenix on 9-27-02. The President of the United States was coming downtown to give a speech at the Phoenix City Plaza. There was a heavy police presence in the area -- much of it was focused on controlling and segregating presidential protesters.

That included cordoning off protesters to one side of the street -- on the other side of a street, a mass of Phoenix police and Secret Service agents gathered. Representing the protesters and standing in at just under five feet tall was Eleanor Eisenberg, then age 64. Eisenberg was also hobbled by a recent foot surgery.

She dared to cross the no-man's land that was the street. Eisenberg did so in an attempt to video the arrest of another protester. Having crossed the invisible line of safety, Eisenberg was targeted by a mounted officer, Wesley Martin. He first bumped Eisenberg. Martin then pointed out her out for arrest to another officer, John Bottoms.

Bottoms effectuated the arrest and the tiny Eisenberg was carried off hog-tie style, her hands and feet bound. She was detained for nine hours before being released. The criminal case against her didn't hold and charges were dismissed.

Eisenberg sued the city and the two officers alleging a civil rights violation. She explained that she simply crossed the street to take pictures -- at no time was she a threat. When told to move on by the horseman, she began to do so. However, she wasn't given time and was simply arrested. The two counts that went to the jury were false arrest and excessive force.

Martin and Bottoms had a simple defense to the case that focused on two themes, (1) Eisenberg disobeyed a lawful order to disperse, and (2) the safety of the President is paramount and Eisenberg's size did not excuse an arrest. Then to the arrest, it

was reasonably effectuated -- that it was difficult was the result of plaintiff having struggled.

Jury Instructions/Verdict: The jury's verdict was for the police defendants and Eisenberg took nothing.

AIRPORT NEGLIGENCE

Arkansas Eastern District - Little Rock

Landing in a heavy thunderstorm, an American Airlines flight slid off the runway and into a steel catwalk -- the pilot was killed and his estate blamed the airport design for placing the catwalk too close to the runway

Caption: *Buschmann v. Little Rock National Airport*, 4:01-347

Plaintiff: Arthur Alan Wolk and Brian P. Kelly, *The Wolk Law Firm*, Philadelphia, PA and James M. Llewellyn, *Thompson & Llewellyn*, Fort Smith, AR

Defense: Courtney R. Bateman, *Dombroff & Gilmore*, McLean, VA, Scott D. Provencher, *Anderson Murphy & Hopkins*, Little Rock, AR and Richard N. Watts, *Watts Donovan & Tilley*, Little Rock, AR

Verdict: \$2,157,265 for plaintiff

Judge: Susan W. Wright

Date: June 2, 2005

Facts: On the evening of 6-1-99, an American Airlines flight (an MD-82), flew from Dallas-Fort Worth to the Little Rock National Airport (LRNA). It was piloted by Richard Buschmann. As the plane approached Little Rock, it encountered a severe thunderstorm. Despite the poor weather, Buschmann pressed on and landed the plane.

The jet hit the runway and began to hydroplane. It slid off the runway at 90 mph, its progress only being slowed when it hit a massive steel catwalk that supported approach lights. The plane then spun and came to rest next to the Arkansas River. Buschmann and ten passengers were killed -- 145 were hurt, several of whom sustained horrific burns.

In this lawsuit, Buschmann's estate sued LRNA, criticizing the design of the airport. A relatively simple theory, his death was blamed on the placement of the steel catwalk just 400 feet from the runway. Importantly, it was well within the federally mandated 1,000 feet zone of safety that should surround a runway. Thus it was argued by plaintiff that the plane didn't crash until it hit the catwalk, that impact penetrating the plane's cockpit. Beyond the placement of the catwalk, its non-frangibility or failure to give way, was also implicated.

LRNA's defense focused on pilot error by Buschmann, that theory comporting with the NTSB investigation. Namely, Buschmann should not have attempted to land when there were wind shear alerts and other indications that the landing could not be safely attempted. Had he simply aborted the landing, there would have been no crash. Buschmann's failure to deploy spoilers was also called error, this decision causing the plane to not slow as quickly.

LRNA also defended that perhaps the catwalk saved lives because if the plane had not hit the catwalk, the plane and its passengers would have wound up in the Arkansas River, a likely more perilous location. [Plaintiff thought it purely speculative to suggest a gentle landing in the river would have been more dangerous than a fiery break-up after striking the catwalk.] Finally to the location of the catwalk, LRNA explained the location of the river made it impossible to place them outside 1,000 feet. [Despite that impossibility, they have since been moved.]

There were two interesting evidentiary issues at trial. First, the jury made a visit to the runway and the site of the crash. The jury also heard the original cockpit recording of the crash. However while the jury heard it, the playing of the recording was held in closed court, Judge Wright excluding the public from this portion of the trial.

Injury: Death (Airplane crash trauma)

Jury Instructions/Verdict: The verdict was for the estate on liability, the jury finding LRNA solely at fault -- having so found, there was no apportionment to the pilot plaintiff. Then to damages, the estate took a general award of \$2,157,265. [This case was tried for eleven days.]

Ed. Note - While this was the only lawsuit that advanced to trial against LRNA, a variety of other claims were presented against American Airlines, predicated on the pilot's poor judgment in landing the plane. There were at least five verdicts for plaintiffs on the plane -- they were \$11,000,000, \$6,500,000, \$6,200,000, \$5,700,000 and \$3,300,000. Two other plaintiffs in this runway suit, flight attendants on the plane, settled their claim just before trial.

RACE DISCRIMINATION

California Eastern District - Fresno

A UPS driver alleged he was fired because of his race -- the company explained it was insubordination for failing to drive a truck that was assigned to him

Caption: *Frazier v. UPS*, 1:02-6509

Plaintiff: William J. Smith and Shelly G. Bryant, *W.J. Smith & Associates*, Fresno, CA

Defense: E. Jeffrey Grube, Sana Sue and Annette M. Rittmuller, *Paul Hastings Janofsky & Walker*, San Francisco, CA

Verdict: Defense verdict on liability

Judge: Oliver W. Wanger

Date: August 19, 2005

Facts: Thomas Frazier, who is black, worked for fourteen years as a driver for UPS. His job included working as a feeder driver, making a regular run from Fresno to Los Angeles. Throughout his tenure with UPS, Frazier believed there was a

tinge of racial discrimination at the terminal. He was frequently referred to as "boy". As frequently, Frazier made complaints about the harassment – they were ignored.

The key event in this case occurred on 3-29-01. On this date, Frazier made a pre-trip inspection of the truck that was assigned to him. The brakes were not working and on this day, he drove a different truck.

When he came to work the next day, he was told to drive the truck with the brake problems. UPS indicated they had been fixed. Frazier said he wouldn't get behind the wheel until he did an inspection. UPS fired him on the spot for insubordination.

Frazier countered and filed this federal lawsuit. It presented two counts. First he alleged he was fired in retaliation for his numerous complaints of harassment. The second claim was more nuanced – it was Frazier's theory that he had a good faith belief the truck was hazardous, that the hazard was real and finally that he was fired for refusing to drive.

UPS denied there was any retaliation. It cited a laundry list of problems with Frazier – the problems included his attendance record and insubordination. The insubordination was defined as telling management on several occasions, "Fuck You".

Then to the ultimate firing, UPS let him go when he refused to drive the truck. It cited that the truck had been inspected by its mechanics and deemed road worthy. The company also noted that at the time Frazier refused to drive the truck, it was 150 miles away. In sum, UPS postured that this was not a case about an unsafe truck – instead, Frazier had hoped to parlay his frivolous complaints into a financial windfall.

Jury Instructions/Verdict: The verdict on race discrimination was mixed, but for UPS – the jury found that Frazier was fired and that he had complained of race discrimination. However it rejected that his complaint was a motivating factor in the termination decision.

To the second count, the jury further found that Frazier had a good faith belief the truck was a real hazard. However it went on to find the hazard wasn't real and thus didn't get to the key question of whether he was fired for refusing to drive it. That finding ended the deliberations and Frazier took nothing.

Excessive Force - A teen ran from the police -- to subdue him, he was Tazered multiple times

Best v. Calvaras County Sheriff, 1:03-6569

Plaintiff: Kenneth M. Foley, San Andreas, CA

Defense: Michael G. Woods, *McCormick Barrow Sheppard Wayte & Carruth*, Fresno, CA

Verdict: Defense verdict on liability

Court: California Central - Fresno

Judge: Dennis L. Beck

Date: 7-14-05

On 12-27-02, Jeffrey Best, then age 17, was a pedestrian in Valley Springs. A deputy for the Calvaras County Sheriff, John Thompson, saw the pedestrian and was sure there was some unknown criminal activity afoot. He circled back around to commence an investigation.

Before Thompson could effectuate a stop, Best took off running across private property. He was quickly detained by another deputy, David Hooks. To bring Best under arrest, Hooks Tazered the boy several times. [Best said four times -- Hooks said it was just twice.] However many times it happened, the Tazer event hurt.

The police would later explain their actions -- at the time they

sought Best, their was a call out for a arson suspect. Best met the description and thus was stopped. Thompson, sued regarding the initial stop, prevailed by a directed verdict at trial.

Hooks explained regarding the arrest that Best resisted -- only then did he exercise reasonable force to bring him under control. [A double-Tazering was very reasonable, Hooks thought, especially since Best appeared to be under the influence of drugs.]

In fact, Best hadn't set the fire and in fact, he wasn't under the influence of arrest. The whole stop, Best thought, was pretextual. He noted the call about the arson suspect didn't go out until *after* he was arrested. Then to the arrest, he denied resisting. While the pain of electrification went away, Best has since complained of post-traumatic stress disorder. He presented excessive force and battery claims against Hooks in this federal lawsuit.

Hooks prevailed at trial on both counts, the teen plaintiff taking nothing. A defense judgment followed.

Fair Labor Standards Act - Twenty 911 dispatchers in Stockton, CA alleged they were unfairly denied overtime benefits

Hughes et al v. City of Stockton, 2:03-166

Plaintiff: Gary M. Messing, Timothy K. Talbot and Stephanie A. Miller, *Carroll Bordick & McDonough*, Sacramento, CA

Defense: Arthur A. Hartinger and Geoffrey Spelling, *Meyers Nave Riback Silver & Wilson*, Oakland, CA

Verdict: Defense verdict on liability

Court: California Eastern - Sacramento

Judge: Morrison C. England, Jr.

Date: 7-8-05

This case concerned a wage claim made by twenty plaintiffs, all 911 dispatchers for the City of Stockton, CA. To understand their allegations, it is important to understand the nature of their work. The dispatchers regularly worked either two or three 24-hour shifts a week -- in one week, it was 48 hours, while in the alternate week, they'd work 72 hours. However, the dispatchers were not paid time and a half on the hours worked over forty.

The plaintiffs sued in this federal Fair Labor Standards lawsuit and sought backpay from January of 2001 through February of 2005. Their theory was simple -- the law provides that overtime be paid on all hours above forty. [Stockton did in fact pay overtime if a dispatcher worked over 48 or 72 hours.]

Stockton defended the case and conceded overtime was not paid. However it responded that this was because the dispatchers' pay was governed by a union contract. As importantly, the dispatchers made more in terms of benefits and other intangibles than they would have had they simply been paid overtime. Thus Stockton explained, the plaintiffs were paid all they were owed.

This case was tried to a federal jury in Sacramento. It rejected the plaintiffs' wage claim and awarded no damages.

CONTRACT FOR ATTORNEY FEES/LEGAL MALPRACTICE

California Northern District - San Francisco

A law firm that provided representation in a complex bankruptcy involving robot entertainment technology sought to collect an unpaid fee – the client counterclaimed that nothing was owed and that the representation was botched

Caption: *Steefel Lewis & Weiss v. Astor Holdings et al*, 3:03-340

Plaintiff: David W. Evans and Scott Bloom, *Haight Brown & Bonesteel*, San Francisco, CA

Defense: Edward V. King, Jr., *King & Kelleher*, San Francisco, CA for Astor Holdings
Russell S. Roeca, *Roeca Haas & Hager*, San Francisco, CA for Pascoe & Rafton

Verdict: \$493,053 for Steefel Lewis against Astor
\$103,121 for Pascoe against Astor
Defense verdict on Astor's malpractice claim

Judge: Joseph C. Spero

Date: August 11, 2005

Facts: This complex case started with the development of robot technology by Marc Thorpe – it was done in connection with the George Lucas of Stars Wars fame. Some years later, Thorpe entered an arrangement with Astor Holdings and Robot Wars, (companies operated by Steven Plotnicki and hereinafter referred to as Robot Wars) to put on sporting events known as *Robot Wars*. The deal went sour quickly.

Litigation followed by Robot Wars against Thorpe. A settlement agreement was reached, but almost before the ink was dry, Thorpe filed bankruptcy in New York. Robot Wars thought he did so to thwart the settlement agreement.

Thereafter Robot Wars retained the San Francisco law firm, *Steefel Lewis & Weiss* to represent it in the bankruptcy – it also hired William Pascoe of *Pascoe & Rafton*, also a San Francisco firm. While the case was in bankruptcy, Robot Wars filed a new lawsuit against Thorpe. That led to discharge of the settlement agreement and contempt proceedings in bankruptcy court.

