

# Federal Jury Verdict Reporter

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December 2005

Nationwide Federal Jury Verdict Coverage

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## Preview Issue

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## Questions about the Federal Jury Verdict Reporter

Q: I practice in XYZ state. Why do I care about a jury verdict from Phoenix or anywhere else?

A: For instance, if you practice bad faith cases, can you afford not to know about the multi-million dollar bad faith verdict from Phoenix in this issue or the nearly \$8,000,000 bad faith verdict from Philadelphia?

The same reasoning applies to any type of case. Are you a lawyer who practices employment law? Can you afford to miss a comprehensive nationwide review of federal employment verdicts? The same sexual harassment and race discrimination pitfalls and theories that are identified in our publication apply to trials all over the U.S.

Q: Don't I already read these verdicts in some other publication? Isn't the FedJVR really duplicative?

A: That's the beauty of the FedJVR - there is **no** other publication in U.S. that provides a comprehensive review of federal civil jury verdicts. None. Period.

If you're relying on *any other* national or local jury verdict reporter, you're missing almost all of the verdicts. That means you're not reading the many cases involving **patent infringement, products liability, sexual harassment, race discrimination**, and on and on in every different permutation.

Each month the FedJVR chronicles approximately 100 verdicts from all over the country. [Each issue has averaged between 40 and 45 states represented.]

Q: Which verdicts are included?

A: That's an easy question. The FedJVR doesn't make that distinction - we write a verdict report on virtually every civil jury verdict in the federal system, our coverage representing all fifty states.

Q: How do I subscribe?

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Ankle fracture in a crash

**False Arrest - Plaintiff was beaten by her drunken husband at his trailer – when the local police chief arrived, he couldn't sort out who the aggressor was, and he arrested not just the drunk aggressor, but also the wife**

*Frazier v. City of Double Springs*, 6:04-1181

**Plaintiff:** Henry F. Sherrod, III, Florence, AL

**Defense:** Timothy P. Donahue, *Donahue & Associates*, Birmingham, AL

**Verdict:** \$30,500 for plaintiff

**Court:** Alabama Northern - Jasper

**Judge:** Inge P. Johnson

**Date:** 9-9-05

Tonya Frazier went to see her husband, Bobby Brooks, on 6-11-02 at his trailer in Double Springs. When she arrived, the two quarreled over a cell phone. Brooks had been drinking and the encounter escalated to violence. Brooks beat and choked his wife, pushing her to the ground. She was able to escape.

Neighbors called the police to report the trailer park brouhaha. The call came into the Double Springs Chief of Police, Stan Thomas. Thomas went to the trailer and commenced an investigation. He noted that Brooks was apparently drunk – he was also wounded, having a superficial cut.

Thomas finished with Brooks and went looking for Frazier – he called her on her cell phone. Frazier agreed to come to the police station. While there she told her story, that she had been violently attacked by Brooks. Her story was backed up by her visible bruises.

It was all too complex for the Chief to sort it out – unable to decide who the primary aggressor was, he arrested Frazier on the spot. He arrested Brooks later that day. The case against Frazier fell apart and it was dismissed.

In this lawsuit, Frazier alleged false arrest by Brooks. It was her contention that the only conclusion the Chief could have drawn was that she was a victim of domestic violence. Frazier also noted that Brooks may have enjoyed preferential treatment because he was friends with the Chief.

Frazier further thought it curious that in his history of making domestic violence arrests, this represented the first time that Thomas could not identify the aggressor, thus triggering the arrest-all-involved procedure. If prevailing in this civil rights case, she sought compensatory and punitive damages.

Thomas defended the case and argued the arrest was reasonable – from his perspective, it appeared that both parties were apparent aggressors. In this respect, he noted that Brooks had an apparent injury. In this situation, when the aggressor could not be identified through a good faith investigation, he had no choice but to effectuate a double-arrest.

Frazier prevailed at trial on the false arrest count and she took compensatory damages of \$20,500. The jury went on to assess punitive damages of \$10,000. The verdict totaled \$30,500. The court has since awarded Frazier attorney fees of \$55,000. The police chief has appealed.

**BAD FAITH**

*Arizona District - Phoenix*

**A dentist with a psychiatric disability was critical of his disability insurer's handling of his claim**

**Caption:** *Leavey v. Provident Life & Accident Insurance*, 2:02-2281

**Plaintiff:** Steven C. Dawson and Anita Rosenthal, *Dawson & Rosenthal*, Sedona, AZ and Gregg H. Temple, Scottsdale

**Defense:** Stephen Bressler, Ann-Martha Andrews and Scott Bennett, *Lewis & Roca*, Phoenix, AZ

**Verdict:** \$19,809,028 for plaintiff

**Judge:** Stephen McNamee

**Date:** October 7, 2005

**Facts:** Brett Leavey worked as a dentist until November of 1998. At that time, he abandoned his practice because of emotional disabilities. Leavey's psychiatric illness was wide-ranging, encompassing both depression and substance abuse. While his professional career was in jeopardy, Leavey was protected.

He had purchased a disability insurance policy from Provident Life and Accident Insurance. At the time he stopped practicing, Leavey made a claim for benefits. Provident began to pay benefits. [Interestingly, from 11-98 to the present, Provident has continued to pay benefits.]

While Provident did pay Leavey, the company was interested in seeing his mental health improve so that he could return to productive dentistry. In this regard, it sent Leavey to several psychiatric evaluations. Those evaluations concluded that while Leavey did have a legitimate disability, it was believed he would benefit from cognitive treatment.

Leavey resisted the treatment. While it might return him to the practice of dentistry, it was argued that the pressure associated with the practice would lead him back to the vicious cycle of depression and substance abuse. Thus Leavey took the position he was permanently disabled because of his emotional condition and any attempt to improve it would only make things worse in the long run.

This dilemma went to the heart of this case. Leavey alleged that Provident engaged in bad faith by seeking to have him participate in therapy. It was his argument that the policy only required him to be disabled – it placed no burden on him to seek treatment to continue receiving benefits.

In developing that it was an illegal scheme, Leavey noted that in December of 2001, Provident advised him that the claim was closed and benefits were terminated. [No idle threat, the reserve was released.] Within a month, Provident backed off and continued to pay without interruption. Leavey further postured that when confronted about the denial, Provident lied about it. Thus in prosecuting his claim, Leavey pointed to proof of emotional harm associated with the temporary denial of his claim.

