The Arkansas Jury Verdict Reporter

The Most Current and Complete Summary of Arkansas Jury Verdicts

August 2012 **Statewide Jury Verdict Coverage** **1 ArkJVR 1**

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Introducing the
Arkansas Jury Verdict Reporter

The nation's most innovative jury verdict publisher has come to Arkansas - for 15 years, we've done original, on-the-ground and in-the-courthouse research on verdict results in Alabama, Tennessee, Kentucky, Indiana, Mississippi, Louisiana and Oklahoma. This month we introduce the newest addition to our line-up, The Arkansas Jury Verdict Reporter.

We've traveled the highways and byways, digging out the details at the courthouse. Every month, the Ark JVR brings you timely coverage of civil jury verdicts from all over the state. We are regularly communicating with court officials and endeavor to report **every** civil verdict we can uncover in state and federal court. More details on subscribing are inside or call us toll-free at 1-866-228-2447. **Introductory rates start at $199.00.**

Let's get to the verdicts.

Civil Jury Verdicts

Timely coverage of civil jury verdicts in Arkansas including court, division, presiding judge, parties, case number, attorneys and results. Notable regional results from our sister publications in Tennessee, Louisiana, Oklahoma, Texas and Mississippi are also included.

Truck Negligence - **A trucker treated for a multi-level disc injury and a degenerative rotator cuff injury after another trucker ran him off the interstate – a first jury in 2011 awarded the plaintiff $1,000,000 – the trial judge ordered a new trial finding error by the plaintiff's counsel having instructed the jury to send a message – the case was tried again 11 months later and the result was the same – the plaintiff was awarded $1,000,000**

Bradshaw v. Fee Transportation, 06:09-6045
Plaintiff: Don P. Chaney, Nathan P. Chaney and S. Taylor Chaney, *Chaney Law Firm*, Arkadelphia
Defense: Gregory T. Jones and Lee J. Muldrow, *Wright Lindsey & Jennings*, Little Rock
Verdict: $1,000,000 for plaintiff
Court: **Hot Springs - Federal**
Judge: Jimm Larry Hendren
Date: 1-17-12

James Bradshaw was operating a tractor-trailer on 1-18-06 on I-30 near Hope, AR. As he passed another trucker, David Booker of Fee Transportation, Booker looked away for a moment. Booker's big rig swerved and collided with Bradshaw's truck.

This sideswipe caused Bradshaw to cross the interstate median and careen into the opposite lanes of traffic. Fortunately Bradshaw did not hit oncoming traffic. He was still shaken by the crash.

While not immediately seeking care, he did report with apparent soft-tissue conditions later that day at the Pike County Hospital ER. Bradshaw has since treated for two injuries, (1) a multi-level disc condition, and (2) a rotator cuff

injury. He treated first with a Glenwood chiropractor, Terry Hutson, and later with a family doctor, Mark Floyd.

In this federal lawsuit, Bradshaw sought damages from Booker and his trucking employer. Fee Transportation conceded fault but contested the injury. It suggested that Bradshaw sustained just a temporary strain/sprain injury, the rotator cuff condition being degenerative.

This case first came to trial in February of 2011 – it was tried on damages only. Bradshaw prevailed and took a general award of $1,000,000. A judgment was entered for him in that sum.

Fee Transportation moved for a new trial and cited the plaintiff's closing argument which had suggested the jury punish the company and deter others. The court was persuaded and granted a new trial in an order dated July 29, 2011.

Before that second trial, Fee Transportation sought a records review IME from Dr. Raymond Peeples, Orthopedics, Little Rock. The court excluded his testimony as Peeples was not named in the defense pre-trial order before the first trial.

The case was tried a second time in January of 2012. Again a different federal jury in Hot Springs awarded Bradshaw $1,000,000 in damages. A consistent judgment was entered and Fee Transportation has appealed.

Workplace Negligence - While sitting next to a picnic table outside a tank car plant in Arkansas (taking a break), the plaintiff was injured when a fellow worker ran into the table and knocked the plaintiff off – in the resulting fall the plaintiff sustained a low-back injury

Tedder v. American Railcar Industries, 3:09-186
Plaintiff: Paul D. McNeill and David Landis, *Womack Landis Phelps & McNeill*, Jonesboro
Defense: Stephen G. Strauss and Stefani L. Rothermel, *Bryan Cave*, St. Louis, MO and Robert F. Thompson, III, Paragould
Verdict: $2,284,888 for plaintiff
Court: **Jonesboro - Federal**
Judge: Brian S. Miller
Date: 4-11-12

George Tedder was working for American Railcar Industries in Paragould, AR on the afternoon of 4-24-08. It was near quitting time and Tedder was taking a break outside the plant. He sat in a chair next to a picnic table. At the same time a co-worker was operating a golf cart in the course of his duties. The co-worker crashed into the picnic table and Tedder was knocked from his chair.

Tedder sustained a disabling low-back injury in the fall. He initially presented a worker's compensation claim. It was denied administratively, it being determined that Tedder was not working at the time of the accident. He then sued his employer directly for negligence regarding the conduct of his co-worker. American Railcar defended the case and first admitted fault for the accident – however it denied that Tedder had sustained any injury.

Tedder prevailed at trial, the jury answering that he was injured in the accident. Proximate cause was the only predicate to damages, negligence not being in issue. Regarding those damages, Tedder took a total of $2,884,888. That included $700,000 for future lost wages. His non-economic damages were $1,412,500. A consistent judgment was entered, Judge Miller also denying American Railcar's oral motion to reduce or remit the award.

Premises Liability - The plaintiff tripped in a hole in a McDonald's parking lot and sustained a shoulder injury

Salley v. McDonald's, 11-917
Plaintiff: Alan L. Lane and Monte Sharits, *Odom Law Firm*, Fayetteville
Defense: Michael J. Emerson and Jonathan E. Baker, *Barber McCaskill Jones & Hale*, Little Rock
Verdict: $82,895 for plaintiff
Court: **Washington Circuit Court**
Judge: G. Chadd Mason
Date: 6-26-12

James Salley was a passenger in a vehicle on 9-14-10 and ordered food at a McDonald's in Fayetteville on College Avenue. The store is operated by a franchisee, Matthews Management. After the order was placed, a McDonald's employee directed Salley's driver to pull forward while the order was completed.

After the car was pulled forward and parked, Salley exited to enter the restaurant and use the restroom. As Salley stepped from the car, he stepped into a hole in the parking lot. Apparently at this time, there was repair work being done in the parking lot. Salley landed hard and sustained a shoulder injury.

In this lawsuit, Salley sued McDonald's and alleged the parking lot was not in a reasonably safe condition. McDonald's denied fault and diminished the claimed injury.

The jury's verdict (it was a specific verdict form) was for Salley and he took $32,585 for medicals. A category called "nature and duration of injury" was valued at $5,400. In a third category, Salley was awarded $45,000. The verdict totaled $82,895. A judgment in that sum was entered for the plaintiff.

