

Closing Argument of William McMurry
Counsel for Plaintiff
Milby v. Nationwide Insurance, 96 CI 5754
Underinsured Motorist Coverage
Verdict: \$500,000 for plaintiff
Jefferson Circuit Court
August 22, 1997

Case Summary

Plaintiff, Patricia Milby was involved in an accident with Knipp; Knipp paid her \$100,000 policy limits, and Milby sought excess coverage in this trial from her UIM carrier, Nationwide Insurance. Her injuries from the wreck included a mild traumatic brain injury, which results in severe headaches, and it takes longer for her to complete simple tasks. The jury awarded Milby her medicals, future medicals and lost wages and then crammed the numbers as follows for suffering and impairment to reach an award of \$500,000: \$201,610 for suffering and \$140,875 for impairment.

Mr. McMurry's Closing Argument

I'll be as brief as I can. I've rushed now for a week in an effort to conclude this case this week so you guys didn't have to come back on Monday and it's primarily my obligation to put on the witnesses as you've now seen because I do have the burden of proof and I have done that as best I know how to do it. I need your attention and I need it now.

This is the last time I get a chance to talk to

Keypoint: Characterizing the Struggle

McMurry explains the human struggle the case represents, aligning his client with the peasants of history, as opposed to the insurer who represented the noble elite.

you and tell you what I see this case is about. All of human history is nothing but a struggle for human dignity. It is a struggle for equal rights. In ancient times, there was the elite, there was the noble, there were the peasants. If you were one of the elite, you had greater rights than the peasants. If you were a peasant, you lived beneath the seats of the mighty and the noble. In America we abandoned that concept in 1776, and we even fought a war for equality. But the one thing we have facing us continually in our lives, is the inequality of a struggle, and in the struggle between Ms. Milby and Nationwide Insurance Company, her automobile insurance carrier, it isn't any different. It's certainly no

fair game, like it would be David in a struggle versus Goliath. Now Nationwide was quick to accept ten years of Pat's insurance premiums. She paid them regularly. She paid them on time. She paid them with their promise. Buy our insurance. We're Nationwide. We're on your side.

But when it came time for the one time this lady had a claim. When she needed her insurance, she needed her medical bills paid, she had to come to me, and I'm delighted that she came to me, right after this accident, as Dale Milby said, when we couldn't get the insurance company to pay our medical expenses. Ms. Milby was in the hospital at Suburban for a week as you will recall. There was great concern by Mr. Milby, Pat's future husband, that the insurance company for Pat was not paying, and so after that, they retained my services.

We're here today because Nationwide has denied Patricia Milby's claim, because Nationwide has taken the position that we're not going to pay if there is a dispute between your doctors. Now, that's what it comes down to. Nationwide is asking you for the first time, to make a determination, that will in essence say, that, if we can find someone who will disagree with your treating physicians, then we can second guess, that we can inject, and that we can interfere, and get in the way of the relationship and trust and the confidence you've developed with your physician. They're asking you to say, to establish a precedent here ladies and gentlemen, that from this point on, any time there's ever a dispute between physicians in a patient's case, that an insurance company can say we aren't paying. We aren't going to pay. When disaster strikes, and this woman needed her insurance the most, because her doctor, Dr. Steinbock came up with a different opinion, they figured they could drive a wedge between her and her doctors. Ladies and gentlemen, look at what Nationwide has done since the inception of this case, since they even refused to pay the medical bills in this case.

Nationwide went to Dr. Steinbock, and he told us, that this attorney that approached him privately did not have a medical authorization, didn't have permission. We all know there is a rule of confidentiality between a patient and her doctor, that whatever information a doctor obtains in treating a patient, be it a radiologist or whoever, they shall not disclose that information to anyone, particularly your opponent, your insurance company, without your authorization.

Discusses defense doctor/lawyer, Marguiles who called the treating doctors from Baltimore to discuss plaintiff's case without authorization.