Leavey's claim went beyond the borders of the insurer's handling of his case – relying on testimony from former Provident bigwigs, it was his proof that the insurer called

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psychiatric claims “gray areas” that were to be exploited and denied. Why would Provident do this? Leavey answered that the insurer was motivated by money, having previously oversold professional disability policies. If Leavey prevailed on a single bad faith count, he sought emotional suffering, future benefits and the imposition of punitive damages.

Provident defended the case and focused on one key fact – that at all times and whether the claim was closed or not, (Provident called it a paperwork snafu), the insurer always paid Leavey his benefits. It further acted reasonably in questioning his care and his failure to return to the practice of dentistry. [Leavey countered as noted above that the policy said nothing about his seeking treatment to return to work.] Provident responded that regardless of whether mistakes were made in handling the claim, it certainly did not rise to the level of bad faith.

**Jury Instructions/Verdict:** The instructions asked if Provident had breached a covenant of good faith and fair dealing. The answer was yes, this Phoenix jury awarding Leavey \$4,000,000 for emotional suffering. He took \$809,028 more for future benefits. The jury also assessed punitive damages of \$15,000,000. Leavey’s verdict totaled \$19,809,028. When reviewed by the FedJVR, Provident’s post-trial motions were just beginning – they have argued among other things, that the verdict was excessive.

## SEXUAL HARASSMENT

*Arkansas Western District - Hot Springs*

**A female car washer alleged she was sexually harassed by her boss**

**Caption:** *Sells v. Speedy Car Care Center*, 6:04-6156

**Plaintiff:** E. Diane Graham, *Ledbetter Cogbill Arnold & Harrison*, Fort Smith, AR

**Defense:** Q. Byrum Hurst, Jr., *Hurst Morrissey & Hurst*, Hot Springs, AR

**Verdict:** \$260,000 for plaintiff

**Judge:** Robert T. Dawson

**Date:** September 9, 2005

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## SKI RESORT NEGLIGENCE

*California Eastern District - Sacramento*

**A snowboarder suffered serious injuries when she fell thirty feet from an unprotected ski lift**

**Caption:** *Woodman v. Kirkwood Ski Resort*, 2:01–2063

**Plaintiff:** John E. Stefanki, Sacramento, CA

**Defense:** Timothy M. Smith, *McKinley & Smith*, Sacramento, CA

**Verdict:** Defense verdict on liability

**Judge:** Morrison C. England, Jr.

**Date:** October 31, 2005

**Facts:** It was 1-3-01 and Jeanine Woodman, then age 28 and a secretary, went snowboarding at the Kirkwood Ski Resort in Alpine County, CA. An experienced snowboarder, Woodman described herself as being of intermediate skill. She was joined on the slopes by her husband.

At the base of the mountain, she joined other friends and had a beer. Heading up the mountain, she rode Kirkwood’s ski lift. The chairs in the lift were open – that is, there was nothing to prevent a patron from falling out of the chair.

As Woodman neared the lift’s exit, she prepared to place her snowboard back on – to enter the lift, one foot is taken out of the board’s rear boot. It was Woodman’s usual practice to reload the rear boot while on the lift, permitting her to make a graceful exit.

Woodman leaned over to secure the boot – she never made it. She lost her balance and fell off the ski lift. Her husband sitting next to her had been looking away. He could only watch her fall to the ground.

Woodman landed hard thirty feet below on rock-hard packed snow. She then proceeded to slide down the mountain another 80-100 feet. Having taken a nasty fall, Woodman sustained multiple fractures, including to her (1) pelvis, (2) L-1 disc (burst), (3) heel, and (4) elbow (dislocated). She remained in the hospital for five weeks.

Woodman filed this diversity lawsuit and blamed her fall on Kirkwood’s failure to have a safety bar in the chair lift – had there been such a restraint, there would have been no fall. Beyond her primary claim, her husband presented a derivative consortium count.

Kirkwood thought the fall was unfortunate but fault rested with Woodman alone – it blamed her poor decision to shift in the chair to put her snowboard back on. Had she waited until she disembarked from the lift, there would have been no injury. It was Kirkwood’s position that the standard of care did not require a restraint.

**Injury:** Multiple fractures (L-1 Burst, Pelvis, Heel, Elbow)

**Jury Instructions/Verdict:** The instructions asked if Kirkwood was negligent – the answer was no and Woodman took nothing. A defense judgment followed this nine-day trial.

## CIVIL RIGHTS

*Colorado District - Denver*

**A municipal judge who had been drinking, but was not drunk, was arrested for drunk driving after having been stopped with an open container – the arresting state trooper postured the arrest was reasonable based on his investigation, the judge having refused field sobriety tests**

**Caption:** *Wilder v. Colorado State Police*, 1:02-732

**Plaintiff:** Paul K. Grant, Centennial, CO

**Defense:** Patricia D. Herron and Christine K. Wilkerson, *Assistant Attorneys General*, Denver, CO

**Verdict:** \$1,000,000 for plaintiff

**Judge:** Wiley Y. Daniel

**Date:** October 28, 2005

**Facts:** Kevin Turner, a trooper for the Colorado State Police, was doing highway duty on 11-30-01. He clocked a speeder at 57 mph in a 50 mph zone. Turner illuminated his lights and pulled over the driver. It wasn't just any driver, but a sitting municipal judge from Montevisto, CO, John Wilder.

Turner thought that Wilder had been drinking, the officer smelling alcohol on the judge – there was also an open container of alcohol in the car. He asked Wilder to submit to a field sobriety test. The judge refused. Turner made a decision to arrest the judicial suspect.

Once in custody, a blood test was taken. It turned out that the judge was not drunk – his BAC was just .0145, far below Colorado's .05 limit. The drunk driving charges were dismissed. So too were charges that Wilder had possessed a firearm while intoxicated. During the arrest, Wilder had volunteered that a licensed pistol was in his car. Based on that admission and his apparent intoxication, the trooper arrested him on the weapons charge.

When the criminal case was resolved for the judge, he turned the tables and filed a federal lawsuit alleging Turner arrested him without probable cause. He noted there was no concrete proof beyond "the smell of alcohol" to indicate he was drunk – the judge's speech was not slurred, nor did he drive erratically. If Wilder prevailed on the constitutional claim, he sought compensatory and punitive damages.