Introducing

The Arkansas Jury Verdict Reporter

Available in both Print and PDF Format (Adobe)

Jury Verdict Publications has produced high-quality and innovative jury verdict reporters all over the country since 1997. This is our first foray into Arkansas – over the last few months, we've traveled the highways and byways of the state uncovering civil jury verdict results. In every case, our staff reviews the pleadings, the depositions and the entirety of the court record to produce an original and unbiased jury verdict report.

Never before have Arkansas attorneys (both for the plaintiff and the defense) as well as the judiciary and other interested parties had such a comprehensive compilation of jury verdict results. The ArkJVR moves the resolution of civil cases out of the realm of hearsay, of rumor, of courthouse gossip, to real results. Real trials. Real facts. Real verdicts.

The Arkansas Jury Verdict Reporter is published monthly (12 times a year) and is available in either a print or a PDF format. Group licenses are available. Simply contact us for more information at 1-866-228-2447.

This sample represents just a portion of the full August 2012 issue. We hope you found it interesting and will begin subscribing. The September 2012 edition is going to be a good one. Good luck resolving, settling and trying your cases. Our staff will be looking for the results as the verdicts are handed down.

Truck Negligence - A state trooper sitting by the roadway (in her cruiser) rendering aide to a disabled motorist was sideswiped by a passing trucker

Mittlestat v. Heartland Express, 10-626
Plaintiff: Melody H. Piazza and Jeff R. Priebe, *Wilkes & McHugh*, Little Rock
Defense: Jerry J. Sallings, *Wright Lindsey & Jennings*, Little Rock
Verdict: $308,000 for plaintiff
Court: **White Circuit Court**
Judge: Craig Hannah
Date: 10-7-11

Jennifer Mittlestat was working as an Arkansas State Trooper on 4-12-10. As she patrolled Hwy 67 near Searcy, she observed a broken down RV on the side of the road. It had suffered a blow-out. Mittlestat pulled in behind the RV to render aide. Her emergency lights were on.

As the same time, Raymond Hereford was operating a tractor-trailer for Heartland Express on Hwy 67. As Hereford passed Mittlestat's police cruiser, his truck sideswiped it. Mittlestat had seen the truck coming and tried to brace for the impending impact.

For his part, Hereford didn't even appreciate he had struck the police car, and he kept going. Mittlestat called dispatch to report the collision and Hereford was tracked down seven miles later by a Bald Knob policeman. His fault for the wreck would not be disputed.

Mittlestat was initially trapped in her cruiser, but was able to extricate herself. She has since treated for broken glass that punctured her skin as well as soft-tissue neck and shoulder pain.

Beyond her physical injuries, Mittlestat has also reported post-traumatic stress symptoms as discussed by a treating psychologist, Dr. John Thomas. A treating orthopedist, Dr. Brett Sprinkle, Orthopedics, Little Rock, opined that her neck and shoulder injuries have limited her from the tough physical work of being a state trooper. In this lawsuit Mittlestat sought damages from Hereford and his employer.

The trucking firm defended the case and diminished the claimed injury. The trucking firm noted that Mittlestat had a history of a prior 2002 MVA. It also challenged the emotional injury, its neuropsychiatry expert, Avram Zolen, Little Rock, disputing both Thomas's methods and diagnosis.

This case was tried for five days in Searcy. The jury considered damages only. The plaintiff took medicals (including those in the future) of $50,000. A category called permanent injury was valued at $15,000, her wage loss totaling $43,000. She took $200,000 more for pain and suffering, the verdict totaling $308,000. A consistent judgment was entered, and it has been satisfied. [Mittlestat retired from the state police (after seven years of service) just a few months later.]

Auto Negligence - A teen driver pulled in front of a motorcyclist – the motorcyclist (who had been a drinking at a BBQ joint) suffered broken ribs and a collapsed lung among other injuries in the resulting collision

Thompson v. Sampson, 09-606
Plaintiff: Joey McCutcheon, *McCutcheon & Sexton*, Fort Smith
Defense: John R. Beasley, *Pryor Robertson Beasley & Smith*, Fort Smith
Verdict: $150,000 for plaintiff less 15% comparative fault
Court: **Sebastian Circuit Court Greenwood**
Judge: James O. Cox
Date: 2-28-12

Jeffrey Thompson, then age 38, spent part of the evening of 5-26-07 at a BBQ restaurant known as the Rib Shack. He was also drinking. He left the restaurant (it was now after ten in the evening) and drove on Hwy 171. He was piloting a Harley-Davidson motorcycle.

At the same time, a teenager, Alison Sampson, came to a stop sign at the

intersection of Old Hwy 171 and Hwy 171. Suddenly she pulled into the intersection.

Thompson had no time to evade, and the motorcycle slammed into the side of Sampson's sedan. The morbidly obese Thompson (he weighed 350 pounds) went flying through the air and landed hard. The collision left him with a significant puncture wound to his head, road rash, broken ribs and a collapsed lung. He was promptly taken to the ER at St. Edward Mercy for treatment.

In this lawsuit Thompson blamed Sampson for pulling into his path. She defended and implicated his look-out. It was the defense suggestion that Thompson's intoxication played a role in the collision.

The defense pointed to a clinical test taken at the ER which indicated Thompson was intoxicated. A police officer later came to the hospital and took a urine test. The later test was much lower, Thompson's BAC being at .05. In any event, the defense thought alcohol played a role. Thompson resisted this notion on several fronts, including, (1) the hospital test was not reliable but for clinical purposes, and (2) though Thompson was drinking, there was no competent proof he was drunk.

The jury's verdict was mixed on fault. It was assessed 85% to the defendant and the remainder to Thompson. He then took general damages of $150,000. A consistent judgment for Thompson was entered in the sum of $127,500. Sampson has paid it. The defense offer of judgment before trial had been for $30,000.

Negligent Installation of Cooling System - A maker of gourmet sauces bought a cooling system for its manufacturing facility – because of a snafu in the instructions on how to operate the system, it became corroded, and costly repairs were required – the gourmet sauce company then sued the company that sold and installed the cooling system

Pepper Source v. River City Industrial Refrigeration, 08-245
Plaintiff: Daniel W. Walker, *Hayes Alford & Johnson*, Ft. Smith and Jason T. Browning, *Mitchell Williams Selig Gates & Woodyard*, Little Rock
Defense: Curtis L. Nebben and Dale W. Brown, *Bassett Law Group*, Fayetteville
Verdict: $200,000 for plaintiff less 35% comparative fault
Court: **Crawford Circuit Court**
Judge: Mike Medlock
Date: 5-9-12

Pepper Source is an Arkansas company that manufactures gourmet sauces and marinades. It entered a deal in May of 2006 to have a cooling system installed at its Van Buren plant. River City Industrial Refrigeration (a Texas company) was paid $301,500 to design and install the cooling system. A third company, Tulco Oil from Tulsa, would deliver coolant and otherwise maintain the cooling system.

The system was installed in October of 2006, and right from the beginning there was a problem. The cooling system required that it be used with a coolant, Propylene Glycol. And not just any kind either – it needed to Propylene Glycol with inhibitors to prevent the machine from being corroded. Pepper Source used Propylene Glycol that didn't have the inhibitors.