This round of litigation followed. It began, Steefel Lewis seeking the unpaid portion of its legal bills, representing \$493,053. [Robot Wars had already paid it millions.] Robot Wars counterclaimed that Steefel Lewis's representation was substandard – because of the advice to file the lawsuit, they faced contempt in bankruptcy court.

From the perspective of Robot Wars, it lost the value of the original agreement plus the millions in fees it had paid, all because the bankruptcy was bungled by Steefel Lewis. Robot Wars also filed a third-party claim against Pascoe and his firm. Pascoe chimed in and filed a counterclaim for his unpaid fee of \$103,121.

Steefel Lewis and Pascoe denied their legal representation was substandard. They blamed the poor decisions on Robot Wars itself and their New York counsel, *Duane Morris*. [The record does not reveal if Robot Wars made any claims against Duane Morris.] Robot Wars countered that the representation was a team process – both Pascoe and Steefel Lewis were on the team

and thus responsible.

Jury Instructions/Verdict: The verdict was for the plaintiff law firm on its contract claims against Robot Wars – Steefel Lewis took \$493,053 as claimed. The third-party Pascoe also prevailed and took the \$103,121 he sought.

The jury then went on to reject the legal negligence counterclaim regarding both Steefel Lewis and Pascoe. A consistent judgment reflected the mixed verdict.

Ed. Note - After the legal wrangling, Robot Wars, which aired in the U.S. from 1994 to 1997, was moved to Britain. It has since been very successful in the U.K. A rival program, *Battle Bots*, was started in the U.S.

BREACH OF CONTRACT

Colorado District - Denver

A fancy anti-trust lawyer wanted 15% of a \$142 million private stock deal -- the client thought the fee excessive, believing the initial \$500,000 retainer was more than adequate

Caption: *Alioto v. Hoiles*, 1:04-438

Plaintiff: Maxwell M. Blecher, John E. Andrews, Ian L. Saffer, *Blecher & Collins*, Los Angeles, CA and Scott Levin and Chad King, *Fisher Sweetbaum & Levin*, Denver, CO

Defense: E. Glen Johnson, Bart A. Rue and Frank P. Greenhaw, IV, *Kelly Hart & Hallman*, Fort Worth, TX and Kenneth B. Siegel, *Sherman & Howard*, Denver, CO

Verdict: \$1,150,000 for Alioto

Judge: Phillip S. Figa

Date: August 9, 2005

Facts: In the summer of 2001, Timothy Hoiles, a Colorado Springs businessman and heir to a media fortune, had a problem. While he and his wife owned 667,000 shares or 8.6 of the privately held Freedom Corporation, a company founded by his grandfather and including newspapers and televisions, they were relatively cash poor. To prevent sales, the value of the stock had been depressed to a value of \$20. This was far less than the market value.

Hoiles met with an attorney, Joseph Alioto, at Alioto's home in Diablo, CA on 8-4-01. A deal was struck. Alioto, an anti-trust lawyer, would represent Hoiles on a contingency basis, receiving 15% of the proceeds of any stock sale. It was Alioto's hope to force the company to buy shares at a market value -- he also took a non-refundable \$500,000 retainer from Hoiles.

Thereafter, Alioto, working with other lawyers, began to pressure Freedom Corporation to buy Hoiles's stock. By May of 2004, a deal was struck. The company would pay \$212 a share to anyone who wanted to tender. Hoiles cashed out and netted a cool \$142 million.

The harmony of the pay-off was interrupted by Alioto's demand for a 15% fee -- he wanted to be paid some \$20.3 million. Hoiles balked, believing that (1) Alioto's representation was substandard, (2) that the retainer more than compensated

him, and (3) that the company reached the deal on its own, the stock buy-back applying to all shareholders.

Hoiles first sued seeking declaratory relief. Alioto counterclaimed on his contract. In the most significant ruling at the trial court, Judge Figa threw out the contingency contract, finding it was contrary to Colorado law. While it might have passed muster in California, it failed in Colorado. That left Alioto with a simple claim for quantum meruit, seeking to be paid for the value of his work. Hoiles continued to deny that Alioto was owed another penny, noting the attorney never filed a lawsuit, only threatening. Moreover, Alioto didn't even bother to keep a record of his time. Alioto countered that he was the catalyst that made the deal happen.

Jury Instructions/Verdict: The key jury instruction asked if Alioto conferred a benefit to Hoiles and that it would be unjust for Hoiles to retain it without paying. The jury said yes and valued Alioto's fee at \$1.15 million. A judgment for \$650,000 was entered, representing a set-off for the \$500,000 retainer. Alioto has promised an appeal, the verdict representing a fraction of the twenty million dollars he had sought in this litigation.

Ed. Note - This case was actually styled *Hoiles v. Alioto*, Hoiles kicking off the litigation in a declaratory action. However for ease of exposition and representing the alignment of the issues at trial, we've reversed the order of the parties in this report.

WRONGFUL DEATH/POLICE SHOOTING

Connecticut District - New Haven

High on crack, a woman tried to run down a police officer -- the cop shot into her car and killed her

Caption: *Cooper v. Town of North Branford*, 3:00-52

Plaintiff: David N. Rosen, New Haven, CT

Defense: Thomas R. Gerarde and John J. Radshaw, III, *Howd & Ludorf*, Hartford, CT

Verdict: For plaintiff on liability (Damages not tried)

Judge: Robert N. Chatigny

Date: July 13, 2005

Facts: Michael Breen, a police officer for the Town of North Branford, was on patrol on the evening of 7-13-99. He made a traffic stop, pulling over a car driven by Steve Guerette. A passenger with Guerette was Victoria Cooper, age 41. Breen suspected Guerette had drugs.

Guerette must have suspected the same thing -- he exited his car and fled on foot. Breen gave chase. In this brief interval, Cooper slid into the driver's side seat. She started to drive away in the Camaro.

Breen was now standing in the middle of the road. As the Camaro came toward him, he fired one shot into the hood. It kept coming. Breen fired a second time as it passed him. The bullet penetrated the driver's side window and struck Cooper. She was fatally injured.

Her estate criticized the shooting and sued Breen and North

Branford. Plaintiff's proof developed that at the time she drove away, Breen was in the middle of the road -- she drove on the side of the road. Thus he was not in any real danger. This was especially so as to the fatal second shot that was discharged into the side of the car as Cooper drove by. A police training expert for the estate was James Fyffe, New York City.

Breen defended that he believed he was in danger and that he acted reasonably in shooting into the car. This was particularly so when drugs were suspected -- in fact, testing would later reveal that the decedent had been smoking crack. [The proof of Cooper's intoxication was excluded by the court.]

In terms of training, Breen also explained he followed it precisely -- that is, he was trained to always fire his weapon twice. Thus he fired the first shot into the approaching car and then consistent with his training, he fired a second shot as it passed. [The estate thought this explanation was nonsensical -- there was no reason to fire twice, when he could have just stepped out of the way.]

Injury: Death

Jury Instructions/Verdict: Procedurally, the case was first tried on two questions, liability and punitive damages. The result was mixed -- the jury found that Breen had an objective reasonable belief of danger. However it rejected a claim that he was unable to safely get out of the way.

The jury next went to punitive damages and elected to award nothing. Before a second trial on compensatory damages could be conducted, North Branford folded its cards and settled the case with the estate for \$1.5 million. [A bigwig at the North Branford police department was shocked by the settlement, suggesting the family should have gotten nothing.]

DISABILITY DISCRIMINATION

District of Columbia

A government lawyer with MS alleged her boss discriminated against her because of her disability, repeatedly asking for medical proof of what was an obvious ailment

Caption: *Bremer v. U.S. Dept. of Commerce*, 1:03-1338

Plaintiff: Joseph V. Kaplan, *Passman & Kaplan*, Washington, D.C.

Defense: Charlotte A. Abel and R. Craig Lawrence, *Assistant U.S. Attorneys*, Washington, D.C.

Verdict: \$3,000,000 for plaintiff

Judge: James Robertson

Date: August 10, 2005

Facts: Lisa Bremer, age 44 and a lawyer with the Department of Commerce, has suffered from multiple sclerosis since 1991. The disease has left her confined to a wheelchair. Through the 1990s, she performed her job with reasonable

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accommodations. That included flexible hours, telecommuting, the purchase of a scooter for her and a prime handicap spot. Bremer's primary responsibility was to respond to Freedom of Information (FOI) requests, work she frequently did at home.

The regime changed in February of 2002 when a new bigwig lawyer at Commerce, Claudia Nadig, began to supervise Bremer. Nadig wasn't quite sure what accommodations Bremer needed. She made repeated requests that Bremer provide updated medical information about her condition. When Bremer didn't promptly interact in the accommodation process, Nadig withdrew existing accommodations. From Nadig's perspective, she could not make accommodations without information. That included taking her off FOI requests, work that could be performed at home, and transferring her to work that required Bremer to physically be in the office.

Bremer thought something else was at play -- she believed Nadig had engaged in disability discrimination in violation of the Rehabilitation Act. Particularly, she thought it was silly that Nadig kept asking for medical records -- it was patently obvious that the wheelchair-confined Bremer was disabled. Then after Bremer made an EEOC complaint, retaliation followed. In this lawsuit, Bremer advanced two theories to trial, (1) disability discrimination and (2) retaliation. Nadig and Commerce denied everything.

Jury Instructions/Verdict: The verdict was mixed, but ultimately for Bremer. She prevailed on the disability discrimination count, while the verdict was for the government on retaliation. To damages, Bremer took a general award of \$3,500,000. [It is believed this verdict will be limited by statute to \$300,000.]

Ed. Note - Nadig's management skills have since earned her a promotion. She is now the general counsel to the National Endowment for the Arts. Bremer retired in 2003.

NEGLIGENT JAIL SECURITY

Florida Middle District - Ft. Myers

A psychiatrist, conducting a mental exam of a kidnaping suspect, was strangled by the suspect in an interview room in the county jail

Caption: *Hoyer v. Collier County Sheriff*, 2:04-211

Plaintiff: David M. Gaspari and W. Hampton Keen, *Lytal Reiter Clark Fountain & Williams*, West Palm Beach, FL

Defense: Bruce W. Jolly, *Purdy Jolly & Guiffreda*, Fort Lauderdale, FL

Verdict: \$2,650,260 for plaintiff less 50% comparative fault

Judge: John E. Steele

Date: May 10, 2005

Facts: On 1-3-01, Rodney Patton was a pre-trial detainee at the Collier County Jail -- it is operated by the local sheriff, Don Hunter. Patton faced kidnaping and robbery charges. While in jail, Patton acted bizarrely, fighting with other inmates and threatening suicide.

A psychiatrist with significant experience evaluating criminal defendants, Dr. David Hoyes, age 60, came to the jail to perform a mental examination of Patton. Before the exam, he was warned by another psychiatrist of Patton's exceptionally violent history.

Despite that history, Hoyes met with Patton in a small interview room. Patton was not handcuffed, shackled or otherwise restrained. No jail staff were present, the room essentially being unmonitored in any way.

The interview went poorly and Patton manually strangled Hoyes to death. Patton was later discovered walking unescorted around the jail -- Hoyes's body was found soon after. Patton was later convicted of murder.

Hoyes's estate (acting through his wife, Rae), sued the sheriff and alleged both negligence and a civil rights claim. [Only the negligence claim advanced to trial.] The estate asserted a combination of errors led to Hoyes's death including, (1) the failure to provide Hoyes's any training, (2) the lack of a panic button or alarm, (3) Patton's unrestrained and unwatched status, and (4) failing to classify Patton as high-risk, something that would have triggered additional protections.

The sheriff defended the case and denied fault. It instead blamed Hoyes's death on two things, (1) the unforeseeable murder by Patton, and (2) Patton's own poor decision to enter the interview room alone with a patient that had a violent history.

Injury: Death (Manual Strangulation)

Experts:
Plaintiff Randall Atlas, Jail Architect, Miami, FL

Jury Instructions/Verdict: The jury's verdict in Fort Meyers was mixed, finding both Hoyer and the sheriff negligent. That fault was then assessed equally to the parties. Moving to damages, the estate took a total of \$2,650,260. The award

included \$2,000,000 for his wife's consortium interest. A judgment was later entered for the estate in the sum of \$200,000, representing two claims times the \$100,000 state limit on municipal claims.

PRODUCTS LIABILITY

Florida Middle District - Orlando

The crash of a military transport plane was blamed on a manufacturing defect – the crash killed eighteen National Guardsmen, this lawsuit representing the first test case of the class to go to trial

Caption: *Richardson v. Bombardier et al*, 8:03-539

Plaintiff: Susan Tarbe, Lewis S. Eidson, Jr., Dean Colson and Maureen E. Lefebvre, *Colson Hicks Eidson*, Coral Gables, FL
Raymond P. Johnson, *Law Offices of Raymond Johnson*, Los Angeles, CA

Defense: Ron A. Sprague, *Gendry & Sprague*, San Antonio, TX and Francis A. Anania and Don Blackwell, *Anania Bandklayder Blackwell Baumgarten & Torricella*, Miami, FL and Robert E. Banker and Charles Wachter, *Fowler White Boggs & Banker*, Tampa, FL

Verdict: Defense verdict on liability

Judge: Gregory A. Presnell

Date: August 2, 2005

Facts: There was a tragic airplane crash on 3-3-01 near rural Unadilla, GA. The plane, a C-23B+, carried eighteen National Guardsman from Hulbert Field in Florida. It was returning the men, a part of the Red Horse Squadron, to their home in Virginia. All on board were killed, including Butch Richardson, age 48.