Turner's defense of the case was not complex. Namely, whether the judge was actually drunk or not was immaterial to the key question of whether or not there was probable cause to arrest. The trooper thought there was, noting (1) the judge was speeding, (2) the smell of alcohol, and (3) the open container.

In this interesting case, the jury was put in the unusual position of being able to judge a significant portion of the key proof for itself – it heard the audiotape of the arrest and thus was uniquely qualified to decide the truth of the matter.

**Jury Instructions/Verdict:** A jury in Denver resolved this case for the judge, finding he had been arrested without probable cause. Having so found, it awarded him \$350,000 in economic damages, plus \$150,000 more in non-economic damages. The jury's punitive award doubled the verdict to an even \$1,000,000. A judgment in that sum followed for the judge.

This case was first tried to a jury in August of 2004. A defense judgment was returned. The court granted a new trial. The basis for granting the new trial is not clear from the court record.

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## GENDER DISCRIMINATION

*Colorado District - Denver*

**A female employee at the U.S. Mint alleged her work environment was so hostile, she ultimately had to get a restraining order issued against her boss – the U.S. Mint denied everything, even refusing to honor the restraining order**

**Caption:** *Snow v. Department of Treasury*, 1:03-1475

**Plaintiff:** Marissa L. Williams and Rhonda L. Rhodes, *Williams & Rhoades*, Englewood, CO

**Defense:** Habib Nasrullah and Terry Fox, *Assistant United States Attorneys*, Denver, CO

**Verdict:** \$95,000 for plaintiff less \$15,000 mitigation

**Judge:** Wiley Y. Daniel

**Date:** September 23, 2005

*See the complete December 2005 Issue for all the details.*

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## FIRST AMENDMENT

*Connecticut District - New Haven*

**A political candidate sent an anonymous AOL e-mail to opponents that was vaguely threatening and made wordplay on an opponent's slogan – recipients complained to the police, who then proceeded to execute an illegal search warrant on AOL, revealing the sender's identity and causing him great embarrassment**

**Caption:** *Freedman v. Town of Fairfield*, 3:03-1048

**Plaintiff:** Daniel J. Klau, H. James Pickerstein and Calvin K. Woo, *Pepe & Hazard*, Hartford, CT

**Defense:** Walter A. Shalvoy, Jr. and Thomas Murtha, *Maher & Murtha*, Bridgeport, Ct

**Verdict:** \$1.00 for plaintiff

**Judge:** Peter C. Dorsey

**Date:** September 26, 2005

*See the complete December 2005 Issue for all the details.*

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### Medical Negligence - Plaintiff died of complications after her bowel was injured during a laparoscopic hernia surgery

*Olayinka v. Georgetown University Hospital*, 1:03-1419

**Plaintiff:** Patrick M. Regan and Lisa D. Barnett, *Regan Halperin & Long*, Washington, DC

**Defense:** Stephen L. Altman and Thomas M. Wochok, *Hamilton Altman Canale & Dillon*, Fairfax, VA

**Verdict:** Defense verdict on liability

**Court:** District of Columbia

**Judge:** James Robertson

**Date:** 10-21-05

See the complete December 2005 Issue for all the details.

### RACE DISCRIMINATION

*Florida Middle District - Ocala*

#### In a reverse race discrimination case, a white deputy purchasing director alleged he was passed over for promotion, city officials favoring the black applicants, in part to appease a black city councilwoman

**Caption:** *Tillman v. City of Ocala*, 5:04-219

**Plaintiff:** William J. Atkins and Eleanor M. Atwood, *Parks Chesin & Walbert*, Atlanta, GA

**Defense:** Michael H. Bowling and Michael J. Raper, *Bell Leeper & Roper*, Orlando, FL and Paul S. Jones, *Luks Santaniello Perez Petrillo & Gold*, Orlando, FL

**Verdict:** \$884,000 for plaintiff

**Judge:** Wm. Terrell Hodges

**Date:** October 14, 2005

**Facts:** James Tillman, who is white, started working in February of 1999 for the city of Ocala, FL as a deputy purchasing director. He did well in the position, supervising eleven employees. In May of 2002, the city's purchasing director retired. His job came open and it was apparently a plum spot – eighty applications were received, Tillman being among the throng.

Ultimately seven were interviewed – Tillman made the cut. Following the interviews, the candidates were pared to four – Tillman again survived. At this point, Tillman thought the job was a sure thing – he was experienced and met all the job qualifications.

Tillman would later describe that he was flabbergasted when he didn't get the job. Instead of hiring him, Ocala selected a black candidate, Daryl Muse. Muse it turns out, was also experienced and exceeded all the job qualifications. From the city's perspective, Muse was better qualified. The selection committee had reasoned that Tillman was too bureaucratic and not customer-oriented.

Tillman strongly disagreed – he believed the hiring decision represented insidious reverse race discrimination, Ocala favoring blacks for promotion over whites. His best evidence of this was proof that the city had been tracking the promotion of black applicants, apparently in an attempt to appease a black city councilwoman. Favoring diversity over competence, Tillman

felt he had become a victim.

Now working under Muse, Tillman complained vigorously about the hiring decision. A year later in 2003, he was out of work. Tillman thought it represented retaliation for having opposed the unlawful promotion of Muse. The city countered that it was Tillman's own poor performance and insubordination that justified the firing.

Tillman memorialized his legal theories in this lawsuit, alleging that Ocala (1) engaged in reverse race discrimination in hiring Muse, and (2) it retaliated by firing him when he complained. At trial, he sought an award of lost wages and damages for emotional suffering. Ocala defended as above that its decision was based strictly on merit, race and retaliation playing no role.

**Jury Instructions/Verdict:** Tillman's two counts advanced to a federal jury in Ocala, FL. He prevailed that (1) his race was a substantial and motivating factor in the decision to deny promotion, and (2) that he was fired when he complained. The jury went on to award lost wages of \$384,000, plus \$500,000 for emotional suffering. The verdict totaled \$884,000. [The court directed a verdict on punitive damages.] Ocala has since sought JNOV relief, repeating trial arguments. Concurrently, Tillman has moved for an award of attorney fees of \$162,987.