By the next summer, the cooling system was not working well. Testing showed it had suffered significant corrosion. The coolant error was identified. Pepper Source brought in a third party to repair the catastrophically damaged installation. The repair and replacement costs were $245,322.

In this lawsuit Pepper Source sued River City and Tulco regarding the coolant mistake. The theory focused that the defendants should have properly instructed Pepper Source on the use of the coolant system. A human factors expert (William Nelson) for the plaintiff discussed the communication error.

On the eve of trial, Pepper Source settled with Tulco. It paid $50,000. The duties of Tulco remained in issue for purposes of apportionment.

River City defended the case and focused that Tulco was mostly to blame for using the wrong coolant. River City also implicated the plaintiff's own comparative fault.

The jury's verdict was mixed. This Van Buren panel found River City negligent in instructing Pepper Source on the type of glycol to use – however, the jury exonerated the defendant (a pyrrhic victory) on a separate design and installation count. Fault was also found with the plaintiff and the non-party Tulco Oil. That fault was assessed 65% to River City, 20% to Tulco and the remaining 15% to Pepper Source.

Turning to damages, Pepper Source took damages of $200,000. After a reduction for Tulco's $50,000 settlement, a judgment was entered for Pepper Source less comparative fault in the sum of $110,400.

Medical Malpractice - The plaintiff died of complications related to a perforated bowel after a laparoscopic cholecystectomy – her estate blamed her surgeons for a delay in diagnosing the bowel injury – the surgeons defended that the plaintiff's bowel wasn't perforated, it instead suddenly becoming ischemic following the surgery

Wiggs v. Tucker et al, 60CV-11-55
Plaintiff: James E. Keever, Texarkana and Eric D. Wewers, Little Rock
Defense: William M. Griffin, III and Bradley S. Runyan, *Friday Eldredge & Clark*, Little Rock
Verdict: Defense verdict on liability
Court: **Pulaski Circuit Court**
Judge: Wendell Griffen
Date: 4-16-12

Hazel Wiggs, age 78 and a retired grandmother living in Judsonia, underwent a laparoscopic cholecystectomy on 1-28-09 at Baptist Medical Center in Little Rock. It was performed without apparent incident by a surgeon, Dr. Everett Tucker, and Wiggs was released the next day.

The night of her release from the hospital, Wiggs returned. She was seen and admitted by Tucker's partner, Dr. Michael Pollock. Over the next two days, Wiggs's condition worsened. There was evidence that she was septic three days after the surgery.

On the fifth day after the surgery (2-2-09), Tucker performed an exploratory laparotomy and discovered the problem. Wiggs's bowel had been perforated in the original surgery and was now facing overwhelming sepsis. Despite significant medical intervention, Wiggs died five weeks later.

In this lawsuit the Wiggs estate alleged a combination of negligence by Tucker and Pollack in failing to diagnose the perforation injury. The estate's expert was Dr. Brian Camazine, Henderson, Surgery, TX. [There was no criticism made by the estate regarding the initial perforation.]

Tucker and Pollack defended the case and focused on a fact dispute. Namely they introduced proof that Wiggs had suffered a perforation at all (it was a complication even if she had), but instead something quite different had happened. Several days after the surgery (and this is why Tucker and Pollock didn't make an immediate diagnosis), Wiggs developed an ischemic bowel.

When signs of this were evident, Tucker operated a second time in an attempt to salvage Wiggs – however, the die had been cast, but the die (as postured by the defense) was the ischemic event that couldn't be predicted or prevented. Defense experts were Dr. Ralph Broadwater, Colorectal Surgery, Little Rock and Dr. Clay Wellborn, Surgery, Little Rock.

This case was tried for six days in Little Rock. The jury answered by a 10-2 count that the doctors were "not guilty" of medical negligence in treating Wiggs. That ended the deliberations, and the estate took nothing. A defense judgment has been entered.

FMLA - A manager for a pizza franchisee was fired while on FMLA leave for an elective gastric bypass surgery

Deen v. Clairday Food Services, 4:10-1160
Plaintiff: John T. Holleman, Paul G. Pfeiffer and Stephen Rauls, *Holleman & Associates*, Little Rock
Defense: Paul D. Waddell and M. Scott Jackson, *Barrett & Deacon*, Jonesboro
Verdict: $29,000 for plaintiff
Court: **Little Rock - Federal**
Judge: James Moody
Date: 5-15-12

Jerry Deen worked for Clairday Food Services as an area manager. The company operates Pizza Inn franchises in Arkansas. It was Deen's job to oversee some five stores. He was a long-term employee, and by 4-21-10 the pizza business had taken its toll. Deen exercised his FMLA rights and took off time for a gastric bypass surgery.

While on leave, Clairday Food Services fired him. His boss explained that the company had hit hard times, Pizza Inn requiring it to spend significant sums to upgrade its stores. In looking for ways to cut costs and do it immediately, a decision was made to let Deen go. At all times Clairday Food Services would deny the decision was related to Deen's exercise of FMLA rights.

Deen believed otherwise and filed this lawsuit against his former employer. The theory was simple: he was fired because he exercised his FMLA rights. The plaintiff countered the financial stress proof introduced by the defendant, noting that its stores were profitable. Clairday Food Services defended as above and explained it was just a coincidence Deen was fired while he was on FMLA leave.

The court's instructions asked if Deen was fired because of his exercise of FMLA rights. The answer was yes, and to damages, he was awarded $29,000. A consistent judgment was entered. Deen has since sought an award of liquidated damages.

Medical Malpractice - A doctor at a medical clinic was blamed for failing to make a timely diagnosis of lung cancer

Owensby v. Dillaha, 07-90
Plaintiff: Joe M. Rogers, *Fogleman & Rogers*, West Memphis
Defense: Paul McNeill, *Womack Landis Phelps & McNeill*, Jonesboro
Verdict: Defense verdict on liability
Court: **St. Francis Circuit Court**
Judge: Richard Proctor
Date: 11-28-11

William Owensby, then age 72, was referred to the Lee County Health Clinic in September of 2003 with reports that he coughed up and spit blood – he was a long-time smoker. He was referred to Dr. Jennifer Dillaha at the clinic. She did a variety of testing, including a TB skin test and a chest x-ray. Her diagnosis was not definitive.

A year later Owensby was diagnosed with advanced lung cancer. Despite aggressive intervention, he died in

September of 2006. In this lawsuit his estate alleged error by Dillaha in failing to make the diagnosis in 2003. Particularly she was criticized for failing to perform a CT scan that would have revealed the cancer.

The plaintiff's expert, Dr. Floyd Shrader, Family Practice, West Memphis, explained that in light of Owensby's history and presentation, Dillaha had a duty to rule out cancer. But for that error, the plaintiff's case continued, Owensby would have had a better chance for a cure and a longer life expectancy. A second expert for the estate was Dr. Peter White, Pulmonology, Springfield, IL.

