



# JURY VERDICT

## REVIEW & ANALYSIS®

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### SUMMARIES WITH TRIAL ANALYSIS

Volume 16, Issue 6  
June 2006

*A monthly review of Florida State and Federal Civil Jury Verdicts with professional analysis and commentary.*

*The Florida cases summarized in detail herein are obtained from an ongoing monthly survey of the State and Federal Courts in the State of Florida.*

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*Published monthly*

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## Summaries with Trial Analysis

### **\$28,000,000 VERDICT - MEDICAL MALPRACTICE - NEGLIGENT POST-OPERATIVE CARE FOLLOWING TVT SLING PROCEDURE TO TREAT STRESS INCONTINENCE - FAILURE TO TIMELY DIAGNOSE AND TREAT OBSTRUCTION OF URETHRA - PERMANENT VOIDING DYSFUNCTION.**

*Seminole County*

**A treating ob/gyn and his professional association were the defendants in this medical malpractice case alleging negligent post-operative care following a TVT sling procedure to treat stress incontinence. The plaintiff contended that the defendant doctor failed to timely diagnose and treat an obstruction of the urethra caused by the sling, resulting in permanent voiding dysfunction. The defendant maintained that he reasonably attributed the plaintiff's symptoms to post-surgical swelling.**

The 37-year-old female plaintiff developed mild stress incontinence and prolapse of the uterus associated with the birth of her second child in 2001. The defendant ob/gyn recommended surgical placement of a TVT sling, a synthetic ribbon placed under the urethra to suspend it.

The sling surgery was performed by the defendant on March 26, 2001, and the plaintiff was discharged from the hospital two to three days later. On her first post-operative office visit on April 2, 2001, the plaintiff complained that she was unable to urinate. The plaintiff had a permanent catheter in place at that time, which was removed and replaced by the defendant. The defendant advised the plaintiff that the inability to urinate was due to normal post-operative swelling.

On April 6, 2001, the plaintiff returned to the defendant's office. Again he removed the permanent catheter, but the plaintiff was still unable to urinate. The plaintiff was instructed regarding a self-catheterization procedure and was told by the defendant to continue that procedure until she could urinate regularly.

The plaintiff testified that she next returned to the defendant's office on April 10, 2001, and advised him that she was still unable to urinate without using the catheter. The plaintiff saw the defendant again on May 3 as well as June 6, 2001, with her symptoms unchanged. The plaintiff testified that she was advised by the defendant at the June 6, 2001, office visit to be patient and that her problem could take up to a year to resolve.

The plaintiff testified that she next called and spoke with the defendant on August 30, 2001, and was reassured that her condition would improve. In the meantime, the plaintiff testified that she continued self-catheterization and a technique involving standing above the toilet, bending and straining in order to urinate.

The plaintiff returned to the defendant in December 2001, some nine-months post-operatively. The defendant then suspected that the plaintiff was suffering from a urethra

obstruction and attempted a urethra dilation. The plaintiff's medical experts testified that the urethra dilation was useless in that it would not be adequate to break the scars to alleviate the obstruction.

In February of 2002, the defendant referred the plaintiff to a urologist. However, the plaintiff felt that there was conflict of interest between her employment as a health department medical investigator and the particular referred to urologist that prevented her from becoming his patient.

The defendant then referred the plaintiff to his practice partner, an ob/gyn, in April 2002. The defendant's partner performed a cystoscopy and urodynamic (flow) studies which immediately confirmed the urethra obstruction. The plaintiff then went to a different urologist who performed surgery to remove the obstruction in August of 2002, some 17 months after the original surgery.

The plaintiff's experts testified that after three to four months, an implanted sling will become ingrained in the tissue making removal difficult. However, removal of the sling, if performed within three to four months, can be accomplished through the vagina and simply involves clipping on both sides of the sling with no permanent damage to the bladder, according to the plaintiff's experts.

All experts agreed that the procedure performed by the defendant to place the TVT sling was indicated and properly performed. The plaintiff contended that the defendant rendered negligent post-operative care and should have immediately ordered diagnostic studies or referred the plaintiff to an urologist for diagnosis of the obstruction at the first indications of such.

Because the sling was so enmeshed in the tissue or "scarred down," the plaintiff required a complete urethrolysis, a laparoscopic procedure to sclerotize (cut around) the urethra. The plaintiff's experts testified that the plaintiff has sustained permanent bladder damage and has become a permanent dysfunctional voider as a result of the long-standing obstruction.

The plaintiff is a single mother of two young children ages six and nine. The plaintiff claimed that she will be required to self-catheterize multiple times a day for the remainder of her life although she can sometimes use the messy standing and bending technique to urinate. The plaintiff claimed that her urinary dysfunction makes it difficult to continue her job, engage in social activities and interact with her children.

The defendant argued that it is a known complication of a TVT sling that some patients may have urethral obstruction which may be temporary or permanent. The defendant's expert testified that the defendant correctly followed the plaintiff in the post-operative period.

The defendant testified that the plaintiff stopped returning to him for complaints of urethral obstruction ten and a half weeks after the surgery and did not return to his office until December 2001. During that period of time, the defendant claimed that the plaintiff did not complain nor indicate she was having any difficulty.

The defendant maintained that since post-surgical urethral obstructions are expected in a certain percentage of patients and that a large percentage of those patients' condition resolve, and since the plaintiff did not return, he reasonably believed that the plaintiff must have either improved or accepted the situation. In fact, the defendant argued that when the plaintiff called in August, 2001, he offered her an office appointment and she refused.

The defendant's expert ob/gyn testified that when the plaintiff returned to the defendant in December 2001, he began an appropriate workup of her condition, including referrals to urologists and other physicians in the practice. The defendant also claimed that the plaintiff's urethrolisis was successful and completely removed the urethral obstruction and that her own treating urologist could find no physical reason for her continuing complaints of urethral obstruction.

The plaintiff's medical records indicated that she reported to her urologist after the urethrolisis that she was completely cured and free of any abnormal problem. The defense contended that this period of normal urinary function lasted one month at which time the plaintiff suddenly and inexplicably returned to her pre-operative dysfunctional state.

The defense contended that there was no evidence of bladder muscle damage, nerve injury, scarring, reobstruction or any other objective explanation for the plaintiff's continuing complaints.

The defendant contended that the plaintiff gave conflicting testimony as to whether she had ever truly been required to catheterize herself to urinate. Testimony showed that the plaintiff filled out an intake form in 2003 (prior to the urethrolisis) in which she indicated she was not required to use a catheter in order to urinate.

The jury found the defendant negligent and awarded the plaintiff \$28 million in damages, including \$3 million for past pain and suffering and \$25 million for future pain and

suffering. The defendant's motion for new trial/remitter is pending. The plaintiff filed a proposal for settlement in the amount of \$275,000.

#### REFERENCE

Plaintiff's urologist: Chester Algood from Gainesville.  
Plaintiff's ob/gyn: Harold Miller from Houston, TX.  
Plaintiff's urogynecologist: Bruce Rosenzweig from Chicago, IL.  
Defendant's urogynecologist: Donald Ostergard from Irvine, CA.

Davis vs. Bowles and Physician's Associates P.A. Case no. 03-CA- 2803-09K; Judge Debra Steinberg Nelson, 4-12-06.

Attorneys for Plaintiff: Joseph Taraska and Scott Noecker of Jacobs & Goodman in Altamonte Springs.  
Attorney for defendant: Richard S. Womble of Rissman, Weisberg, Barrett, Hurt, Donahue & McLain in Orlando.

#### COMMENTARY:

**The magnitude of this \$28 million damage award may have been related in large part to the nature of the plaintiff's injury. The injury was shown to be extremely personal and caused not only pain, suffering and the loss of the enjoyment of life, but also humiliation. The plaintiff's life expectancy is approximately 40 years and the testimony of the plaintiff and her physicians indicated that this injury will continue for the remainder of her life. In addition, the plaintiff was able, during her testimony in chief, to describe for the jury the intimate nature of this injury and the effects that it has had on her life and will continue to have on her life.**

**Plaintiff's counsel utilized an effective color-coded time line depicting each of the plaintiff's multiple visits with the defendant in a progressive tint (from blue to yellow to red) indicating the more extreme deviation from the required standard of care as the dates progressed in time. The time line was also designed to demonstrate that the defendant had many opportunities to investigate the cause of the plaintiff's unresolving symptoms and yet failed to do so. Additionally, the jury may have considered that the defendant's partner was an expert in this particular type of surgery, that he diagnosed the condition immediately upon examining the plaintiff and this doctor could have been easily consulted by the defendant much earlier in the post-operative course.**

**The case was tried over the course of six days with a two hour jury deliberation. Plaintiff's counsel requested damages in the millions, but left the figure open. The defendant made no offers prior to trial. □**

**\$400,000 VERDICT - MEDICAL MALPRACTICE - FAILURE OF UROLOGIST TO TIMELY DIAGNOSE PROSTATE CANCER - DELAY IN TREATMENT - DIMINISHED CHANCE OF CURE - WRONGFUL DEATH AT AGE 80.**

*Charlotte County*

**The estate of the 80-year-old decedent alleged that the defendant urologist deviated from the required standard of care in failing to timely diagnose the decedent's prostate cancer at a time when it was treatable. The defendant maintained that the decedent's care met the required standard in all respects and that earlier diagnosis of his prostate cancer would not have made a difference in his medical course. The defendant urologist's practice group was also named as a defendant in the case on a vicarious liability theory.**

On October 25, 2002, the plaintiff's decedent, age 80, presented to his family physician (who was not a party to the litigation) for his annual Prostate Specific Antigen (PSA) test. PSA is a protein secreted by the prostate gland. The test revealed an elevated value of 7.11 ng/ml, which had risen from the previous year's PSA of 4.8 ng/ml.

The decedent was referred to the defendant urologist whom he saw for the first time on November 19, 2002. The defendant noted the elevated PSA and also noted that the decedent's prostate was enlarged. However, the defendant believed that the decedent's PSA value was within the acceptable range for age-adjusted PSA, a concept that allows for higher PSA values in older men to account for benign growth. The defendant recommended no further urological work up.

The plaintiff argued that the defendant failed to discuss with the decedent the possibility of a prostate biopsy to rule out prostate cancer. Over the course of the next three months, the decedent noticed blood in his urine and the plaintiff contended that his prostate gland began to increase in size.

On February 18, 2003, the decedent underwent another PSA drawn by his family physician which showed a further PSA increase to 12.6 ng/ml, which the plaintiff asserted was far outside any acceptable range. The decedent was, again, referred back to the defendant urologist whom he saw for the second time on April 8, 2003, and reported the blood in his urine. The defendant still believed the increase in prostate size was the result of benign growth and did not believe a biopsy was indicated. Again, the plaintiff argued that the defendant failed to discuss with the decedent the possibility of a prostate biopsy to rule out prostate cancer.

The defendant performed a TURP (transurethral resection of the prostate) in which prostate tissue is surgically removed in order to reduce the size of the gland. This tissue

was excised and sent to the laboratory for pathological analysis. The tissue sample was negative for cancer. No biopsy was performed.

The plaintiff's medical experts testified that the TURP procedure is not a substitute for biopsy as the tissue in both procedures is taken from different areas of the prostate, a peripheral and transitional. The plaintiff's experts testified that 90% of prostate cancers emerge from the peripheral area and it is this area from which biopsy specimens are taken. The plaintiff's sample was taken from the transitional area.

Evidence showed that the decedent's bleeding resolved for approximately six weeks and then returned. On November 10, 2003, the decedent presented to the emergency room complaining of constipation. A CT scan revealed a massively enlarged prostate gland. The decedent also reported weight loss. The radiologist, who read the decedent's CT scan, reported that he could not exclude prostate cancer and he did not think the mass was colonic in origin.

The emergency room physician referred the decedent back to the defendant urologist. When the defendant saw the decedent a week later, notes indicated that the decedent reiterated that he had been losing weight. The defendant performed an ultrasound and discovered that the decedent's prostate had increased to 185 cubic centimeters, about the size of an orange. The defendant still did not believe these symptoms were caused by prostate cancer and scheduled a follow-up visit for three months later.

Meanwhile, the decedent saw his family physician who ordered a bone scan, CT scans of the abdomen and pelvis and pelvic and chest x-rays. The CT scan showed an enlarged prostate with mixed density and irregularity and extension outside the capsule, suggestive of prostate cancer. The bone scan showed evidence of metastatic disease. The decedent's family physician, once again, referred the decedent back to the defendant urologist who, this time, performed a biopsy which revealed advanced Gleason 9 prostate carcinoma. The decedent underwent hormonal treatment for his prostate cancer.

The plaintiff's urological expert testified that the decedent should have undergone a prostate biopsy on November 19, 2002, (first visit to the defendant), and April 8, 2003 (second visit to the defendant), which would have resulted in diagnosis of the cancer. The plaintiff contended that earlier diagnosis and treatment would have significantly

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"FLORIDA JURY VERDICT REVIEW AND ANALYSIS (ISSN 1058-8604) is published Monthly for \$295/year by Jury Verdict Review Publications, Inc., 45 Springfield Ave., Springfield, N.J. 07081. Periodical Postage Paid at Springfield, N.J. and additional mailing offices. Postmaster: Send Address Changes to Florida Jury Verdict Review and Analysis, 45 Springfield Ave., Springfield, N.J. 07081"

increased the decedent's chance of surviving the disease. The decedent died six weeks after his diagnosis. He was survived by his wife of 45 years.

The defendant argued that the defendant's belief that the plaintiff's symptoms stemmed from a benign growth was reasonable under the circumstances. The defense contended that the negative TURP was one more reason that prostate cancer would not have been suspected. The defense contended that the standard of care did not require that a patient be informed concerning the possibility of a prostate biopsy.

The defense also argued that the decedent's cancer was highly aggressive Gleason 9 which had spread long before his first and second visits to the defendant. Therefore, the defendant claimed that even if diagnosed at these early dates, the decedent's cancer would still have taken the decedent's life.

The jury awarded the plaintiff \$400,000 in damages. The award included \$200,000 in past pain and suffering and \$200,000 in future pain and suffering. The case is currently on appeal.

#### REFERENCE

Plaintiff's oncologist: Gerald Sokol from Hudson. Plaintiff's urologist: Michael B. Schoenwald from Hollywood. Plaintiff's radiologist: Michael Foley from St. Petersburg. Defendant's pathologist: Jonathan I. Epstein from Baltimore, MD. Defendant's urologist: Mark Soloway from Miami. Defendant's radiologist: Marc Kaye from Naples.

Lindall vs. Melser, et al. Case no. 05-73 CA: Judge Isaac Anderson, 2-15-06.

Attorney for plaintiff: Elizabeth H. Faiella and Peter J. Gulden, III, of Elizabeth Hawthorne Faiella, P.A., in Winter Park. Attorney for defendants: Craig Stevens and Lynne E. Dailey of George, Hartz, Lundeen, Fulmer, Johnstone, King & Stevens in Fort Myers.