**Ed. Note** - According to published accounts in the *Ocala Star Banner*, the city council voted to move forward with an appeal of the verdict.

#### Disability Discrimination - A warehouse manager who couldn't stay awake (because of pain medications related to a back injury) pursued a "perceived as" ADA claim after he was fired

*Ward v. Sorrento Lactalis*, 1:04-6

**Plaintiff:** Julie Klein Fischer and John Kormanik, *White Peterson*, Nampa, ID

**Defense:** Candy W. Dale and Scott R. Leonard, *Hall Farley Oberrecht & Blanton*, Boise, ID

**Verdict:** \$1,250,000 for plaintiff

**Court:** Idaho - Boise

**Judge:** B. Lynn Winmull

**Date:** 9-27-05

Dante Ward started in July of 2000 as a warehouse manager for Sorrento Lactalis in Nampa, ID – the company manufactures cheese products. While Ward did well at Sorrento, he was plagued by on-going back pain that pre-existed his employment. In February of 2002, he underwent back surgery.

Returning to work, Ward needed pain medications to function. The medications sometimes caused him to be drowsy. In a meeting in June of 2002 with Sorrento bigwigs, Ward fell asleep. Ward remained in his position until 4-23-03 when he took time off for another back surgery.

When he returned to work on 6-23-03, Ward found himself out of a job. Sorrento cited a variety of performance problems, including having sent frozen cheese to the wrong location. The company also pointed to Ward's difficulty in staying awake – Sorrento explained that consciousness is essential to functioning as a warehouse manager.

Ward thought differently and in this "perceived as" ADA claim, he alleged Sorrento perceived him as disabled and then discriminated against him. The perceived disability was his

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### Products Liability

Airplane Crash - Orlando, FL - Defense verdict  
 Airplane Crash - Philadelphia, PA - \$1,925,000  
 Runway Design - Little Rock, AR - \$2,157,265  
 Helicopter Crash - Durham, NC - Defense verdict  
 Helicopter Crash - Cheyenne, WY - Defense verdict  
 Kia Automobile - Indianapolis, IN - Defense verdict  
 Television Explosion - Pikeville, KY - \$2,102,221  
 Pontiac Grand Am - Knoxville, TN - Defense verdict  
 Ford Expedition - Beaumont, TX - Defense verdict  
 Ford Explorer - Martinsburg, WV - Defense verdict  
 Ford Explorer - Charleston, SC - \$3,925,000  
 Ford Pick-Up - Jonesboro, AR - Defense verdict  
 Ford Pick-Up - Marshall, TX - Defense verdict  
 Lawnmower - Boston, MA - \$550,000  
 Shotgun Malfunction - Utica, NY - Defense verdict  
 Swivel Chair - Charleston, WV - \$162,031

### Patent Infringement

Temporal Thermometer - Boston, MA - \$2,522,378  
 Surgical Device - Denver, CO - \$51,000,000  
 Treadmill Design - Boston, MA - \$2,500,000  
 Beanie Baby Toy - Chicago, IL - Defense verdict  
 Orthopedic Rod - Portland, OR - \$458,853

### Personal Injury/Diversity

Greyhound Security (Bus) - Winchester, TN - \$8,000,000  
 Motel Negligence - Billings, MT - \$1,135,666  
 Negligent Security (Jail) - Ft. Myers, FL - \$2,650,260  
 Negligent Security - Oxford, MS - \$20,881,884  
 Ski Negligence - Boston, MA - Defense verdict  
 Ski Resort Negligence - Sacramento, CA - Zero  
 Sexual Abuse - Couer d'Alene, ID - \$1,300,000  
 Sexual Battery - Boston, MA - \$697,000  
 Swimming Pool Design - Memphis, TN - \$2,500,000  
 Train Derailment - New Orleans, LA - \$5,587  
 Truck Negligence - Sioux City, IA - \$2,303,023  
 Truck Negligence - Dothan, AL - \$1,000,000

### Race Discrimination

Junior College (Reverse Race) - Mobile, AL - \$300,000  
 Federal Express (Reverse Race) - Sherman, TX - \$100,000  
 Arizona Mall - Phoenix, AZ - \$100,001  
 City of Ocala (Reverse Race) - Ocala, FL - \$884,000  
 Boeing Helicopter - Philadelphia, PA - Defense verdict  
 UPS - Fresno, CA - Defense verdict  
 Law Firm (Reverse Race) - New York, NY - \$241,800  
 Langston University (Reverse Race) - Oklahoma City, OK  
 \$298,335

### Sexual Harassment

Pennsylvania State Police - Harrisburg, PA - Zero  
 Circuit Court Judge - Peoria, IL - Defense verdict  
 Jail Dispatcher - Montgomery, AL - \$250,157  
 Legal Secretary - Birmingham, AL - Defense verdict  
 Secretary to Police Chief - East St. Louis, IL - Zero  
 Production Worker - Indianapolis, IN - Defense verdict  
 Car Repair Firm - Oklahoma City, OK - \$9,300  
 Allstate Employee - Dallas, TX - Defense verdict

### Disability Discrimination

Treasury Department - Washington, DC - \$3,000,000  
 Wal-Mart - Central Islip, NY - \$7,500,000  
 Nursing Student - Knoxville, TN - Defense verdict  
 Cheese Warehouse - Boise, ID - \$1,250,000  
 Post Office - Sioux Falls, SD - Defense verdict

### First Amendment Claims

City of Honolulu - Honolulu, HI - \$1,500,000  
 University of Nevada - Reno, NV - \$209,315  
 Sarpy County Sheriff - Omaha, NE - \$155,000

### Medical Negligence

Gastric Bypass - Detroit, MI - Defense verdict  
 Anesthesia Error - Cincinnati, OH - Defense verdict  
 EMT Error - Camden, NJ - Defense verdict  
 Surgical Error - Wichita, KS - Defense verdict  
 Pediatric Surgery - Kansas City, MO - \$1,100,000  
 Critical Care - St. Louis, MO - Defense verdict  
 ER/Radiology - Baltimore, MD - Defense verdict  
 Psychiatric Care - Philadelphia, PA - \$7,477,800

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inability to stay awake because of the pain medications – the discrimination was the decision to fire him, it occurring the day he returned to work after the surgery. Ward alleged that before the perception of disability was cemented, he was regarded as a star employee. If prevailing at trial, he sought economic and non-economic damages.