As Dillaha was a state employee, the estate's recovery (if it prevailed) was limited to the extent of her insurance. Those limits are not reflected in the record. Dillaha denied fault and also contested that the result would have been different if she had made the diagnosis in 2003. Her experts were Dr. George Matuschak, Pulmonology, St. Louis, MO and Dr. Bill Tranum, Internist-Oncology, Little Rock.

This Forrest City jury returned a verdict for Dillaha on liability, and the estate took nothing. A defense judgment closed the case.

Employment Retaliation - Two white employees at a company that ships rice-related foods alleged they were fired after complaining that their boss was racially offensive to black co-workers

Richard et al v. Riceland Foods, 5:11-104
Plaintiff: Reggie Koch, *Koch Law Firm*, Little Rock
Defense: Spencer Robinson, *Ramsay Bridgforth Robinson & Raley*, Pine Bluff
Verdict: $391,332 for Richard
$385,187 for Turney
Court: **Pine Bluff - Federal**
Judge: James M. Moody
Date: 2-29-12

Randy Richard and Bennett Turney (who are white) worked for Riceland Foods in Stuttgart, AR. The company operates a rice shipping depot. Richard and Turney (the plaintiffs) alleged that their boss regularly used racially offensive terms to refer to black co-workers. The plaintiffs were offended and complained.

Soon thereafter both were fired as a part of a so-called reduction in force. The plaintiffs believed the firing represented retaliation for having opposed race discrimination. Riceland Foods defended that the firing decision was all about reducing costs – the plaintiffs worked in maintenance, and the company made a decision to outsource its maintenance.

Both plaintiffs prevailed at trial on the retaliation count. Richard took lost wages of $91,332, Turney taking $85,187. Each plaintiff was awarded $300,000 in emotional distress. A consistent judgment was entered.

Physician Contract - After a recruited pulmonologist left his employment at a hospital, the hospital sued him to recover loans it had made to the doctor

Baptist Memorial v. Kalyan, 03-380
Plaintiff: George T. Wheeler, Jr., *Harris Shelton Hanover Walsh*, Memphis, TN and Philip Hicky, Forrest City
Defense: Mike Beardon, *Beardon Law Firm*, Blytheville
Verdict: $46,478 for plaintiff
Court: **Mississippi Circuit Court Blytheville**
Judge: Randy Philhours
Date: 10-26-11

Madhu Kalyan, who practiced pulmonary medicine in Munster, IN, was recruited in 2002 to work at Baptist Memorial Hospital-Blytheville. As a part of the deal, the hospital made loans to Kalyan over the next year. They totaled $228,350. As a part of the recruitment, Kalyan recalled that he was promised regular work as a pulmonologist and there was a strong need in the community.

Kalyan soon found this was not true. He spent most of his time practicing internal medicine – he would calculate that just 16% of his work was in pulmonary medicine. Dissatisfied with this work, Kalyan left the hospital a year later for a new job in Fayetteville. The loans were not repaid.

The hospital sued Kalyan and sought to collect on the promissory note. The theory was simple. Kalyan had taken a loan, and in breach of the physician agreement he had not repaid it. The plaintiff sought the full $228,350. [Kalyan didn't dispute the amount.]

Kalyan did contest that the money was owed. He argued that the hospital had breached the contract because so little of his work represented pulmonology. He also argued that because of its conduct, the hospital was estopped from enforcing the contract.

A Blytheville jury heard proof for three days. By a 9-3 count, the plaintiff prevailed on the contract count. Kalyan's promissory estoppel affirmative defense was rejected. Turning, then, to the issue of damages the hospital took $46,478. A consistent judgment was entered.

The hospital has since moved for JNOV relief and argued it was a simple all or nothing case, the damages having been stipulated. The motion was denied by Judge Philhours in a 3-26-12 order.

Medicare Fraud - The State of Arkansas sued a pharmaceutical giant alleging it engaged in false and deceptive practices related to the marketing of Risperdal, the state then paying thousands of Medicaid claims – the jury found for the plaintiff on liability, the court then assessing penalties on thousands of violations, the judgment totaling $1.205 billion

State of Arkansas v. Janssen Pharmaceutical, 60CV-07-15345
Plaintiff: Fletcher V. Trammell, Michael W. Perrin, Robert W. Cowan and Elizabeth W. Dwyer, *Bailey Perrin Bailey*, Houston, TX and Bradford T. Phelps and Jean C. Block, *Assistant Attorneys General*, Little Rock
Defense: James M. Simpson, Laura Hensley Smith and Martin A. Kasten, *Friday Eldredge & Clark*, Little Rock and Thomas F. Campion and Edward M. Posner, *Drinker Beadle & Reath*, Philadelphia, PA
Verdict: For plaintiff on liability (Court assessed statutory penalties totaling $1,205,792,500)
Court: **Pulaski Circuit Court**
Judge: Timothy Davis Fox
Date: 4-10-12

Janssen Pharmaceutical and Johnson & Johnson jointly (hereinafter Janssen) marketed a drug, Risperdal, which is designed to treat psychiatric illness. The drug's off-label uses included treating the elderly for dementia and children that have depression. As a part of its marketing efforts, Janssen sent so-called "Dear Doctor" letters to physicians in the U.S. (including Arkansas) that described those uses.

Risperdal was prescribed many thousands of times to Arkansas residents. The State of Arkansas had an interest in this prescription practice because it paid for many of those prescriptions as a part of Medicaid.

In this lawsuit Arkansas sued Janssen and alleged it engaged in false and deceptive practices regarding the marketing of Risperdal. The crux of the plaintiff's case was that Janssen understated a significant risk of diabetes and weight gain that is associated with the drug. The state thought the mistake wasn't innocent either – it was argued Janssen knew of the risk and not only didn't disclose it, it in fact manipulated the Dear Doctor letters and package inserts to downplay the risk.

As the case advanced, the jury was only asked to decide if Janssen had engaged in a false or deceptive act – there was an additional count presented pursuant to the Arkansas Medical Fraud False Claims Act. If the answer was yes, the court would determine how many violations there were and assess statutory penalties. The litigation was also interesting for another reason, Arkansas hiring private law firms to advance the claim – the state contract provided a 15% contingency fee. Key experts for the government included William Wirshing, Psychiatry and Laura Plunkett, Pharmacology.

Janssen defended the case and focused that the package insert was FDA approved, and thus the entire question was preempted by state law. [The plaintiff countered it pursued a remedy solely under state law.] As for the merits of the case, Janssen denied any deception in the marketing of Risperdal.

As the trial was to begin, a lengthy article ran in the *Arkansas Democrat-Gazette* that profiled the case. Janssen sought a continuance of the trial, citing that the jury pool had been polluted by the pre-trial publicity. The motion was denied, and the case continued to trial.

The State of Arkansas prevailed on both the false and deceptive acts claim and the Medical Fraud False Claims Act. That the plaintiff had prevailed was the only thing the jury decided – the judge would decide damages.

In an order entered a month later, Judge Fox found 4,569 violations regarding false and deceptive practices. The court assessed a statutory penalty of $2,500 for each violation, damages on this count totaling $11,422,500.

