The Alabama Jury Verdict Reporter

The Most Current and Complete Summary of Alabama Jury Verdicts

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Unbiased and Independently Researched Jury Verdict Results

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Civil Jury Verdicts

Complete and timely coverage of civil jury verdicts in Alabama including circuit, presiding judge, parties, case number, attorneys and results.

Road Construction Negligence

On a state highway, a driver lost control, hit a bridge rail, and rolled over; the driver's passenger was killed, and his estate blamed the tragedy on faulty construction by the company that had repaved the road

Estate of McGilvary v. APAC Southeast, Inc., 05-126
Plaintiff: Leah O. Taylor, *Taylor & Taylor*, Birmingham; and Lynn W. Jinks, III, *Jinks Daniel & Crow*, Union Springs
Defense: Daniel S. Wolter and Davis A. Barlow, *Gaines Wolter & Kinney, P.C.*, Birmingham; B. Saxon Main and Gerald C. Swann, Jr., *Ball Ball Matthews & Novak*, Montgomery
Verdict: $10,000,000 for plaintiff
Circuit: **Bullock**, 4-27-07
Judge: Burt Smithart

It was 2-28-05, and James McGilvary was riding as a passenger in a vehicle being driven by Leon "Buck" Singer. The two were traveling on AL 110 in Bullock County. As the vehicle approached a bridge located between the intersections with C.R. 165 and C.R. 7, Singer lost control and ran into the bridge rail. In the next instant, the vehicle rolled over. Tragically, McGilvary was killed in the crash.

Trooper Kevin Cook investigated the crash and identified a noticeable dip in the road near the approach to the bridge. The exact location of the dip would later become a subject of controversy.

It turned out that sometime prior to the crash, the state had contracted with a company called APAC Southeast, Inc. to repave the road in the area near the bridge. McGilvary's estate filed suit against APAC and criticized its construction and maintenance of the roadway.

The estate's accident reconstructionist was Brian Pfeifer of Tallahassee, FL. According to Pfeifer, APAC's construction of the roadway was defective in at least two respects.

First, the company had left a dip in

the pavement some distance before the bridge. Pfeifer argued it was the dip that caused Singer to lose control of the vehicle in the first place. Second, the soft shoulder prevented Singer from regaining control of the vehicle after the collision with the railing and was one of the factors that contributed to the fatal roll-over.

APAC defended the case and insisted its repaving of the road had been done properly and in full compliance with the plans and specifications contained in the company's contract with the state. Additionally, APAC attempted to cast doubt on the reliability of Pfeifer's expert opinion.

The company pointed out that although Pfeifer examined the scene of the crash, he never actually saw the dip and could not precisely identify its location. Pfeifer speculated that the state must have repaired the dip before he had a chance to examine it.

Furthermore, Pfeifer had based his expert opinion upon information provided to him by the estate's attorneys concerning what they expected Trooper Cook to say about the location of the dip. As it happened, Trooper Cook subsequently stated that the dip was located at the joint between the road and the bridge.

This was significant inasmuch as Pfeifer stated during his deposition that if the dip were located at that spot, then the accident could not have happened as it did. For these reasons, APAC argued Pfeifer's opinion was unreliable. The identified accident reconstructionist for the defense was Larry Mann.

A jury in Union Springs heard the evidence and returned a verdict for the estate in the amount of $10,000,000. The court followed with a consistent judgment. Interestingly, the verdict form contains a handwritten note stating that the case had been settled by the parties post-verdict and was dismissed.

Auto Negligence - Although a woman was awarded damages for injuries she suffered in an auto accident, her husband's consortium interest was valued at zero

Davis v. Davis, 06-537
Plaintiff: Roderick Walls, *Roderick Walls & Associates*, Birmingham
Defense: Ralph D. Gaines, III and Andrew J. Moak, *Gaines Wolter & Kinney, P.C.*, Birmingham
Verdict: $2,000 for Mary Davis; defense verdict on Leo Davis's consortium claim
Circuit: **Jefferson**, 2-26-07
Judge: G. William Noble

On 1-28-04, Mary Davis, then age 64, was driving a 2003 Hyundai X63 near the intersection of 24th Street S.W. and Jefferson Avenue in Birmingham. At the same time, Takisha Davis was driving a 2001 Kia Optima in the same area. An instant later, the two collided.