#### COMMENTARY:

**The plaintiff's presentation in this medical malpractice action focused on the allegation that not only did the defendant urologist fail to order a timely prostate biopsy, but he also failed to inform the decedent or his wife that such a procedure was available to confirm or rule out prostate cancer. Instead, the defendant waited for more than one year before performing the crucial biopsy which ultimately confirmed the cancer.**

**Among the plaintiff's most damaging evidence was a CT report which clearly stated that prostate cancer could not be ruled out, ever increasing PSA levels, blood in the urine and testimony that the decedent's prostate had swelled to the size of an orange. Yet, despite these documented findings, evidence showed that the defendant physician scheduled the decedent to come in for a follow-up some three months later.**

**The defense stressed a causation argument, contending that the decedent's cancer was extremely aggressive and had already metastasized prior to his first visit with the defendant urologist.**

**The parties have reached a post-trial settlement for attorneys fees in the amount of \$190,000 which will be added to the amount of the verdict if the defendant's pending appeal is unsuccessful. □**

## DEFENDANT'S VERDICT - MEDICAL MALPRACTICE - RETAINED SURGICAL SPONGE FOLLOWING EMERGENCY HYSTERECTOMY AND OOPHORECTOMY - FAILURE TO TIMELY DIAGNOSE PRESENCE OF RETAINED SPONGE - REMOVAL SURGERY REQUIRED - LOSS OF SOLE REMAINING OVARY.

### *Orange County*

**The plaintiff, a 40-year-old female at the time she underwent an emergency hysterectomy and oophorectomy performed by the defendant ob/gyn, contended that the defendant was negligent in leaving a surgical sponge in her pelvic cavity following the surgery. The plaintiff also claimed that the defendant was negligent in failing to diagnose the retained sponge on a post-operative x-ray and in failing to obtain a radiology consult. The defendant ob/gyn argued that he reasonably relied on the hospital nurses and the radiologist who did not report any questionable findings. The hospital and assistant surgeon settled the plaintiff's claims prior to trial. The radiologist was also named as a defendant, but was voluntarily dismissed from the case prior to trial.**

The evidence adduced at trial showed that the plaintiff underwent an emergency hysterectomy and oophorectomy performed by the defendant on September 28, 1999. The

plaintiff claimed that a post-operative x-ray indicated a vague area of radiopacity in the plaintiff's left upper quadrant which was not appreciated by the defendant. The plaintiff argued that the radiopacity represented the retained sponge which had been left in the plaintiff's abdomen during the surgery.

The plaintiff contended that the standard of care required that the defendant obtain a radiology consult and follow-up on the radiology report which mentioned the questionable area. The plaintiff continued to be treated by the defendant for approximately 18 months after performance of the hysterectomy. The foreign body was discovered during a subsequent hospital admission for chest pain.

A large mass of purulent material was removed from the plaintiff's pelvic cavity, along with the retained surgical sponge. Due to the presence of adhesions, the plaintiff's remaining ovary was removed as well.

The plaintiff alleged that she underwent an unnecessary surgery for the removal of the retained sponge. She also alleged that she had been placed in early onset of menopause due to the removal of her sole remaining ovary. During this period of time, the defendant provided hormonal treatment for menopausal symptoms.

The defendant contended that during the plaintiff's emergency surgery, he reasonably relied upon the hospital nurses to perform an accurate sponge count. The defendant also testified that he was not made aware of any questionable findings on the plaintiff's post-operative x-rays.

The defendant's expert radiologist testified that it was the standard of care for the radiologist to verbally report any questionable findings on x-ray to the surgeon. The defense argued that the radiologist acted below that standard of care in failing to verbally inform the defendant of the questionable finding.

The jury found no negligence on the part of the defendant which was a legal cause of injury to the plaintiff.

#### REFERENCE

Plaintiff's ob/gyn: Eric Freiling from Hollywood. Defendant's ob/gyn: Dale Bearman from Atlanta, GA. Defendant's radiologist: Michael Foley from St. Petersburg.

Stewart vs. Koren. Case no. 03 CA-4071; Judge Cynthia MacKinnon, 1-13-06.

Attorney for plaintiff: Peter Mineo, Jr., and Peter Mineo, III, of Mineo, Dellapina & Marucci in Fort Lauderdale. Attorney for defendant: Jeffrey S. Badgley of Alvarez, Sambol, Winthrop & Madson in Orlando.

#### COMMENTARY:

**In successfully defending this retained sponge case, defense counsel emphasized two themes. The first theme related to the defendant's performance of the life-saving surgery under emergency circumstances. Given the nature of the circumstances of the surgery, the defense contended that it was understandable that a surgical sponge could well be left in the pelvic cavity and that doing so did not constitute negligence. The defense also focused on the teamwork effort involved in treating the plaintiff. Defense witnesses explained to the jury the respective roles of the nurses and the radiologist in completing the emergency, life-saving surgery.**

**The defendant's radiology expert testified that the radiologist was negligent in failing to verbally draw the defendant's attention to the questionable findings on the plaintiff's post-operative x-ray. The defendant contended that his field of expertise is not radiology and, therefore, he was required to rely on the radiologist in this area. The radiologist was voluntarily dismissed from the suit without payment to the plaintiff.**

**Although the plaintiff had no abdominal symptoms during the 18 months that the retained sponge was in her abdomen, she claimed she experienced unusual feelings in her body such as numbness in her upper extremities and chest pain. She also sought damages for the loss of her sole remaining ovary which caused the early onset of menopause at age 40.**

**The defendant made no settlement offers prior to trial. □**

## **\$25,200,000 VERDICT - AVIATION NEGLIGENCE - MID-AIR COLLISION OF TWO SMALL AIRPLANES - NEGLIGENT AIR TRAFFIC CONTROL - WRONGFUL DEATH OF 46-YEAR-OLD FATHER OF FOUR.**

### *Broward County*

**This wrongful death action stemmed from the mid-air collision of a small Cessna airplane piloted by the 46-year-old decedent and another small plane over Deerfield Beach in June of 2003. The plaintiff claimed that the accident resulted from the negligence of the defendant air traffic control company, which was contracted by the Federal Aviation Administration to provide air traffic controllers. The defendant argued that its controllers were unaware of the danger presented by the second airplane and, therefore, were under no duty to warn the decedent of its presence.**

On the evening of Tuesday, June 17, 2003, the decedent, a Boca Raton chaplain and pilot, and his friend were flying in a Cessna 182 north to Boca Raton Airport. They were returning from a missionary trip in the Bahamas and had just cleared U.S. Customs at Fort Lauderdale-Hollywood International Airport with clear visibility.

At the same time, a Cessna 172, with a family of three aboard, was headed south to Fort Lauderdale Executive Airport. At the controls of the second airplane was a private pilot who was learning to be an airline pilot at a local training academy which owned the airplane. The pilot of this plane was taking his wife and 12-year-old daughter for a pleasure ride along the coast. At 7:52 p.m., the two planes collided into each other about 1,000 feet above the Deerfield Beach Fishing Pier and plunged into the water. There were no survivors.

The plaintiff claimed that the two planes collided moments after contact with air traffic controllers in Pompano Beach and Boca Raton. The defendant aviation company ran the air traffic control operations at both the Pompano Beach and Boca Raton airports.

The plaintiff alleged that the defendant was negligent in failing to provide traffic advisories and warnings so as to avoid the mid-air collision of the two aircraft. The plaintiff contended that one of the two air traffic controllers em-

ployed by the defendant at the Boca Raton tower had left early on the night in question, leaving the remaining air traffic controller to perform additional duties.

The decedent was survived by his wife and four children, ages 6, 11, 17 and 19 at the time of his death.

The defendant argued that it was obligated to provide traffic advisory and traffic alerts only if they were actually aware of a potential danger. The defense claimed that the second plane failed to follow instructions and did not report to the Boca control tower. The defense also argued that the decedent was comparatively negligent in failing to maintain due vigilance in looking for and avoiding other aircraft.

The jury found the defendant aviation company 100% negligent and awarded the plaintiffs \$25,200,000 in damages. The pilot of the other airplane was listed as a Fabre defendant and was found not negligent. The award included \$1.2 million in economic damages; \$10 million in pain and suffering to the decedent's wife and \$3.5 million in pain and suffering to each of the decedent's four children. Post-trial motions are pending, including the plaintiff's motion for attorney fees and costs.

#### REFERENCE

Plaintiff's accident reconstruction/piloting expert: Donald E. Sommer from Broomfield, CO. Plaintiff's air traffic control expert: Richard P. Burgess from Fort Worth, TX. Plaintiff's physiological optics/visibility expert: Warren Dehaan from Boulder, CO. Plaintiff's economist: David Williams from Miami. Defendant's air traffic control expert: Edmund Strong from Fort Myers. Defendant's piloting expert: Lyle Schaefer from Marietta, GA. Defendant's economist: J. Rody Borg from Jacksonville.

Ross vs. Robinson Aviation, Inc. Case no. 03-13487; Judge Victor Tobin, 3-29-06.

Attorneys for plaintiff: Steven C. Marks and Ricardo Martinez-Cid from Podhurst Orseck in Miami. Attorneys for defendant: Mitchell Kallet from Kern & Wooley in Hartford, CT and Edward M. Booth, Jr., of Spohrer, Wilner, Maxwell & Matthews in Jacksonville.

#### COMMENTARY:

**The dramatic nature of this mid-air collision which left no survivors seemed to support the plaintiff's argument that the air traffic controllers were not properly performing their jobs. Plaintiff's counsel argued that the highest priority of all personnel in the air traffic control tower is to provide advisories and alerts to prevent such midair collisions.**

**The defense maintained that the second plane did not report to its tower, that it was not aware of the danger and, therefore, that it was under no duty to warn the decedent of the approaching aircraft. The jury rejected this argument apparently reasoning that if the defendant's air traffic controllers were not aware of the impending crash, they should have been.**

**The case was tried over the course of eight days and the jury deliberated approximately 90 minutes before finding the defendant air traffic control company 100% responsible and rendering a substantial \$25.2 million award for the plaintiffs. The plaintiff had also named as a defendant the training academy which owned the other airplane and where the other pilot was training to become an airline pilot. The training academy settled the plaintiff's claims last year for \$1,750,000.**

**The plaintiff filed proposal for settlement as to the remaining air traffic control company in the amount of \$2,399,999. The defendant's liability policy limit was \$7.5 million at the time of the crash. □**

## **\$613,327 VERDICT - NEGLIGENT FIRING OF SLINGSHOT BY 13-YEAR-OLD BOY - ROCK STRIKES NINE-YEAR-OLD PLAINTIFF - EYE INJURY - LOSS OF EYE - PROSTHETIC EYE INSTALLED - EMOTIONAL INJURIES CLAIMED.**

*Palm Beach County*

**The plaintiff father brought this action on behalf of his nine-year-old daughter who was struck in the eye by a rock fired from a slingshot by the minor defendant. The 13-year-old defendant contended that he fired the slingshot to scare the infant plaintiff, but never meant to hurt her. The parents of the nine-year-old child who owned the slingshot were named as codefendants in the case under the claim of negligent entrustment of the slingshot to their son. They paid a \$100,000 homeowners policy limit to settle the plaintiff's claims prior to trial.**

Testimony established that the plaintiff was visiting the defendant for the afternoon. The plaintiff and her girlfriends threw oranges that struck the young defendant. The

13-year-old defendant was also allegedly throwing oranges back at the girls. Several minutes later, the boy went to the garage of the settling codefendant neighbor's house where he knew that a slingshot was kept in a toy box. The defendant retrieved the slingshot and fired a small rock from the slingshot towards the minor plaintiff and the other girls. The rock ricocheted off the ground and struck the plaintiff in her left eye.

The infant plaintiff, who was bleeding profusely at the scene, screamed that she was "afraid I'm going to die." The evidence revealed that the plaintiff's eye was removed and a prosthesis installed. Her physicians testified that the plaintiff has lost depth perception, peripheral vision and that the prosthetic eye will not track as a normal eye.

The plaintiff's doctors also testified that the prosthetic eye will require replacement approximately every two years at a cost of \$3,000 per replacement. The plaintiff claimed \$135,000 in future medical expenses for cleaning and replacement of the prosthetic eye.

The plaintiff's psychologist testified that the plaintiff suffered from post-traumatic stress syndrome and will experience flare ups throughout her life, requiring continuing psychological counseling. The plaintiff sought \$50,000 for future psychiatric treatment.

The plaintiff testified she is constantly ridiculed by her classmates regarding her artificial eye and she feels ugly. The plaintiff also testified that her eye fell out once at cheerleading practice and frightened her friends. The child's cheerleading coach confirmed that the eye fell out at school.

The plaintiff's rehabilitation expert opined that the minor plaintiff will be precluded from many fields of employment and sustained a diminished earning capacity as a result of the loss of her eye. He opined that the plaintiff has sustained a 90% loss of job capacity.

The minor defendant testified that he shot the rock in an attempt to scare the plaintiff and intended to strike the ground nearby. The defense argued that the children were engaged in childish horseplay and the plaintiff's eye injury was an unfortunate accident.

The defense argued that although the plaintiff sustained a serious injury, she received a good result from her prosthetic eye and can be trained in adaptive techniques and can function normally with single vision.

The defendant's vocational rehabilitation expert testified that there are numerous jobs available to individuals with single vision and the plaintiff has suffered no earning capacity loss.

The jury found the minor defendant 100% negligent. The plaintiff was awarded \$613,327 in damages. The award included \$6,335 in past medical expenses; \$181,992 in future medical expenses; \$175,000 in past pain and suffering and \$250,000 in future pain and suffering.

#### REFERENCE

Plaintiff's pediatric ophthalmologist: Lee Friedman from West Palm Beach. Plaintiff's economist: Bernard Pettingill from Palm Beach Gardens. Plaintiff's rehabilitation specialist: John Williams from Coral Springs. Plaintiff's

ocularist (fabricator of prosthesis): Scott Garonzik from Palm Beach. Plaintiff's psychologist: Mary Hunt from Palm Beach. Defendant's vocational rehabilitation expert: Pedro Roman from Miami. Defendant's ocularist: Raymond Peters from Bonita Springs.

Alvira vs. Faucher. Case no 502005CA 000636; Judge Karen Miller, 4-06.

Attorney for plaintiff: Glenn S. Cameron of Cameron, Davis & Gonzalez in West Palm Beach. Attorney for defendant: Joseph W. Ligman and Michael R. Seward of Ligman, Martin, P.L. in Miami.

#### COMMENTARY

**This case sets a relatively low value of \$613,327 upon the loss of an eye to a very young female plaintiff. One of the important factors may well include the jury's rejection of the plaintiff's claim that she sustained a diminished future earning capacity as a result of the eye loss. Plaintiff counsel's damage request during closing statements included \$150,000 in loss of future earning capacity and \$3 million in pain and suffering. However, the defense stressed the major achievements of individuals with only one eye, including piloting an airplane. The defendant maintained that the young plaintiff is already adjusting to her disability and that her reading level has actually increased since the date of the accident. From all outward appearances, the plaintiff at trial appeared to be a beautiful and normal little girl. Also limiting the jury's emotional reaction was the testimony establishing that the thirteen-year-old defendant never meant to harm the plaintiff and that the rock, in fact, had bounced off the ground prior to striking her in the eye.**

**The defendant's mother was inside her home playing cards with friends at the time of the incident. A negligent supervision count against the mother was disposed of by summary judgment prior to trial. However, the parents of the nine-year-old boy who owned the slingshot tendered their \$100,000 homeowners policy limit prior to trial. The defendant's homeowner's carrier (the same carrier that covered the slingshot owner) defended the case under a reservation of rights and filed a declaratory judgment action based on the intentional act exclusion. The carrier then went into receivership and the \$300,000 policy limits were accepted in post-trial settlement of the case. □**

## DEFENDANT'S VERDICT - PARAMEDIC NEGLIGENCE - ALLEGED IMPROPER EVALUATION OF PATIENT - FAILURE TO TRANSPORT PLAINTIFF TO HOSPITAL FOLLOWING FALL - DELAY IN DIAGNOSIS OF LUMBAR DISC HERNIATION - PERMANENT NERVE DAMAGE - WHEELCHAIR DEPENDENCE.