The court also found 238,874 violations of the Medical Fraud False Claims Act, assessing a $5,000 penalty (the lowest allowed by statute) for each violation. That totaled $1,194,370,000. The combined judgment on the two counts equaled $1,205,792,500. [Lawyers for the state would later note that as the appeal advances, interest is accumulating on the judgment to the tune of $10,000,000 per month.]

Janssen moved for a JNOV and challenged the verdict on several grounds, including arguing that (1) it was erroneous to conclude there was a false statement every time a prescription was filled, and (2) the penalty imposed by the court was so excessive as to be unconstitutional. The motion was denied and Janssen has since appealed.

Premises Liability - The plaintiff was injured at a retail store when heavy merchandise (being stocked on the other side of the aisle) fell and struck her in the head – the case featured an aggressive cross-examination of the defense IME, neurologist Reginald Rutherford

Atkins v. Fred's Stores, 4:10-4052
Plaintiff: Jesse J. Gibson, *Gibson Law Firm*, Little Rock
Defense: Richard D. Underwood and Terry P. Weill, *Underwood & Thomas*, Memphis, TN
Verdict: $200,000 for plaintiff
Court: **Texarkana - Federal**
Judge: Harry F. Barnes
Date: 8-12-11

Dawn Atkins shopped on 10-4-05 at a Fred's Stores (it is a discount retailer) in DeQueen, AR. As she perused an aisle, a store employee was stocking an adjoining aisle. That stocking process involved placing merchandise on a high shelf – the employee didn't use a stool or ladder.

In the process of that stocking on one side of the aisle, merchandise was knocked over and onto Atkins. The resulting impact knocked Atkins down and left her with a cervical disc injury. She has reported pain that radiates from the her neck to her jaw. The injury was

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Case Style _____

Jurisdiction _____ Case Number _____

Trial Judge _____ Date Verdict _____

Verdict _____

For plaintiff _____ (Name, City, Firm)

For defense _____ (Name, City, Firm)

Fact Summary _____

_____

Injury/Damages _____

Submitted by: _____

_____

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confirmed by a treating physiatrist, Dr. Mark Wren.

In this lawsuit Atkins sought damages from Fred's Stores and alleged negligence by its employee in carelessly stocking the high shelf. Fred's Stores defended the case and diminished the claimed injury with an IME, Dr. Reginald Rutherford, Neurology, Little Rock – Rutherford concluded Atkins was normal neurologically.

Rutherford's direct examination was typical for an IME. The cross-examination by contrast was brutal. Atkins's attorney, relying on an order from a worker's compensation commissioner, noted the commissioner had concluded Rutherford's abuse of injured workers was "practically legendary." The commissioner continued (as alluded to by plaintiff's counsel) and wrote that Rutherford was insensitive, hostile and "downright vindictive". When Rutherford was asked about that characterization of his IME career, he replied, "No comment".

Atkins prevailed at trial in Texarkana and took a general award of $200,000. A consistent judgment was entered, and Fred's Stores paid it.

Breach of Contract to Sell a Bar/Restaurant - The plaintiff alleged the buyer of his restaurant and bar failed to take possession and failed to make required contractual payments – the buyer countered that he paid the plaintiff a negotiated amount (off the contract price) in a single lump sum representing $240,000 in cash

Trammell v. Hooks, 11-35
Plaintiff: Hunter J. Hanshaw, Jonesboro
Defense: Tony L. Wilcox and Raney E. Coleman, *Wilcox & Lacy*, Jonesboro
Verdict: Defense verdict on liability
Court: **Greene Circuit Court**
Judge: David Laser
Date: 1-20-12

Lawrence Trammell operated a restaurant/nightclub in Paragould on Kings Highway known as Riley's Pig and the Stardust Club. Trammell struck a deal in December of 2010 to sell both establishments to Willis Hooks. The contract provided that Hooks would pay the purchase price of $402,000 in monthly installments of $15,000.

Trammell would testify that despite demands, Hooks never made any payments on the business. Essentially the business was just taken from him. Hooks had a warranty deed and locked Willis out. In this lawsuit Trammell sought to enforce the contract. He also presented separate fraud and deceptive trade practice counts that did not survive a directed verdict at trial.

Hooks defense raised fact disputes. He cited that after the original deal was completed, he approached Trammell with a new offer. Instead of installment payments, he would make a one-time lump sum payment of $240,000. And it would be made in cold hard cash. He recalled paying Trammell in 24 stacks of one hundred $100 bills. Following the payment, when he asked for a receipt, Trammell replied that the warranty deed (which was marked as fully paid) would suffice as a receipt.

Trammell flatly denied that Hooks had paid him anything. Thus the dispute was established and the case hotly contested. The two parties had diametrically and opposing versions of what happened.

This Paragould jury deliberated the case after three days of proof. Its verdict was for the defendant on the contract count and Trammell took nothing. A defense judgment was entered.

Trammell moved for JNOV relief and noted that it was Hooks who wrote on the deed that the note was fully paid. The motion was denied – Trammell has appealed. The defendant has also been awarded attorney fees of $72,000 as the prevailing party.

Auto Negligence - A case arising out of sideswipe crash near the I-30/I-40 junction that occurred during a heavy rainstorm was resolved for the defendant on liability

Hardin v. Bryant, 10-2397
Plaintiff: James L. Bargar, *The Bargar Law Firm*, Conway and Quincy W. McKinney, *McKinney & McKinney*, Conway
Defense: Mel Sayes, *Matthews Sanders & Sayes*, Little Rock
Verdict: Defense verdict on liability
Court: **Pulaski Circuit Court**
Judge: Wendell Griffen
Date: 5-4-12

Allen Hardin, then age 25, traveled in Little Rock on 3-31-08 near the I-30/I-40 junction. A heavy rain was falling. Suddenly, Christopher Bryant encroached Hardin's lane and sideswiped his vehicle.

That initial impact caused Hardin's vehicle to rotate clockwise – it was then struck a second time by Bryant. Bryant's vehicle then careened into a retaining wall. In this lawsuit Hardin blamed Bryant for sideswiping him. Bryant, for his part, noted that (1) the rain was torrential making it hard to tell who was in which lane, and (2) Hardin encroached his lane.

However liability might be resolved, there was a collision, and Hardin has since treated for a soft-tissue injury. Bryant's defense denied fault and minimized the claimed injury.

The jury's verdict was for Bryant by an 11-1 count. It followed 45 minutes of deliberations. A defense judgment was entered.

After the case began, it was moved to the Old Supreme Court courtroom due to a water main break at the main courthouse. Water service was restored, and the case was concluded at the courthouse.

Medical Malpractice - An ER doctor was criticized for misdiagnosing a cardiac condition – the patient was sent home and died three days later

Love v. Crabtree, 09-2211
Plaintiff: Phillip L. Votaw, *Votaw & Associates*, Fort Smith
Defense: Walter B. Cox, *Cox Cox & Estes*, Fayetteville
Verdict: Defense verdict on liability
Court: **Sebastian Circuit Court Fort Smith**
Judge: James O. Cox
Date: 3-28-12

Victor Love reported to the ER on 11-20-07 at St. Edward Mercy Medical Center. He was complaining of chest pain. An ER doctor, Bruce Crabtree, evaluated Love and ran an EKG. Crabtree also consulted by telephone with a cardiologist, Dr. Peter Fleck.

