

The Alabama Jury Verdict Reporter

The Most Current and Complete Summary of Alabama Jury Verdicts

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Statewide Jury Verdict Coverage - Published Monthly

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Products Liability - A construction worker bent over his work area and fired a nail gun upward into the underside of a piece of wood; when the gun accidentally fired a second nail that went into the worker's eye and destroyed his vision, he blamed the manufacturer for the nail gun's faulty design

Pierce v. Illinois Tool Works, Inc., 02-415

Plaintiff: Michael C. Bradley and Jeffrey C. Kirby, *Pittman Hooks Dutton Kirby & Hellums*, Birmingham
Defense: Carey Bennett McRae, *Adams & Reese/Lange Simpson, LLP*, Birmingham

Verdict: \$2,000,000 for plaintiff

Circuit: **DeKalb**, 9-15-05

Judge: Randall L. Cole

It was 5-1-01, and Bobby Pierce was working as a laborer for Larry Hanson and Sons Construction in DeKalb County. On this particular day, Pierce

was working alongside Larry Hanson's son-in-law, Jesse Farr, on the construction of a new house in Sylvania.

Hanson had provided Pierce with a nail gun to use on the construction project. The nail gun was manufactured by a company called the Duo-Fast Corporation, a division of Illinois Tool Works, Inc., and sold to Hanson through a distributor called Sand Rock Contractors Equipment Rental & Sales.

It would be significant for this case that the nail gun was set up for "non-sequential" operation. That is, it was not necessary to pull a trigger each time one wanted to fire a nail. Rather, the gun would fire a nail whenever the gun's nozzle was simply bumped onto a surface.

During the course of the construction project, Pierce had occasion to attach a two-by-four to the bottom of a beam that ran around the top of the new house's carport. The two-by-four

happened to be positioned at a height just above Pierce's knees.

Pierce maneuvered the two-by-four in place under the beam and then positioned his nail gun under the two-by-four so as to fire a nail upward into the wood. In doing so, he had to lean his body over in such a way that the nail gun was pointing directly up at his head with only the wood in between.

Pierce fired a nail into the wood near the edge of the two-by-four. In the next split second, however, the recoil of the gun caused it both to move forward just enough that its nozzle extended over the edge and to make a second contact with the wood.

This bouncing action caused the gun to fire a second nail. With no intervening wood to protect him, the nail went directly into Pierce's left eye. In agony, Pierce pulled the nail from his eye and threw it away. He was then taken to the ER at Baptist Medical Center - Dekalb where he was stabilized and then transferred to UAB. Later that same day, Pierce was again transferred, this time to the Callahan Eye Foundation at UAB.

Pierce underwent four separate surgeries in an effort to repair the damage the nail had done to him. Sadly, however, he has lost all vision in his left eye, and he continues to suffer from severe shooting pains in his eye, itching and watering, infections, headaches, and sensitivity to light. As a result of his injuries, Pierce's career as a construction worker is over.

Pierce received \$79,451 in worker's compensation benefits from the Alabama Home Builder's Self-Insurer's Fund. He then filed suit against both Illinois Tool Works and Sand Rock Contractors. However, the claim against Sand Rock did not advance to trial, and the litigation proceeded solely against Illinois Tool Works.

According to Pierce, the nail gun was defective due to its non-sequential firing mechanism. One of his experts, Mark Ezra, P.E. Maryland Heights, MO, offered the opinion that the kind of recoil actuated double firing that happened in this case is a known phenomenon that could have been prevented by the simple use of a sequential trigger mechanism. Such a mechanism would have necessitated pulling a trigger for each firing, thereby eliminating accidental double firing.

Pierce's identified vocational rehabilitation expert was John McKinney, III of Huntsville, and his economist was Robert Hebert of Lafayette, LA. McKinney estimated that Pierce's annual wage loss due to the accident would come to approximately \$11,440.

Illinois Tool Works defended the case on several fronts. First, it pointed out that the nail gun had actually been sold as a sequential operator, and it was Hanson, Pierce's employer, who converted it to non-sequential operation. Thus, the manufacturer could hardly be blamed for a modification made to the tool by the end user.

As a second line of defense, Illinois Tool Works implicated Pierce's fault. In particular, the company noted that Pierce's co-worker, Farr, had explicitly told Pierce not to aim the nail gun upward while he was bent over it.

Rather, Farr instructed Pierce to squat down and aim the gun upward and away from his body. Pierce chose to ignore that sensible instruction. Accordingly, responsibility for the consequences of that choice must rest with him.

Finally, Illinois Tool Works cited the opinions of two of its in-house engineering experts, Corey Parker and Ron Rathsam. Parker offered the opinion that the tragedy could have been avoided if Pierce had simply worn the safety glasses that came with the nail gun. Pierce's decision not to wear the glasses added to his culpability.

Pierce responded to Illinois Tool Works's defenses. Although he acknowledged Hanson had modified the nail gun for non-sequential operation, he pointed out that Illinois Tool Works actually sold a kit that facilitated exactly that conversion. Thus, the company's attempt to disclaim any responsibility for the conversion must fail.

Also, Pierce's expert, engineer Kelsey, argued the safety glasses would have been of questionable value at best given that the gun was only seventeen inches away from Pierce's face when he fired it. At that distance, the glasses would have provided little or no real protection.

The case was tried over four days in Fort Payne. The jury returned a verdict for Pierce and awarded him

compensatory damages of \$800,000. To this amount was added another \$1,200,000 in punitive damages. That brought Pierce's total award to an even \$2,000,000. The court entered a consistent judgment for that amount.

Post-trial, Illinois Tool Works filed a motion for a judgment as a matter of law or for a new trial. The motion was denied, and Illinois Tool Works has filed an appeal. At the time the AJVR reviewed the record, the appeal was still pending.

Auto Negligence - A motorist attempted to pull into a parking space in front of a bakery; instead of stopping, the motorist jumped the curb, smashed into the front of the bakery, and seriously injured a four year-old child

McArdle v. Estate of Payne, et al., 02-111

Plaintiff: R. Gordon Pate, *Pate & Cochrun*, Birmingham

Defense: Staci G. Cornelius, *Gaines Wolter & Kinney*, Birmingham

Verdict: \$43,000 for plaintiffs

Circuit: **Jefferson**, 1-25-06

Judge: Houston L. Brown

It was 9-27-00, and Lisa McArdle was walking on 18th Street in the City of Homewood with her four year-old son, Alan. The two were on their way to Savage's Bakery with Alan running four or five feet ahead of his mother.

At the same time that Alan and Lisa approached the bakery, Myna Payne arrived on the scene in an automobile. Just as little Alan turned to enter the bakery, Payne pulled into a parking space in front of him. However, she failed to slow down.

Lisa screamed for Alan to run and for Payne to stop, but it was too late. Payne's vehicle jumped the curb and smashed into the front of the bakery, hitting Alan in the process. Lisa ran to her child and found him lying on the ground beneath a metal rack. He was unresponsive and bleeding profusely from his head and leg.

Lisa picked up Alan and cradled him in her arms as she screamed for help. Eventually, paramedics arrived and took them both to Children's Hospital. Following diagnostic tests, the medical team sutured Alan's wounds. During the painful procedure, Alan, who by this time had regained consciousness,