Sorrento defended as above and denied it perceived Ward as disabled – even if it did, the company postured as noted above, Ward was not a qualified individual because he couldn't perform an essential function of his job, namely, staying awake.

The liability issues were trimmed down to just two questions: (1) did Sorrento perceive Ward as substantially limited because he can't stay awake and alert at work?, and (2) Was that perception a motivating factor in the decision to fire? The answer to both was yes and then to damages, Ward took \$805,000 for economic damages, plus \$445,000 more in non-economic damages. The verdict totaled \$1,250,000. Ward has since sought an award of attorney fees.

---

**Premises Liability - A customer exited a Denny's restaurant late at night and suffered a tendon laceration in his wrist when the glass door leading out of the restaurant shattered**

*Taylor v. Denny's Restaurant*, 1:04-7361

**Plaintiff:** Thomas H. Murphy, *Edward Vrydolynek & Associates*, Tinley Park, IL

**Defense:** Adrian Mendoza, *Kane Carbona & Mendoza*, Chicago, IL

**Verdict:** \$30,001 for plaintiff

**Court:** Illinois Northern - Chicago

**Judge:** Sidney I. Schenkier

**Date:** October 25, 2005

It was just after 1:00 a.m. on 9-22-02 and Andre Taylor, then age 24, went to eat at a Denny's Restaurant in Normal, IL. As he exited the store, he pushed on the front door. [It is made of glass.] Suddenly the glass shattered and shards penetrated his arm.

Taylor suffered a lacerated tendon in his wrist. It was surgically repaired, Taylor's medical bills totaling \$21,972. In this diversity lawsuit, Taylor alleged negligence by Denny's in failing to use shatterproof glass. The restaurant defended the case and blamed the incident on Taylor having used excessive force to open the door. It also noted he had been drinking. [Taylor conceded as much but denied he was drunk.]

The verdict in Chicago was for Taylor and he took an award of \$30,001. [The breakdown of the verdict is not known as the verdict itself was not made a part of the court record.] A consistent judgment followed.

## SEXUAL HARASSMENT

*Illinois Southern District - East St. Louis*

### The secretary for a small-town police chief alleged she was fired after she refused the chief's sexual advances

**Caption:** *Sudyom v. City of Lebanon*, 3:03-387

**Plaintiff:** John J. Pawloski, St. Louis, MO

**Defense:** Charles A. Pierce, *Hinshaw & Culbertson*, Belleville, IL

**Verdict:** Defense verdict on liability

**Judge:** G. Patrick Murphy

**Date:** September 29, 2005

**Facts:** Lisa Sudyom started in 1990 as a dispatcher with the police department in Lebanon, IL. By 1999, the city had moved to an automated dispatch system. Sudyom was transferred to a new spot, as the secretary to the police chief, Doug Lebert.

Sudyom did well in her position into 2002. Things took a dark turn that May when Sudyom received an evaluation from the chief – it suggested her evaluations would improve if she had sex with the chief. Sudyom was shocked.

The chief then explained it was all a joke and he gave Sudyom the real evaluation. As disturbing as the phony evaluation was, Sudyom couldn't believe when the chief repeated sexual innuendo to her at a local restaurant. She rebuffed the chief.

In September of 2002, Sudyom told an alderman about the chief's sexual harassment. Within a month, she was out of a job. The City of Lebanon explained her position was not needed, the chief not having enough work to justify employing a secretary. From Lebanon's perspective, that should have been the end of the matter – a competent employee was let go not because of performance, but rather because the position was no longer needed.

Sudyom thought otherwise – she cited proof that the chief had recently remarked that her role with the police was vital. Within months and after she rebuffed the chief, it had been determined her job was unnecessary. Sudyom thought the firing was related to her having rejected the chief's sexual advances.

Lebanon defended the case that the decision to eliminate Sudyom's job was unrelated to the chief's practical joke with the phony evaluation. Then in terms of timing and distancing a causal connection, Lebanon noted that (1) the job was eliminated four months after Sudyom purportedly rebuffed the chief, and then (2) the decision to fire was made before she complained to the alderman. Sudyom disputed this second contention, sticking to her version that until she rebuffed the chief, she was regarded as vital – only when she spurned his advances was she considered unnecessary.

**Jury Instructions/Verdict:** The court's instructions asked if Sudyom's job was eliminated because she rejected the chief's sexual advances? The answer was for the city and Sudyom took nothing. A defense judgment was entered.

### Why the

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**AUTO NEGLIGENCE***Iowa Northern District - Sioux City*

**Plaintiff was instantly killed in an interstate crash when she drove into a poorly lit and slow-moving semi-tractor – each of her children took \$1,000,000 for their consortium interest**

**Caption:** *Wagner v. Sparks Enterprises*, 5:03-4093

**Plaintiff:** Edward J. Keane, *Goldenmeister & Keane*, Sioux City, IA for Wagner as plaintiff  
Timothy A. Clausen, *Klaus Stoik Muga Villone Phillips Orzechowski Clausen & Lapierre*, Sioux City, IA for Wagner as defendant

**Defense:** Cheryle Wiedmeier Gering, *Davenport Evans Horwitz & Smith*, Sioux Falls, SD for Sparks as defendant  
Steven A. Shapiro, *Fleishman & Shapiro*, Denver, CO for Sparks as plaintiff

**Verdict:** \$2,303,023 for Wagner plaintiffs less 15% comparative fault; Defense verdict on Sparks's counterclaim

**Judge:** Donald E. O'Brien

**Date:** September 2, 2005

*See the complete December 2005 Issue for all the details.*

**CIVIL RIGHTS***Kansas District - Kansas City*

**A black customer at Wal-Mart alleged racial profiling when she was accused of shoplifting a toddler's shoes – while the customer put the shoes on her toddler and tore off the price tag, she held it in plain view and did in fact pay for the shoes – this did not stop loss prevention from detaining the customer on suspicion of shoplifting**

**Caption:** *Hester v. Wal-Mart*, 2:03-2447

**Plaintiff:** Thomas R. Larson, *Larson & Larson*, Leawood, KS and Arthur A. Benson, II, Kansas City, MO

**Defense:** James R. Jarrow and Koriambanya S. Carew, *Baker Sterchi Cowden & Rice*, Overland Park, KS

**Verdict:** Defense verdict on liability

**Judge:** John W. Lungstrum

**Date:** October 19, 2005

*See the complete December 2005 Issue for all the details.*

**SEXUAL HARASSMENT***Massachusetts District - Boston*

**Despite evidence that a middle school student was being repeatedly raped by a classmate, school officials failed to intervene to stop it**