*Sarasota County*

**The plaintiff was an 88-year-old female who fell in her Sarasota home. Paramedics employed by the defendant responded to the plaintiff's call for assistance. The plaintiff claimed that the defendant's paramedics im-**

**properly evaluated the plaintiff and negligently failed to transport her to the hospital, resulting in a delay in diagnosis of a lumbar disc herniation which ultimately caused the plaintiff to suffer permanent nerve damage.**

**The defendants argued that the plaintiff showed no apparent injury at the scene of the accident and repeatedly declined transportation to the hospital for further evaluation. The defense also disputed that the plaintiff's neurological condition was caused by any alleged delay in surgery for the lumbar herniation.**

The evidence revealed that the plaintiff fell at home after a history of sciatica. A friend called paramedics to assist her off the floor. The defendants' paramedics assessed the plaintiff in her home and found no apparent injury. The plaintiff and her friend testified that the plaintiff complained to the paramedics of numbness in her legs at the time of the fall. The plaintiff was asked by the paramedics if she wanted to go to the hospital whereupon she declined.

Three days after the fall, the plaintiff presented to the hospital where she was diagnosed with a herniated lumbar disc related to the fall. She underwent lumbar disc surgery several days later and her physicians testified that the plaintiff has been left with permanent neurological damage.

The plaintiff contended that the defendants' paramedics negligently failed to perform a complete examination of the plaintiff after the fall, failed to assess her neurological emergency and failed to transport the plaintiff to the hospital. The plaintiff claimed that as a result, she will suffer permanent weakness of the legs which limits her ability to walk any distance. The plaintiff indicated that she relies mostly on a wheelchair and contended that she went from an independent lifestyle to being wheelchair-dependent in a nursing home.

The defendants maintained that the plaintiff showed no signs of a neurological injury or impairment at the time of their evaluation. The defense argued that its paramedics offered transportation on several occasions throughout the visit, all of which the plaintiff declined. The defendants' expert radiologist testified that no radiologist could date when the plaintiff's neurological injury occurred. This expert opined that the injury seen on the plaintiff's CT scan was within 0 to 30 days old. He testified that the injury could have occurred on the day the film was taken, or it could have occurred weeks before. The defendants also argued that earlier surgery would not have made a difference in the plaintiff's medical outcome.

The jury found no negligence on the part of the defendants which was a legal cause of injury to the plaintiff. Post-trial motions are pending.

## REFERENCE

Plaintiff's emergency medicine expert: John Sterba from Buffalo, N.Y. Plaintiff's radiologist: Michael Foley from St. Petersburg. Plaintiff's neurosurgeon: Robert Knego from Sarasota. Plaintiff's physiatrist: Kevin McGaharan from Sarasota. Defendant's emergency medicine expert: Richard Aghababian from Worcester, MA. Defendant's radiologist: Joseph Kleinman from Boca Raton.

Steffy vs. Sarasota County Emergency Services and Sarasota County Fire Rescue. Case no. 2004CA 006456NC; Judge Becky Titus, 5-5-06.

Attorneys for plaintiff: Ralph L. Marchbank, Jr., and Shelle Eddie of Dickinson & Gibbons in Sarasota. Attorneys for defendants: Todd M. Smayda and Michael Minkin of Stephens, Lynn, Klein, LaCava, Hoffman & Puya in Tampa.

## COMMENTARY:

**The well documented medical records may have been the most important factor in the successful defense of this case involving alleged paramedic negligence. The medical records seemed to indicate that the care providers recorded the plaintiff's complaints of pain and weakness accurately and that there was no support for the testimony of the plaintiff's witnesses that there was a constant complaint of leg numbness at the time of evaluation. The defendant also successfully stressed that the plaintiff had refused transportation to the hospital on several occasions during the paramedics' evaluation and it is questionable whether she could have been transported by the defendant against her will. The plaintiff, age 91 at trial, testified that she could not remember if she declined transportation to the hospital. Her friends, however, confirmed that the offer was made by the paramedics.**

**In addition, the defense asserted a strong causation defense challenging the alleged delay in the performance of surgery and the plaintiff's permanent neurological impairment. The defendants stressed that the plaintiff's own treating neurosurgeon and physiatrist could not state that the plaintiff would have been walking with earlier surgery.**

**The defendant made no settlement offers prior to trial. □**

**\$435,000 VERDICT - MOTOR VEHICLE NEGLIGENCE - AUTOMOBILE STRIKES HORSE & BUGGY - PLAINTIFF EJECTED FROM BUGGY - COMPARTMENT SYNDROME - NERVE DAMAGE - DAMAGES/CAUSATION ONLY.**

*St. John County*

**This was an action involving the defendant's automobile striking the rear of a horse and buggy driven by the female plaintiff on a St. Augustine Street. The plaintiff was ejected from the buggy and sustained injuries. The defendant stipulated to negligence, but disputed the extent and nature of the injuries allegedly sustained by the plaintiff as a result of the accident.**

The plaintiff was transported to the emergency room via ambulance following the accident. She was diagnosed with compartment syndrome within two hours following the accident.

The plaintiff's orthopedic surgeon testified that the plaintiff sustained initial orthopedic injuries when she was thrown from the carriage which caused compartment syndrome and the subsequent nerve damage. The plaintiff's pain management specialist testified that the plaintiff continues to suffer burning pain in her leg stemming from the injury.

The plaintiff returned to her employment as a horse drawn carriage driver, but argued that her employment capacity is limited as a result of her accident-related injuries.

The defendant argued that since the plaintiff was able to return to her former employment, she sustained no loss of future wages.

The jury found for the plaintiff in the amount of \$435,000.

**REFERENCE**

Plaintiff's pain management expert: Chris Roberts from Jacksonville. Plaintiff's orthopedic surgeon: James Grimes from St. Augustine.

Allen vs. Vought. Case no. n/a; Judge Wendy Berger, 1-16-06.

Attorneys for plaintiff: Randy Rutledge of Farah & Farah in Jacksonville and Richard Block of Jacksonville. Attorney for defendant: Michael Obringer of Marshall, Dennehey, Warner, Coleman & Goggin in Jacksonville.

**COMMENTARY:**

**This was a case in which liability was stipulated and the main thrust of the plaintiff's claim was that she developed compartment syndrome after her horse and buggy was struck from behind. The defendant did not deny that the plaintiff suffered from compartment syndrome nor that the condition was causally related to the accident. Thus, the only real issue before the jury was the placement of a monetary value on the plaintiff's damages related to the accident. There were opposing views regarding the impact of the plaintiff's injury on her ability to continue working as an operator of a horse drawn carriage. Although the plaintiff was able to return to that position, she claimed that the burning leg pain has prevented her from working at her pre-accident capacity. □**

**\$433,238 GROSS VERDICT - MOTOR VEHICLE NEGLIGENCE - AUTO/PEDESTRIAN COLLISION - FAILURE TO STOP AT STOP SIGN FOR JOGGER - HERNIATED LUMBAR DISC TO MARATHON RUNNER - LAMINECTOMY AND FUSION PERFORMED - 35% COMPARATIVE NEGLIGENCE FOUND.**

*Pinellas County*

**The female plaintiff, age 57, claimed that she was jogging through a pedestrian crosswalk in Clearwater on December 27, 2000, when the female defendant driver negligently drove through a stop sign and struck her. The defendant admitted that he did not stop for the stop sign and stipulated to some negligence. However, the defense argued that the plaintiff was comparatively negligent in causing the accident. The defendant driver's husband, a co-owner of the vehicle, was also named as a defendant in the case.**

The plaintiff's physician testified that the plaintiff sustained a herniated lumbar disc as a result of the accident. The plaintiff underwent a laminectomy and fusion approximately four years after the accident. The surgically-implanted orthopedic hardware surgery remains in the

plaintiff's back. The plaintiff testified that she had participated in 26-mile marathons prior to the accident, but is no longer able to engage in marathon running.

The defendant argued that the plaintiff ran straight into the intersection without stopping or looking for traffic. The defense also contended that the plaintiff was not able to hear the defendant's approaching vehicle due to the fact that she was wearing music headphones at the time.

The jury found the defendant 65% negligent and the plaintiff 35% comparatively negligent. The plaintiff was awarded damages of \$433,238 which was reduced to a net award of \$281,605. The award included \$98,238 in past medical expenses; \$85,000 in future medical expenses; \$50,000 in past pain and suffering and \$200,000 in future pain and suffering.

**REFERENCE**

Massa vs. Rogers. Case no. 04-7396-CA; Judge n/a, 1-13-06.

Attorney for plaintiff: Robert T. Joyce of Joyce & Reyes in Tampa. Attorney for defendant: Mark S. Ramey, Ramey & Kampf in Tampa.

**COMMENTARY:**

The defendant conceded that he did not stop his vehicle at the stop sign controlling the Clearwater intersection where his car struck the plaintiff. However, the defendant maintained that the plaintiff was also comparatively negligent in causing the collision as she ran into

the street without looking. The jury assessed 35% negligence against the plaintiff, apparently accepting the defense position that she should have looked for oncoming traffic before crossing the street. Damaging evidence also established that the plaintiff was listening to music through a headphone at the time of the accident.

The plaintiff's history as an extremely fit 57-year-old woman who was very health conscious and a marathon runner, may have bolstered her damages. The plaintiff testified she is no longer able to compete in 26-mile marathons as she did before the accident. □

## Verdicts By Category

### PROFESSIONAL MALPRACTICE

#### Gastroenterology

**DEFENDANT'S VERDICT**

**Medical malpractice - Alleged performance of contraindicated colonoscopy - Colon perforation - Surgical repair required.**

*Miami-Dade County*

The female plaintiff alleged that the defendant gastroenterologist was negligent in performing a contraindicated colonoscopy which caused a perforation of the plaintiff's colon. The defendant argued that the plaintiff, who suffered radiation proctitis, was a candidate for the colonoscopy and that the procedure was performed within the standard of care. The defense maintained that the injury occurred in the absence of any negligence on the part of the defendant.

The plaintiff was diagnosed with uterine cancer and had undergone previous radiation therapy which caused radiation proctitis. She underwent a colonoscopy performed by the defendant. During the colonoscopy, the plaintiff sustained a colon perforation

which was immediately diagnosed by the defendant and surgically repaired.

The plaintiff's gastroenterologist testified that the defendant was negligent in performing the colonoscopy which was contraindicated because of the plaintiff's radiation proctitis, and two prior failed sigmoidoscopy attempts which encountered colon strictures.

The plaintiff's expert testified that there were other less-invasive procedures available for the plaintiff such as barium enema or flexible sigmoidoscopy and that the plaintiff was at a high risk for colon perforation during the colonoscopy.

The defendant argued that the colonoscopy was necessary in light of the plaintiff's complaints of rectal incontinence, possible polyps and history of cancer.

The defendant's expert gastroenterologist testified that the colonoscopy was not contraindicated for the plaintiff. The defense stressed

that a subsequent successful colonoscopy was performed after the colon perforation and surgical repair.

The defendant's gastroenterologist opined that the defendant properly performed the procedure and colon perforations are a known risk of colonoscopy.

After a two-day trial, the jury found no negligence on the part of the defendant which was a legal cause of injury to the plaintiff.

**REFERENCE**

Plaintiff's gastroenterologist: Richard Dwoskin from Palm Beach.

Defendant's gastroenterologist: Peter Holt from New York, N.Y.

Martinez vs. Hernandez. Case no. 2002-032549CA01; Judge Michael A. Genden, 2-16-06.

Attorney for plaintiff: Anthony J. Soto of Robert M. Rubenstein, P.A., in Miami. Attorney for defendant: Benito H. Diaz of Diaz & Morel-Saruski in Coral Gables. □

### Nursing

#### **DEFENDANT'S VERDICT**

**Alleged nursing malpractice - Failure to report allergic reaction - Compartment syndrome - Partial loss of use of left arm and hand.**

*Palm Beach County*

**This was a nursing malpractice case brought against the defendant hospital by the female plaintiff, a 33-year-old at the time of treatment. The plaintiff claimed the defendant's nurses were negligent in failing to inform the treating surgeon of an allergic reaction exhibited by the plaintiff. The defendant argued that the nurses appropriately reported the reaction to the plaintiff's treating anesthesiologist who had prescribed the medication. The anesthesiologist was also named as a defendant but was dismissed from the case just prior to trial.**

The plaintiff underwent out-patient shoulder surgery and was placed on the anti-nausea medication, Anzemet, by her treating anesthesiologist. In the recovery room, the plaintiff developed a hives on her left forearm arm at the site of the I.V. where she received the Anzemet I.V. push.

The defendant's nurses reported the rash to the treating anesthesiologist who prescribed Benadryl. The plaintiff was discharged from the hospital that day.

The following morning, the plaintiff returned to the hospital with complaints of left forearm and hand pain and weakness. She was diagnosed with compartment syndrome (restricted blood flow in and out of the muscle). She was admitted for corrective surgery and was hospitalized for a week.

The plaintiff contended that the nurses were negligent in failing to report the condition to the plaintiff's treating surgeon who would have recognized an allergic reaction to the Anzemet. The plaintiff claimed that she developed compartment syndrome as a result of the Anzemet and that, if she had been immediately treated, the injury would not have occurred. The plaintiff's physicians testified that she had permanently lost function in her left arm and hand.

The plaintiff returned to her employment as the manager of a fast food restaurant. She claimed she was required to wear a brace on her arm and was unable to grasp with her non-dominant left hand. Approximately a year and a half after returning to work, the plaintiff was involved in an automobile accident and stopped working. She claimed she sustained a diminished future earning capacity as a result of the compartment syndrome related to the Anzemet.

The defendant's nursing expert testified that the defendant's nurses acted within the required standard of care

in reporting the plaintiff's reaction to the physician who had prescribed the medication. The defense also denied that the continued Anzemet administration caused compartment syndrome to the plaintiff. The defendant's expert testified that the plaintiff most likely slept on her arm after her discharge from the hospital. The defendant also argued that the plaintiff was comparatively negligent in failing to timely return to the hospital or call the surgeon.

jury found no negligence on the part of the defendant which was a legal cause of injury to the plaintiff.

#### **REFERENCE**

Plaintiff's anesthesiologist: Lawrence Reid from West Palm Beach. Plaintiff's nursing expert: Cheryl Cartwright from Palm Beach. Defendant's nursing expert: Linda Boyum from Daytona Beach. Defendant's anesthesiologist: John B. Downs from Tampa.

Guerts vs. Columbia Hospital. Case no. 502004CA007550; Judge Elizabeth T. Maass, 4-12-06.

Attorney for plaintiff: Christopher M. Larmoyeux of Larmoyeux & Bone in West Palm Beach. Attorneys for defendant: Gregory M. Keyer and Andrew Rief of Billing, Cochran, Heath, Lyles & Mauro in West Palm Beach. □

### Ob/Gyn

#### **DEFENDANT'S VERDICT**

**Medical malpractice - Alleged failure to diagnose gestational diabetes - Stillbirth - Emotional injuries.**

*Lee County*

**This action was brought against the plaintiff mother's treating ob/gyn alleging that the defendant failed to diagnose gestational diabetes leading to the stillbirth of the plaintiff couple's baby. The defendant denied that the plaintiff mother suffered from gestational diabetes.**

The plaintiff's expert ob/gyn testified that the stillbirth of the plaintiffs' infant resulted from undiagnosed and untreated gestational diabetes. The plaintiff parents claimed emotional injuries associated with the loss of their child.

Evidence showed that the plaintiff mother had presented to the emergency room for shortness of breath two days before the delivery of her child. The emergency room physician did not test nor monitor for fetal heartbeat at that time. The emergency

room physician settled the plaintiff's claims prior to trial for an undisclosed sum.