Crabtree concluded that Love was suffering from pericarditis – this is an inflammation of the sac covering the chest. He prescribed Love anti-inflammatory medicines and discharged him from the hospital. Love was instructed to return if his symptoms got worse.

Three days later Love suffered a sudden cardiac event and died. His death was linked to a bacterial infection of his heart. In this lawsuit, Love's estate blamed Crabtree for failing to make the diagnosis. The estate's expert, Dr. Barry Brenner, ER, Cleveland, OH, was critical of Crabtree's workup, management and diagnosis of Love.

The estate had also sued Fleck. Fleck defended that he merely provided a phone consultation to Crabtree and never developed a physician-patient relationship with Love. The trial court agreed and granted Fleck's motion for summary judgment.

Crabtree defended the case that his diagnosis was appropriate based on Love's presentation. He also introduced proof that the infective endocarditis (the heart infection) developed rapidly and in fact likely did so after Love left the ER. What was the cause of it then? Crabtree suggested the infection was related to the decedent's IV drug use – not only did Love have a history of drug use, a syringe was found in his pocket during his autopsy. The record does not indicate defense experts.

This case was tried for three days in Fort Smith. The jury's verdict was for Crabtree by a 9-3 count, and the estate took nothing. A defense judgment was entered.

Products Liability - The plaintiff linked the development of breast cancer to the use of a hormone replacement drug

Curtis v. Wyeth Laboratories, 3:05-74
Plaintiff: Michael L. Williams and Leslie W. O'Leary, *Williams Love O'Leary & Powers*, Portland, OR and Christopher T. Kirchmer, *Provost & Umphrey*, Beaumont, TX
Defense: F. Lane Heard, III and Richmond Moore, *Williams & Connolly*, Washington, D.C. and David E. Dukes, *Nelson Mullins Riley & Scarborough*, Columbia, SC
Verdict: Defense verdict on liability
Court: **Jonesboro - Federal**
Judge: Billy Roy Wilson
Date: 10-20-11

Gloria Curtis, then age 50 and of Marmaduke, AR, was suffering symptoms of menopause in 1995. Her family doctor prescribed her Prempro – it is a hormone replacement drug manufactured by Wyeth. Nearly seven years later Curtis was diagnosed with breast cancer. She had a lumpectomy and a course of radiation. Her cancer has not recurred.

In this lawsuit (a part of Multi-District Litigation) Curtis linked the development of her breast cancer to the Prempro. She cited that Wyeth knew or should have known (but for the failure to run adequate tests) that Prempro had an unacceptably high risk of causing cancer. Wyeth defended the case that (1) its disclosures fully warned that breast cancer was a risk, and (2) the plaintiff's cancer was more likely related to other risk factors, including a family history of the disease.

This case was tried for twelve days. It represents the fifth bellwether trial in Prempro litigation. The jury answered for Wyeth that Curtis had not proved the warnings of a known or knowable risk were inadequate. That ended the deliberations and Curtis took nothing. A defense judgment followed.

Premises Liability - A customer tripped on a wet floor (caused by a heavy rain) at a retail store – she broke her hand in the fall, the injury converting to RSD

Smith v. Dollar General, 4:10-1534
Plaintiff: W. Gary Holt and Connie L. Grace, *Gary Holt & Associates*, Little Rock
Defense: Baxter D. Drennon and Kyle R. Wilson, *Wright Lindsey & Jennings*, Little Rock
Verdict: Defense verdict on liability
Court: **Little Rock - Federal**
Judge: James M. Moody
Date: 1-12-12

Betty Smith shopped on 10-29-09 at a Dollar General retail store in Jacksonville, AR. It had been raining heavily that day, and customers had tracked water into the store. As Smith walked inside, she slipped and fell on the wet floor. She sustained a broken hand in the fall – beyond the broken hand, she has also since complained of RSD symptoms.

Smith sued Dollar General (it removed the case to federal court) and alleged negligence by the retailer in failing to keep the floor dry and/or post a wet floor sign. Dollar General defended the case, and explained that it appreciated the rainy conditions and regularly mopped the area. It further noted that there was a yellow mop bucket in the area where Smith fell.

This case was tried for four days. The jury answered that Dollar General was not negligent, and Smith took nothing. A defense judgment followed.

Auto Negligence - The plaintiff complained of a cervical disc injury after a rear-end crash on I-630

Brown v. Staffield, 11-8
Plaintiff: Will Bond and Carter C. Stein, *McMath Woods*, Little Rock
Defense: T. Scott Clevenger, *Clevenger & Associates*, Little Rock
Verdict: $22,500 for plaintiff
Court: **Lonoke Circuit Court**
Judge: Sandy Huckabee
Date: 4-9-12

Charlene Brown traveled on I-630 on 11-10-09 – she was in an older model BMW. As she proceeded in the inside lane of three lanes, she was rear-ended by Susan Staffield. Staffield conceded fault for the wreck.

Brown has since treated for a C4-5 disc injury. Her treating neurologist, Dr. Lee Archer, Little Rock, identified that the disc was protruding and he linked that condition to the MVA. The plaintiff has continued to complain of neck pain. In this lawsuit she sought damages from Staffield. Staffield defended and minimized the claimed injury.

The defense having admitted fault, the jury considered damages only. Brown took a general award of $22,500. A consistent judgment was entered.

Truck Negligence - An elderly woman was killed in an icy interstate crash in West Memphis when she lost control and was struck by a tractor-trailer

Sims v. Willis Shaw Transport, 04-376
Plaintiff: Ronald Wilson, *Wilson & Associates*, West Memphis and Sheila F. Campbell, Little Rock
Defense: Richard E. Glassman and Edwin E. Wallis, III, *Glassman Edwards Wyatt Tuttle & Cox*, Memphis, TN
Verdict: Defense verdict on liability
Court: **Crittenden Circuit Court**
Judge: Cindy Thyer
Date: 4-29-11

It was in the middle of the night on 2-26-03, and Ruby Sims, age 68, traveled on I-55 in West Memphis. A wet sleet was falling. As Sims entered the elevated portion of a concrete bridge, she encountered icy conditions.

At the same time, Robert Boyer, a trucker for Willis Shaw Transport, was operating a tractor-trailer. He had just reentered the interstate after stopping at a weigh station. It was his recollection that it was raining – he did not see any ice on the road when he first exited the weigh station. Suddenly, though, as he came to the bridge, the ice was present. A second trucker, Charles Harris, working for Navajo Express, was also proceeding on the bridge.

Sims lost control on the bridge when she hit the ice and spun into a retaining wall. She was then clipped by Casey Dyson who was operating a sedan. Sims's vehicle rotated, and she was broadsided by the Navajo Express driver. At nearly the same time, she was hit by Boyer. The combination of these collisions, even if it was not clear which one exactly was the cause, resulted in Sims's death.