He called to find a weakness in an insured's medical records, and do everything you can to work that against the insured. This lady has an absolute right in this world to accept the diagnosis and to accept the treatment of her treating doctors. She has that right because we are all equal. We have a right to choose. Not our insurance companies. It's our health. It's our life. And if we want to believe our doctors, who tell us we have a brain injury, we have brain damage, we're going to need medication for the rest of our lives, we're going to need to come in and be consulted and have sessions with a psychiatrist. We have the right to believe and accept that. Our trust and our confidence in this whole physician-patient relationship is founded on that concept. But the insurance company in this case wants to drive a wedge between it. How do they do it?

They go to Dr. Steinbock. They prey on Dr. Steinbock. We don't know how they do it. Maybe it was, you missed a big diagnosis here, you might get sued for malpractice. They knew who to find to defend Dr. Steinbock's misdiagnosis in this case. They went to the guy who runs around the country and defends doctors left and right, and how many of you accept the testimony of a man who would take the stand and say he wrote a chapter in a book, that is designed and geared strictly for insurance companies, but he's never read the book, he doesn't even know what the book is about. How can he get away with that kind of testimony in Louisville, Kentucky? He can't do it. I can't believe he did it.

He is an expert just like his own book says in tongue in cheek. Mark Twain once defined an expert as a fool a long way from home. And that is where Marguiles comes in the picture. But before he came here, he did his best to do what Nationwide wanted him to do. When this doctor was smart enough not to talk to the defense lawyer, Marguiles gets on the phone, he knows a doctor will take another doctor's phone call, even though he's a lawyer. He didn't announce himself as a lawyer. He didn't say this lawyer Marguiles from Baltimore, he said this is Doctor Marguiles from Baltimore, and I've got a real problem with the diagnosis down in Louisville, Kentucky.

We haven't heard from Jean Knipp. She didn't testify that this woman pulled out in front of me. That this lady did anything wrong. That this lady was speeding. Jean Knipp's the one that pulled out in front of this lady, who had the right of way and they've admitted that, but a week before, they figured they'll find somebody who might just have a memory, of a 35 mph speed limit sign, and that might be able to come here and say that my lady, Pat Milby, was doing as

much as 40-45 mph in a 35 mph suggested speed zone, and you ask this lady, well how long did you have to observe this vehicle. *McMurry sets up her deposition testimony.* Let's see what her first answer in deposition is, not her tenth answer after she's badgered for an hour. Let's see what her first answer as to how long she saw Pat's vehicle. Answer. I didn't see the vehicle until the vehicle was right making impact with her. She saw this thing in an instant, not ten seconds.

But the point is that Nationwide thinks it can come in here, and present this kind of evidence to you and convince you, to put some percentage of fault in front of Pat's name. Well don't do it. Don't buy into it. Put 100% in front of Jean Knipp, because Jean Knipp is the one at fault in this accident, and if it wasn't true, you can be sure they'd have brought Jean Knipp in here to tell you about it.

McMurry, partially inaudible on tape, discusses her appropriate treatment at a brain treatment program, where her brain injury was noted.

The case is really, whether she has a brain injury, turns on two types of evidence. There's the MRI evidence and then there's the psychological evidence. Dr. Marguiles' chapter, I read it to him yesterday, and in the back of it, he says we're going to be suspicious about these cases unless there's a subsequent follow-up, a second neuropsychological evaluation. And when that second neuropsychological evaluation shows her getting much worse, then we get suspicious. In this case, it shows she's getting better. The one thing that we all agree upon, and there's no evidence to the contrary, this lady's neuropsychological testing by two experts, brilliantly trained, that she did not fake, she did not malingering, and she did not lie. That what she gave them was truthful and what she gave them was honest. She didn't try to exaggerate her symptoms, her complaints or her problems. Why didn't they bring another neuropsychological tester in here? I'll tell you why. They knew a neuropsychological tester would agree. Isn't it obvious they'd agree? So if we look at neuropsychological testing all by itself, from two of the best neuropsychological experts you could ever have, she's got a brain injury as a result of that accident.