The defendant ob/gyn argued that, at the time of his last examination of the plaintiff approximately a week before her emergency room visit, the baby's heartbeat was heard by Doppler and there were no problems indicated with the pregnancy.

The defense maintained that he had no opportunity to examine nor speak with the plaintiff between the time of her emergency room visit and the delivery of her baby.

The jury found no negligence on the part of the defendant which was a legal cause of injury to the plaintiff.

#### REFERENCE

Bishr vs. Auld. Case no. n/a; Judge Jay B. Rosman, 5-06.

Attorney for plaintiff: Jon D. Parrish of Parrish, White & Lawhon in Naples. Attorney for defendant: Benito H. Diaz of Diaz & Morel-Saruski in Coral Gables. □

## COUNTY LIABILITY

### DEFENDANT'S VERDICT

**Government liability - Alleged negligent operation of county correctional facility - Finger injury.**

*Miami-Dade County*

**The male plaintiff was an inmate at the defendant Miami-Dade County's correctional facility when he claimed his finger was crushed in a sliding gate. The defendant argued that the plaintiff was comparatively negligent, and that his finger injury was not severe and had completely resolved.**

The plaintiff, in his 40s at the time, testified that a security gate in the defendant's facility closed on his fin-

ger. The plaintiff claimed that his finger was severed and surgically reattached. The plaintiff claimed permanent nerve damage and limitation of motion in his middle finger.

The defense argued that the plaintiff was negligent in placing his finger in the gate and that the negligence of a third-party also contributed to the incident.

The defense argued that the plaintiff's medical records described only a finger laceration and comminuted finger fractures as a result of the accident. The defendant contended that the injuries completely resolved with suturing and physical therapy.

The jury found no negligence on the part of the defendant which was a legal cause of injury to the plaintiff. The defendant's motion for attorney fees and costs is pending.

#### REFERENCE

Sarmina vs. Miami-Dade County. Case no 02-31536; Judge David Miller, 3-23-06.

Attorney for plaintiff: George Blustein of Hollywood. Attorneys for defendant: Bruce Libhaber and Jorge Martinez-Esteve Assistant Miami-Dade County Attorneys. □

## FALSE ARREST

### \$42,845 VERDICT

**False arrest - Lack of probable cause for charge of resisting arrest - Rotator cuff tear.**

*Orange County*

**The plaintiff alleged that he was falsely arrested by a police officer employed by the defendant City of Orlando after being stopped for speeding. The defendant contended that there was probable cause for the plaintiff's arrest after he continuously disobeyed the officer's command not to approach the police vehicle.**

The plaintiff, a male in his 40s, was stopped by the defendant's officer for speeding on the East/West Expressway. The plaintiff testified that he did not believe he was driving as fast as the speed cited by the officer and he questioned the officer as to how he obtained the speed. The plaintiff testified that he walked back to see if there was a radar device in the officer's vehicle and remarked "You

don't even have radar!" The plaintiff claimed that the officer then yelled "you are under arrest," grabbed him, shoved him against the vehicle, bent his arm back to handcuff him and he heard a popping sound from his shoulder. The plaintiff denied being told by the officer not to approach the police vehicle. The plaintiff was arrested for resisting arrest, but the charges were not prosecuted.

The plaintiff's treating orthopedic surgeon testified that the plaintiff sustained a non-surgical rotator cuff tear as a result of the incident. The plaintiff dismissed his excessive force claim prior to trial.

The defendant's officer testified that the plaintiff insisted that his speed was determined by radar and wanted to look in the officer's vehicle for the radar device when, in fact, the plaintiff's speed was actually obtained by pacing the plaintiff's vehicle. The officer testified that he issued a speeding ticket to the plaintiff and was about to leave when the plaintiff tried

to approach his vehicle and look inside. The officer testified that he instructed the plaintiff to stop because he felt the plaintiff's approach constituted a safety issue in that the plaintiff could attempt to grab the shotgun kept inside the police vehicle. The plaintiff continuously disobeyed the command not to approach the vehicle to the point that the officer felt that the plaintiff had mental issues, according to the officer. The defendant also claimed that the plaintiff struggled with the officer and that the officer did not apply undue pressure during the handcuffing procedure.

The jury found for the plaintiff in the amount of \$42,485. The plaintiff's motion for costs and attorney fees is pending based on a proposal for settlement in the amount of \$19,995.

#### REFERENCE

Plaintiff's orthopedic surgeon: Paul Maluso from Orlando.

Raymond vs. City of Orlando. Case no. 04-CA-5216; Judge Cynthia Z. Mackinnon, 2-1-06.

Attorney for plaintiff: Jon H. Gutmacher of Orlando. Attorney for defendant: Shannon G. Hetz Assistant City Attorney in Orlando. □

## HIRING NEGLIGENCE

### DEFENDANT'S VERDICT

**Alleged negligent hiring, supervision and retention of spa personnel - Claimed sexual assault during Turkish bath - Emotional injuries.**  
*Broward County*

The plaintiff, a female in her early 40s, alleged that she was sexually assaulted by an employee of the defendant spa while she was taking a Turkish bath. The defendant denied that the plaintiff was sexually assaulted. Alternatively, the defense argued that if an assault had occurred, it was an intentional act outside the course and scope of employment for which the defendant was not responsible. The court granted summary judgment for the defendant as to the plaintiff's claims of negligent supervision, retention and premises liability. A verdict was directed for the defendant at trial as to negligent hiring. Thus, the case went to the jury on the theory of respondeat superior and direct negligence against the defendant.

The plaintiff related that she was undergoing a full body treatment (Turkish bath) at the defendant's spa. The plaintiff claimed that while she was laying on the table with her eyes covered, the defendant's male attendant thrust his face into her crotch. The defendant's employee was arrested on the plaintiff's complaint. A recording of the police interview of the employee regarding the criminal charges was admitted into evidence.

The plaintiff claimed emotional injuries, including depression, associated with the assault. Her husband asserted a claim for loss of consortium.

The defendant contended that the plaintiff was in a room with steam, marble floors and water and that the attendant could have simply slipped onto the plaintiff. The defense further argued that the plaintiff's eyes were covered and, by her own admission, she did not know how the incident occurred. The defense claimed that the statement made by its employee was not a literal translation since the questioning officer spoke English,

the interpreter spoke Spanish and the defendant's employee spoke Portuguese. The employee in question was not present at trial. The defendant additionally argued that the plaintiff had received treatment for emotional difficulties, including depression, before the date of the incident.

The jury found that the spa attendant was not in the course and scope of his employment at the time of the incident. The jury also found that the defendant was not negligent and a defense verdict was entered. The case is currently on appeal.

### REFERENCE

Yanavok vs. Contour Nails By Fanit Panof. Case no. 04-0125. Judge Jeffrey E. Streitfeld, 2-14-06.

Attorney for plaintiff: Rebecca J. Covey of Rebecca J. Covey, P.A., in Fort Lauderdale. Attorney for defendant: David J. Schottenfeld of David J. Schottenfeld, P.A., in Plantation. □

## INSURANCE OBLIGATION

### \$441,062 VERDICT

**Underinsured motorist claim - Red light/green light - Herniated cervical disc - Surgery performed.**  
*Broward County*

This was a classic red light/green light case in which both parties claimed to have had a green light when entering the Broward County intersection where their cars collided. The defendants included the driver of the vehicle which struck the plaintiff's car as well as the plaintiff's underinsured motorist carrier based on an underlying liability policy limit of

**\$25,000. In addition to disputing liability, the defendants denied that the plaintiff's cervical condition and surgery was causally related to the accident.**

The plaintiff was a 39-year-old female at the time of the accident. She testified that the defendant's vehicle drove through a red light and impacted her car in the driver's side door.

The plaintiff moved to North Carolina following the accident. Her treating orthopedic surgeon testified that the plaintiff sustained a disc herniation at the C5-C6 level as a result of

the accident. The plaintiff underwent a cervical discectomy and fusion. The plaintiff's pain management expert testified that the plaintiff continues to suffer neck pain and spasm associated with the accident.

The defendant's neurologist testified that the plaintiff exhibited a thickening of the posterior longitudinal ligament, but no disc herniation. The defendants' medical experts opined that the plaintiffs condition was not related to the accident and was not permanent.

The jury found the defendant driver 100% negligent. The jury also found that the plaintiff sustained a permanent injury as a result of the accident and awarded her \$441,062 in damages. The applicable underinsured motorist policy limit was \$25,000.

#### REFERENCE

Plaintiff's pain management expert: Patricia Shannon from Charlotte, NC. Plaintiff's neurologist: Arthur

Sonberg from Boca Raton. Defendant's orthopedic surgeon: Alan Routman from Fort Lauderdale. Defendant's neurologist: Alan Teman from Coral Springs.

Burge vs. Nationwide Insurance Company, et al. Case no. n/a; Judge Jaffee, 6-05.

Attorney for plaintiff: Paul M. Adams of Young & Adams in Boca Raton. Attorney for defendant driver: Frank Allocca of Allocca & Felder in Miami. Attorney for defendant underinsured motorist carrier: Glynda G. Goldlist of Law Offices of Douglas E. Polk, Jr., in Plantation. □

### DEFENDANT'S VERDICT

**Alleged wrongful denial of fire loss claim - Arson defense - Misrepresentation in presentation of claim.**  
*Volusia County*

**The plaintiffs brought this action against Allstate Floridian Insurance Company alleging wrongful denial of a fire loss claim. The defendant maintained that the fire was intentionally set by the plaintiffs and that the plaintiffs misrepresented the amount of their loss stemming from the blaze.**

The plaintiffs' residence was completely destroyed by fire and the defendant paid \$311,000 to the mortgagee for the loss. The defendant alleged that the fire was intentionally set by the plaintiffs and brought a counterclaim to recover the amount paid to the mortgage company.

The plaintiffs, who were divorced at the time of trial, sold the 20-plus acre property following the fire. The

plaintiffs claimed that among the items destroyed in the fire, was a 42-inch plasma television for which they had paid \$16,000 in cash.

The plaintiff's cause and origin expert as well as the state fire marshal opined that the fire was accidentally started by lightning. The plaintiffs sought the policy limits of \$227,000 in loss of contents as well as an additional \$143,000 for structural damage plus attorney fees from the defendant.

The defense maintained that the plaintiffs were the chief suspects in starting the blaze. The defendant also argued that the plaintiff had no evidence to support their claim that a large plasma television was destroyed in the fire. The defense stressed that the plaintiff's had no receipts, allegedly paid cash and could not remember the name of the store where the television was purchased. The defense contended that

the plaintiffs' misrepresentation in presentation of the claim barred their recovery.

The jury found that the plaintiffs did not intentionally cause the fire, precluding the defendant's counterclaim for reimbursement. However, the jury found that the plaintiffs intentionally misrepresented to the defendant that a plasma television was burned in the fire and a defense verdict was entered as to plaintiff's damage claim.

#### REFERENCE

Waddel vs. Allstate Floridian Insurance Company. Case no. 2003-10976; Judge Robert K. Rouse, Jr., 3-9-06.

Attorney for female plaintiff: Tyrone H. Tyler of Tyler & Hamilton in Jacksonville. Attorney for male plaintiff: Douglas L. Grose of Douglas L. Grose, P.A., in Tampa. Attorney for defendant Allstate Floridian Insurance Company: Harris Brown of Harris Brown, P.A., in Jacksonville. □

## JONES ACT

### DEFENDANT'S VERDICT

**Jones Act - Claimed dangerous job requirements for shipboard waiter - Overloaded trays allegedly cause cervical disc herniations - Cervical fusion performed.**  
*Miami-Dade County*

**The 38-year-old male plaintiff waiter brought this Jones Act claim against the defendant cruise ship operator alleging that the defendant's job requirements for waiters was dangerous. The plain-**

**tiff claimed that he suffered two herniated discs as a result of carrying heavy, overloaded trays of dishes. The defendant denied that the plaintiff was required to carry a specific number of plates on a tray and further contended that there were adequate and reasonable safety policies in place for the plaintiff's protection.**

The plaintiff claimed that the defendant required him to carry too many plates on a tray and that some of the

trays he carried on his shoulder exceeded 50 pounds each. The plaintiff contended that he sustained two cervical disc herniations as a result of lifting and carrying the heavy, overloaded trays. The plaintiff underwent cervical fusion surgery to treat the herniations.

The defendant maintained that the plaintiff's job was reasonably safe as supported by the medical science physicians.

The jury found for the defendant. The case is currently on appeal.

**REFERENCE**

Plaintiff's orthopedic surgeon: Daniel Cohen from Miami. Defendant's neurosurgeon: Luis Pagan from Miami.

Kayaci vs. Royal Caribbean Cruises, Ltd. Case no. 04-10301CA23; Judge Henry Leyte-Vidal, 2-06.

Attorneys for plaintiff: Steven Hunter of Hunter, Williams & Lynch in Miami and Jerrold K. Wingate of Wingate Law Firm in Miami. Attorney for defendant: Jerry D. Hamilton and Hector Ramirez of Hamilton & Miller in Miami. □

## MOTOR VEHICLE NEGLIGENCE

### Auto/Truck Collision

**\$58,564 GROSS VERDICT**

**Auto/logging truck collision - Failure to stop for stop sign - Concussion - Rib fractures - Bilateral shoulder injuries - Permanent scarring of arms and legs - 30% comparative negligence found.**

*Jackson County*

**The plaintiff alleged that the defendant, driving an empty logging truck, negligently pulled through a stop sign and violated the plaintiff's right-of-way. The defendant maintained that he could not see the plaintiff's car because the plaintiff was not using his headlights at night. The defense also claimed the plaintiff was comparatively negligent, failed to take evasive action and was not wearing his seatbelt.**

The plaintiff was a man approximately 30 years old at the time of the accident. He testified he was driving through a Jackson County intersection with the right-of-way, when the defendant's truck drove through a stop sign. The plaintiff's pick-up truck struck the side of the defendant's tractor-trailer.

The plaintiff testified that his headlights were on at the time of the accident. The plaintiff also called an

engineer who testified that the headlights of the plaintiff's pick-up truck were functioning properly at the time of the collision.

The plaintiff's vehicle was deemed a total loss and the plaintiff was hospitalized for six days following the accident. He claimed to have sustained a concussion, cervical and lumbar sprain and strain, rib fracture, bilateral shoulder injury and arm and leg lacerations with permanent scarring.

The defendant driver testified he stopped at the stop sign and did not see traffic approaching. The defendant claimed the plaintiff was not using his headlights at the time of the collision, which was after dark. The defendant also argued that the plaintiff was not driving attentively, failed to properly react to the situation and failed to wear his seatbelt.

The defendant's seatbelt expert testified that a seatbelt would have prevented the plaintiff from being thrown into the windshield and striking the steering wheel.

The jury found the defendant 70% negligent and the plaintiff 30% comparatively negligent. The jury also found that the plaintiff sustained a permanent injury as a result of the accident. The plaintiff was awarded

\$58,564 in damages, which were reduced accordingly. The award included \$17,514 in past medical expenses; \$900 for the plaintiff's vehicle; \$5,150 in storage and towing charges and \$35,000 in past pain and suffering. The jury declined to award damages for future pain and suffering.

**REFERENCE**

Plaintiff's neurosurgeon: Douglas Stringer from Panama City. Plaintiff's engineer: Tony Sasso from Tallahassee. Defendant's seatbelt expert: Chris Bloomberg from Pensacola.

Smith vs. Finuff. Case no. n/a; Judge Hentz McClellan, 5-17-06.