This case involved a class of thirteen plaintiffs that were on the plane. By agreement, Richardson was selected as the test plaintiff. His case would come to trial first. Five other plaintiffs settled their claims against assorted defendants for sums ranging from \$1.05 million to \$3.75 million.

The claim of the Richardson estate targeted several defendants. They included the plane's manufacturer, Bombardier and its subsidiary, Short Brothers. Also sued was Rockwell Collins which manufactured the Auto-Pilot and weather systems on the plane. The final defendant was Duncan Aviation, which maintained the C-23B+.

The liability theory was complex. Plaintiff developed the plane took off without incident – two experienced pilots were at the helm. Climbing to 9,000 feet, they came too close to a thunderstorm, in part because the weather system on the plane malfunctioned. The storm caused the plane to pitch up – the Auto-Pilot then acted to correct the pitch. However it did so without the pilots knowing it – they too tried to correct the pitch and essentially the pilots and the Auto-Pilot were working against each other. A cable jammed and the plane went out of control – as it dove, it exceeded its maximum speed and broke up.

Bombardier and Short Brothers were implicated in the

construction of the plane, plaintiff noting it was constructed from an outdated civilian DC-3 at a chop shop in West Virginia. A defect was alleged in the manufacture of an elevator mount. Rockwell Collins was implicated regarding the allegedly defective weather system and Auto-Pilot. Rockwell Collins prevailed at trial by a directed verdict. [This significantly neutered plaintiff's claim as the key complaint focused on the Auto-Pilot.] The final claim against Duncan Aviation regarding negligent maintenance was settled in trial.

The only defendant to face the jury, Bombardier and its subsidiary Short Brothers, had a simple explanation for the crash and it had nothing to do with the plane. Instead, it was loaded with too much luggage. Instead of limiting the passengers to just 40 pounds each, they were allowed to bring on board 60 pounds. This caused the plane to have an unstable weight – when it hit turbulence, the plane went out of control.

Injury: Death (Airplane Crash)

Jury Instructions/Verdict: The jury's verdict was for Bombardier and Short Brothers on liability. That finding ended the deliberations with no award of damages.

Post-Trial Motions: Plaintiff has moved for a new trial citing numerous errors, including, (1) excluding the primary theory regarding the autopilot defect, (2) telling the jury that Rockwell prevailed by directed verdict, giving the jury the impression the overall claim was frivolous, and (3) improper remarks by the Judge that undercut the case. For instance, as the wife of a victim cried in the back of the courtroom, Judge Presnell threatened to throw attorney Tarbe in jail if the woman didn't cease her grief. The court had reasoned that the woman should have been over the grief, the crash having occurred four years earlier. When reviewed by the FedJVR, the motion was pending.

PRODUCTS LIABILITY

Georgia Northern District - Rome

Plaintiff was killed when he was run over by an all-wheel drive forklift – the estate blamed the forklift's failure to have larger mirrors to permit a larger field of vision

Caption: *Custer v. Terex*, 4:02-38

Plaintiff: Peter C. Ensign, *Ensign & Bowe*, Chattanooga, TN

Defense: Ben L. Weinberg, Jr., *Weinberg Wheeler Hudgins Gunn & Dial*, Atlanta, GA

Verdict: \$150,000 for plaintiff

Judge: Harold L. Murphy

Date: June 3, 2005

Facts: On 5-29-01, James Custer was working for an Alberci, Inc – on this date, Alberci had a contract to do a construction project at Georgia Power Plant facility in Cartersville, GA. Before the project could start, steel had to first be unloaded. To accomplish this task, an Alberci employee

utilized a Terex Corporation manufactured forklift. It was a Square Shooter telescopic model with all-wheel drive.

It was Custer's job to assist in guiding the steel off the forklift. As the men worked, the driver of the forklift lost sight of Custer. He would next see him when he heard a bump – he looked down and saw that he had run over Custer. Custer was rushed to a hospital, but died of his trauma injuries several hours later.

His estate sued Terex and alleged a product defect with the forklift. Particularly, the mirror inside the forklift was inadequate to compensate for the limited field of vision. This was especially true as this model forklift had arms that spread out 36 feet when extended – when retracted, the field of vision is especially limited.

The problem was further complicated by the all-wheel design of the forklift. Because the forklift was extremely mobile and had a short turning radius, it was especially important to have the best possible field of vision. Custer's proof was that a larger mirror was feasible and could be installed for \$30. That Terex should anticipate the problem, the estate noted a history of prior injury incidents. At trial, three counts went to the jury, (1) strict liability, (2) negligence and (3) failure to warn.

Terex defended and denied there was any defect in the forklift. Instead it characterized the hazard as open and obvious. In this respect, plaintiff was implicated for failing to exercise ordinary care for his own safety. [Under Georgia law, if Custer was more than 50% at fault, damages would be precluded.]

Injury: Death

Experts:

Plaintiff Richard Pearson, Human Factors, Atlanta, GA
James Sparks, Engineer, Cantonment, FL

Defense Richard Brooks, Engineer, Chassell, MI

Jury Instructions/Verdict: The verdict was mixed. Custer prevailed on negligence, while it was for Terex on strict liability and failure to warn. Then to damages, the estate took medicals of \$973 and the funeral bill of \$2,333. Pain and suffering was \$36,748. In a final category called "damages to the life of the deceased", the estate took \$109,944. All the odd numbers added up to \$150,000.

Post-Trial Motions: Terex moved for a new trial and argued that the jury had clearly found plaintiff more than 50% at fault. [That would be fatal to the claim in Georgia.] Terex theorized that it must have decided that he was 70% to blame – its evidence was the amount of the special damages. For both the funeral bill and medicals, the estate took exactly 30% of the claimed amount. Custer opposed the motion and explained the jury was properly instructed as to the 50% rule and that Terex's bare speculation was insufficient to set aside the verdict.

Judge Murphy was persuaded by the motion and agreed that there was only way to reconcile the verdict – that the jury found Custer 70% at fault. The JNOV was granted and the case

dismissed. Custer has appealed.

CIVIL RIGHTS - FIRST AMENDMENT

Hawaii District - Honolulu

A city worker was ostracized when he complained that lead paint and asbestos were unsafely stored in an arena

Caption: *Sun v. City and County of Honolulu*, 00-397

Plaintiff: Venetia Carpenter-Asui, Honolulu, HI

Defense: Marie Gavigan, *Office of Corporation Counsel*, Honolulu, HI

Verdict: \$1,500,000 for plaintiff

Judge: Barry M. Kurren (Magistrate)

Date: August 5, 2005

Facts: Tom Sun began working in 1987 as a painter for the City and County of Honolulu in the Department of Enterprise Services. Beginning in 1997, Sun made complaints about public health violations at Blaisdell Arena. Particularly, he alleged lead paint and asbestos were improperly stored. Workers were also required to work with inadequate training and safety equipment. Sun was concerned not just for employees, but also the general public that visited the arena.

Thereafter, Sun alleged Honolulu engaged in a pattern of retaliation. His bosses wrote him up for phony violations, Honolulu essentially ostracizing him from his co-workers. At no time was he fired or suspended -- instead it was asserted his employer made his life difficult. That included denying him medical leave when he became sick from exposure to the very chemicals that formed the basis of his complaints.

Sun sued in federal court and alleged both First Amendment and state law claims as a whistleblower. Honolulu defended the case and denied any retaliation. Originally it prevailed by summary judgment -- reversed on appeal, the matter came back to trial in August of 2005.

Jury Instructions/Verdict: Sun prevailed on both a First Amendment retaliation claim, as well as a count predicated on the Hawaii Constitution. He was then awarded \$1.5 million in general damages. A consistent judgment followed.

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SEXUAL HARASSMENT*Illinois Northern District - Chicago*

Three female employees at a food service company alleged they were sexually harassed by their boss – he admitted he was abrasive, but denied sex had anything to do with it

Caption: *Farina et al v. Ciccone Food Products*, 1:04-2383

Plaintiff: Dennis H. Stefanowicz, Jr., *Holman & Stefanowicz*, Chicago, IL

Defense: David G. Duggan, Jr., Chicago, IL

Verdict: \$35,000 for plaintiffs

Judge: Harold L. Murphy

Date: August 29, 2005

Facts: Sal Ciccone operates a business in Addington, IL known as Ciccone Food Products. By his own admission, Ciccone was something of a task master – to motivate his employees, Ciccone would yell at them. He would explain this was just part of running a business.

Three female employees who worked in the office saw it differently. They were Kathy Farina, Rosanna Gelardi and Addolorata Cupola. While each had a slightly different set of facts supporting their case, they were all fundamentally the same – that is, Ciccone constantly screamed at the women. His favorites included advising that, “You are fucking stupid.” Ciccone would also tell the women that they were stupid bitches. One plaintiff, Cupola, who speaks fluent Italian, also indicated that Ciccone cursed at her in Italian. [Ciccone admitted yelling, but denied cursing.]

Even more sinister, the three plaintiffs alleged the yelling not only represented gender discrimination, it also had a tinge of sexual harassment. They recalled that Ciccone and the company’s general manager, Joe Minerva, made constant requests for sex. This was denied.

In this federal action, the Ciccone Three alleged both gender discrimination and sexual harassment. If prevailing, they sought compensatory and punitive damages. Ciccone defended as above and denied everything except the yelling. His attorney postured that the federal courts were not the vocabulary policemen of the workplace.

Jury Instructions/Verdict: The verdict was mixed. The plaintiffs prevailed on sexual harassment, while the gender-based claim was rejected. Farina took \$5,000, while Gelardi and Cupola both took \$15,000. Punitives were rejected. The verdict against Ciccone Food Products totaled \$35,000.

PRODUCTS LIABILITY*Illinois Southern District - East St. Louis*

While cleaning an electrical transformer, plaintiff alleged she suffered permanent respiratory problems secondary to an exposure to PCBs that insulated the transformer

Caption: *Krutsinger v. Pharmacia Corporation*, 3:03-111

Plaintiff: Randi L. Gori, *Goldenberg Miller Heller & Antognli*, Edwardsville, IL

Defense: Kenneth R. Heineman, Joseph C. Orlet and Ron Hobbs, *Husch & Eppenberger*, St. Louis, MO

Verdict: Defense verdict on liability

Judge: Michael J. Reagan

Date: July 19, 2005

Facts: On 3-19-01, Cheryl Krutsinger, then age 41, was working as an electrician apprentice for Illinois Power Company in Vermillion, IL. Her task that day was to replace bushing on a transformer. The bushing contained polychlorinated biphenyls (PCBs), which acted to insulate the transformer.

Following the first day on this job, Krutsinger complained her head was itching. By the third day, her symptoms were so bad that she was taken to the ER. Testing revealed PCBs were in her fatty tissue. She has since complained of broad health problems implicating respiration, memory loss and cognitive function.

In this diversity lawsuit, Krutsinger sued Pharmacia Corporation, the purported manufacturer of the PCBs used in this transformer. While not certain when supplied in this case (the transformer was made in 1977), plaintiff’s proof developed that Pharmacia had been a bulk supplier of PCBs since 1929. Krutsinger’s liability theory alleged the dangerous PCBs were negligently designed.

Pharmacia defended on several fronts. It first argued there was no proof it was the manufacturer of these PCBs, that a standard of care actually existed or that it was breached. The sophisticated user defense was also raised, Pharmacia explaining it sold the PCBs in bulk, relying then on sophisticated end-users to provide for their safe use. Pharmacia finally argued that Krutsinger’s exposure was inadequate to cause injury.

Injury: PCB exposure affecting respiration, memory and cognitive function

Experts:
Plaintiff Gary Ordog, Toxicology, Santa Clarita, CA

Jury Instructions/Verdict: The verdict was for Pharmacia and Krutsinger took nothing.

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PRODUCTS LIABILITY

Indiana Southern District - Indianapolis

Plaintiff was left paralyzed when her 1998 Kia Sportage hit a patch of ice and rolled over twice -- the liability theory criticized the vehicle's roof strength

Caption: *Flis v. Kia Motors*, 1:03-1567

Plaintiff: Robert M.N. Palmer and Joby J. Raines, *Law Offices of Robert Palmer*, Springfield, MO and Timothy J. Kennedy, *Miller Muller Mendelson & Kennedy*, Indianapolis, IN

Defense: Kevin C. Schiferl and Robert B. Thornburg, *Locke Reynolds*, Indianapolis, IN and David R. Kelly and Nathan H. Bjerke, *Bowman & Brooke*, Minneapolis, MN

Verdict: Defense verdict on liability

Judge: John D. Tinder

Date: June 15, 2005

Facts: On 2-8-02, Jane Flis, age 44 and a caterer, was driving on northbound I-65 in a 1998 Kia Sportage. The Kia hit a patch of ice and fish-tailed as it slid into the median. As it rotated, the tires furrowed into the grass -- this caused the Kia to roll-over twice. The roof above Flis's seat was crushed.