**Caption:** *Colon v. Town of Tewksbury*, 1:04-10003

**Plaintiff:** Lynn A. Leonard, Melrose, MA and Anita B. Sullivan, Wakefield, MA

**Defense:** Leonard H. Kesten and Deborah I. Ecker, *Brody Haroon Perkins & Kersten*, Boston, MA

**Verdict:** \$250,001 for plaintiff

**Judge:** Patti B. Saris

**Date:** October 21, 2005

**Facts:** In 2001, Stephen Colon was a seventh-grade student at John Wynn Middle School in Tewksbury, MA. That year another student, Richard, made sexually inappropriate comments and gestures to Colon – school aides saw the improper conduct, but did nothing.

It got worse the next fall. During class, aides notices the boys were touching each other inappropriately. The pair were sent for an appointment with a school psychologist. They were told to stop it.

To the key event in this case in January of 2001, Richard got a bathroom pass – Colon lied and said he needed to get a book from his locker. The pair were in fact in the bathroom engaging in anal sex. A teacher caught them. Colon would later explain that he and Richard had sex between five and ten times. By all accounts, the sex was consensual.

In this lawsuit against the Town of Tewksbury, Colon alleged two counts: (1) that he had been sexually harassed by Richard and school officials were indifferent to it, and (2) that a sexually offensive educational environment had been created. In developing his case, Colon introduced proof that he suffered from fetal alcohol syndrome and mild retardation. With an impaired capacity, he argued school officials should have protected him.

Tewksbury defended the case that there was no sexual harassment, the conduct between the boys being entirely consensual. Then to the issue of indifference, school officials postured that while they were suspicious, they had no reason to believe anal sex was occurring in the bathrooms. Colon countered the “it was consensual theory” arguing that didn't matter – because of his mental limitations, the school still had a duty to protect him from sexual harassment at school.

**Jury Instructions/Verdict:** Colon first prevailed on the harassment charge that (1) he had been harassed by Richard, (2) the harassment was severe and pervasive and (3) school officials were deliberately indifferent. He also prevailed on a disability discrimination claim, proving that a sexually offensive educational environment had been created. The jury went on to award compensatory damages of \$250,000. A judgement in that sum was entered for Colon. [The jury deliberated eight hours before reaching its verdict.]

**Ed. Note** - In a remarkably similar case that was tried in August

of this year in Kansas City, KS, a teenaged boy was forced out of school because of ongoing accusations that he was gay. That jury awarded the plaintiff \$250,000. See 1 FedJVR 1 at page 23, *Theno v. Toxgonxie School District*.

## UNION RETALIATION

*Massachusetts District - Boston*

**A female cop in Lowell, MA was retaliated against by the police brethren in the local union when she had the audacity to complain of mistreatment on a union-sponsored drunken trip to Boston**

**Caption:** *Dixon v. International Brotherhood of Police et al*, 1:01-11806

**Plaintiff:** Inga S. Bernstein, *Zalkind Rodriguez Lunt & Duncan*, Boston, MA

**Defense:** Joseph W. Monahan, III and Thomas J. Freda, *Monohan & Padellaro*, Cambridge, MA for IBPO defendants  
Peter J. Perroni, *Nolan Perroni*, Lowell, MA for Local 382 defendants

**Verdict:** \$2,232,501 for plaintiff

**Judge:** William G. Young

**Date:** October 18, 2005  
*See the complete December 2005 Issue for all the details.*

## MEDICAL NEGLIGENCE

*Missouri Western District - Kansas City*

**A child died of a bowel injury, her estate blaming the death on her pediatric surgeon failure to timely diagnosis the coming pediatric catastrophe**

**Caption:** *Blevens v. Holcomb*, 4:03-713

**Plaintiff:** Dennis M. Murphy and Matthew D. Murphy, *The Murphy Law Firm*, Columbia, MO

**Defense:** Bruce Keplinger, *Norris & Keplinger*, Overland Park, KS

**Verdict:** \$1,100,000 for plaintiff less 10% comparative fault

**Judge:** Ortie D. Smith

**Date:** September 22, 2005

**Facts:** Delanie Blevens, a minor, presented on 8-21-02 to Western Missouri Medical Center in Warrensburg, MO. Complaining of apparent constipation, she was admitted. Thereafter she was transferred to Children's Mercy Hospital in Kansas City, MO. During the day, she exhibited abdominal pain. That afternoon she was examined by Dr. George

Holcomb, a pediatric surgeon. He suspected a small bowel obstruction.

Into the evening on 8-21-02, Blevens exhibited signs of a fever. The next morning her condition was worse and a bowel resection was performed. Despite that intervention and a second repair surgery, the development of sepsis was too widespread. She died that night.

In this diversity lawsuit, she targeted Holcomb, alleging negligence by him in two distinct ways. One expert, Helikson, was critical of Holcomb for failing to order an Upper GI study. The second expert, Fleisher, believed that Holcomb's instructions to the nursing staff were inadequate – in light of her condition, he should have been advised when her fever rose.

Fleisher further explained that when Holcomb saw Blevens in the afternoon, she was likely in shock, the abdominal catastrophe having already begun. Had surgery been performed by 10:00 that evening, Fleisher opined, the girl could have been saved. A claim was also presented against Children's Mercy – it was resolved before trial.

Holcomb defended the case that based on the girl's presentation that afternoon, his diagnosis was correct. He faulted the nurses who didn't tell a single physician that night when Blevens began to vomit and develop a fever. Holcomb also cited as a superseding event, the on-call doctor that night at Children's Mercy who failed to intervene. Finally it was the defendant's argument that there was no competent proof the result would have been different even if the condition were diagnosed that afternoon instead of the next morning. [The record is silent as to Holcomb's experts.]