In this lawsuit prosecuted by her estate, the plaintiff first sought damages from Navajo Express. Navajo Express settled and paid $750,000. The jury would know there was a settlement but not the amount. [Dyson was not sued.]

The estate also targeted Boyer and his employer regarding the crash – the theory implicated his lack of care in failing to take caution for the icy conditions. An expert for the estate, Frank Peretti, Pathology, Little Rock (he did the autopsy) spoke to the issue of what killed Sims – it was his opinion that she was alive when her vehicle was struck by the truckers.

Willis Shaw Transport defended and denied fault – it noted that when Boyer came to the bridge, there was no reason for him to suspect the conditions were icy. This was confirmed by an independent witness (another trucker) who witnessed the crash. The defense also developed a theme that it was impossible to say which of the four impacts (the wall, Dyson, Navajo Express, and Boyer's truck) had resulted in Sims's death.

This case was tried for a week in Marion. The jury answered that no one was at fault, including the decedent, the defendant, the non-party Navajo Express driver, and the final non-party (not sued) Dyson. Thus, damages were not reached. A defense judgment closed the case.

A Notable Tennessee Verdict

Medical Malpractice - An anesthesiologist was blamed for mismanaging a fatal infection in a patient who had undergone a kidney stone surgery – the estate of the patient, who had been a successful real estate developer, sought some $40 million in economic loss at trial

Neel v. Gairhan, CT-001653-08
Plaintiff: Gayle Malone, Jr. and Charles I. Malone, *Walker Tipps & Malone*, Nashville, TN and Steven E. Anderson, *Anderson & Reynolds*, Nashville, TN
Defense: Katherine L. Frazier, *Domico Kyle*, Memphis, TN and William H. Haltom, Jr., *Thomason Hendrix Harvey Johnson & Mitchell*, Memphis, TN
Verdict: $20,000,000 for plaintiff assessed 70% to the defendant
Court: **Memphis, Tennessee Shelby Circuit Court**
Judge: Jerry Stokes
Date: 3-29-12

Mark Neel, age 45 and a Collierville real estate developer who was described as healthy and active, suffered abdominal pains on his birthday on 5-16-07. He suspected a kidney stone. Neel presented to a doctor the next day and was referred to the Conrad/Pearson Clinic and a urologist, Dr. David Hickey. Hickey diagnosed kidney stones and a surgery was set for the next day.

Before that surgery could be performed, Neel reported severe pain. He was also turning blue. He was taken to the emergency room and there was some concern he had suffered a seizure. Neel improved and the surgery went on the next day at the clinic. Dr. Charles Gairhan provided anesthesia during Hickey's operation. During the surgery, Hickey perforated Neel's ureter.

As Neel was already suffering an infection, infected urine poured into his body. In the post-operative period, Neel began to show signs of decline. He was finally transferred from the surgical center at Conrad/Pearson to Methodist Germantown. His decline continued as

infection and sepsis consumed his body. He suffered a cardiopulmonary arrest – while resuscitated, Neel suffered a brain death. Life support was withdrawn the next day and Neel died. He was survived by his wife of 23 years and three minor children.

In this lawsuit Neel's estate alleged error by both Gairhan and Hickey in several different regards. It began with the decision to perform surgery in the first place after the apparent seizure-like event the night before the surgery – this should have triggered an alert that Neel had a serious infection. Similarly the doctors were blamed for not using appropriate antibiotics and then not promptly transferring Neel to a higher level of care (even as nurses insisted) when his condition worsened as the infection spread through his body. The combination of these errors was linked to Neel's death.

On the eve of trial, Hickey entered a secret settlement with the estate. The case advanced to trial against Gairhan only, Hickey's duties remaining in issue. Liability experts for the estate were Dr. Mitchell Tobias, Anesthesia, Falls Church, VA, Dr. Thomas Trostle, Anesthesia, Roanoke, VA and Dr. John Drummond, Infectious Disease, Atlanta, GA.

A business success at the time of his death, earning some $400,000 a year (with expectations that sum would increase), Neel's estate sought a staggering $40,000,000 for his economic loss. This sum was developed by Jerry Faulkner, CPA and Bruce Hutchinson, Economist. Beyond's Neel pain and suffering, his wife and three children also presented consortium claims.

Gairhan defended the case that he appropriately monitored Neel and there was no reason to suspect the infection before the surgery – he was then properly transferred to Methodist Germantown when his condition declined. Gairhan's identified experts included Dr. Holly Morgan, Anesthesia, Seeley Lake, MT, Dr. Robert Fisher, Anesthesia, Columbia, MO, DR. Dr. Todd Rice, Critical Care, Vanderbilt, Dr. Bruce Waldron, Internist, Bentonville, AR and Dr. Lawrence Eskew, Urology, High Point, NC. Gairhan also sought to apportion fault (if there was any at all) to the since-settled Hickey.

A Memphis jury heard proof in this case for two weeks. As it deliberated the case, it had a question for the court: Does the plaintiff receive only the percentage of liability decided by the jury? If the court answered, that answer was not a part of the court record.

Returning with a verdict, it was mixed on fault. The jury found a deviation from the standard of care by both Gairhan and the since-settled Hickey. It assessed that fault 70% to Gairhan and the remainder to Hickey.

Turning to damages, the estate took $1,000,000 for Neel's pain and suffering. The present value of his economic loss was valued at $10,000,000. The jury added $3,000,000 for his wife's consortium interest, each of his children $2,000,000 more for the same category. The raw verdict totaled $20,000,000. While no judgment was a part of a court record months post-trial, presumably it would have been for the estate in the sum of $14,000,000 because of comparative fault.

The estate has since moved the court to allocate the full $20,000,000 against Gairhan. It has argued that there shouldn't be a reduction because Gairhan never pled comparative fault as an affirmative defense by specifically identifying Hickey. The motion has focused on the identification issue. When the record was reviewed, the motion was pending. If Gairhan has sought post-trial relief, those motions were not a part of the court record.

A Notable Louisiana Verdict

Apartment Negligence - A toddler suffered severe burns in a bathtub that heated up quickly to dangerous temperatures because of a broken or defective hot water heater

Phelps v. Audubon Park, 589316
Plaintiff: Richard P. Voorhies, III, *The Voorhies Law Firm*, New Orleans, LA
A.M. "Tony Clayton and Michael P. Fruge, *Clayton & Fruge*, Port Allen, LA and Roderick "Rico" Alvendia, *Alvendia Kelly & DeMarest*, New Orleans, LA
Defense: Ralph G. Breaux and Trent P. Roddy, *Perrier & LaCoste*, New Orleans, LA
Verdict: $3,950,000 for plaintiff
Court: **Baton Rouge, Louisiana East Baton Rouge**
Judge: Wilson Fields
Date: 6-15-12

It was the evening of 8-29-09 and Shmarua Phelps was going to give his son (Kamari - two years old) a bath at their apartment. They lived (with the boy's mother Kaneshia Parks) at an apartment complex in Baton Rouge known as Audubon Park. The family had just moved in.