Flis sued Kia and alleged a design defect, focusing on weakness in the roof structure. Had the roof remained intact, she would have walked away from the crash. Flis suggested the Subaru Forrester represented a safer alternative design.

Kia defended and denied there was any defect. It blamed Flis's injuries on this very serious roll-over crash. That is, in a roll-over, it is not the roof crush that causes injury, but instead the physics of the plaintiff moving as the vehicle rolls.

Injury: Catastrophic neck injury at C-7 level. Plaintiff is a quadriplegic confined to a wheelchair. She has limited use of her hands, but no bladder or bowel control. Flis also has a permanent tracheotomy. [Her husband also presented a consortium claim.]

Flis's life care plan was estimated at \$322,000 a year. Her vocational loss was \$878,000.

Experts:

Plaintiff Steve Syson, Design, Goleta, CA
Martha Bidez, Biomedical, Birmingham, AL
Robert Voogt, Life Care, Virginia Beach, VA
Brent Jaffee, Economist, Indianapolis, IN

Defense Gary Bahling, Design, Metamora, MI
Thomas McNish, Biomechanics, San Antonio, TX
Geoff Germane, Accident Reconstruction, Ogden, UT

Jury Instructions/Verdict: The verdict was for Kia on liability after ninety minutes of deliberations. Plaintiff's duties and damages were not reached.

Post-Trial Motions: Flis has moved for a new trial arguing juror misconduct. Just as the trial ended, the court permitted counsel to speak with jurors. Plaintiff's counsel overheard the

foreman advise attorney Schiferl for Kia that he'd worked in the industry for forty years defending these kinds of lawsuits. Based on this statement, Flis believed she was deprived of a fair trial.

Kia has opposed the motion and argued (1) the juror never said any such thing and (2) it was agreed in any event that any remarks from jurors could not form the basis of a post-trial challenge.

Flis has also challenged the instructions citing a state law issue -- it is her position that it was error to instruct the jury that there was a rebuttable presumption that the Kia was safe because it complied with federal standards. Flis relied on *Schultz v. Ford Motor Company*, 822 N.E.2d (Ind. App. 2005), a recently decided case that concluded that just such an instruction represented reversible error.

All motions were pending at presstime.

NATIONAL ORIGIN/RELIGIOUS DISCRIMINATION

Iowa Southern District - Des Moines

A Muslim state road designer alleged he suffered a hostile environment and was ultimately fired because of his origin and religious beliefs -- he remembered a supervisor asking him where they parked camels in the Middle East

Caption: *Fattahi v. Iowa Department of Transportation*, 4:03-10215

Plaintiff: Pamela J. Walker, Sherinian & Walker, *West Des Moines*, IA and Beth Townsend and Tom Newkirk, *Fiedler Townsend & Newkirk*, Johnston, IA

Defense: Mark Hunacek, *Assistant Attorney General*, Ames, IA

Verdict: \$231,783 for plaintiff

Judge: Ronald E. Longstaff

Date: July 14, 2005

Facts: Farrokh Fattahi, a Muslim and a native of Iran, started working in 1980 for the Iowa Department of Transportation (DOT) as a roadway architect. His employment was uneventful until 1991 when he was assigned to a new supervisor, Lee Hammer. Fattahi, who had a good performance record, suddenly began receiving bad reviews. He was also subjected to excessive discipline.

Beyond the increased scrutiny, Hammer also made remarks about Fattahi's background. Fattahi recalled he was asked about traffic in Iran: Where do they park the camels? Hammer also referred to him as towel head and camel jockey.

Things came to a head in February of 2002 when Fattahi was fired. The DOT explained that Fattahi was let go because of excessive tardiness. Then following the firing, it searched his desk and found a copy of a Playboy magazine -- thus had it known of the magazine, it would have still fired him.

Fattahi thought something else was at work, the DOT illegally discriminating against him on the basis of his national origin and religion. The theory asserted the bigoted bigwigs at DOT fired him not because of performance, but instead so that an American could keep his job. DOT defended and again cited performance.

Then to the alleged insensitive remarks, they were characterized as isolated, sporadic and innocuous.

Jury Instructions/Verdict: Fattahi prevailed on both national origin and religious discrimination counts. The jury further rejected an exculpatory instruction that asked if Iowa would have fired Fattahi in any event. Then to damages, plaintiff took \$173,783 in lost wages plus \$58,000 more for emotional distress. The verdict totaled \$231,783.

GENDER DISCRIMINATION

Kansas District - Kansas City

From the seventh to the eleventh grade, a boy had to deal with persistent taunting and harassment by classmates that he was gay -- he wasn't and the harassment got so bad, he was forced to drop out of school

Caption: *Theno v. Tongonxie School District*, 2:04-2195

Plaintiff: Arthur A. Benson, II and Jamie K. Lansford, *Benson & Associates*, Kansas City, MO

Defense: J. Steven Pigg and David R. Cooper, *Fisher Patterson Saylor & Smith*, Topeka, KS

Verdict: \$250,000 for plaintiff

Judge: John W. Lungstrum

Date: August 11, 2005

Facts: In 1999, Dylan Theno, entered the seventh grade at the Tongonxie Middle School. Almost immediately, a rumor began to circulate at school that Theno is gay. [He is not.] The rumor spread viciously and throughout the year, he suffered numerous slurs. It all began with an allegation that Theno had masturbated in the bathroom -- thereafter at Tongonxie, he was known pejoratively as the Jack-Off Kid.

When alerted to the harassment, Tongonxie officials did intervene and several students were disciplined. Despite the remedial measures, the harassment followed Theno from middle school to Tongonxie High. At one point in a basketball game, he missed a shot and another child on the team remarked, "Way to go queer."

All matter of juvenile taunts continued to plague Theno -- his locker was attacked and he was slandered on the blackboard. By the fall of his eleventh grade year, it had become almost unbearable. Bigwigs at the high school decided to nip the problem in the bud.

In every homeroom in school an edict came from above -- no student would be permitted to utter the words "gay" or "fag." This the school administrators believed, would solve the matter once and for all.

They were wrong. Every kid in the school knew exactly what the edict was about. The harassment went from bad to worse and within a few days, Theno dropped out of school. He later got a GED. In valuing his damages, his parents portrayed him as an active boy when he entered school in 7th grade -- he enjoyed sports and had friends. By the eleventh grade, he was a shell of himself who quivered and shook.

Theno sued the Tongonxie School District and alleged school

officials were indifferent to the gender-based harassment that he suffered. While they attempted to intervene, they were so inept that they only made things worse. Instead of the prohibition on speech, it was argued the school should have contacted parents, meted out suspensions and had the faculty work together to deal with the problem.

Tongonxie School District defended the case and focused on two points, (1) the harassment was not gender-based, and (2) it wasn't severe or pervasive. Attorney Pigg argued in closing that while the name-calling was crude and mean, it was part of what seventh graders do. Moreover, when school officials learned of harassment, they did their best to take corrective action.

Experts:

Plaintiff Edward Dragan, Education Standards, Lambertsville, NJ

Defense Mary Devin, Education Standards, Manhattan, KS

Jury Instructions/Verdict: To prevail, Theno had to navigate a four-part jury instruction that asked: (1) was he harassed because of his gender, (2) was it severe and pervasive, (3) did it deprive him of an educational benefit and (4) did the school system act with deliberate indifference. The answer was yes to all four questions and Theno took a general award of \$250,000. [The jury deliberated for twelve hours.]

PRODUCTS LIABILITY

Kentucky Eastern District - Lexington

A woman's Sony television spontaneously combusted -- she was badly burned when overcome by smoke

Caption: *Dotson v. Sony Corporation*, 7:02-35

Plaintiff: Sandra Spurgeon, *Spurgeon & Tinker*, Paintsville, KY and Steven G. Cochran and James W. Gladstone, *Womble Carlyle Sandridge & Rice*, Washington, DC

Defense: Richard McGary, *Vial Hamilton Koch & Knox*, Dallas, TX and David C. Stratton, *Hogg Stratton & Maddox*, Pikeville

Verdict: \$2,102,221 for plaintiff

Judge: David Bunning

Date: June 20, 2005

Facts: 1-27-01 was a regular morning for Lois Dotson, age 68. At her home in McCarr, she was making breakfast -- she was watching her 25 inch Sony television. She bought it new in 1999 at a Goody's in South Williamson. Suddenly Dotson heard her television began to pop and crack.

She came closer to investigate. Dotson now saw that a blue cloud-like flame encircled the television. Quickly she went for a fire extinguisher. She sprayed it, but it was nearly empty.

As smoke filled the home, Dotson went for a second fire extinguisher. She just had time to get it and return to the television before she was overcome by smoke. Dotson remembered nothing else of the television's spontaneous

combustion.

Nearby workers rescued Dotson from the fire, but not before she suffered serious injuries. They included second and third-degree burns to 9% of her body. Her face, neck and chest, as well as her hands, were all affected. Despite a lengthy rehabilitation and several skin graft surgeries, Dotson has been left with scarring and pain. Dotson has also suffered from emotional injuries secondary to this fire.

Most dramatically affecting Dotson was that the fire has left her with no use of her hands. Her injuries have been complicated by the fact that at the time of the fire, she was an insulin-dependent diabetic. Her medical bills were over \$100,000 and she sought sums for future care and suffering.

Appropriate medical proof of her injury was produced at trial.

Dotson sued Sony and alleged a defect in the television. It would never be known to her exactly what that defect was as the fire destroyed the television. Plaintiff's engineer experts, Jeffrey by the process of elimination, focused the origin of the fire on the television.

In so doing, they excluded an attached VCR and a nearby sewing machine. Plaintiff's proof noted that (1) the sewing machine wasn't plugged in, and (2) the tape track in the VCR was undamaged, something that would be unlikely if the fire started in it.

Sony defended the case and denied there was any defect in its television. It noted in that regard that as the television was destroyed, there was no way to blame it with certainty. In fact, plaintiff's proof didn't even identify any particular defect with it -- instead it simply blamed Sony by exclusion. This was inadequate, the defendant thought, to form the basis of a products lawsuit.

Beyond exculpating its television, Sony also blamed a culprit. Its key expert, Donald Huffman, Warren, MI, thought a wall receptacle was the mostly likely fire source. While Huffman explained there was no evidence to link the fire to the TV, he could not rule out the attached VCR and other appliances in the house including a space heater.

Injury: 2nd and 3rd degree burns to 9% of the body; Loss of use of hands.

Experts:
Plaintiff Jeffrey Ketcham, Engineer
Lawrence Schneider, Engineer

Defense Donald Huffman, Engineer, Warren, MI

Jury Instructions/Verdict: Tried for a week in Pikeville, the verdict was for Dotson on liability. She then took \$102,221 in past medicals, another \$500,000 in the future. Her past and future suffering was valued at \$1.5 million. The verdict totaled \$2,102,221 and a consistent judgment followed.

Post-Trial Motions: Sony has since moved for a new trial and cited among other things, (1) the failure to grant a mistrial when

a potential juror in voir dire blurted out that she had problems with her Sony DVD, (2) a repeat of *Daubert* challenges to plaintiff's experts, and (3) that the damages were shocking. On the last count, Sony noted Dotson was only burned on 9% of her body. Dotson has replied to the motion that Sony had "remarkable temerity" in suggesting the verdict was excessive.

TRAIN DERAILMENT

Louisiana Eastern District - New Orleans

Plaintiff was injured when an Amtrak train derailed, the crash aggravating an already fragile spine -- in this action, plaintiff targeted the railroad that maintained the tracks

Caption: *Lapapa v. Illinois Central Railroad*, 2:04-1241

Plaintiff: David W. Oestricher, II, New Orleans, LA

Defense: Rachele D. Dick, Forester Jordan & Dick, Baton Rouge, LA

Verdict: \$5,577 for plaintiff

Judge: Kurt D. Engelhardt

Date: July 19, 2005

Facts: On 4-6-04, Mark Lopez, age 42, was a passenger on the Amtrak train known as the City of New Orleans. The route was from New Orleans to Chicago. As the train passed through Flora, MS at 78 mph, it navigated tracks operated by National Railroad Passenger Corporation.

Due to a track defect, the train derailed. Lopez's train car flipped. He was able to crawl through the carnage to exit the train. One passenger on the train was killed and nearly fifty others were injured.