**Injury:** Death

**Experts:**  
*Plaintiff* Mary Helikson, Pediatric Surgery, Portland, OR  
David Fleisher, Gastroenterology, Columbia, MO

**Jury Instructions/Verdict:** The verdict was mixed on liability, the jury finding both Holcomb and the non-party hospital at fault – that fault was assessed 90% to Holcomb. Then to damages, the estate took \$100,000 for economic damages and \$500,000 each for past and future non-economic damages. The verdict totaled \$1.1 million less 10% comparative fault.

**Post-Trial Motions:** Holcomb has moved for a new trial and cited among other grounds (1) plaintiff's causation proof was inadequate, (2) there were no economic damages beyond the funeral bill, and (3) to conform the verdict to the limitations of the Missouri cap on non-economic damages of \$350,000 in medical cases. The motion was pending when reviewed by the FedJVR.

**CIVIL RIGHTS***Mississippi Northern District - Oxford*

**Because of a paperwork snafu, plaintiff was arrested and held for four hours on a bench warrant for having failed to appear in court – in fact, she had appeared**

**Caption:** *Hobbs v. City of Horn Lake*, 2:04-269

**Plaintiff:** Phillip A. Stroud and James D. Harper, *Stroud & Harper*, Southaven, MS

**Defense:** David D. O'Donnell and S. Ray Hill, III, *Clayton O'Donnell Walsh & Davis*, Oxford, MS

**Verdict:** \$75,000 for plaintiff

**Judge:** Glen H. Davidson

**Date:** October 19, 2005  
*See the complete December 2005 Issue for all the details.*

**Forklift Negligence - A trucker making a delivery to a Wal-Mart warehouse sustained injuries when a Wal-Mart employee on a forklift hit a stack of pallets which fell onto the plaintiff**

*Flanders v. Wal-Mart*, 3:04-308

**Plaintiff:** Jim Davis Hull, *Hull Law Firm*, Koscuisko, MS

**Defense:** Edley H. Jones, III and William D. Purnell, *Wells Marble & Hurst*, Jackson, MS

**Verdict:** Defense verdict on liability

**Court:** **Mississippi Southern - Jackson**

**Judge:** William H. Barbour, Jr.

**Date:** 10-3-05

*See the complete December 2005 Issue for all the details.*

**FIRST AMENDMENT***Nebraska District - Omaha*

**A deputy sheriff (also the local FOP president) alleged he suffered retaliation when he complained of irregularities by sheriff bigwigs in (1) enforcing ticket-writing quotas, (2) passing out frequent flier miles, and (3) assigning choice part-time security gigs to high ranking officers**

**Caption:** *Shiller v. Sarpy County Sheriff*, 8:03-365

**Plaintiff:** John E. Corrigan, *Howard & Corrigan*, Omaha, NE

**Defense:** Terri M. Weeks, *Bowman & Krieger*, Lincoln, NE

**Verdict:** \$155,000 for plaintiff

**Judge:** Laurie Smith Camp

**Date:** September 30, 2005  
*See the complete December 2005 Issue for all the details.*

**SEXUAL HARASSMENT***Ohio Northern District - Youngstown*

**A female worker at a manufacturing plant alleged she was subjected to an endlessly sexually hostile work environment**

**Caption:** *Parker v. General Extrusions*, 4:04-120

**Plaintiff:** Martin J. Hume, Youngstown, OH and Melisa K. Rocci, Canfield, OH

**Defense:** Richard C. Haber and Shannon J. Polk, *Haber Polk*, Cleveland, OH

**Verdict:** \$100,000 for plaintiff

**Judge:** James S. Gwin

**Date:** September 23, 2005  
*See the complete December 2005 Issue for all the details.*

**PATENT INFRINGEMENT***Oregon District - Portland*

**The manufacturer of a specialized orthopedic rod alleged a larger competitor first tried to buy the company – when it couldn't, the competitor infringed their patents**

**Caption:** *Acumed v. Stryker Corporation*, 3:04-513

**Plaintiff:** Paul K. Vicery and Richard B. Megley, Jr., *Niro Scavone Haller & Niro*, Chicago, IL

**Defense:** Gregory J. Vogler and Sharon A. Hwang, *McAndrews Held & Malloy*, Chicago, IL

**Verdict:** \$458,853 for plaintiff

**Judge:** Anna J. Brown

**Date:** September 20, 2005  
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**BAD FAITH***Pennsylvania Eastern District - Philadelphia*

**Despite its own analysis that a medical claim was not defensible, a medical negligence insurer advanced to trial, the underlying plaintiff taking an excess verdict of \$2.5 million – the doctor hit with the verdict assigned his claim to the underlying plaintiff, and this second trial alleged bad faith by the insurer**

**Caption:** *Jurinko v. Medical Protective Co.*, 2:03-4053

**Plaintiff:** Mark W. Tanner and Peter M. Newman, *Feldman Shepherd Wohlgelernter Tanner & Weinstock*, Philadelphia, PA

**Defense:** Jeffrey R. Lerman and Glenn F. Rosenbaum, *Montgomery McCracken Walker & Rhoads*, Philadelphia, PA

**Verdict:** \$7,908,345 for plaintiff

**Judge:** Cynthia M. Rufe

**Date:** October 18, 2005

**Facts:** This case began as a medical negligence lawsuit in state court in Philadelphia, PA. Stephen Jurinko alleged negligence by a dermatologist, Dr. Paul Marcincin, in failing to diagnose and treat a malignant melanoma on his nose that metastasized to his neck. While Marcincin first noted the spot under Jurinko's nose in 1992, it was sent to a pathologist at SmithKline. It was read as normal. The spot appeared again in 1998 and 1999 – at this time, Marcincin just removed it.

In 2000 a lump in Jurinko's neck was diagnosed – Jurinko was given a poor prognosis. He sued Marcincin and the pathologist. The case was tried to a jury in Philadelphia which returned a verdict on 4-22-02. Jurinko and his wife prevailed against Marcincin only, taking a verdict of \$2.5 million.

Insured with the Medical Protective Company, Marcincin's policy limits were \$200,000, the state CAT fund then kicking in another \$1,000,000. Faced with an excess verdict, Marcincin assigned his bad faith claim to the Jurinkos. They filed a new lawsuit in federal court against Medical Protective.

The purported bad faith went to the failure to tender Marcincin's \$200,000 policy limits. Plaintiff's smoking gun was an internal Medical Protective document that indicated that the "case can't be defended." Despite its own analysis that indicated the case was a loser, Medical Protective continued to attempt to futilely defend the case. In so doing, that not only denied Jurinko the underlying \$200,000, but also the \$1,000,000 CAT fund limits which could not be tapped until Marcincin had fully paid his policy.