Both said there could be an accumulation effect, an accumulation effect if you have a prior brain injury, and who brought the prior brain injury business up? Mr. Smith did mention, he said, you can't have it both ways. Well, I don't understand this whole concept of having it both ways. We've talked about all these prior brain injuries they start to say might have caused the spots on her brain, that might have caused the injury. The point is that if she had some brain injury

in the past, they're responsible. Nationwide is responsible for any aggravation of a pre-existing condition. If this lady's head was like an eggshell, and was tapped in this accident, and it wouldn't have hurt anyone but this lady, because of the fragility of her head, they'd still have to pay the full measure of damages, and that is written by this court. The court says, if you determine that plaintiff, Patricia Milby is entitled to recover damages for her injuries, you shall include compensation for losses attributable to her pre-existing condition, but only if and to the extent the pre-existing conditions were aroused or aggravated by the accident in question.

If Pat was more susceptible in this second accident, than you must compensate her for the terrible events that transpired after that accident, and as a result of that accident. So it is important. Both of these experts, these neuropsychological testers have concluded that maybe she has some prior brain injury in the past. It doesn't matter. Pat still wins if you believe she did or you believe she didn't. The people who have tried to have it both ways are Nationwide. They've tried to convince this jury, you good people, that an accident where there was a \$500 bumper ding, means all her problems are related to that, and not this accident. That's what they've tried to do. No question about it. The strangest defense I've ever seen. Instead of looking at a 40 mph head against a windshield, they want to talk that Dr. Robards says there may be a minor brain injury.

McMurry discusses the hospital's inadequate personnel to diagnose plaintiff's MRI, which when properly read, evidenced that contrary to most such injuries, plaintiff was not improving. The hospital then advised her to see a neuropsychologist.

But she does have the presence to remember he told her to go see a neurosomething, and now she's to be blamed and she's to be punished because she asks her attorney who to go to. I give her a list. I give her a list of names and phone numbers because I care about her. She goes down that list, and she gets an appointment with a Dr. Changaris, a man I don't know from Adam. I've never met him. I've never had anything to do with him. I never sent him any clients. I never had any contact with him. He's just one of many in this community, and she happened to land on that number, and he happened to be in town, and she happened to see him.

Why would Nationwide want to pick on her, for going to her attorney, and saying, can you help me find a neurosomething. Dr. Changaris is not going to compromise his fine reputation in this community by coming in here, and pretending that something

happened when it didn't. By pretending to have a diagnosis when it's not real. Dr. Changaris has been referred to as a consultant, as an evaluator, as a hired guy by this lawyer. Well I didn't pay him. Dr. Changaris didn't see her one time, he saw her six times for a six month period of time, and referred her to Dr. Craft, the best guy around, and Dr. Kraft evaluated her in the same way he evaluates all his patients.

Did Kraft give more consideration to the possibility Pat had a brain injury because she came from Dr. Changaris? No. One look at Dr. Kraft, tells you that guy can't be compromised. Does he see people day in and day out who don't have brain injuries? You bet he does. Does he think Pat has one. You bet. Is it significant? You bet. But Dr. Changaris didn't want you folks to be in any way misled by the reality of her condition so what does Dr. Changaris do? He has her reevaluated in 1997, a year later, to see if there's any improvement, so you folks, and he, and the patient, the one he cares about, will know whether or not she's doing better.

I don't want to miss this opportunity to discuss the MRI evidence. *McMurry then discussed medical proof that defense doctor backed off his opinion which tended to eliminate other causes for plaintiff's injury.*

When I knocked all those down, we came up with migraine headaches. Migraine headaches cause white spots on the brain, but you heard, I don't know if you heard it or not but boy she covered it. Dr. Aaron said nonsense, the temporal lobes are where you get migraines, and that's where these lesions are, and they're not consistent with the pattern we see here.

All Mr. Smith did was ask, well can migraine headaches cause this? Why did he ask that question? Because he knew Dr. Marguiles, the lawyer from Baltimore, would come down here, and say, in my crystal ball, I think she's got migraine headaches, and with this migraine headache situation, I'll define migraine headaches as anything that gets better with migraine medication. Well I don't know that much about migraines but I think they're pretty serious and they require serious treatment. And if what she had in 1995 was migraines, they were serious and they required narcotic medication. What about the ones she had before? I don't think they're migraines. His opinion was she'd always had these migraines, migraines being defined as anything that's relieved by migraine medication. How about Tylenol and chiropractic adjustments?