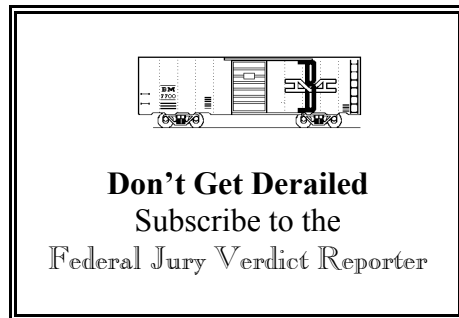
Lapapa has since treated for two distinct injuries, (1) the aggravation of a prior lumbar condition, and (2) post-traumatic stress disorder. Lapapa had a history of several prior lumbar surgeries, including a fusion. Regarding the emotional injury, his psychiatrist testified the derailment has left him "discombobulated."

Lapapa sued National Railroad in this lawsuit, citing its failure to maintain the tracks. That winter, a replacement part had been placed where the track had shrunk -- in the April heat several months later, the track expanded and then buckled. National Railroad conceded fault and defended the case on damages. [Amtrak's care was not implicated in this accident.]

Injury: Aggravated Prior Lumbar Condition
Post-Traumatic Stress Disorder

Jury Instructions/Verdict: As National Railroad conceded fault, the jury only considered damages. It awarded Lapapa a total of \$5,577, including \$3,000 for pain and suffering.

Post-Trial Motions: Lapapa has moved to set aside the verdict, arguing the verdict was "patently inadequate." The motion is pending.



EMPLOYMENT RETALIATION - FIRST AMENDMENT

Maine District - Bangor

A long-time history teacher alleged he faced retaliation when ordered not to teach ancient history -- the order came after a Christian fundamentalist complained his teaching methods contradicted her Biblical worldview

Caption: *Cole v. Maine School Administrative District 1*, 1:03-205

Plaintiff: Arthur J. Greif and Julie Farr, *Gilbert & Greif*, Bangor, ME

Defense: Melissa A. Hewey and Peter C. Felmly, *Drummond Woodsom & MacMahon*, Portland, ME

Verdict: Defense verdict on liability

Judge: Margaret J. Kravchuk

Date: August 25, 2005

Facts: Gary Cole, age 61, started teaching in Maine in 1969. By 1997, he was assigned to Skyway Middle where he taught history and social studies -- Skyway is on Presque Island and is operated by the Maine School Administrative District 1 (SAD-1). Particularly, Cole focused in classes on ancient history including both eastern and western civilizations. He also noted the presence of Cro-Magnon man some 40,000 years ago.

His teaching methods drew the ire of a certain Christian fundamentalist. She angrily confronted Cole at an open house -- she apparently disliked that her children were taught about any history that was older than that provided in Genesis. From her perspective, there was no history before Adam and Eve. [This parent is the granddaughter of a locally prominent fundamentalist preacher, Rev. Blackstone.]

At virtually the same time the parent complained, SAD-1 elected to go in a new direction in its curricula. Cole was ordered to stop teaching ancient eastern history. The purported reason was that this material would be covered in high school. Particularly, a high school history teacher complained that Cole-educated students already knew the material when they entered her class -- students from another middle school by contrast, were blissfully ignorant and easier to teach.

Cole thought the order put him in a pickle. He strongly believed in teaching ancient history and thus to continue doing so, he faced discipline. It was that ongoing threat of discipline that formed the basis of his First Amendment claim. Namely, while still teaching at SAD-1, he does so with a dilemma, (1) teach the truth and face consequences or (2) censor history and his speech.

SAD-1 denied any retaliation and even if there was, it explained this was because Cole resisted the teaching edict. SAD-1 further denied that the fundamentalist complaints motivated the curriculum change, instead citing the high school problem noted above. Rather than a case of academic freedom as Cole postured, SAD-1 countered that teachers do not get to decide their own curriculums.

Jury Instructions/Verdict: The verdict was mixed. While the jury found that SAD-1 retaliated against Cole because of his

exercise of First Amendment rights, it went on to find that the SAD-1 would have acted the same way regardless of the speech. Having so found, Cole took nothing.

GENDER DISCRIMINATION

Maryland District - Baltimore

A male vice-president at a state university alleged the female president forced him out so that he could be replaced by a woman -- while the jury believed gender discrimination was proved, the jury was confused and further believed gender had to be the sole reason for the firing (beyond gender, it believed cronyism motivated the decision)

Caption: *Mollica v. Salisbury University*, 1:04-1542

Plaintiff: Suzanne M. Tsintolas, *Law Office of Suzanne Tsintolas*, Rockville, MD

Defense: Anne L. Donahue, *Assistant Attorney General*, Baltimore, MD

Verdict: Defense verdict on liability

Judge: James K. Bredar (Magistrate)

Date: July 29, 2005

Facts: Albert Mollica was hired in June of 2001 to run the foundation at Salisbury University as a vice-president, a state university in Maryland -- he was recruited from Cabrini College in Radnor, PA. From Radnor, Mollica relocated to Lewes, DE, some forty miles away from Salisbury. Mollica did well at Salisbury and received good evaluations.

Things changed in the summer of 2003. At that time, Salisbury's president, Janet Dudley-Esbach, offered a position to a long-time friend, Rosemary Thomas. [Thomas and Dudley-Esbach had previously worked together at another college.] The job was subordinate to Mollica. Thomas passed.

Three weeks later, Dudley-Esbach fired Mollica. She did so without consulting the Salisbury board. Her reasons for the firing were related to (1) residency issues, Mollica living so far away, and (2) poor performance, including difficulty interacting with potential donors. Dudley-Esbach then hired Thomas to fill the spot.

Mollica believed he was a victim of gender discrimination and he filed this lawsuit. His theory was simple -- Dudley-Esbach wanted her female friend, Thomas, to fill the foundation spot and to accomplish this, she simply forced Mollica out. Salisbury defended the case as above, denying gender played any role and instead focusing on performance issues. The defense thought it was nonsensical that Dudley-Esbach would initially hire a man for the spot if it was her plan to later replace him with a woman.

Jury Instructions/Verdict: As the jury deliberated the case, it asked the court: Must plaintiff prove gender discrimination is the sole reason for the firing? The court replied it was gender, this not being a mixed-motive case.

Back with a verdict, the jury found that Mollica was qualified for the position, rejecting the university's reasons for the firing, but further that gender discrimination was not the sole reason for

his firing. That ended the deliberations and Mollica took nothing.

According to published reports, the jury foreman explained the jury dealt with the problem that instructions required that gender had to be “the only” factor and not “a” factor.

Post-Trial Motions: Mollica has moved for a new trial citing the inconsistent verdict -- that is the jury believed gender discrimination was proved, but still rejected the claim because of its confusion that gender had to be the sole reason. The jury believed that both cronyism and gender were the factors and thus concluded gender wasn't the sole factor, when at trial, there was no evidence of cronyism. The motion was pending when reviewed by the FedJVR.

SKI NEGLIGENCE

Massachusetts District - Boston

A model-wannabe sustained serious injuries in a skiing accident -- she blamed a teenage skier for failing to yield to her

Caption: *Taylor v. Lowry*, 1:03-11296

Plaintiff: Evan Slavitt and Tish Bernard, *Bodoff & Slavitt*, Boston, MA

Defense: Lawrence J. Kenney, Jr., *Sloane & Walsh*, Boston, MA

Verdict: Defense verdict on damages

Judge: Robert B. Colings (Magistrate)

Date: June 29, 2005

Facts: On 1-27-03, Sarah Walker, then age 23 and an expert skier, was descending a slope at Loon Mountain in New Hampshire. She just came off a jump where her trail intersected another. At the same time, Megan Lowry, then age 14, was crossing Walker's trail. Walker crashed hard into Lowry at top speed. [Lowry was knocked out by the impact and remembered nothing of it.]

Walker took the worst of it. She broke her knee cap and suffered a devastating facial cut, as well as a concussion. These injuries especially affected Walker who then had just signed a modeling contract. The combination of the injuries ended that dream.

In this diversity lawsuit, Walker sued Lowry and her parents, blaming the teenager for failing to yield. Lowry defended and blamed (1) Walker's excessive and reckless speed and (2) that fact that Walker had left the ground, essentially losing control. Walker countered that while she was going fast, speed is permissible and safe on the trail so long as other skiers yield when they should.

Injury: Fractured patella; Fractured teeth; 27 stitches to the face; Severed thumb nail

Jury Instructions/Verdict: The verdict was mixed on fault -- 5% was assessed to Lowry, the remainder to plaintiff. The

distinction made little difference, the jury electing to award Taylor no damages. [The juror foreman remarked after the trial that it was a “matter of wrong place, wrong time.” The same juror wondered how a simple skiing accident developed into a federal case, apparently not appreciating diversity jurisdiction.]

Post-Trial Motions: Taylor moved for a new trial calling the verdict against the weight of the evidence, it being impossible to find Lowry negligent and then only assess her 5% of the fault. The motion was denied.

CIVIL RIGHTS - SCHOOL

Michigan Eastern District - Detroit

When a middle school gym teacher was accused of sexually abusing girls, the genius superintendent had a brilliant idea -- simply transfer the abuser to an elementary school -- soon after, the teacher fondled three third-graders

Caption: *Doe et al v. Warren Consolidated Schools et al*, 2:00-72956

Plaintiff: William R. Seikaly, *Seikaly & Stewart*, Bloomfield Hills, MI

Defense: Timothy J. Mullins and Stephen J. Hitchcock, *Cox Hodgman Giarmarco*, Troy, MI and Gary Collins and Lorie E. Steinhauer, *Collins & Blaha*, Southfield, MI for Warren Schools Suzanne P. Bartos, *Phunkett Cooney*, Detroit, MI for Stamatakis and Clor

Verdict: \$2,109,000 for the three minor plaintiffs

Judge: Paul D. Berman

Date: December 16, 2005

Facts: James Kleary was a long-time gym teacher for the Warren Consolidated Schools in suburban Detroit. During his tenure as a teacher and tracing back to the 1980s, a pattern of sexual abuse claims followed him. In 1995 and while Kleary was at a middle school, it was alleged that he had sexual contact with several girls.

This placed the superintendent, Paul Stamatakis in a bit of a pickle -- if he chose to discipline Kleary, there was a risk of a long and protracted union struggle. He made a decision to transfer Kleary to the Siersma Elementary. Stamatakis reasoned that while Kleary might have had a problem with middle school girls, he had no such history with younger girls. Stamatakis was also reassured because he specifically instructed James Clor, the assistant superintendent, to keep a close eye on Kleary. The transfer was made -- interestingly, it was done over the vehement objection of several other administrators.

At Siersma Elementary, Kleary again taught gym. Three girls in his class, Kelcie, Sherri and Sarah (identified as Does in the lawsuit), were assigned as his class helpers. It wasn't long until Kleary fondled the three girls. He later pled guilty to criminal charges arising from the abuse.

In this lawsuit, the three Does sued the school district, Stamatakis, Clor and a third administrator, Gerald Maiorano. [Maiorano was the principal at Siersma and a long-time friend of Kleary.] The plaintiffs' theory was multi-part, alleging (1)

Kleary violated their rights, (2) the school district had a policy of inaction, and (3) the three named-administrators each acted with deliberate indifference. It was argued that Kleary was moved from school to school, Warren Consolidated Schools never addressing the problem and simply passing it on.

The three plaintiffs, eight at the time of the abuse, are all now high school freshmen. If prevailing at trial, the Does sought compensatory and punitive damages. [Plaintiffs settled with Kleary just before trial.]

Despite his plea of guilty, Kleary denied the sexual misconduct. Similarly, the administrators and Warren Consolidated Schools denied knowing anything or that there was a custom or practice to accommodate sexual abuse by its teachers. [Plaintiffs would characterize this as having closed their eyes and seeing no evil.]

Injury: Sexual abuse of three third-grade girls

Jury Instructions/Verdict: The three girls prevailed on all counts against the school district, finding all three state players acted with deliberate indifference. It assessed damages, respectively, of \$40,000 against Stamatakis, \$32,000 against Clor and \$31,000 against Maiorano. Also finding the tortious conduct represented a school district policy, punitives of \$600,000 were awarded to each plaintiff. The combined verdict for the Does totaled \$2,109,000. [Just before trial, the plaintiffs settled with Kleary.]

While deliberating the case the jury asked the court: Where is deliberate indifference defined? Can we have a dictionary?

Post-Trial Motions: The case was resolved post-trial by a confidential Hi-Lo agreement. While its parameters are not known, each plaintiff took a lump sum of \$440,000, plus annuity for a number of years. Apparently the plaintiffs didn't exceed the low end of the agreement, as each plaintiff took their entire award. In the court's order approving the award, Seikaly also took \$693,000 in attorney fees.

The three companies made their money in identifying new profitable locations -- however when they would submit new locations to Viacom in the application process, they would discover their applications were denied. Inevitably, Viacom would explain that the site had already been applied for.

From the perspective of the three plaintiffs, Viacom abused its deal with the railroads and simply *railroaded* the plaintiffs with its size -- that is, it would depend on the small fry plaintiffs to identify choice sites and then once identified, the sites would be stolen. While told that the application process was first-come-first serve, in practice, it was anything but.