Attorneys for plaintiff: Vincent Bruner and Paul Parker of Vincent Bruner & Associates in Fort Walton and Panama City. Attorneys for defendant: Christopher Barkas and Ellen Thompson of Carr Allison in Tallahassee. □

### Parking Lot Collision

**\$18,091 GROSS VERDICT**

**Negligent reversal of automobile - Cervical disc bulges - Epidural injections performed - No permanent injury found.**

*Broward County*

**The plaintiff, a 37-year-old woman, claimed that the defendant driver negligently reversed her vehicle in a parking lot and struck the front of the plaintiff's car. The defendant argued that her car was in the process of moving backwards, when the plaintiff drove behind her**

**and caused the accident. The defendant also disputed the injuries which the plaintiff claimed to have sustained as a result of the accident.**

The plaintiff's medical experts testified that the plaintiff sustained multiple cervical disc bulges as a result

of the subject accident. The plaintiff underwent epidural injections for neck pain and her physician testified that additional injections will be required in the future.

The defendant's orthopedic surgeon opined that the plaintiff did not sustain a permanent injury as a result of the subject accident. Evidence showed the plaintiff was involved in a prior accident with similar complaints. The defense claimed that the plaintiff did not reveal a prior neck injury and prior MRI to her treating physicians.

The defendant argued that the plaintiff's last cervical MRI in July of 2005 indicated no bulging or hernia-

tions according to two treating radiologists. The defense also contended that there was no property damage to the defendant's vehicle stemming from the accident, indicating a light impact.

The jury found the defendant 60% negligent and the plaintiff 40% comparative negligent. The jury also found that the plaintiff did not sustain a permanent injury as a result of the accident. The plaintiff was awarded \$18,091 in past medical expenses which was reduced accordingly. The defendant offered \$3,000 to settle the case prior to trial.

### **Rear End Collision**

The plaintiff's doctors testified that the plaintiff's preexisting cervical condition was aggravated by the subject collision to the point that additional surgery was indicated. The plaintiff also claimed carpal tunnel syndrome causally related to the accident.

The defendant's medical expert testified that the plaintiff's neck condition was preexisting and not changed as a result of the accident. The defense also contended that the plaintiff's carpal tunnel syndrome was associated with the repetitive motion of operating a keyboard.

The jury found that the plaintiff sustained a permanent injury as a result of the accident. The plaintiff was awarded \$282,650 in damages. The award included \$7,650 in past medical expenses; \$50,000 in future medi-

### **REFERENCE**

Plaintiff's chiropractor: Chris White from Royal Palm Beach. Plaintiff's orthopedic surgeon: Jeffrey Kugler from West Palm Beach. Defendant's orthopedic surgeon: Stephen Wender from Hollywood.

Thompson vs. Gomer. Case no. 04-010092; Judge Leroy Moe, 3-29-06.

Attorney for plaintiff: Ethan F. Kominsky of Rosenthal & Levy in West Palm Beach. Attorney for defendant: Gregory J. Willis of Julie A. Taylor & Associates in Fort Lauderdale. □

### **\$282,650 VERDICT**

**Rear end collision - Aggravation of preexisting cervical condition - Carpal tunnel syndrome - Damages/causation only.**

*Hillsborough County*

**This action stemmed from a collision to the back of a vehicle driven by the 60-year-old female plaintiff. The defendant stipulated to negligence and the case was tried on the issues of damages and causation only.**

The plaintiff's physician testified that the plaintiff had undergone a prior cervical fusion associated with a 1991 automobile accident. The subject rear end collision occurred in 2003.

cal expenses; \$25,000 in past pain and suffering, \$150,000 in future pain and suffering and \$50,000 to the plaintiff's husband for his loss of consortium claim.

### **REFERENCE**

Plaintiff's orthopedic surgeons: Frederick J. McClimans and Michael J. Buscemi, both from Tampa. Defendant's neurologist: Stephen M. Sergay from Tampa.

Dunbar vs. McCaffery. Case no. 04-CA-008599; Judge Ralph Stoddard, 3-06.

Attorney for plaintiff: C. Steven Yerrid and Tammy J. Judge of the Yerrid Law Firm in Tampa. Attorney for defendant: Mark S. Ramey of Ramey, Ramey & Kampf in Tampa. □

### **\$45,200 VERDICT**

**Rear end collision - Head injury - Permanent cognitive deficits claimed - Cervical and lumbar sprain and strain - Damages/causation only.**

*Orange County*

**This action was tried on the issues of damages and causation only after the defendant stipulated to negligence in striking the rear of the plaintiff's vehicle.**

The plaintiff's medical expert opined that the plaintiff sustained a permanent brain injury as a result of the accident, leaving her with cognitive deficits. The plaintiff complained of difficulties with speech and organizational skills.

The plaintiff, a woman in her 40s, also claimed continuing back and neck pain extending down her right arm associated with the accident. The

plaintiff alleged that her accident-related injuries limited her ability to work in her father's business.

The defendant's medical expert testified that the plaintiff's psychological testing did not indicate brain damage nor cognitive deficits. The defendant contended that the plaintiff sustained only temporary and mild soft tissue injuries as a result of the accident.

The jury found that the plaintiff did not sustain a permanent injury as a result of the accident. The plaintiff

was awarded \$45,200 in economic damages. The award was reduced to \$25,341 after collateral source offsets. The defendant's motion to tax costs and attorney fees is pending based on a proposal for settlement in the amount of \$65,000.

#### REFERENCE

Defendant's orthopedic surgeon: Joseph Uricchio from Winter Park.

Hamilton vs. Hauser. Case no. 03-CA5183; Judge Renee A. Roche, 3-06.

Attorney for plaintiff: Jack B. Nichols of Law Offices of Jack B. Nichols in Orlando. Attorney for defendant: Nicholas P. Evangelo of Thompson, Recksiedler & Evangelo in Maitland. □

### **\$45,143 COMBINED GROSS VERDICT**

**Rear end collision - Disc herniations to two plaintiffs - Damages/causation only - No permanent injury found.**

*Lake County*

**The plaintiffs in this action were two females who both claimed that they suffered herniated discs as a result of a rear end collision caused by the defendant. The defendant stipulated to negligence in causing the accident, but denied that the plaintiffs were permanently injured as a result of the impact.**

The first plaintiff was in her 50s at the time of the accident. She claimed to have sustained a herniated cervical disc as a result of the collision.

The second plaintiff, in her 30s, alleged a herniated lumbar disc causally related to the accident. Both plaintiffs were employed in a factory at the time of the collision. They did not return to that employment.

The defendant's medical expert testified that the plaintiffs' complaints stemmed from preexisting conditions and were not causally related to the accident. The defendant argued that the first plaintiff's medical records showed prior neck complaints and the second plaintiff exhibited previous back symptoms.

The jury found that the plaintiffs did not sustain a permanent injury as a result of the accident. The plaintiffs were awarded a combined verdict of \$45,143 which was reduced to \$12,600 after appropriate set-offs. The first plaintiff recovered a net award of \$3,000. The second plaintiff received a net recovery of \$9,600.

#### REFERENCE

Kingcade, et al. vs. McClendon. Case no. 2004-CA000875; Judge William G. Law, Jr., 1-06.

Attorney for plaintiff: Edward L. Scott of Ocala. Attorney for defendant: Lourdes M. Calvo-Paquette of Law Offices of Stephen F. Lanosa in Orlando. □

### **\$30,299 GROSS COMBINED VERDICT**

**Rear end collision - Lumbar disc herniation - Damages/causation only.**

*Miami-Dade County*

**The defendant stipulated to negligence in striking the back of a vehicle occupied by the husband and wife plaintiffs. The plaintiff wife claimed a permanent back injury related to the collision. The plaintiff husband sought only past medical expenses. The defendant denied that the plaintiff wife's back condition was causally related to the accident.**

The plaintiff wife, in her 30s at the time, was transported to the hospital from the scene by ambulance with cervical collar and backboard following the collision.

The plaintiff's orthopedic surgeon testified that the female plaintiff sustained a non-surgical lumbar disc herniation which was causally related to the collision and has been left with a permanent impairment. The plaintiff husband claimed to have sustained cervical and lumbar sprain and strain injuries which resolved.

The defendant's orthopedic surgeon testified that the female plaintiff's back condition preexisted the date of the accident and that her medical records showed low back symptoms going back some 20 years.

The jury found that the female plaintiff did not sustain a permanent injury as a result of the accident. The plaintiffs were awarded combined past medical expenses of \$30,299. The plaintiffs' final judgment after offsets and the addition of costs was \$15,510.

#### REFERENCE

Plaintiff's orthopedic surgeon: Mitchell Pollak from Fort Lauderdale. Defendant's orthopedic surgeon: Brad Chayet from Plantation.

Gehres vs. Somoza. Case no 04-011; Judge Dorian K. Damoorgian, 2-1-06.

Attorney for plaintiff: Daniel A. Norton of Kogan & DiSalvo in Boca Raton. Attorney for defendant: Andrew M. Westhafer of Office of General Counsel in Miami. □

**\$8,624 VERDICT**

**Rear end collision - Neck injury with surgery - Osteoarthritis requiring total knee replacement - Damages/causation only - No permanent injury found.**

*Pinellas County*

**This was a case of stipulated liability stemming from an impact to the back of a vehicle driven by the plaintiff. Accordingly, the case was tried on the issues of damages and causation only.**

The female plaintiff was in her 50s at the time of the accident. The plaintiff claimed she suffered a cervical injury requiring surgery, end-stage osteoarthritis requiring a total knee replacement and lumbar sprain and strain, all causally related to the subject accident.

The defendant testified that her car barely tapped the back of the plaintiff's car at low speed. The defense argued that the property damage to the vehicles was very minimal. The defendant read the deposition testimony of the orthopedic surgeon who performed the plaintiff's knee surgery. This physician opined that the accident did not necessitate the plaintiff's total knee replacement.

The defendant's orthopedic surgeon opined that the plaintiff required perhaps six weeks of treatment for minor soft tissue injuries related to the accident.

The defense argued that the plaintiff's testimony that she experienced no prior neck complaints was impeached by her medical records which documented both neck and knee complaints before the date of the accident.

The jury found that the plaintiff did not sustain a permanent injury as a result of the accident. The plaintiff was awarded \$8,624 in past medical expenses.

**REFERENCE**

Plaintiff's neurosurgeon: Robert Nucci from Tampa. Plaintiff's treating orthopedic surgeon (deposition read by defendant): Ira Guttentag from Tampa. Defendant's orthopedic surgeon: Bernard Fishalow from St. Petersburg.

Richelson vs. Kurth. Case no. 03-3135; Judge James R. Case, 4-4-06.

Attorney for plaintiff: Eduardo R. Latour of Latour & Associates in Tarpon Springs. Attorney for defendant: Ellen H. Ehrenpreis of Law Offices of James J. Pratt in Tampa. □

**\$543 VERDICT**

**Rear end collision - Alleged thoracic disc herniation with surgery - Damages/causation only - No permanent injury found.**

*Pinellas County*

**The defendant admitted negligence in striking the back of a vehicle driven by the plaintiff, a man in his 50s. However, the defense denied that the plaintiff sustained a permanent injury as a result of the light impact.**

The plaintiff did not seek treatment at the scene of the accident which occurred on July 25, 2000, but presented to the emergency room later that day with neck complaints. The plaintiff had undergone a prior cervical fusion in 1998 and voiced concern that the accident may have re-injured his neck. However, the plaintiff voiced no further neck symptoms.

The plaintiff's treating orthopedic surgeon testified that the plaintiff sustained a thoracic disc herniation as a result of the accident. The plaintiff underwent thoracic surgery to treat the herniation.

The defendant argued that the impact to the back of the plaintiff's car was very light as shown by photographs depicting minimal property damage to the vehicles involved.

The defendant's orthopedic surgeon opined that the plaintiff's thoracic condition was asymptomatic and not related to the accident. The defense also argued that the plaintiff's complaints of left-sided thoracic pain were inconsistent with his claim of a right-sided disc herniation.

The defendant's expert testified that the plaintiff's medical treatment on the day of the accident was reason-

able, necessary and related to the accident, but the remainder of his medical expenses were not.

The jury found that the plaintiff did not sustain a permanent injury as a result of the accident. The plaintiff was awarded \$543 in past medical expenses representing hospital treatment for the day of the accident.

**REFERENCE**

Defendant's orthopedic surgeon: Bernard Fishalow from St. Petersburg.

Mercer vs. Netscher. Case no. 03-4093; Judge James R. Case, 2-15-06.

Attorney for plaintiff: W. Newt Hudson of Tarpon Springs. Attorney for defendant: Ellen H. Ehrenpreis of Law Offices of James J. Pratt in Tampa. □

**DEFENDANT'S VERDICT**

**Rear end collision - Herniated cervical discs claimed - Damages/causation only - No permanent injury found.**

*Miami-Dade County*

**The female plaintiff in this case, a seamstress in her 60s, contended that her car was struck from behind by the defendant's vehicle. The defendant stipulated to negli-**

**gence in causing the accident and the case was tried on the issues of damages and causation only.**

The plaintiff's experts chiropractor and orthopedic surgeon each testified that the plaintiff sustained two non-

surgical cervical disc herniations as a result of the accident. The plaintiff complained of continuing neck pain. She returned to her employment as a seamstress following the collision.

The defendant argued that the impact to the back of the plaintiff's car was light and caused minimal property damage to the vehicles involved. The defendant's orthopedic surgeon opined that the plaintiff's cervical condition was degenerative, preexist-

ing and not causally related to the accident. The defense argued that the plaintiff's medical record documented neck symptoms before the date of the subject collision.

The jury found that the defendant's negligence was not a legal cause of injury to the plaintiff.

#### REFERENCE

Plaintiff's chiropractor: Brian Kalodish from Sunrise.

Hograth vs. Romer. Case no. 05005587; Judge Ronald J. Rothschild, 3-7-06.

Attorney for plaintiff: Mark P. Bockstein of Plantation. Attorney for defendant: Sherri Rahinsky Short of Fort Lauderdale. □

## NEGLIGENT SUPERVISION

### DEFENDANT'S VERDICT

**Alleged negligent supervision of pre-schooler - Fall on playground - Greenstick fracture of collarbone - Failure to obtain immediate medical treatment.**

*Miami-Dade County*

**The plaintiff mother alleged that the defendant operator of a preschool was negligent in allowing her two-year-old son to fall on the playground and in failing to seek immediate medical treatment. The defendant argued that the injury resulted from an unavoidable childhood fall and the minor plaintiff's Greenstick collarbone fracture was not apparent. The defense also denied that the delay in treatment caused harm to the child.**

The two-year-old plaintiff had an unwitnessed fall while playing at the defendant's playground at approximately 10:15 a.m. The defendant did

not call the boy's parents nor seek medical treatment. When the minor plaintiff's mother picked the boy up in the afternoon, he was still crying and complaining of pain. She took him to his pediatrician who ordered an x-ray which showed a non-surgical Greenstick fracture of the collarbone. The child's arm was placed in a sling for six weeks.

The plaintiff argued that, given the student/teacher ratio of approximately 1/8 at the defendant's school, the teachers must not have been paying attention or they would have seen the child fall. In addition, the plaintiff claimed that the child's continuous crying should have alerted the defendant's staff that he was injured.

The defendant argued that the type of fracture sustained by the plaintiff can reasonably go undetected due to the nature of the injury. Evidence showed that the fracture was minimally displaced on one side and not

displaced on the other. The defense also maintained that the delay in treatment did not worsen the child's injury nor change the nature and extent of his medical treatment and that the boy had completely recovered from the injury.