Medical Protective defended the case that while it was true that the case was considered poor in the early stages in internal documents, the outlook turned brighter when experts were hired. In that regard, valid defenses were presented, namely that Marcincin relied reasonably on the pathology report. That theory was then supported by what Medical Protective called a "world-class" expert. Finally, besides having a reasonable basis to deny the claim, Medical Protective postured that the parties were so far apart, the failure to tender didn't affect the prospects of settlement. [Plaintiffs, speaking for Marcincin, countered with

proof the case could have been settled, protecting Marcincin from an excess verdict.]

**Jury Instructions/Verdict:** The plaintiffs prevailed at trial on the bad faith count and took a total verdict of \$7,908,345 – that included \$6.25 million in punitive damages. The jury deliberated the case for eighty minutes before returning its verdict. A consistent judgment was entered.

**EMPLOYMENT RETALIATION***Pennsylvania Eastern District - Philadelphia*

**A black merchandise manager at a warehouse store alleged he suffered retaliation when he complained of race discrimination**

**Caption:** *Bradley v. Costco Wholesale Corp.*, 2:04-3860

**Plaintiff:** Carmen L. Rivera Matos, Doylestown, PA and Ralph E. Lamar, IV, Collegeville, PA

**Defense:** Lynn A. Kappelman, Boston, MA and Devjani Mishra, New York City, both of *Seyfarth Shaw*

**Verdict:** \$200,000 for plaintiff

**Judge:** Juan R. Sanchez

**Date:** October 17, 2005

*See the complete December 2005 Issue for all the details.*

**PRODUCTS LIABILITY***Pennsylvania Eastern District - Philadelphia*

**A pilot and a student pilot were killed when an ultra-light plane crashed in a field, purportedly because of an engine defect– the manufacturer defended that there was no proof of a defect, the plane going down because of pilot error**

**Caption:** *Simeone et al v. Bombardier-Rotax*, 2:02-4852

**Plaintiff:** Arthur Alan Wolk and Alan D. Mattioni, *The Wolk Law Firm*, Philadelphia, PA

**Defense:** Robert J. Kelly, Newark, NJ and Jonathan Dryer, Philadelphia, PA, both of *Wilson Elser Moskowitz Edelman & Dicker*

**Verdict:** \$1,425,000 for Lengyel estate  
\$550,000 for Simeone estate

**Judge:** Berle M. Schiller

**Date:** October 24, 2005

*See the complete December 2005 Issue for all the details.*

**MEDICAL NEGLIGENCE***Tennessee Western District - Memphis***The delay in performing a c-section was linked to a fetal brain injury****Caption:** *Miller v. Dacus*, 2:03-2701**Plaintiff:** Timothy R. Holton, *Deal Cooper & Holton*, Memphis and William B. Raiford, III, *Merkel & Cocke*, Clarksdale, MS**Defense:** Dixie W. Cooper and C.J. Gideon, Jr., *Gideon & Wiseman*, Nashville, TN**Verdict:** Defense verdict**Judge:** Jon P. McCalla**Date:** 4-8-05*See the complete December 2005 Issue for all the details.***DISABILITY DISCRIMINATION***Texas Northern District - Amarillo***At the Old West Stables, the cowboy-in-charge refused to let a blind teenager go on a trail ride – while the boy explained he was an experienced rider who could navigate the trail with accommodation, the cowboy explained he alone decided who did and did not ride****Caption:** *Elliott v. Old West Stables*, 2:04-255**Plaintiff:** Michael R. Nichols, McKinney, TX**Defense:** William E. Kelly, III, Canyon, TX**Verdict:** Defense verdict on liability**Judge:** Mary Lou Robinson**Date:** September 14, 2005*See the complete December 2005 Issue for all the details.***SEXUAL HARASSMENT***Texas Northern District - Dallas***A marketing coordinator for the supplemental insurance division of Allstate Insurance alleged she was fired for failing to submit to the advances of a third-party agent – it was plaintiff's argument that the insurer submitted to the demands of the top-selling independent agent, choosing to placate him rather than protect its employee****Caption:** *Rogers v. Allstate Insurance*, 3:04-367**Plaintiff:** Robert G. Lee and Teena Mathews, Irving, TX**Defense:** Timothy B. Strong and Melissa B. Dearing,*Coffman Coleman Andrews & Grogan*, Jacksonville, FL**Verdict:** Defense verdict on liability**Judge:** Jane J. Boyle**Date:** September 21, 2005*See the complete December 2005 Issue for all the details.***RELIGIOUS DISCRIMINATION***Utah District - Salt Lake City***A non-Mormon teacher alleged she was forced out of her job because she was not a church member – she cited complaints that were made by parents about her witch-like fascination with Halloween – plaintiff conceded she liked Halloween, but denied witch tendencies****Caption:** *Jensen v. Sevier School District*, 2:04-166**Plaintiff:** Erik Strindberg and Ralph E. Chamness, *Strindberg Scholnick & Chamness*, Salt Lake City, UT**Defense:** Kirk G. Gibbs and Michael F. Skolnick, *Kipp & Christian*, Salt Lake City, UT**Verdict:** Defense verdict on liability**Judge:** Dale A. Kimball**Date:** October 24, 2005*See the complete December 2005 Issue for all the details.***PRODUCTS LIABILITY/  
MEDICAL NEGLIGENCE***West Virginia Southern District - Huntington***In this unusual case, plaintiff alleged her knee replacement was disrupted by a combination of a faulty passive motion machine and negligent monitoring by hospital nurses****Caption:** *Craig v. Ormed et al*, 3:03-2450**Plaintiff:** R. Gary Winters, *McCaslin Imbus & McCaslin*, Cincinnati, OH and Robert M. Losey, Huntington, WV**Defense:** Scott W. Andrews, *Offutt Fisher & Nord*, Huntington, WV for Ormed  
Joseph M. Farrell, Jr., *Farrell Farrell & Farrell*, Huntington, WV for Pleasant Valley Hospital**Verdict:** Defense verdict on liability for Ormed \$206,000 for Craig against Pleasant Valley**Judge:** Robert C. Chambers**Date:** November 1, 2005

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