In this federal action, the billboard plaintiffs alleged several counts, (1) a RICO claim predicated on a criminal enterprise, (2) fraud, (3) unfair competition and (4) tortious interference. Any damages awarded on the RICO count would be trebled. It was plaintiff's theory that Viacom was motivated by greed, it electing to steal from the smaller companies instead of hiring people to research its own sites. Beyond the company itself, several Viacom bigwigs were also implicated individually in the purported scheme. [Plaintiffs postured the railroads were innocent victims of Viacom's fraud.]

Viacom denied any fraud and explained that just because plaintiffs disliked how it exercised the exclusive railroad deal did not equate to fraud or a criminal enterprise. At best, Viacom called it a simple run-of-the-mill business dispute.

The jury's verdict was for the three billboard plaintiffs on all four counts, Civil RICO, fraud, unfair competition and tortious interference -- the verdict was assessed against Viacom Outdoor and two of its bigwigs, Wally Kelly and Harold Gustin. Two other Viacom bosses were exonerated.

Then to damages, the plaintiffs took \$890,000 on the RICO claim -- those damages were tripled to \$2,670,000. Then on *each* of the three remaining claims, plaintiffs took \$330,000 in compensatory damages, plus another \$1,044,455 in punitives. The verdict totaled \$13,060,125, including the RICO trebling. [According to published reports, the verdict was nearly \$14,000,000 -- our review of the verdict indicates only an award of just more than \$13,000,000.]

Civil RICO/Fraud - Three small billboard companies alleged a media giant engaged in a fraud to steal the best sites for billboards on railroad right-of-ways

Craig Outdoor et al Viacom Outdoor, 4:04-74

Plaintiff: Floyd P. Finch, Jr. and F.G. Maxwell Carr-Howard, *Blackwell Sanders Peper & Martin*, Kansas City, MO and James Wyrsh, *Wyrsh Hobbs & Mirikian*, Kansas City, MO

Defense: Karen L. Hirschman, Stacey H. Dore and Robert C. Walters, *Vinson & Elkins*, Dallas, TX and R. Lawrence Ward, *Shugart Thomson & Kilory*, Kansas City, MO

Verdict: \$13,060,125 for plaintiffs

Court: Missouri Western - Kansas City

Judge: Dean Whipple

Date: 7-26-05

This highly complex case involved the placement of billboards on railroad right-of-ways. A media giant, Viacom Outdoor, had contracts with several railroads to handle the placement of billboards. The contracts provided for an application process overseen by Viacom.

Small-time billboard companies were encouraged to submit applications for billboard sites to Viacom. The plaintiffs in this case were three billboard firms, Casey Outdoor and Midwest Outdoor Media, both of Kansas City, MO and Patriot Outdoor of Bolton, CT.

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CIVIL RIGHTS - FIRST AMENDMENT*Nevada District - Reno*

A university locksmith alleged he suffered retaliation when he complained of pornography that was placed on the wall in a campus workshop

Caption: *Stricker v. Nevada University*, 03-239

Plaintiff: Jeffrey A. Dickerson, Reno, NV

Defense: Mark Ghan, *University General Counsel*, Reno, NV

Verdict: \$209,315 for plaintiff

Judge: Robert A. McQuaid, Jr.

Date: June 15, 2005

Facts: Charles Stricker, a locksmith for the University of Nevada-Reno (UNR), complained that pornography was present on the walls in a campus workshop. From Stricker's perspective, this wasn't just nude pictures, but hardcore pornography. Besides being posted, the pornography was also on the computers.

After Stricker complained, he alleged his boss, Rick Favre, not only didn't remove the pornography, he also engaged in a pattern of retaliatory conduct. Stricker also alleged Favre's boss, Charles Leone, acted with deliberate indifference to Favre's retaliation. This conduct formed the basis of a federal retaliation lawsuit, UNR having moved against Stricker when he spoke out against pornography in the workplace.

UNR defended the case and raised fact disputes, including, (1) it was a swimsuit calendar and not pornography, (2) the locksmith shop stopped surfing pornographic websites (Stricker said they continued), and (3) Stricker was a hothead or as Stricker countered, he was a candidate for employee-of-the-year. Thus from UNR's spin on the facts, this case was little more than a venue for petty workplace grievances, retaliation having nothing to do with it.

Jury Instructions/Verdict: Stricker prevailed in his retaliation claim against Favre – Leone, held to a deliberate indifference standard as Favre's supervisor, was exonerated. To damages and against Favre only, Stricker took a general award of \$209,315. Interestingly, following the verdict, the jury also asked the court to read a public message. It read that the case showed a "gross disregard for university policy, taxpayers' money, the court's time and the First Amendment."

Post-Trial Motions: UNR moved for a new trial and called the verdict excessive. The motion was denied.

UNIVERSITY RETALIATION*New York Western District - Buffalo*

A graduate student in the anthropology department had his Ph.D dreams derailed when he had the temerity to complain of disability discrimination

Caption: *Bayon v. SUNY-Buffalo*, 1:98-578

Plaintiff: Robert G. Scumaci, *Gibson McAskill & Crosby*, Buffalo, NY

Defense: Ann C. Williams, *Assistant Attorney General*, Buffalo, NY

Verdict: \$601,000 for plaintiff

Judge: John T. Elfvin

Date: May 5, 2005

Facts: In 1996, Carlos Bayon, then age 40, enrolled in the graduate anthropology department at SUNY at Buffalo (SUNYAB). Bayon walks with a limp related to a knee injury sustained years earlier during a violent robbery.

After enrolling in the graduate department, Bayon alleged his professors failed to accommodate his disability. He complained about it to a state civil rights office. In response, his university advisor told him his academic progress would be smoother if he dropped the complaints.

Bayon didn't and things weren't smooth. He alleged professors conspired against him to lower his grades. That led to the loss of financial aid and ultimately his dismissal from the program. [Unable to pay debts at the school, his transcript is frozen and he is essentially in a permanent academic purgatory.] Bayon argued that but for the illegal discrimination, he would have earned a Ph.D. and been gainfully employed as a university professor.

Bayon sued the university in federal court alleging a variety of counts -- only the retaliation count survived, Bayon alleging SUNYAB bigwigs took adverse action against him when he complained. The school flatly denied retaliation, instead blaming Bayon's problems on his poor academic performance. From its perspective, Bayon simply failed to meet the rigorous SUNYAB academic standards.

Jury Instructions/Verdict: The jury's verdict found a causal link between Bayon's protected activity and the university's adverse action. It then made a general award of \$601,000 to Bayon.

Post-Trial Motions: SUNYAB has moved for a new trial calling the award speculative, especially as there was no competent proof Bayon would have ever become a professor.



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RACE DISCRIMINATION

New York Southern District - Manhattan

A white plaintiff's lawyer alleged he was fired because of his race -- the liability theory asserted his firm sought to replace him with a minority lawyer who it was believed would have more appeal to juries in Brooklyn and the Bronx

Caption: *D'Ascoli v. Rouri & Melamed*, 1:02-2684

Plaintiff: Gregory S. Antollino, New York City

Defense: Alan Serrins, *Queller Fisher Dienst Washor & Kool*, New York City

Verdict: \$241,800 for plaintiff
Including punitives of \$145,000

Judge: Lawrence M. McKenna

Date: March 14, 2005

Facts: Dominic D'Ascoli, who is white, worked as a plaintiff's lawyer for the law firm of *Roura & Melamed*. D'Ascoli did well and successfully tried several personal injury cases in Brooklyn and the Bronx. In March of 2000, he was fired by the firm -- it indicated it sought a different direction. D'Ascoli was replaced by a black attorney.

D'Ascoli sued and thought that represented race discrimination. The firm principals, he argued, were racists at heart who sought to hire a black attorney in hopes of appealing to mostly minority jury panels in Brooklyn and the Bronx -- that appeal was expected to translate into larger verdict awards. Thus despite D'Ascoli's outstanding performance, he was let go in furtherance of this scheme.

The firm denied any racism. It instead cited numerous problems with D'Ascoli's work product -- that included being sanctioned in Brooklyn when he questioned a judge's veracity. [D'Ascoli countered that this same judge's veracity deserved questioning as he was later indicted.] In any event, it was the firm's position that performance, not race, motivated its decisions.

Jury Instructions/Verdict: The jury answered for D'Ascoli that he was fired because of his race. He then took lost wages of \$96,000, but nothing for emotional damages. The jury further imposed punitive damages of \$145,000. The verdict totaled \$241,800.

Post-Trial Motions: *Roura & Melamed* has appealed.

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ENTERTAINMENT MANAGEMENT CONTRACT

New York Southern District - Manhattan

The lead singer of Nine Inch Nails sued his long-time manager and alleged fraud in the handling of his business affairs

Caption: *Reznor v. Malm et al*, 1:04-3808

Plaintiff: Steven E. Shiffman, New York City and Zia F. Modabber, Los Angeles, CA, both of *Katten Muchin Rosenman*

Defense: Alan N. Hirth and Debra J. Horn, *Meyers Roman Friedberg & Lewis*, Cleveland, OH and Thomas M. Lopez, *Esanu Katsky Korins & Siger*, New York, NY

Verdict: \$2,927,213 for plaintiff
Pre-judgment interest of \$1.6 million added

Judge: Jed S. Rakoff

Date: May 27, 2005

Facts: Trent Reznor, now the lead singer of the successful band Nine Inch Nails, was just a struggling artist in 1988. At that time, Reznor, a Cleveland native, signed a management contract with John Malm. Malm was then a small-time music promoter.

Almost immediately thereafter, Nine Inch Nails landed a national record deal. It soon became popular around the world and Reznor and Malm both became rich.

The relationship flourished into the 1990's, both making millions. A trusting Reznor made the music and he let Malm handle his business affairs. That was a mistake.

The original 1989 contract tended to favor Malm. It provided that Malm would take 20% of Reznor's income for all times. Reznor's proof would later indicate this was inconsistent with the market standard -- instead it represented improper self-dealing.

It all came to a head in 2003 when despite Reznor's professional success, he only had \$400,000 in the bank. He believed that Malm had breached a fiduciary duty as well as committing the torts of fraud and conversion. Reznor focused that Malm improperly maintained an interest in Nine Inch Nails trademarks and merchandising.

Interestingly, Reznor did not allege that he lacked bargaining power in contracting with Malm -- instead he trusted Malm to do right. Malm defended the case and denied impropriety. He focused on the terms of the contract. He even presented a counterclaim for unpaid commissions.

Jury Instructions/Verdict: Reznor prevailed on all counts and took a general award of damages in the sum of \$2,927,913. The court later added pre-judgment interest of \$1.6 million, also returning all the trademarks to Reznor. Malm's counterclaim was rejected by the jury.

Ed Note: At the time the verdict was announced, Reznor was not in court. He was on tour supporting the Nine Inch Nails dental tribute, *With Teeth* -- the album debuted at No. 1.

Breach of Contract - A dispute arose over a complex contract to provide air bags

Micrel v. TRW Automotive, 1:02-2539

Plaintiff: Stephen J. Kottmeier and Maria S. Bellafronto, *Hopkins & Carley*, San Jose, CA

Defense: Mark J. Savage and Damond R. Mase, *Squire Sanders & Dempsey*, Cleveland, OH

Verdict: Defense verdict on Micrel's claim; \$9,282,188 on TRW's counterclaim

Court: Ohio Northern - Cleveland

Judge: Dan Aaron Polster

Date: 7-22-05

In October of 2001, TRW Automotive of Livonia, MI, a supplier of air bags to automobile manufacturers, was looking for a new supplier of integrated circuits for its airbags. A deal was struck with Micrel, a San Jose, CA firm, which was to design the circuits that send signals to deploy the air bags.

The deal had gone sour by the next May. TRW didn't believe Micrel's delivered product met specifications. TRW terminated the contract and went into the market to buy the circuits as well as it could. It spent \$9.9 million to cover.

Micrel, by contrast, claimed that TRW had breached the contract. In fact, TRW never intended for Micrel to become a supplier -- it simply struck a deal with Micrel to gain leverage with other suppliers. Then once the contract was in place, TRW backed out by claiming Micrel had not met contract requirements -- Micrel characterized those requirements as shifting sand, TRW never intending to use Micrel circuits. If Micrel prevailed in this diversity contract action, it sought nearly \$30,000,000 in lost profits that would have accrued had the contract been honored.

TRW defended that Micrel didn't produce acceptable parts -- while it was true TRW was looking for a cheaper supplier, Micrel still had to supply parts that met quality control standards. When it couldn't, TRW terminated the deal and covered in the market. It counterclaimed for the nine-plus million dollars it spent to cover.

The jury's verdict was mixed. Micrel lost on its contract claim, while TRW prevailed on its counterclaim. It was awarded damages of \$9,282,188. A consistent judgment followed.

MEDICAL NEGLIGENCE

Ohio Southern District - Cincinnati

During a surgery to repair a broken finger, an anesthesiologist damaged plaintiff's median nerve

Caption: *Mucerino v. Russell*, 1:03-919

Plaintiff: Thomas C. Corbee and Robert D. Lewis, Jr., *The Lawrence Firm*, Covington, KY

Defense: D.C. Offut, Jr. and David E. Rich, *Offut Fisher & Nord*, Huntington, WV

Verdict: Defense verdict on liability

Judge: Herman J. Weber

Date: July 21, 2005

Facts: On 3-28-03, Brian Mucerino, then age 22 and a

student at Marshall University, broke his finger while playing a game at his fraternity. [In this not very fun game, Mucerino punched a wall.] A week later, a surgical repair was undertaken in Proctorville, OH. Dr. David Russell provided anesthesia, including an axillary block.