The jury found no negligence on the part of the defendant which was a legal cause of injury to the plaintiff. The case is currently on appeal. The defendant's motion for costs and attorney fees based on proposals for settlement in the amount of \$1,000 and \$3,000 is pending.

#### REFERENCE

Trujillo vs. First Baptist Church of South Miami, Inc. Case no. 2002-017797; Judge Sarah I. Zabel, 3-22-06.

Attorney for plaintiff: Gabriel M. Sanchez of Miami. Attorney for defendant: Andrew Stone of Josephs, Jack & Miranda in Miami. □

## PREMISES LIABILITY

### Fall Down

#### \$120,577 GROSS VERDICT

**Premises liability - Dangerous condition caused by condensation on floor - Slip and fall - Shoulder fracture with adhesive capsulitis - Carpal tunnel syndrome - 30% comparative negligence found.**

*Miami-Dade County*

**The plaintiff was employed as a housekeeper for the defendant when she slipped and fell in the defendant's apartment. The plaintiff claimed the defendant created a dangerous slippery condition by not using her air conditioner which caused condensation on the apartment floor. The defendant denied that the plaintiff slipped and fell as**

**a result of condensation and maintained that the plaintiff's fall was caused by mop water placed on the floor by the plaintiff herself.**

The plaintiff was a woman in her 60s at the time of the fall. She contended that the defendant, who was 90, liked to keep her apartment warm and did not use her air conditioner. Because the apartment located below the de-

defendant was kept very cold, the plaintiff claimed that condensation would often form on the floor of the defendant's apartment and that it was this condensation which caused the plaintiff to fall. The plaintiff pointed to moisture damage in the defendant's apartment as evidence of the condensation problem.

The plaintiff claimed to have sustained a shoulder fracture and adhesive capsulitis of the shoulder as well as carpal tunnel syndrome as a result of the fall. The plaintiff underwent both shoulder and wrist surgery.

The defendant denied that the conditions described by the plaintiff would cause condensation to form on the

floor of the defendant's apartment. The defense contended that the plaintiff had mopped the floor just prior to her fall. The defense also disputed that the plaintiff's carpal tunnel symptoms were causally related to the fall.

The jury found the defendant 70% negligent and the plaintiff 30% comparatively negligent. The plaintiff was awarded \$120,577 in damages which was reduced to a net award of \$84,404.

#### REFERENCE

Plaintiff's biomechanical expert: Andrew Rentschler from Jacksonville.  
Plaintiff's orthopedic surgeon: Alfred Desimone from Jacksonville.

Defendant's orthopedic surgeon: Stephen Jacobs from Fort Lauderdale.

Biez vs. Cohen. Case no. 04-267-21; Judge David Miller, 3-06.

Attorney for plaintiff: Harvey M. Cohen of Cohen & Juda in Plantation.  
Attorney for defendant: Robert Groelle of Groelle & Salmon in Lake Worth. □

## DEFENDANT'S VERDICT

**Premises liability - Slip on wet floor of medical building - Alleged tear of tendons in right ankle.**

*Marion County*

**The female plaintiff claimed that she was on crutches walking into the defendant's medical building when she slipped on a wet floor. The defendant denied negligence and further denied that the plaintiff sustained injury as a result of the alleged incident.**

The plaintiff, age 32 at the time, related that she fell and sustained an ankle injury at work on June 14, 2002. She presented to the defendant U.S. Healthworks where she was prescribed crutches and an air cast for her ankle. Three days later, on June 17, 2002, the plaintiff returned to the defendant for physical therapy. She testified that upon entering the lobby of one of the defendant's buildings,

her crutches slipped on a wet floor causing her to place her injured right foot (in the air cast) on the floor. The plaintiff testified that she did not actually fall.

The plaintiff claimed to have sustained a tendon tear as a result of the incident. Her orthopedic surgeon opined that the plaintiff's current complaints are related to both the initial June 17, 2002, fall and the incident at the defendant's facility on June 17, 2002.

The defendant contended that it had a reasonable maintenance and inspection program in place at the time in question. The defendant argued that the plaintiff's first progress note dated July 29, 2002, indicated that the films of her right foot and ankle were all within normal limits.

Although the plaintiff's August 2002 MRI supposedly demonstrated a tear of the tendons of the right ankle, the

defense stressed that another film taken in April 2003 performed with a larger magnet was entirely within normal limits.

The jury found no negligence on the part of the defendant which was a legal cause of injury to the plaintiff.

#### REFERENCE

Plaintiff's orthopedic surgeon: Laurette Chang from Lafayette, IN.

Abel vs. U.S. Healthworks Medical Group of Florida Inc., a/k/a U.S. Healthworks, Inc. Case no. 05-1156; Judge Victor J. Musleh, 5-1-06.

Attorney for plaintiff: Jonathan I. Rotstein of Daytona Beach.  
Attorneys for defendant: Vance R. Dawson and Laura B. Floyd of Rissman, Barrett, Hurt, Donahue & McLain, P.A., in Orlando. □

## \$85,826 GROSS VERDICT

**Trip and fall over wheel stop in restaurant parking lot - Knee injury with surgery - 60% comparative negligence found - New trial granted.**

*Pinellas County*

**The plaintiff was a female in her early 60s who tripped and fell over a parking bumper or wheel stop in**

## Hazardous Premises

**the parking lot of the defendant's restaurant. The plaintiff claimed the parking bumper was dangerous and a tripping hazard. The defendant argued that the parking bumper was open and obvious and the plaintiff failed to watch where she was walking.**

The plaintiff's physician testified that the plaintiff sustained an injury to her right knee as a result of the fall, necessitating surgical intervention.

The defendant denied that the parking bumper was dangerous and disputed the causal relationship between the plaintiff's fall and her right knee condition and subsequent surgery.

The jury found the defendant 40% negligent and the plaintiff 60% comparatively negligent. The plaintiff was awarded \$85,826 in damages which was reduced accordingly. The award included \$18,826 in past medical expenses; \$57,000 in future medical expenses and \$10,000 in past loss of wages. The jury declined to award the plaintiff damages for pain and

suffering in the past or future. The plaintiff's post-trial motion for new trial was granted. A new trial on both liability and damages is scheduled for August 2006.

#### REFERENCE

Granberg vs. Outback/West Florida-I Limited Partnership. Case no. 04005197CI; Judge Walt Logan, 1-18-06.

Attorney for plaintiff: Bernard Kanner of Bernard Kanner, P.A., in St. Petersburg. Attorney for defendant: Ann L. O'Hern of Brasfield, Fuller, Freeman & O'Hern in St. Petersburg. □

### DEFENDANT'S VERDICT

**Premises liability - Trip and fall over stove display - Medial meniscus tears - ACL tear - Patella injuries - Bilateral knee replacements performed - Emotional injuries claimed.**

*Palm Beach County*

**The female plaintiff claimed that the defendant retailer created a dangerous condition in its Best Buy store in the form of a board placed behind a row of stoves on display. The plaintiff claimed that she tripped over the board and fell. The defendant argued that the board was open and obvious and that the plaintiff caused the accident by attempting to walk between the stoves and not watching where she was walking. The defense also denied that the plaintiff's knee condition was causally related to the fall.**

The plaintiff, age 47 at the time of the fall in 2002, testified that she thought the space between the row of back-to-back stoves on display in the defendant's store was a route to the next aisle. As the plaintiff was walking between the stoves, she tripped and fell over a 12-inch-wide board, which was raised off the floor.

The evidence revealed that the board was placed by the defendant's employees to assist in lining up the stove displays. The plaintiff claimed that the defendant was negligent in placing the board in a position which constituted a tripping hazard.

The plaintiff's physicians testified that the plaintiff sustained medial meniscus tears of both knees, a torn ACL of the left knee and damage to the patella cartilage of both knees as a result of the fall.

The plaintiff underwent two arthroscopic surgeries to the left knee, an arthroscopic surgery to the right knee and subsequently had both knees replaced in 2004. She also underwent a revision of the left knee replacement. The plaintiff's orthopedic surgeons causally the plaintiff's knee injuries and surgeries to the subject fall.

The plaintiff's psychiatrist testified that the plaintiff also suffered from depression and other emotional injuries stemming from the knee injuries. The defendant argued that the gap between the stoves was clearly not intended for customer traffic and the plaintiff should have watched where she was walking. The defendant argued that the plaintiff was involved in several subsequent falls after the subject accident. The defendant's or-

thopedic surgeon testified that the plaintiff's knee swelling, bruising and instability did not manifest until some three to four weeks after the fall. This expert opined that the plaintiff's knee condition and surgeries were not causally related to the fall.

The jury found no negligence on the part of the defendant which was a legal cause of injury to the plaintiff. The defendant filed a proposal for settlement in the amount of \$250,000. The plaintiff's motion for new trial is pending.

#### REFERENCE

Plaintiff's orthopedic surgeons: Jeffrey Katzell and Jeffrey Weiner both from West Palm Beach. Plaintiff's psychiatrist: Joel Kahan from West Palm Beach. Plaintiff's physiatrist: Craig Lichtblau from West Palm Beach. Defendant's orthopedic surgeon: Jeffrey Penner from West Palm Beach.

Martin-Notestine vs. Best Buy Co., Inc. Case no. 5022003CA00719; Judge Jonathan Gerber, 4-06.

Attorney for plaintiff: Jason J. Guari of Murray & Guari in West Palm Beach. Attorney for defendant: Patrick W. Knight of Kubicki Draper in Miami. □

### DEFENDANT'S VERDICT

**Premises liability - Trip and fall on residential step - Alleged building code violations - Ankle fracture - Open reduction - Internal fixation.**

*Broward County*

**The plaintiff was a 59-year-old realtor who was walking into the defendant homeowners' carport, when she tripped and fell. The plaintiff claimed that the fall was caused by the dangerous condition of the defendants' step. The defendant contended that the step was**

**not dangerous and the plaintiff failed to watch where she was walking.**

The plaintiff had sold the property to the defendant 1.5 years earlier and was listing it for resale. She had intended to show the property to a potential buyer on the day of the fall.

The plaintiff's liability expert testified that the defendants' carport step violated applicable building codes in that it was too narrow and lacked a non-skid surface.

The plaintiff's orthopedic surgeon testified that the plaintiff sustained an ankle fracture in the fall requiring open reduction and internal fixation.

The defendant claimed that the step met the applicable building code at the time it was constructed. The de-

fense also argued that the plaintiff was aware of the step and had walked up it approximately five minutes before the fall.

The jury found no negligence on the part of the defendant which was a legal cause of injury to the plaintiff. Plaintiff's motion for new trial is pending.

#### REFERENCE

Ferragut vs. Garay. Case no. 0407486; Judge Miette Burnstein, 3-8-06.

Attorney for plaintiff: Paul M. Adams of Young & Adams in Boca Raton. Attorney for defendant: Terry L. Watson of Capito & Polk in Plantation. □

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## RACIAL DISCRIMINATION

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### DEFENDANT'S VERDICT

**Alleged discrimination based on national origin - Claimed retaliation by Palm Beach Gardens Police Department.**

*Palm Beach County*

**The plaintiff, a former police officer for the defendant City of Palm Beach Gardens, brought this action under Florida's Civil Rights Act. The plaintiff claimed he was discriminated against due to his national origin and that he was wrongfully discharged in retaliation for his complaints about the discrimination. The defendant denied any discrimination against the plaintiff and maintained that he was terminated for poor job performance.**

The plaintiff, a native of Haiti, testified that all five of his field training officers made derogatory racial comments about him to the police chief and to his supervising officer. The plaintiff filed a report concerning the alleged comments in December, 1999. He alleged that, as a result of his report of discrimination, he was then passed over for promotions and given poor performance reviews.

In July 2000, the plaintiff was informed that he did not pass his one-year probationary period. A week later, he filed a formal complaint of discrimination with the defendant city. The plaintiff was terminated in August 2000.

The defendant argued that the plaintiff could not properly identify crimes and performed poorly as a police officer. The defendant denied that the plaintiff was the victim of any racial discrimination or retaliation at the police department.

After an 11-day trial, the jury found for the defendant.

#### REFERENCE

Alexandre vs. City of Palm Beach Gardens. Case no. 2001-003767; Judge Thomas H. Barkdull, III, 4-06.

Attorney for plaintiff: Frederick Ford of Law Offices of Frederick Ford in West Palm Beach. Attorney for defendant: Richard McDuff of Johnson, Anselmo, Murdock, Burke, Piper & McDuff in Fort Lauderdale. □

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### DEFENDANT'S VERDICT

**Racial discrimination - Retaliatory discharge claimed by African-American factory worker - Alleged termination for filing workers compensation claim.**

*Pinellas County*

**This action was brought under 42 U.S.C. Section 1981 claiming racial discrimination and retaliatory discharge. The defendant corporation, a Clearwater rubber and plastic manufacturer, denied that the plaintiff's discharge was in any way related to his race or his filing for workers compensation benefits as he alleged.**

The plaintiff was hired by the defendant on September 11, 1998. He testified that two of his co-workers (who were also African-American) harassed him and created a racially hostile work environment. The plaintiff alleged that the defendant's management failed to rectify the situation, despite his complaints.

The plaintiff was terminated by the defendant in September, 2001. He claimed that the termination was in retaliation for his complaints regarding the discrimination by his co-workers and in retaliation for filing an earlier workers compensation claim. The plaintiff claimed a work-

related injury from inhalation of noxious fumes approximately a year before his termination.

The defendant argued that the plaintiff's termination was due to the fact that he was insubordinate and unable to get along with his co-workers.

The defendant's production manager testified that, although he stationed the plaintiff at the opposite end of the plant from the two co-workers in question, the plaintiff still engaged in a loud and disruptive altercation with one of the men. The plaintiff and the other man were suspended for a day as a result of the altercation.

The defendant's production manager also testified that, three months after the altercation, the plaintiff refused to perform a work assignment, grabbed his supervisor's arm, shook it and threatened to walk off his shift.

The jury found for the defendant on all counts.

#### REFERENCE

Durhams vs. TSE Industries, Inc. Case no. 03001471C1013; Judge Mark Shames, 3-16-06

Attorney for plaintiff: Craig L. Berman of The Berman Law Firm in St. Petersburg. Attorneys for defendant: Richard T. Catalano of TSE Industries in Clearwater and Darryl Rouson of Rouson & Dudley in St. Petersburg. □

## WATER SKIING NEGLIGENCE

### DEFENDANT'S VERDICT

**Negligent operation of professional water skiing tournament - Closed head injury - Cognitive and neurological injuries claimed.**

*Orange County*

**The male plaintiff was a professional waterskiier participating in a tour operated by the defendant when he was injured during a ski jump. The plaintiff alleged that the defendant was negligent in maintaining the ski jump, causing the plaintiff to sustain injury. The defendant denied negligence and denied that the plaintiff sustained permanent injury as a result of the fall. The defense also contended that the plaintiff had signed a release which prevented his claim against the defendant for personal injury.**

The plaintiff testified that he was participating in a professional waterskiing competition operated by the defendant on June 16, 2001, when hit a ski jump at a speed of approximately 70 mph. The plaintiff alleged

that the jump was not properly maintained, causing his skis to stick. The plaintiff flipped forward, landed on his face, lost consciousness and was transported to the hospital where he was diagnosed with a concussion.

The plaintiff's physician testified that the plaintiff sustained a brain injury as a result of the fall. The plaintiff claimed permanent cognitive deficits as well as neurological injuries which prevented him from competitive waterskiing. The plaintiff, who was in his 20s at the time in question, sought damages for a diminished future earning capacity as a result of his injuries.