The record does not reveal the nature of Mary's injuries or the amount of her medical expenses. She filed suit against Takisha and blamed her for the crash. In her complaint, Mary alleged counts for both negligence and wantonness.

Mary also named Pamela Evans, the owner of the Kia that Takisha was driving, as a co-defendant on a theory of negligent entrustment. Finally, Mary's husband, Leo Davis, presented a derivative claim for his loss of consortium. Takisha and Evans defended the case and minimized the claimed damages.

Just prior to the commencement of trial, Mary and Leo dismissed their claim against Evans. The case then went to trial in Birmingham. At the close of evidence, the court granted Takisha's motion for a judgment as a matter of law on the claim for wantonness.

The jury deliberated only the negligence count and returned a mixed verdict. Mary was awarded $2,000 on her claim, but Leo was awarded zero for his consortium interest. Interestingly, the verdict form was designed in such a way that after having found for Leo and awarding him zero damages, the jury was able also to find for Takisha against Leo on that same claim. In any event, the court entered a judgment that reflected the verdict.

Fraud - The owner of a company purchased two life insurance policies based in part on assurances that the premiums would remain level for the duration of his life; fourteen years later the premiums went up, and the policies lapsed

Smith, et al. v. AmerUs Life Ins. Co., 02-304
Plaintiff: David H. Marsh and Michael K. Beard, *Marsh Rickard & Bryan, P.C.*, Birmingham
Defense: Charles A. Dauphin and Elizabeth W. McElroy, *Baxley Dillard Dauphin McKnight & Barclift*, Birmingham
Verdict: $6,500,000 for plaintiff (allocated $2,500,000 compensatory and $4,000,000 punitive)
Circuit: **St. Clair**, 3-12-07
Judge: Charles E. Robinson

In 1967, Bobby Smith joined the staff of a company called Precision Chipper Sales and Engineering, Inc. in Birmingham. Smith thrived in his new position, and over the subsequent years he began to acquire shares of stock in the company. He was so successful in this that by 1984 Smith had become the sole owner of Precision Chipper.

Along the way, and as a result of various mergers and acquisitions, the company changed its name to Precision Husky Corporation and now specializes in the manufacture of log loaders and recycling equipment. In the meantime, the company expressed its recognition of Smith's indispensability by deciding to purchase insurance policies on his life.

In 1987, Carl Jeffrey, an agent for both Central Life Assurance Company and an entity identified as the Jeffrey Planning Group, met with representatives of Precision Husky about the possibility of purchasing the insurance policies. Jeffrey pitched to the company the idea of purchasing two separate "universal life" policies. The first policy would provide a death benefit of $3,000,000 (later increased to $3,500,000), and the second policy would provide a death benefit of $500,000.

During the sales presentation, Jeffrey gave certain assurances about what the premiums would be for the rest of Smith's life. In particular, the premiums on the first policy would be $3,970 per month, while the premiums

on the second policy would be $478.

Jeffrey further stated that the premiums would remain at that level until Smith reached the age of 95. Since Smith was 53 years old at the time, this meant the premiums were to remain level for the next 42 years.

These terms sounded good to Precision Husky. Central Life issued the policies, and Precision Husky began making the premium payments as agreed. All seemed well for the next several years. Eventually, however, things began to change.

For one thing, Central Life merged into and was absorbed by AmerUs Life Insurance Company. Also, Jeffrey was replaced in 1991 as Precision Husky's insurance agent. The new agent would be George Brooks.

When Brooks came on the scene, he informed Precision Husky that the two insurance policies would lapse unless Precision Husky made a substantial increase in the amount of its premium payments. Despite this ominous warning signal, Precision Husky continued to pay the premiums to which the company had agreed.

Some two years later, on 12-29-93, ownership of the policies was transferred to Smith personally. On the same day, the Bobby Ray Smith Family Trust was created with Smith's wife, Martha, serving as Trustee.