The surgery was uneventful. However when Mucerino woke up, he had a burning pain in his dominant hand. He has since complained of chronic pain and a loss of sensation in the hand. His medical proof linked the permanent condition to a median nerve injury sustained when Russell administered the axillary block.

Mucerino sued and alleged negligence by Russell in performing the procedure. Russell defended that the injury was a known complication that can and does occur in the absence of negligence.

Injury: Median nerve; weakness in dominant hand

Experts:
Plaintiff Stephen Block, Anesthesia, Pittsburgh, PA

Jury Instructions/Verdict: The court's instruction asked if Russell was negligent in providing care to Mucerino. A jury in Cincinnati said no and Mucerino took nothing.

RACE DISCRIMINATION

Oklahoma Western District - Oklahoma City

A white payroll employee at a historically black college alleged she was passed over for promotion because of her race

Caption: *Jenkins v. Langston University*, 5:04-681

Plaintiff: Stanley M. Ward and Scott F. Brockman, *Ward & Glass*, Norman, OK

Defense: David W. Lee and Ambre C. Gooch, *Comingdeer Lee & Gooch*, Oklahoma City, OH

Verdict: \$298,335 for plaintiff

Judge: Joe Heaton

Date: July 13, 2005

Facts: Debra Jenkins started working in 1979 for the historically black college, Langston University in Langston, OK. She worked in human resources handling payroll. Jenkins, who is white, was supervised by a black, Beverly Smith.

The key events in this case started in 2000. At that time, Jenkins sought to be promoted to payroll supervisor. Langston offered Jenkins the job at \$27,000, an increase of \$3,000 over her current job. Jenkins wanted \$30,000 and turned down the job. Langston later hired a black to fill the spot at \$32,000.

Thereafter Jenkins complained to Smith that the hiring practices were not fair. Jenkins recalled that Smith told her that lots of people were treated unfairly. Jenkins then filed an EEOC complaint. Subsequent to the restructuring, Jenkins alleged Smith began to retaliate.

That included (1) restructuring her job and adding duties

without added pay, (2) giving her poor evaluations and (3) moving her contract from an annual one to month to month. Ultimately Jenkins left human resources. She's still at Langston in student affairs.

Concurrently she filed a federal lawsuit alleging race discrimination and retaliation. To the discrimination count, she implicated Langston for hiring a less qualified black for the supervisor slot and then paying her more. Then when Jenkins complained, the pattern of retaliation noted above began.

Langston countered on several grounds. It first noted that the job was offered to Jenkins -- she just turned it down because she wanted more money. Then to the black employee that was hired at a higher rate of pay, Langston noted this applicant had a college degree. Jenkins did not. [Jenkins would counter that her 20 years of experience more than made up for lack of a degree.]

Langston also denied any retaliation, the evaluations being accurate. Moreover, it argued moving from an annual contract to month to month did not represent an adverse job action.

Jury Instructions/Verdict: Jenkins prevailed at trial on both discrimination and retaliation claims. Then to a general award of damages, she took \$298,335.

EXCESSIVE FORCE/POLICE SHOOTING

Oregon District - Portland

The Portland, OR police officer shot an unarmed female suspect as he attempted to drag her from a moving car -- the officer explained he feared he would be dragged to his death unless he shot and disabled the driver

Caption: *Jones v. Portland Police*, 6:03-1371

Plaintiff: Milton Grimes, *Law Offices of Milton Grimes*, Los Angeles, CA, Ernest Warren, Jr., *Walker & Warren*, Portland, OR and Christian Bottoms, Portland

Defense: Robert S. Wagner and David L. Lewis, *Miller & Wagner*, Portland, OR

Verdict: Defense verdict on liability

Judge: Ann L. Aiken

Date: June 28, 2005

Facts: There was a traffic stop in Portland, OR late in the evening of 5-5-04. It occurred on Interstate Avenue in a high-crime neighborhood. First on the scene was a Officer Rick Bean. Four persons were in the car. Bean began to process the occupants. Kendra James, then age 21, was in the back seat. Other officers arrived on the scene including Scott McCollister.

As James was asked to exit the car, she instead jumped into the front seat. She turned on the car and started to drive away. A first officer, Kenneth Reynolds, Tazered James -- she was undeterred. McCollister, partially in the car, first pepper-sprayed James. [There would be disputes about whether he did or did not pepper-spray James.]

In any event, the car kept moving. McCollister feared for his life and fired a shot at James. He was able to extricate himself. The car kept rolling. James was found in it and she was unresponsive. She was taken to the hospital in handcuffs. She

was pronounced dead, the cause of death being the fatal gunshot from McCollister.

Her estate sued the Portland Police and alleged excessive force by McCollister in shooting James. Citing numerous fact disputes, the estate argued that (1) no pepper-spray was used, (2) McCollister was not inside James's car, (3) he lied when he said he was in danger in an attempt to mask the real reason he shot the unarmed plaintiff, which was, (4) because he was angry she was fleeing.

In citing that McCollister acted improperly, the estate noted that the police department suspended him for 5 ½ months after this incident. [While they found the shooting was justified, the police were critical of McCollister's tactics.] In this unusual excessive force, James alleged not just excessive force in shooting her, but also that the provocation of pointing a gun at her constituted excessive force. Before the jury, the estate asked for an award of \$12 million.

The police defended the case and first discussed James. They noted the arrest occurred in a high-crime area and that James (1) had a history of 24 arrests, (2) was wanted on a warrant and (3) was high on cocaine. Then to the events that led to the shooting, McCollister argued it was a rapidly unfolding scenario. Facing danger with only seconds to react, McCollister postured that he acted reasonably. An expert, Howard Webb, noted that McCollister used a continuum of force, beginning with pepper spray, only shooting James when she wouldn't stop. Webb even replicated his own test of being dragged in a car -- Webb reported it left him scared.

Injury: Death

Experts:
Plaintiff Van Blaricom, Police Practices

Defense Howard Webb, Police Practices, Montana
William Lewinski, Human Factors, Mankato, MN

Jury Instructions/Verdict: The plaintiff's two excessive force counts were expressed as follows: (1) Did McCollister use excessive force in shooting James?, and (2) by pointing a gun at her, did he provoke James such that the provocation constituted unreasonable excessive force? On both counts, the verdict was for the police, the estate taking nothing. The jury deliberated for three hours.

Ed. Note - This case attracted enormous attention in Portland and sparked significant racial unrest in the community.

Excessive Force - During a raid on an Indian Tribe shop selling tax-free cigarettes, one of the proprietors suffered a broken ankle when he resisted the police action

Jennings v. Rhode Island State Police, 1:03-572

Plaintiff: C. Michael Bradley, Westerly, RI

Defense: Rebecca T. Parrington, *Assistant Attorney General*, Providence, RI

Verdict: \$301,100 for plaintiff

Court: Rhode Island - Providence

Judge: Ernest C. Torres

Date: 3-28-05

It was 7-14-03 and an insidious force had invaded Charlestown, RI. The Narragansett Tribe had begun to sell cigarettes on tribal land. These weren't just any cigarettes, they were cigarettes with no taxes. This generated intense interest

from law enforcement.

On this date, local officials, aided by the Rhode Island State Police (RISP), executed a search warrant on the store. For posterity, the police brought along a cavalry of news cameras from local television stations. The tribe put up some resistance.

A manager at the store, Adam Jennings, then age 35, objected to the search and asked to see a warrant. He was told "you people" are not entitled to one. Things went downhill from there. It ended with Jennings struggling with troopers, including Ken Jones, Staci Shepard and Ken Bell.

With Jennings on the ground in the store, still struggling, Trooper Jones put his extensive training to work -- to bring Jennings under control, he expertly applied an ankle control technique. In layman's term, this highly technical procedure involves turning the ankle manually until the ankle hurts. Jones turned the ankle so far that it broke.

This conduct later formed the basis of a lawsuit by Jennings in which he alleged Jones used excessive force in breaking his ankle. Particularly, he had stopped resisting and complained that his ankle was hurting -- Jones persisted and twisted it more.

Jones and the other troopers denied the use of excessive force. Instead the ankle control technique was utilized to bring the unruly tribesman into compliance. [Undercutting plaintiff's theory was a suggestion that racial bias motivated the aggressive police action.] That left a jury in Providence to consider whether (1) Jennings was injured after he stopped resisting, or instead, (2) he continued to resist. In making its decision, the jury was able to rely on video of the attack.

The jury verdict was for Jennings on the excessive force claim against Trooper Jones -- two other officers, Shepherd and Bell were exonerated. Then to damages, Jennings took medicals of \$1,100, plus \$300,000 for pain and suffering. A consistent judgment followed.

The RISP moved to set aside the verdict repeating arguments that the force was reasonable and that Jones was protected by qualified immunity. Judge Torres agreed and set aside the verdict in an 8-24-05 order -- he wrote that while the jury found the ankle control technique represented excessive force, the court simply disagreed.

DECEIT/FIDUCIARY DUTY

South Dakota District - Aberdeen

An insurance agent served time in prison, the life insurer he represented failing to produce evidence that would have resulted in his conviction for mail fraud being set aside

Caption: *Kent v. United of Omaha Life Insurance*, 4:02-4214

Plaintiff: Nancy J. Turbak, *Turbak Law Office*, Watertown, SD

Defense: Steven W. Sanford and Shawn M. Nichols, *Cadwell Sanford Deibert & Garry*, Sioux Falls, SD

Verdict: \$27,400,000 for plaintiff

Judge: Charles B. Kornmann

Date: September 7, 2005

Facts: This unusual case started back in 1990. At that time, Eugene Kent, a life insurance salesman, had an idea to market health insurance to a South Dakota association of bankers. He teamed with United of Omaha Life Insurance to offer policies. While the facts were complex, apparently the policy offered to the association was contrary to South Dakota law. [Kent would later allege United of Omaha knew this and stayed silent -- it denied wrongdoing.]

In any event, an investigation was launched into the policies and ultimately both Kent and United of Omaha were penalized by a state agency. Things took a darker turn when Kent was indicted in 1995 for mail fraud. It hinged on his receipt in the mail of two checks from United of Omaha. [The checks totaled over \$330,000 and represented reserves on the health insurance policies.]

Kent would always admit he made mistakes -- a federal jury later convicted Kent of two counts of mail fraud. [He was acquitted of 58 other counts -- the heart of the criminal case was that he had used the mail system to misappropriate insurance funds.] Concurrently, the state of South Dakota also revoked Kent's license to sell insurance.

While awaiting sentencing, Kent hoped meet with United of Omaha bigwigs. He was sure the two checks had been sent to him via UPS -- if this was true and he believed it was, the shipping receipts would prove his innocence. United of Omaha not only wouldn't meet with him, it had security escort him out of the building. The federal judge presiding in the criminal case wouldn't issue a subpoena either. Ultimately Kent was sentenced and served two years in jail.

A habeas petition led to his release. The shipping receipts were subpoenaed and when finally produced by United of Omaha, they in fact revealed the checks were sent via UPS. That led to a dismissal of the charges and Kent was freed from prison. [The law has since changed and UPS and Federal Express deliveries are now considered mail fraud.]

In this lawsuit, he blamed the loss of his insurance license and his imprisonment on deceit and a breach of a fiduciary duty. Regarding his license, had United of Omaha been truthful to South Dakota authorities, Kent argued, he never would have lost his license. He explained that he was experienced with life insurance and that when things went wrong with the health policies, United of Omaha left him to twist in the wind.

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The second part of his case went to the imprisonment. Had it simply produced the shipping receipts, he never would have gone to jail. If Kent prevailed, he sought compensatory and punitive damages. He has since regained his insurance license, but has struggled to rebuild his business. [Kent also sued his counsel in the criminal case alleging ineffective counsel in failing to subpoena the shipping records – he received a six-figure settlement in that case.]

United of Omaha's defense began and ended with one theme – Kent was a crook who wasn't entitled to profit from his own wrongdoing. That is, while it may have shipped UPS, that was just a technicality that didn't excuse his handling of the two checks – thus that Kent went to jail was his own fault and United of Omaha was not to blame. Moreover it denied that it had any duty to volitionally produce them. [Kent would reply that any misconduct by him was irrelevant to United of Omaha's deceit in failing to produce the receipts.]

Injury: Imprisonment; Loss of Insurance License

Jury Instructions/Verdict: Kent prevailed at trial on both the fiduciary duty and deceit counts. He was then awarded lost wages of \$2,000,000, another \$900,000 for economic loss in the future. This jury valued his loss of liberty at \$7,000,000. Then to punitives, he took \$10,000,000 regarding his liberty interest, \$7.5 million more with respect to the loss of his insurance license. The verdict for Kent totaled \$27.4 million. When reviewed by the FedJVR, post-trial motions had not yet been filed.