The defendant argued that it routinely requires participants in the waterskiing competition sign a liability waiver. The defendant maintained that although it could not produce the copy of this waiver signed by the plaintiff, the plaintiff would have had to sign it in the ordinary course of business and, therefore, released the defendant of responsibility for his injury. The plaintiff testified that he

could not remember signing the release. The defendant additionally denied that the ramp was negligently maintained.

The defendant's orthopedic surgeon and neurologist testified that the plaintiff showed no evidence of a brain injury, cognitive deficits or neurological injuries stemming from the accident.

The jury found negligence on the part of the defendant which was a legal cause of injury to the plaintiff. However, the jury also found that the plaintiff signed a tour contract containing the release language and a defense verdict was entered.

#### REFERENCE

Smith vs. World Sports and Marketing, LLC. Case no. 03-CA-4793 (35); Judge Reginald Whitehead, 2-10-06.

Attorney for plaintiff: John M. Tamayo of Frost, Tamayo, Sessums & Aranda in Bartow. Attorney for defendant: Bruce B. Bogan of Hilyard, Bogan & Palmer in Orlando. □

## WHISTLEBLOWER ACT

### DEFENDANT'S VERDICT

**Alleged violation of Florida's "Whistle Blower" Act - Retaliatory discharge claimed by massage therapists.**

*Broward County*

**The two male plaintiff massage therapists in this "Whistle Blower" action claimed that the defendant spa terminated their employment in retaliation for complaints concerning the lack of a**

**conspicuously displayed license and the use of non-licensed personnel to perform massages. The defendant argued that one of the plaintiffs had resigned and that the second plaintiff was suspended for causing a disruptive scene at the spa.**

The first plaintiff, McClellan, was employed by the defendant for six months. The second plaintiff, Degan, had worked at the spa for approximately four years. The plaintiffs tes-

tified that they complained to the defendant's manager that there was no conspicuously displayed establishment license as required by state law. The plaintiff's also testified that they had lodged complaints that unlicensed personnel were performing massages at the spa. McClellan alleged that although he had submitted a resignation and obtained another full-time job, the defendant rehired him for weekend work. Both plain-

tiffs claimed that they were terminated in retaliation for making their complaints.

The defendant argued that the plaintiff McClellan had submitted a written resignation on November 7, 2003, and was permitted to work out his two-week notice period. The defendant denied that McClellan was rehired for weekend work. On the last day of his employment, the defense claimed that McClellan verbally assaulted the spa's general manager with a litany of complaints in a public area and in the presence of customers.

The defendant contended that the plaintiff Degan joined with several other employees in cheering McClel-

lan on in his tirade and gathered throughout the day to talk about the incident when they should have been working. Degan, as well as the other employees allegedly involved in those actions, were given a written 60-day suspension, according to the defense. All of the other suspended employees requested reinstatement and were back at work in a week, according to the defendant. The defense claimed that the plaintiff Degan never requested reinstatement.

The jury found that the plaintiffs had complained about the defendant's practice, policy or procedure. However, the jury found that no retaliation was taken against the plaintiffs and a

defense verdict was entered. The defendant's motion for statutory costs and attorney fees is pending.

#### REFERENCE

McClellan and Degan vs. Contour Nails by Fanit Panof, et al. Case no. n/a, Judge Richard D. Eade, 4-06.

Attorney for plaintiff: Neil R. McGinnis of Bennett, Ajello, Henry & McGuinness in Miami. Attorney for defendant: David J. Schottenfeld of David J. Schottenfeld, P.A., in Plantation. □

## Supplemental Verdict Digest

The following digest is a composite of additional significant verdicts from the Northeast region including New York, New Jersey, Pennsylvania, and the New England states and are reported in full detail in our companion publications in these states. (*Copies of the full summary with analysis can be obtained by contacting our Publication Office*).

### MEDICAL MALPRACTICE

**\$3,759,000 GROSS VERDICT - FAILURE TO ADEQUATELY TREAT PNEUMONIA LEADS TO SPINAL ABSCESS - FAILURE TO ORDER MRI ON STAT BASIS WHEN PLAINTIFF COMPLAINS OF NUMBNESS IN LEGS - ABSCESS NOT DETECTED UNTIL PLAINTIFF SUFFERS PARTIAL PARALYSIS OF LEGS - PLAINTIFF ABLE TO WALK SHORT DISTANCE ONLY WITH BRACES.**

*Hudson County, New Jersey*

The female plaintiff, in her late 40s, was initially hospitalized under the care of her family physician/internist in July 2000 for pneumonia. The plaintiff contended that this defendant internist and codefendant member of her medical practice negligently failed to adequately follow her after both the discharge from this hospitalization and sev-

eral more hospitalizations in the ensuing months for the non-resolving pneumonia. The plaintiff further contended that the defendant pulmonologist, who treated her during a hospitalization in November 2000, negligently failed to adequately treat the infection. The plaintiff maintained that this defendant failed to order an MRI on a STAT basis. As a result., the plaintiff contended that an abscess was not detected until four days after the MRI was conducted. The plaintiff maintained that by that time, it was too late to prevent a permanent and extensive loss of use of her legs. The plaintiff named the pulmonologist, neurologist, the hospital radiologist, the primary care physician/internist's medical group and the primary care physician herself as defendants. The plaintiff settled with the pulmonologist, neurologist and radiologist prior to trial for a non-disclosed sum and during

trial, the plaintiff also settled with the member of the defendant primary care physician/internist's group, leaving the primary care physician as the sole non-settling defendant when the verdict was read.

The jury found the non-settling primary care physician 25% negligent, the internist member of his group who settled during trial 20% negligent, the settling pulmonologist 25% negligent, the settling neurologist 25% negligent and the settling radiologist 5% negligent. The jury then rendered a gross award of \$3,000,000 for pain and suffering, \$750,000 for future medical bills and \$74,000 in past medical bills. The gross award was then molded to reflect the settlements.

#### REFERENCE

Smith v. Badin et al. Docket no. Judge Peter Bariso, 2-06.

Attorney for plaintiff: Frank Nostrome in Jersey City, N.J. □

**\$3,500,000 RECOVERY - FAILURE TO PERFORM BLOOD ENZYME TESTS IN THE FACE OF A NORMAL EKG UPON PRESENTATION OF OBESE PATIENT WHO WAS A SMOKER WITH COMPLAINTS OF CHEST PAIN WHILE WALKING - CARDIAC DEATH OF 30-YEAR-OLD MOTHER OF FOUR.**

*Kings County, New York*

The plaintiff contended that the emergency room physician on staff at the defendant hospital negligently failed to take cardiac enzyme tests when the 30-year-old female decedent, who was obese and a smoker, presented with a history of chest pain upon walking since the prior day. The patient was discharged and the plaintiff contended that the decedent suf-

fered a fatal infarct two days later. The decedent was the single mother of four minor children.

The case settled during trial for \$3,500,000.

**REFERENCE**

Cromell vs. North General Hospital, et al. Index no. 6754/03; Judge Marsha Steinhardt, 2-06.

Attorney for plaintiff: Eleni Coffinas of Sullivan Papain Block McGrath & Cannavo P.C. in Manhattan. □

**\$2,950,000 RECOVERY REACHED DURING DELIBERATIONS - MEDICAL MALPRACTICE - FAILURE TO RECOGNIZE UNSTABLE ANGINA AND APPRECIATE CARDIAC RISK FACING 33-YEAR-OLD FEMALE PATIENT - FAILURE TO PLACE PATIENT ON CARDIAC MONITOR AND INSTITUTE MEDICATION TO INCREASE BLOOD FLOW TO HEART WHEN ADMITTED SEVERAL DAYS LATER WITH RENEWED CHEST PAIN AND VOMITING - CARDIAC DEATH OF MOTHER OF TWO.**

*Bronx County, New York*

This medical malpractice action involved a 33-year-old female decedent who presented to the initial defendant, an internist, with a complaint of several weeks of chest

pressure which was not related to exertion and which was radiating to her left arm. The plaintiff further contended that the defendant internist failed to adequately consider cardiac causes and negligently diagnosed her with gastroesophageal reflux disease (GERD), prescribed Zantac and instructed her to return to his office in one month for a stress test in order to rule out cardiac causes for her chest pain. The plaintiff further contended that when the decedent visited the emergency room of the codefendant hospital two days later with continued intermittent chest pain, the defendant emergency room physician negligently failed to appreciate signs of unstable angina and failed to admit her. Finally, the patient was transported back to the hospital by ambulance the following day after the onset of severe chest pain and pressure, as well as vomiting. The plaintiff maintained that the emergency room physician on duty at

that time negligently failed to place her on a cardiac monitor and failed to institute medication to increase the flow of blood to the heart. The patient then suffered ventricular fibrillation as a result of an MI and died several hours later, despite heroic efforts to resuscitate her. The decedent was separated and was the mother of two young girls, ages 12 and 14 at the time of her death.

The plaintiff's pre-trial demand was \$3,000,000. The case settled during jury deliberations for \$2,950,000. The defendants had coverage through the same carrier and the settlement did not disclose the extent to which each defendant assumed liability.

**REFERENCE**

McKeever vs. Pollizzi, et al. Index no. 26055/97; Judge Douglas E. McKeon, 3-06.

Attorney for plaintiff: Jason M. Rubin of Wingate Russotti & Shapiro in Manhattan. □

## MOTOR VEHICLE NEGLIGENCE

**\$3,000,000 VERDICT - INITIAL DEFENDANT DRIVER NEGLIGENCELY FAILS TO MAKE ADEQUATE OBSERVATIONS AS SHE ATTEMPTS TO CROSS 11 TOLL LANES TO REACH EXACT CHANGE LANE, SIDE-SWIPING CODEFENDANT DRIVER AND PROPELLING HIS CAR INTO REAR OF PLAINTIFF'S CAR - HERNIATED LUMBAR DISC - INITIAL DEFENDANT CONTENDS STOPPED WHEN CODEFENDANT STRUCK HER VEHICLE AND CONTINUED INTO REAR OF PLAINTIFF'S CAR - JURY**

**EXONERATES CODEFENDANT ON PROXIMATE CAUSE GROUNDS**

*Middlesex County, New Jersey*

This was an action involving a female plaintiff driver in her mid-40s who, while stopped in a line of cars waiting to pay a toll at the Union Toll Plaza on the Garden State Parkway, was struck in the rear by a codefendant whose negligence was found not to be a proximate cause of the accident. The plaintiff maintained that the initial defendant negligently failed to make proper observations as she cut across 11 toll lanes to reach the exact change lanes and sideswiped the codefendant, whose vehicle then struck the plaintiff's car. The

plaintiff contended that she sustained a lumbar herniation that will cause severe and permanent pain and weakness.

The jury found that the defendant attempting to cross the toll lanes was causally negligent and that although the codefendant was negligent, there was an absence of proximate cause. They then awarded \$3,000,000. The defense post trial motions are pending.

**REFERENCE**

Armstead vs. Crosson, et al. Docket no. L-3870-03; Judge Lorraine Pullen, 2-06.

Attorney for plaintiff: David A. Nitti of Michael Percario in Linden, N.J. □

**\$2,768,000 VERDICT, INCLUDING \$2,268,000 TO PLAINTIFF CAB PASSENGER AND \$500,000 TO SECOND PLAINTIFF CAB PASSENGER - MOTOR VEHICLE NEGLIGENCE - HOST TAXI DRIVER SWERVING TO AVOID PHANTOM DRIVER LOSES CONTROL AND STRIKES BUS OPERATED BY CODEFENDANT - BUS IS JUTTING INTO TRAVEL PORTION OF CROSS-BRONX EXPRESSWAY WHILE STOPPED ON CROSSHATCH AREA - BUS COMPANY FOUND 40% LIABLE - RETRIAL.**

*Bronx County, New York*

The female plaintiff taxicab passengers, including one passenger approximately age 50 and a second passenger in her mid-30s, contended that the defendant bus driver negligently stopped his vehi-

cle while it was partially on the zebra-stripped crosshatch area. The bus was protruding partially onto the highway at the location where a portion of the Cross-Bronx Expressway bifurcates at the Whitestone Bridge. The plaintiff also contended that the host cab driver was traveling too rapidly and failed to make adequate observations when an unidentified car in front of the cab lost control and struck the median divider. The plaintiff maintained that when the cab driver attempted evasive action, he lost control and struck the partially protruding bus. The 50-year-old plaintiff contended that she suffered a closed head trauma causing a coma that lasted approximately one month, a crush injury to the larynx which will permanently cause difficulties speaking and a hoarseness in the plaintiff's voice, fractures to both sides of the mandible, a fracture to the zygomatic arch, a ruptured spleen necessitating a splenectomy, and a

lacerated liver that required a surgical repair. The coplaintiff contended that she suffered fractures to the femur and hand that necessitated surgery and which will cause permanent pain and limitations. The case was tried previously, resulting in a finding of 100% liability against the defendant bus driver and a total award of \$7,800,000. The verdict was set aside and this new trial was ordered.

The jury found the cab driver 60% negligent and the bus driver 40% negligent. They then rendered awards of \$2,268,000 to the 50-year-old plaintiff and \$500,000 to the coplaintiff.

**REFERENCE**

Crowder, et al. vs. Wells & Wells Equipment, Inc., et al. Index no. 13215/98; Judge Norma Ruiz, 11-05.

Attorney for plaintiff: Edmond C. Chakmakian in Mineola, NY. □

**\$1,225,000 RECOVERY - FAILURE TO MAKE OBSERVATIONS BEFORE PROCEEDING BEYOND STOP SIGN AT INTERSECTION WHERE VIEW IS OBSTRUCTED BY BUILDING - DIABETIC SUFFERS SEVERE LEG FRACTURES - SUBSEQUENT BELOW-THE-KNEE AMPUTATION - DEATH FROM UNRELATED CAUSES APPROXIMATELY 1 1/2 YEARS AFTER ACCIDENT.**

*Essex County, New Jersey*

The plaintiff contended that the defendant driver of a box truck negligently failed to make sufficient observations before turning left from a stop sign at an intersection in which the driver's view was obstructed by a building situated at

the corner. The plaintiff contended that as a result, he collided with the defendant's truck, suffering severe bilateral leg fractures. The plaintiff also suffered fractures to the jaw and eye orbit. The plaintiff was a diabetic and contended that the superimposition of the fractures on the underlying diabetes caused severe complications, including the onset of infection that ultimately required a below-the-knee amputation. The plaintiff further contended that after the amputation, the patient fell and suffered a fractured hip. The patient died from unrelated causes approximately one-and-a-half years following the accident. The plaintiff maintained that the pain and suffering during this period was particularly severe and that the emotional consequences were heightened by the evidence that whenever the dece-

dent seemed to be making progress, he subsequently suffered a setback, including the onset of the infection which ultimately led to the amputation and subsequent hip fracture.

The defendant had \$1,000,000 in primary coverage and more than sufficient excess coverage. The case settled after mediation before Retired Judge Carole Ferentz for \$1,225,000, including \$850,000 from the primary carrier. The primary carrier also paid \$150,000 in a PIP subrogation claim

**REFERENCE**

Moldanado vs. Knight, et al. Docket no. L-11689-00; 2-06.

Attorney for plaintiff: Gregg Alan Stone of Kirsch Gelband & Stone in Newark, N.J. □

**\$1,180,000 CONFIDENTIAL RECOVERY - MOTOR VEHICLE NEGLIGENCE - REAR END COLLISION - PLAINTIFF'S STOPPED VEHICLE IS STRUCK FROM BEHIND BY ANOTHER VEHICLE TRAVELING 35 MILES PER HOUR - TRAUMATIC BRAIN INJURY.**

*Middlesex County, Massachusetts*

In this motor vehicle negligence action, the plaintiff maintained that her vehicle was struck in the rear by the defendant's vehicle. The plaintiff contended that as a result of the high impact collision, she sustained head injuries. The defendant disputed liability as well as the nature and extent of the plaintiff's injuries.