To me, it's foolish and silly for a man who declares himself to be an expert in medicine and the law to come down here and try to pull that. It's unbelievable. They couldn't get her family doctor to

say she had migraines. Did it surprise you? In his deposition, and I like these condensed things in the back, there's an index with every word that's spoken, you know where every word is on every page and line, and under migraine, I go to the big letter M, and doggone, it's not in his deposition. They never even asked her family doctor, who'd been treating her as her family doctor for years, they never even asked if she had migraine headaches. Never asked it.

Doctor Marguiles thought he could be sneaky, and get on the phone and try to get some information out of the good doctor, and perhaps persuade the good doctor to say the word migraine in this case, it would really help this Nationwide Insurance Company.

Humans cannot survive except in reliance.

Keypoint: Brain Injury Damages

Plaintiff's counsel describes the unique importance of the brain to the human species, then correlating the client's brain injury.

We come on this earth unarmed. Our brain is our only weapon. Animals, they obtain food by force. Man doesn't have claws, fangs, horns or big strong muscles. We must plant our food or we must hunt it. To plant, we need our process of thought, to hunt we need weapons. For weapons, we need the process of thought. From the simplest necessity, to the most abstract religious concept, everything we have and everything we are comes from the single attribute of man, the function of our brain, and before 1995, what did Pat have?

She was on top of the world. As she told you, she had the tiger by the tail. Although she had a tough childhood, you didn't hear her whine. She always had time for her daughter. *Partially inaudible discussion of her plaintiff's character.*

We are what we accomplish, and Pat is not able to pursue her accomplishments the way she was before. Not only did she lose the physical and material things in life, she's lost feeling and undergone a personality change. *This discussion continues by McMurry, partially audible on tape.*

Pat is at the lowest she's ever been in her life. *Uses a board to describe it.* First item of damages is pain and suffering. Smith said \$750,000 is somehow a joke, that I made that figure up hoping you'd cut it by some percentage. That's not so. And what did Smith say: that \$750,000 was unfair for a significant brain injury. Pat doesn't want anything more than what's fair. She wants justice. She wants full justice, and half a loaf ain't a full loaf. She doesn't want half-justice, she wants full justice, and she's entitled to it.

\$750,000 represents \$50 a day for her life for the next 39.5 years, \$50 a day for the additional problems she has, for the communication problems, for the personality defects, for all that she can't enjoy that she once enjoyed, \$50 a day is unreasonable? And they say I suggest \$750,000 as a figure that you should toss aside, because I obviously expect you to cut it.

Necessary and reasonable medical expenses. Every single penny of this is reasonable. Nationwide knows that if you try to make it difficult for insureds, make it difficult for insureds. It's all about economics. The defense didn't have to go through her gynecological past, and they said he had to do it because she wasn't complaining of headaches for this time. Not a nickel of the medicals is unfair in any way. She completed a course to learn how to cook, and I don't mean they don't just wave a magic wand. This lady needed help. They've not denied it. It was no joke.

McMurry described his prayer for future medical as conservative, also defining her lost wages using her tax returns.

Let's look at the loss of the power to labor and earn, now that's the future, and let's look at what it'd be like for Pat and yeah, these figures are large, no question about it. Let's look at what will it be like for Pat if she never returns to the nail business. Never ever. *McMurry described the calculations for these items of damage with pre versus post earnings as a nail technician noting she is now unable to work as fast.*

After quantifying these figures, McMurry continued, With this kind of money, Pat won't be becoming one of the noble and elite. We're not trying to take advantage of anybody. All Pat wants is what she's entitled to.

The question, ladies and gentleman, is will you believe Nationwide and say that all her doctors are lying, everything they've told you is a lie. You don't have brain damage and you can ignore those doctors, and you can stop taking the medication your doctor's have given you, it's all just a lie. We're Nationwide, we know that your doctors are malpracticing on you, that they don't have your care at heart, and have come in here trying to pull the wool over this jury's eyes, and Nationwide, they know. That's what they're asking of you in this case. Don't do it. Don't buy into it.