NEGLIGENT BUS SECURITY

Tennessee Eastern District - Winchester

Plaintiff was left a paraplegic when a Greyhound bus overturned after a psychotic passenger attacked the driver

Caption: *Surles v. Greyhound Lines*, 4:01-107

Plaintiff: Andrew L. Berke and Marvin B. Berke, *Berke & Berke*, Chattanooga, TN, Stanley Jacobs and Jodi J. Aamodt, *Jacobs Manuel & Kain*, New Orleans, LA and Phillip F. Cossich and Walter J. LeBlanc, Jr., *Cossich Sumich & Parsiolo*, Belle Chasse, LA

Defense: Frederick N. Sager, Jr., Mark R. Johnson, Richard H. Hill, II and Thomas Allen, *Weinberg Wheeler Hudgens Gunn & Dial*, Atlanta, GA

Verdict: \$8,000,000 for plaintiff

Judge: H. Bruce Guyton

Date: August 10, 2005

Facts: On 10-3-01 and just in the wake of the September 11th attacks, a Greyhound bus drove in the middle of the night through Tennessee on I-24 near Manchester. The bus originated in Chicago and was headed to Orlando. It was piloted by Garfield Sands.

As the bus moved through Kentucky, a passenger behaved

oddly. He walked up and down the aisles and made menacing remarks. It turns out this passenger was a Croatian immigrant named Damir Igric. Igric, a former policeman in Croatia, had a long history of mental problems. Also on the bus was Sharon Surles, age 56 and of Saginaw, MI. She was seated in the fourth row.

Suddenly Igric attacked Sands with a box-cutter -- he cut the driver's throat and grabbed the steering wheel. Sands fought as well as he could. The bus still went into the median. It became airborne and landed on its side. [Igric died in the crash.] So did seven other passengers -- many more were injured.

Surles, asleep at the time, was badly hurt in the crash when ejected from the bus -- she sustained a disc fracture at T1-T2. The injury has left her permanently paralyzed from her neck down. She also had broken ribs, a serious leg injury as well as head trauma. Surles's only memory of the crash was the bus rolling -- despite her medications, Surles continues to report daily pain. Her medicals to date have totaled \$1.6 million.

In this lawsuit, she targeted Greyhound and its absent security on the bus. She noted that the bus lacked any security -- there was no protective barrier between the driver and passengers, nor did Sands have a cell phone or communication device to indicate there was a problem.

Nor was Sands warned about the risk of an attack. Surles thought this amounted to more than just ordinary negligence -- it was gross negligence, the company having a history of thousands of incidents of violence. There were also sixty-one reports of passengers interfering with the driver. Despite this history, Surles argued, Greyhound did nothing to secure its buses.

A safety expert, Lance Wolf, opined that the attack was reasonably foreseeable and that a protective barrier and metal detectors would have prevented this attack. Plaintiff also argued that she would have sustained only minor injuries if a three-point seat belt had been provided to her. If prevailing in her negligence action against Greyhound, Surles sought an award of compensatory and punitive damages.

Greyhound's defense of the case focused on a single theme -- the tragic crash was the result of an unforeseeable, unprovoked and unpredictable attack by Igric. It was argued there was no reason to suspect he would attempt to commandeer the bus.

Greyhound also responded to plaintiff's statistics about prior violence on its buses -- it noted that this was the first ever instance where a bus driver was attacked with the intention of crash. Quite simply, there is no safety measure to prevent such an insane action. [Despite Greyhound's focus on Igric, the instructions did not provide for apportionment to him -- it was either all Greyhound's fault or it would be fully exonerated.] Greyhound also responded to the seat belt charge -- it explained that a seat belt wouldn't have helped much. Moreover, it is impossible to make the extrapolation that because seat belts are helpful in cars that they will have similar utility on a bus.

Injury: Paraplegia; paralysis from the waist down

Experts:
Plaintiff Robert Martin, Security, Los Angeles, CA
 Lance Wolf, Transportation Security
 Charles Benedict, Engineer, Tallahassee, FL

Defense Gregg McCray, Criminology, Fredericksburg, VA
 Carmen Daecher, Transportation Safety,
 Camp Hill, PA
 Stephen Werner, Engineer, Phoenix, AZ

Jury Instructions/Verdict: The jury's verdict was for Surles on negligence and she took a general award of \$8,000,000. Punitive damages were rejected. A consistent judgment followed.

PRODUCTS LIABILITY

Texas Eastern District - Marshall

In a tragic accident, a three-year old girl was killed when her head became caught in the power window of her parents' Ford pick-up – incredibly, the girl's mother was sitting right next to her doing the entire asphyxiation and failed to appreciate the peril

Caption: *Ayala v. Ford Motor Company*, 2:04-395

Plaintiff: J. Hunter Craft and Martin J. Siegel, Houston, TX and Mikal C. Watts, *Watts Law Firm*, Corpus Christi, TX, all of Watts Law Firm and Brendon C. Roth and Carl R. Roth, *Roth Law Offices*, Marshall, TX

Defense: Ronald D. Wamstead and Michael W. Eady, *Thompson Coe Cousins & Irons*, Austin, TX and Kevin W. Schiferl and Robert B. Thornburg, *Locke Reynolds*, Indianapolis, IN

Verdict: Defense verdict on liability

Judge: Leonard Davis

Date: August 5, 2005

Facts: On 6-6-04, Francisco Ayala took his family to a location where he was mowing a lawn. Ayala drove a 2001 Ford F-250 pick-up truck and parked in front of a bank. As Ayala did his work, his wife Eduvigas sat in the front seat. Their daughter, Yancey, age 3, was in the front seat. [An older child was asleep in the back seat.]

Eduvigas's attention wandered as she waited. She did notice that little Yancey was playing with the truck's power window. Eduvigas told her to stop. She looked away for an indeterminate amount of time, just listening to the radio.

When she looked back, Yancey's head was caught in the power window. Immediately Eduvigas tried to lower the window. It took her a moment to free Yancey. Unfortunately the girl had asphyxiated in the window. She could not be revived.

The girl's parents sued Ford and alleged a defect in the power window system. It argued Ford knew of the risk of accidental operation of its rocker-switch control and that the window needed a (1) push-pull switch and (2) an auto-reverse sensor. In developing proof of gross negligence, plaintiffs cited a history of prior accidents where the windows were accidentally engaged.

Ford defended the case and called the risk of harm extremely harm – namely, that a three-year old would mechanically asphyxiate in the window while her mother was sitting right next to her. Ford noted the key safety feature was that the windows would not work unless the key was in the ignition and thus there would definitionally be adult supervision. For whatever reason, it will never be known for sure, the distracted mother failed to appreciate her daughter's peril that was happening just an arm's

length away. Ford's pathology expert opined that the girl was choked for several minutes – Ayala had countered it was only a few moments.

Injury: Death

Experts:

Plaintiff Thomas Flanagan, Design, Carlsbad, CA
Wayne Ross, Injury Causation, Lancaster, PA

Defense John Pless, Pathology, Indianapolis, IN

Jury Instructions/Verdict: The court's instructions framed this issue as follows: Did the 2001 Ford F-250 pick-up have a design defect in its power window switch? The answer was no and the jury then did not reach the duties of the mother or damages.

Sexual Harassment - An male worker at a porn shop alleged same sex harassment; the company defended that after all, it was a porn shop, not a Bible store

Davis v. AVE, Inc, 5:03-345

Plaintiff: R. Chris Pittard, San Antonio, TX

Defense: John Fahle, III, San Antonio, TX

Verdict: Defense verdict on liability

Court: Texas Western - San Antonio

Judge: Pamela Mathy (Magistrate)

Date: 8-10-05

Billy Davis worked in a sexually charged environment by definition -- he was employed by an adult video store operated by AVE and entitled Adult Video. That meant he wasn't bothered by a 6-foot model of a phallus or x-rated film titles. However Davis did not bargain for having to endure same sex harassment.

Davis alleged his supervisor, Joseph Pais, made profane, vulgar and inappropriate remarks about him both to him and to customers -- he also made references to sodomy. Things got worse in January of 2002 when a new manager, Christine Phelps, was brought in. Davis complained to her, but got no relief. In fact, while he had an unblemished porn-selling record, he then faced numerous write-ups. It ultimately led to his termination.

Davis turned the tables and filed this federal lawsuit -- in it he asserted that he had been subjected to a sexually hostile environment by the advances and innuendos from Pais. Plaintiff also explained it was sometimes difficult to complain about harassment because AVE didn't have a harassment policy in place -- moreover, company higher-ups were only referred to by code names. If prevailing, Davis sought compensatory and punitive damages.

AVE defended the case and noted that no harassment complaint was made to management until after Davis had been fired. Then to the alleged harassment, Pais conceded there was some sexual banter at the workplace. However he explained importantly, (1) it was a sex shop, (2) the remarks were jokes, and (3) Davis was a willing participant, sometimes initiating the inappropriate conduct. The theme of the AVE's defense was that a porn shop, almost by definition, has a higher-charged sexual environment than other employers.

Since the underlying events of this case and before trial, AVE fell on hard times. It was the subject of a federal investigation and an AVE bigwig was convicted. The store and other sister

stores in San Antonio have since closed.

While AVE is no more, the matter pressed on to trial. The jury's verdict was for AVE on the same sexual harassment claim and Davis took nothing.

Products Liability - A postal worker suffered a low-back injury when his swivel chair suddenly slid down, its gas spring failing

Nichols v. Steelchase et al, 2:04-434

Plaintiff: J. Michael Ranson and Cynthia M. Ranson, *Ranson Law Offices*, Charleston, WV

Defense: J. Victor Flanagan and Cy A. Hill, Jr., *Pullin Fowler & Flanagan*, Charleston, WV for Steelchase
William R. Slicer, *Shuman McCuskey & Slicer*, Charleston, WV for third-party defendant SUSPA

Verdict: \$162,031 for plaintiff against Steelchase; Defense verdict on third-party claim against SUSPA

Court: West Virginia Southern - Charleston

Judge: John T. Copenhaver, Jr.

Date: 9-1-05

It was 9-20-02 and Michael Nichols was working at the USPS bulk mail facility in Charleston, WV. He did a variety of tasks on his job and didn't have a set work station. On this evening, Nichols was moved to a new location – he took a seat at the first available swivel chair.

As he sat in the chair, it suddenly collapsed several inches to its lowest position. This aggravated Nichols's already fragile spine. Two years before this incident, he had been diagnosed with a ruptured disc. Because of the swivel chair incident, Nichols has been permanently impaired – he has not returned to work.

In this lawsuit, he targeted Steelchase, the manufacturer of the swivel chair. His theory alleged a gas spring in the chair failed, causing it to collapse. This was developed by his engineer expert, Gary Jackson.

Steelchase defended and first wondered if its chair really failed – it cited a witness to the incident that the chair collapsed very slowly. It was also critical of Jackson's opinions, noting that as the chair was never recovered, Jackson was never able to actually examine it. Finally even if the chair collapsed, at best, the chair could only collapse five inches, an event that would be unable to cause injury.

Steelchase covered all its bases and filed a third-party complaint against SUSPA – SUSPA manufactured the gas spring. SUSPA denied its gas spring had failed.

The jury concluded that the chair was defective in that it was not reasonably safe for intended use – the third-party defendant was exonerated. Then to damages, Nichols took an award of \$162,031. That included \$60,000 in economic damages.

CIVIL RIGHTS/POLITICAL EXPRESSION

Wisconsin Western District - Madison

A candidate for state representative alleged a small-town mayor interfered with her campaign during town's summer festival

Caption: *Linton v. Schnook*, 04-814

Plaintiff: Victor Arrellano, Madison

Defense: Joel L. Abery, *Weld Riley Prens & Ricci*, Eau Claire, WI

Verdict: \$3,000 for Linton; Defense verdict on claim of Nuuntinen

Judge: John C. Shabaz

Date: May 12, 2005

Facts: In July of 2004, the Bay Days Celebration was underway in Ashland, WI. Overseeing the event was its proud Mayor, Fred Schnook. [He is a Democrat.] A candidate for state representative, Barb Linton, sought to campaign at the festival. She was joined by her campaign treasurer, Jessica Nuuntinen.

Schnook was not keen on mixing politics and fun at the Bay Days festival. For a period of three hours on 7-17-04, he prevented Linton and Nuuntinen from campaigning and handing out political literature. The candidate and her treasurer believed this constituted a constitutional violation.

They sued Schnook in federal court and presented a First Amendment claim. The mayor defended the case and denied fault. [Incidentally, Linton lost the election in the fall of 2004.]

Jury Instructions/Verdict: The jury was mixed but for the plaintiffs. Both prevailed that the Mayor had violated their First Amendment rights. Then to damages, the candidate took an award of \$3,000 in compensatory damages -- her treasurer was awarded no damages.

Post-Trial Motions: Plaintiffs subsequently sought an award of attorney fees. The court granted the motion, awarding plaintiffs \$121,000. Nuuntinen's motion for a \$1.00 in damages was also granted, that finding permitting her to share in the award of attorney fees. Schnook's own motion for a new trial was also denied.

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