Following mediation, the matter was resolved. The defendant's insurance carrier tendered its policy limits and the excess carrier contributed monies for a total settlement of \$1,180,000.

**REFERENCE**

Doe vs. Driver Roe. Docket information withheld based upon confidentiality agreement. 6-05.

Attorney for plaintiff: David A. Rich of Lawson & Weitzen in Boston. □

**\$378,750 RECOVERY - REAR END COLLISION - POST- TRAUMATIC HEADACHE DISORDER WITH COGNITIVE IMPAIRMENTS - BILATERAL TMJ DISORDER - AGGRAVATION OF PREEXISTING CERVICAL AND LUMBAR CONDITION - DAMAGES/CAUSATION ONLY.**

*Philadelphia County, Pennsylvania*

The female plaintiff, age 58, contended that she sustained life-changing physical and mental injuries with consequential cognitive impairments as a result of a rear end collision caused by the defendant. The defendants, a taxi cab company and its driver, admitted negligence and the case was tried on the issues of damages/causation only.

The case was settled through a alternative dispute resolution with an award to the plaintiff in the amount of \$378,750.

**REFERENCE**

Stack vs. Defendant. Case no. 04-05-440; Judge n/a, 10-05.

Attorney for plaintiff: John F.X. Fenerty, Jr., of The Law Offices of John F.X. Fenerty, Jr., in Huntingdon Valley. □

**\$234,500 VERDICT AGAINST  
SETTLING DEFENDANTS  
ONLY - \$750,000 PRIOR RE-  
COVERY - AUTO/TRACTOR-  
TRAILER COLLISION -  
CLOSED HEAD INJURY - AL-  
LEGED COGNITIVE DEFICITS -  
PELVIC FRACTURE WITH FU-  
SION SURGERY - TOTAL DIS-  
ABILITY FROM EMPLOYMENT  
CLAIMED.**

*Dauphin County, Pennsylvania*

The plaintiff claimed that a vehicle driven by the defendant Geesaman negligently exited a ramp onto Route 83 in Lower Paxton Township. The plaintiff alleged that Geesaman's exit caused a vehicle driven by the codefendant, Dan-

ner, to suddenly change lanes in front of the plaintiff. The plaintiff's car struck the back of Danner's car and spun. The plaintiff's vehicle was then struck in the side by a tractor-trailer operated by the defendant truck driver and owned by the defendant Wal-Mart Stores, Inc. The defendant Geesaman settled the plaintiff's claims for \$650,000 of a \$1 million policy limit prior to trial. The defendant Danner tendered her policy limit of \$100,000 to settle the case. The plaintiff claimed that the defendant Wal-Mart's driver was negligent and failed to use due caution to avoid the accident. Wal-Mart maintained that its driver was faced with a sudden emergency and could not avoid the impact.

The jury found that the defendant tractor-trailer driver (Wal-Mart) was not negligent. It found the defendant Geesaman (who exited the ramp) 40% negligent, the defendant Danner (who changed lanes) 35% negligent and the plaintiff 25% comparatively negligent. The plaintiff's motion for new trial is pending.

**REFERENCE**

Knowles vs. Wal Mart Stores, Inc. et al. Case no. 1467 CV 2003; Judge Scott A. Evans, 11-10-05.

Attorney for plaintiff: Richard C. Angino of Angino & Rovner in Harrisburg. Attorney for defendant Wal-Mart and its driver: Patrick C. O'Donnell of West Chester. □

## PREMISES LIABILITY

**\$700,000 VERDICT - PREMISES  
LIABILITY - LANDLORD NEGLI-  
GENTLY INSTALLED SINK  
THAT FELL ONTO MINOR  
CHILD - LACERATIONS TO  
RIGHT THIGH AND LEFT HIP  
LEAVING SUBSTANTIAL SCAR-  
RING.**

*Bronx County, New York*

On March 21, 1998, the six-year-old female minor plaintiff and her mother were visiting the child's grandmother in her apartment located at 2544 Valentine Avenue in the Bronx. The plaintiff contended

that as the child was getting a glass of water in the apartment bathroom, the sink suddenly collapsed on top of her. The plaintiff maintained that she sustained severe lacerations to her right thigh and left hip. The plaintiff sued the landlord of the apartment building alleging that he had improperly installed the sink one and a half years prior to the incident.

The plaintiff had demanded \$750,000 including compensation for emotional distress. The defendant offered \$350,000. After a five-week trial and after deliberating for three

hours, the jury returned a plaintiff's verdict and awarded \$700,000, including \$100,000 for past pain and suffering, \$500,000 for future pain and suffering and \$100,000 for future medical expenses.

**REFERENCE**

Asencio vs. Kelly Associates. Index no. 015479/1999; Judge Edgar G. Walker, 11-15-05.

Attorney for plaintiff: Ronald Landau of Mirman, Markovits & Landau in Manhattan. Attorneys for defendant: London Fischer, LLP in Manhattan. □

**DEFENDANT'S VERDICT ON  
PROXIMATE CAUSE - DANGEROUS  
STAIRWAY LEADING TO  
LIQUOR STORE BASEMENT  
ALLEGEDLY CAUSES DELIVER-  
PERSON TO FALL WHILE  
BRINGING BEER DOWN STAIR-  
CASE ON HANDTRUCK - LUM-  
BAR MICRODISCECTOMY -**

**FAILED BACK SYNDROME - IN-  
ABILITY TO WORK - NO DE-  
FENSE MEDICAL TESTIMONY.**

*Essex County, New Jersey*

The plaintiff employee of a liquor distributorship, who was making a delivery to the defendant's liquor store, contended that the stairs leading to the basement were dangerous, causing him to trip and fall as he was bringing a hand cart containing ten cases of beer down the

steps. The plaintiff contended that as a result, he suffered a herniated lumbar disc. The plaintiff underwent a microdiscectomy which failed and maintained that he will suffer extensive permanent pain and weakness and will be permanently unable to work. The plaintiff contended that the metal stairs in question were installed in 2000 as a replacement of prior wooden stairs. The plaintiff maintained that the stairs in the older building

were at a very steep angle and that the tread from which the plaintiff fell was only six-and-a-half inches deep.

The defendant had offered to enter into a \$400,000/\$800,000 high/low offer prior to trial. This offer, as well as the defendant's offer of \$450,000

cash after the jury announced that it had a verdict, but before the verdict was read in open court, was rejected. The jury found that the defendant was negligent, but there was no proximate cause between the negligence and any incident. A defense verdict was then entered.

#### REFERENCE

Colon vs. Arnav & Pankh, et al. Docket no. L-5549-04; Judge Stephen Bernstein, 2-06.

Attorney for defendant: Edward L. Thornton of Methfessel & Werbel in Edison, N.J. □

## ADDITIONAL VERDICTS OF INTEREST

### Dram Shop

**\$750,000 VERDICT - DRAM SHOP ACTION - SERVICE OF ALCOHOL TO VISIBLY INTOXICATED BAR PATRONS - PATRONS SUBSEQUENTLY ASSAULT PLAINTIFF - ULNAR FRACTURE - OPEN REDUCTION INTERNAL FIXATION - SECOND SURGERY TO REMOVE ORTHOPEDIC HARDWARE.**

*Philadelphia County, Pennsylvania*

The male plaintiff, a 38-year-old native of China, was standing on a Philadelphia street waiting for a bus when he was assaulted by the two defendant assailants. The plaintiff claimed that the assault

would not have occurred but for the negligence of the defendant bar in serving alcohol to the assailants at a time when they were already visibility intoxicated. One of the assailants was in default at the time of trial. The second assailant admitted that he was "drunk" when he left the defendant bar. The defendant tavern maintained that there was no evidence that the two assailants had actually been served alcohol in its bar on the morning in question. This defendant also argued that the assailants stopping in its bar was not the causative factor of the attack.

The jury found the defendant bar 7% responsible and the two defendant assailants 93% responsible. The plaintiff was awarded \$750,000 in

damages. The defendant bar will be held to be jointly and severally liable for the full amount of the verdict.

#### REFERENCE

Lee vs. Cheers To You, Inc. Case no. 03-03-4299; Judge Annette M. Rizzo, 9-22-05.

Attorneys for plaintiff: Edward F. Chacker and Christy Adams of Philadelphia. Attorney for defendant assailant: Daniel D. McCaffery of Friedman, Schuman, Applebau, Nemeroff & McCaffery in Elkins Park. Attorney for defendant bar: Robert D. MacMahon of Weber, Gallagher, Simpson, Stapleton, Fires & Newby in Philadelphia. Private counsel for owner of defendant bar: Irving L. Abramson of Radnor. □

### Government Liability

**\$1,500,000 VERDICT - DANGEROUS ROAD CONDITION - FAILURE OF PENNDOT TO MAINTAIN SHOULDER BERM - UNSAFE DROP FROM PAVED ROAD SURFACE - VEHICLE ROLL-OVER - BRAIN INJURY - PERMANENT COGNITIVE IMPAIRMENT.**

*Lawrence County, Pennsylvania*

This was an action brought against the Commonwealth of Pennsylvania, Department of Transportation (PennDOT) alleging a dangerous road condition in the form of an unacceptable shoulder drop-off. The plaintiff claimed that a drop-

off of two to seven inches caused his car to strike an embankment and roll over. The plaintiff was a 49-year-old single male at the time of the accident. The plaintiff claimed a total disability from employment as a result of the injuries sustained in the accident. He was previously employed as a truck driver. The defendant denied that the accident was caused by a dangerous road condition and maintained that driver error was to blame.

The jury found the defendant 100% negligent and awarded the plaintiff \$1.5 million in damages. The award including \$750,000 in lost wages and \$750,000 in pain and suffering. A

\$250,000 statutory liability cap applied. Post-trial motions have been denied.

#### REFERENCE

Mazzarini vs. Commonwealth of Pennsylvania Department of Transportation. Case no. 105 of 2002; Judge Michael Werry, 10-14-05.

Attorneys for plaintiff: Lawrence M. Kelly, Joseph A. George, Jason A. Medure and Charles W. Garbett of Luenberg, Garbett, Kelly & George, P.C. in New Castle. Attorney for defendant: Senior Deputy Attorney General Robert T. McDermott and Deputy Attorney General Henry J. Salvi in Pittsburgh. □

**\$65,200,000 VERDICT - INTELLECTUAL PROPERTY ACTION - PATENT INFRINGEMENT - PLAINTIFF ALLEGES THAT THE DEFENDANT INFRINGED UPON ITS PATENT RELATED TO THE DISCOVERY OF NATURAL CELL SIGNALING PHENOMENON IN THE HUMAN BODY.**

*U.S. District Court, District of Massachusetts*

In this intellectual property matter, the plaintiff, a biotechnology company, contended that the defendant pharmaceutical company

### Intellectual Property Rights

infringed upon its patent related to the discovery of natural cell signaling in the human body. The defendant pharmaceutical company maintained that there was no infringement and disputed the validity of the plaintiff's patent.

The jury unanimously found in favor of the plaintiff and awarded the sum of \$65,200,000 to the plaintiff representing 2.3% of the defendant's sales of these two drugs.

#### **REFERENCE**

Ariad Pharmaceuticals, Inc. vs. Eli Lilly & Co. Case no. 1:02-CV-11280-RWZ; Judge Rya W. Zobel, 5-4-06.

Attorneys for plaintiff: Meredith L. Ainbinder, Lee Bromberg, Lisa M. Fleming and Kerry L. Timbers of Bromberg Sunstein in Boston. Attorneys for defendant: Paul H. Berhgoft, Alison Baldwin S. Richard Carden, Grantland G. Drutchas, David M. Frischkorn, Nicole A. Keenan, Anita Terpstra and Andrew M. Williams of McDonnell Boehnen Hulbert & Berghoff in Chicago and Leslie A. McDonnell, Lawrence A. Robins and Christopher S. Schultz of Finnegan Henderson Fararabow Garrett & Dunner LLP in Cambridge, MA. □

**\$26,500,000 VERDICT - TRUCK MAINTENANCE NEGLIGENCE - FAULTY LIFTGATE ON TRUCK - DRIVER UNLOADING WORKSTATION WEIGHING 800 POUND IS CRUSHED WHEN LIFTGATE FALTERS AND UNIT TIPS OVER CRUSHING THE PLAINTIFF - PARAPLEGIA.**

*U.S. District Court, District of Connecticut*

In this negligence action, the plaintiff argued that the liftgate on the defendant's truck was faulty, caus-

### Truck Maintenance Negligence

ing an 800-pound workstation to tip over as he was unloading it. The plaintiff was crushed and rendered a paraplegic. The defendant moving companies argued that the incident was solely caused by the plaintiff's negligence.

After a nine-day trial, the jury returned its verdict in favor of the plaintiff and against the defendants. The jury awarded the sum of \$26,500,000, including \$993,100 for past economic damages, \$5,313,276 for future economic damages, \$4 million for past non-economic damages

and \$16 million for future non-economic damages. The defendants intended to appeal the verdict.

#### **REFERENCE**

Shawn Pouliot vs. Paul Arpin Van Lines, et al. Case no. 3:02-cv-01302-JCH; Judge Janet C. Hall, 1-24-06.

Attorneys for plaintiff: Roland Moots of Moots, Pellegrini, Mannion, Martindale & Dratch in New Milford, CT and Michael Oh and Michael A. Stratton of Stratton Faxon in New Haven, CT. Attorneys for defendants: Roger Brunelle and Karen Wolf of Friedman Gaythwaite Wolf & Leavitt in Portland, ME. □

**\$17,200,000 RECOVERY - UTILITY COMPANY NEGLIGENCE - ALLEGED IMPROPER MAINTENANCE OF GAS EQUIPMENT - GAS EXPLOSION IN RESIDENTIAL HOME - WRONGFUL DEATH OF TWO CHILDREN AGES FIVE AND FOUR.**

*Middlesex County, Massachusetts*

In this utility negligence case, the plaintiff parents contended that their daughters were killed as a result of a gas explosion that the

### Utility Negligence

plaintiffs maintained was caused by a gas leak. The plaintiff further maintained that the gas leak was a direct result of the defendants' negligence. The defendants, the utility company, one of its parts suppliers and the landlord, disputed that they were liable for the explosion and the resulting loss of the plaintiffs' children.

The parties agreed to settle the matter for the sum of \$17,500,000 prior to trial. The settlement consisted of \$12,500,000 contribution from the defendant Nstar, \$4,500,000 from the

manufacturer of the fitting that was claimed to have failed, and \$175,000 from the landlords.

#### **REFERENCE**

Tara and Heath Carey vs. Nstar, et al. Case no. 2002-04171; Judge Connors, 1-06.

Attorney for plaintiffs: Alan Cantor in Boston. Attorney for defendant Nstar: Michael K. Callahan in Boston, MA. Attorney for defendant Pearson: Paul L. Cummings in Newton, MA. Attorney for defendant Inner-Tite: John F. Lawler in Boston. □

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Published by Jury Verdict Review Publications, Inc.  
 45 Springfield Avenue  
 Springfield, NJ 07081  
 973 376-9002 Fax 973 376-1775

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**Publisher**  
 JVR Publications, Inc.

**Editor**  
 Laine Harmon, Esq.

**General Manager**  
 Jed Zarin

**Information Research**  
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