The following day ownership was transferred again for tax reasons. This time they were transferred to Martha in her capacity as Trustee. After these transfers were complete, the Trust continued making the premium payments at the agreed upon level.

Finally, in October of 2001, Smith was again informed that the policies would lapse if the premiums were not increased. When the increased premium payments were not forthcoming, the policies did in fact lapse in September of 2002, approximately 14 years after the policies had been purchased.

Smith, the Trust, and Precision Husky all filed suit against both Jeffrey and AmerUs Life Insurance Company. In their complaint, plaintiffs alleged counts for fraud, suppression or concealment, and breach of contract.

Plaintiffs accused Jeffrey and AmerUs of making false and misleading representations to the effect that the premium payments would remain level for the effective duration of Smith's life. According to plaintiffs, defendants made these representations knowing they were untrue and for the purpose of inducing plaintiffs to purchase the insurance policies.

Plaintiffs also made a claim against AmerUs for the negligent hiring, training, and supervision of Jeffrey. However, the court granted AmerUs a dismissal of that count on the ground that the statute of limitations had run.

In addition, Jeffrey has since retired and moved to Panama. This fact led to some uncertainty as to whether service of process was ever properly made on him. For that reason, the court ordered a separate trial on the claims against him.

AmerUs defended the remaining claims on several fronts. First, the insurer pointed out that the variable rate of the premiums was no secret. In fact, the cover of each policy clearly states "Flexible Premium Adjustable Life Policy." Furthermore, each year Smith was sent an annual statement which said on its face, "Plan: Flexible Premium Adjustable Life." In light of these facts, Smith could hardly have been unaware that the premiums could not go up.

AmerUs also raised an interesting second line of defense. It seems the insurer had been the defendant in a class action suit, *Bhat v. AmerUs Life Ins. Co.*, No. 96-4627 SI, Northern District of California.

As part of the litigation in that case, Smith was sent a letter in January of 1999 concerning a proposed settlement. Despite receiving that letter, Smith did not opt out of the class action. Six months later, on 7-19-99, Smith received another letter stating that the proposed settlement had been approved.

Pursuant to the settlement, $1,985 would be credited to the value of Smith's policies. Smith made no objection to this arrangement. By his failure to take action or make any objection, then, Smith tacitly agreed to the settlement. Thus, he should be barred from any further recovery in the present case.

A jury in Pell City heard the evidence and returned a verdict for plaintiffs. They were awarded compensatory damages of $2,500,000, plus $4,000,000 more in punitive damages. That brought the total award to $6,500,000. The court entered a judgment for that amount.

AmerUs filed a post-judgment motion for a judgment as a matter of law, or for remittitur, or for a new trial. At the time the AJVR reviewed the record, the motion was still pending.

Auto Negligence - Although plaintiffs prevailed in a car crash case, they were awarded only nominal damages

Brown, et al. v. McIntosh, 05-632
Plaintiff: Robert W. Shores, *Carter & Shores*, Fultondale
Defense: Lynn Hare Phillips, *Hare Clement & Duck, P.C.*, Birmingham
Verdict: $398 for Brown; $376 for Lewis
Circuit: **Jefferson**, 2-7-07
Judge: Edward L. Ramsey

On 2-11-03, James Brown was driving on Hwy 280 in the company of his passengers, Haroldson Lewis and Christopher Thomas. An instant later, they collided with a vehicle being driven by Keith McIntosh.

The record does not reveal the nature of Brown's, Lewis's, or Thomas's injuries, nor does it reveal the amounts of their respective medical expenses. They filed suit against McIntosh and blamed him for the crash. In addition to their claims for negligence, plaintiffs also alleged counts for wantonness. McIntosh defended and minimized the claimed damages.

The case was tried to a jury in Birmingham. At the close of evidence, the court granted McIntosh a judgment as a matter of law on the claim for wantonness. Also, Thomas dismissed all his claims.

The jury deliberated only the remaining negligence claims and returned verdicts for both Brown and Lewis. Brown was awarded damages of $398, and Lewis was awarded $376. The court entered a consistent judgment for those amounts, and the judgment has been satisfied.