Shmarua (an aspiring rapper known as Fresh Boi Sham) drew the water for the bath and tested it with his hands. The temperature seemed appropriate. He placed Kamari in the shallow water and went into the bedroom for just a moment. By the time Shmarua returned to the bathroom, little Kamari had suffered a serious scalding injury to his feet, legs and buttocks. The burns were identified as second and third degree.

Kamari was taken to the hospital and he remained in intensive care for seven days. He has since undergone several repair surgeries, including skin grafts. There was proof the boy will require more surgeries in the future. Beyond the physical burns, Kamari also suffered emotional injuries.

In this lawsuit (prosecuted by his parents), Kamari sought damages from the apartment complex. The theory was

that the hot water heater was defective and broken. There was evidence a prior tenant had made numerous complaints that it tended to overheat. Despite those complaints, Audubon Park failed to repair the hot water heater.

Thus the broken hot water heater, which shouldn't have permitted temperatures exceeding 120 degrees, rocketed to as high as 195 degrees because of a defective thermostat. This tied to proof from Kamari's plastic surgeon that his injuries were caused by water that ranged from 140 to 180 degrees. The plaintiff's engineer expert discussing the broken hot water heater was George Hero.

Audubon Park's defense of the case was elegantly simple. It explained there was no defect – a hot water heater has one important function – to make water hot. And in this case, it did just that. The duty rested upon Shmarua to correctly adjust the temperature. It also disputed any notice that there had been any prior complaints of the hot water heater overheating.

Audubon Park also disputed Shmarua's version of the events as a matter of physics. That is in the 30 or so seconds that Shmarua left the bathroom (after testing the water temperature as safe), it was impossible for the shallow bathtub water to have rocketed to a dangerous temperature. It simply couldn't get that hot that quickly. A defense engineer expert was Frank Roberts. Finally Audubon Park diminished damages and suggested Kamari was well-healed with only minimal scarring.

This Baton Rouge jury received the case at eight or so in the evening. It deliberated for three hours before returning a verdict. It found Audubon Park solely at fault, rejecting any apportionment to the father.

Then to damages, the plaintiff took medicals of $50,000 plus $1.2 million for future care. Kamari's lost earning capacity was $200,000. He also took $200,000 for each of the following categories, past suffering, future suffering, past loss of enjoyment of life, future loss of enjoyment of life and scarring. The award was $400,000 for both past and future mental anguish. Each of his parents took $250,000 more for their consortium interest. The verdict totaled $3,950,000. A consistent judgment was entered.

A Notable Oklahoma Verdict

Premises Liability - After a few beers and a concert at a casino, the plaintiff went to the IHOP in the middle of the night for a snack – she suffered an the aggravation of a recent fusion surgery (leading to a failed fusion) when a bathroom stall door in the IHOP fell off and struck her

Avard v. IHOP, 08-255
Plaintiff: Mark S. Stanley and John A. Colfax, *Carpenter Stanley & Myers*, Tulsa, OK
Defense: George Gibbs, Douglas M. Borochoff & Kevin S. Hoskins, *Gibbs Armstrong Borochoff Mullican & Hart*, Tulsa, OK
Verdict: $558,000 for plaintiff
Court: **Tulsa, Oklahoma Tulsa District Court**
Judge: Dana Kuehn
Date: 2-15-12

Carrie Avard spent the evening of 9-10-06 at the Osage Casino watching a Leann Rimes concert with her husband. She had a few beers and enjoyed the show. Later in the evening at one in the morning, she and her husband went to eat at an IHOP restaurant.

Avard entered the bathroom at IHOP and closed the bathroom door behind her in a stall. Suddenly the heavy bathroom door became unhinged and it fell upon her. The effect of this falling door was to lead to a failure of a cervical disc surgery from just two months earlier.

The so-called failed fusion as identified by Dr. Christopher Covington, Neurosurgery, led to a revision of the surgery. Avard's medical bills totaled $57,244.

In this lawsuit Avard sued IHOP and alleged negligence by the pancake maker in failing to maintain the bathroom. She cited proof that a store manager had noticed the hinge was loose a few hours earlier and failed to make a complete repair. The plaintiff argued the failure to properly repair the door represented reckless conduct and she additionally sought the imposition of punitive damages.

IHOP's defense focused on damages. It noted that Avard had a long history of radiating neck pain that dated to a car wreck in the 1990s. The defense further disputed the failed fusion was related to this bathroom door incident. An expert on damages for IHOP was Dr. Sami Framjee, Orthopedics, Tulsa. Avard had countered that prior to this incident, her radiating pain had mostly been to her right side – she now suffers from new left-side symptoms. It also argued the premises were maintained in a reasonably safe condition.

The jury's verdict was for Avard on liability (finding IHOP solely at fault) and she took a general award of $558,000. The jury however rejected that IHOP's conduct was reckless and there were no punitive damages. A consistent judgment was entered.

IHOP has since moved for a new trial and/or JNOV arguing the claimed injury was identical to Avard's pre-existing problems. The motion was pending when the record was reviewed.

A Notable Texas Verdict

Products Liability - The plaintiff suffered a severe brain injury in a roll-over crash – he blamed his enhanced injury on the collapse of his seat during the crash

Morina v. Johnson Controls, 5:10-125
Plaintiff: E. Todd Tracy, *The Tracy Firm*, Dallas, TX, Darren W. Armstrong, Texarkana, TX and Melissa R. Smith, *Gillam & Smith*, Marshall, TX
Defense: John R. Mercy, *Mercy Carter Tidwell*, Texarkana, TX and Richard K. Wray and Tracy G. Ferak, *Reed Smith*, Chicago, IL
Verdict: Defense verdict on liability
Federal: **Texas Eastern - Texarkana**
Judge: Michael H. Schneider
Date: 6-28-12

Alfreda Morina traveled in Texarkana on the morning of 9-8-08. He was driving a 2002 Ford Expedition. The SUV's driver's side seat was manufactured by a component supplier, Johnson Controls. As Morina proceeded through an intersection, Bettie Blackmon ran a red light. She broadsided Morina in a hard crash.

That impact caused Morina's SUV to roll over and crash into a parked van. The collision left Morina with serious injuries, including a lacerated liver, head lacerations and a significant traumatic brain injury. In this lawsuit against Johnson Controls, Morina blamed his enhanced injury on a defect in his seat. The plaintiff's seat expert, Stephen Syson, explained the seat collapsed during the collision because a seat hinge pin failed, that failure leading to the brain injury. [The plaintiff conceded he would have been injured even if the seat hadn't failed (including the liver laceration), but the seat's failure enhanced his brain injury.]

Johnson Controls defended the case and postured that it simply supplied the seat to Ford consistent with its specifications. It played no role in the integration of that seat into the vehicle design. Johnson Controls also defended and sought to apportion fault to both Blackmon and the non-party Ford.

The court's liability instruction asked if there was a design defect in the driver's seat when it left the defendant's possession. The answer was no and having so found, the jury didn't reach the duties of Blackmon and the non-party Ford, apportionment or damages. A defense judgment has been entered.

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