

# Federal Jury Verdict Reporter

The Most Current and Complete Summary of Federal Jury Verdicts

August 2006

Nationwide Federal Jury Verdict Coverage

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## Notable Verdicts in The August 2006 Issue

**Age Discrimination - Colorado** - A longtime firefighter alleged he was fired because of his age – the city blamed the firing on a theft allegation - \$510,571 p. 7

**Civil Rights - Texas Northern** - A black military family, crossing the country to reach a new post assignment, alleged they were evicted from the Motel 6 motel room because of their race p. 22

**Employment Retaliation - Connecticut** - An Indiana engineer alleged he was fired in retaliation because of a combination of age, national origin and the FMLA - \$11,091,423 p. 7

**Employment Retaliation - Minnesota** - An IBM employee alleged FMLA retaliation - Zero p. 16

**First Amendment - Alabama Northern** - A citizen spoke out at a city council – the Mayor didn't like her criticism and had a criminal warrant taken against her - \$175,000 p. 4

**Industrial Negligence - Michigan Eastern** - The plaintiff was badly injured when assembling a giant press – he fell through a hole that was covered only with cardboard - \$7,023,502 p. 16

**Medical Negligence - Indiana Southern** - Plaintiff's laryngeal nerve was injured during thyroid surgery - \$259,375 p. 10

**Products Liability - Louisiana Eastern** - A dentist's hand was mangled in a lawnmower accident - \$1,039,000 p. 14

**Products Liability - Ohio Northern** - In a test case of a multi-district welding fume litigation, a Texas welder linked a brain injury to the exposure to welding fumes - Zero p. 19

**Race/National Origin Discrimination - Oregon** - In an unusual case, a postmaster imposed liability against the USPS for harassment of her by postal customers - \$250,000 p. 20

**Sexual Harassment - New York Northern** - An office manager at a machine shop alleged she was sexually harassed by her boss – the boss defended that they were just friends p. 18

**Wrongful Death - Oklahoma Eastern** - A car salesman was shot outside a bar, a policeman believing the salesman was going to run him over in his van – the salesman's estate called the shooting an exercise of excessive force - Zero p. 19

## Verdict of the Month

### RESTAURANT NEGLIGENCE

*Maine District - Portland*

**Plaintiff blamed an E. coli illness on a partially cooked hamburger that she purchased at Wendy's**

**Caption:** *Roney v. Wendy's Old Fashioned Hamburgers, 2:05-109*

**Plaintiff:** Michael J. Waxman, Portland, ME

**Defense:** Joshua G. Vincent, *Hinshaw & Culbertson*, Chicago, IL and Jeffrey T. Edwards, *Preti Flaherty*, Portland, ME

**Verdict:** Defense verdict on liability

**Judge:** David M. Cohen

**Date:** August 3, 2006

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**Construction Contract – A bank was flooded (the manager thought it was like Niagara Falls) after a contractor started a repair, poked holes in the roof and failed to consider the possibility it might rain – after the bank’s insurer paid the bank’s claim, it then sued the contractor**  
*Federal Insurance v. Dean Construction*, 2:04-905

**Plaintiff:** Albert S. Nalibotsky, *Cozen O’Connor*, Charlotte, NC and Samuel M. Ingram, Carpenter Prater Ingram & Mosholder, Montgomery, AL

**Defense:** Steven A. Higgins and Floyd R. Gilliland, Jr., *Nix Holtsford Gilliland Higgins & Hitson*, Montgomery, AL

**Verdict:** \$90,000 for plaintiff

**Court:** Alabama Middle - Montgomery

**Judge:** W. Harold Albritton, III

**Date:** 4-27-06

Colonial Bank in Luverne, AL had a history of leakage problems with its roof. Dean Construction was hired in November of 2002 to install a new roof. The first job was to remove the old roof – to accomplish that, Dean Construction began to punch holes in the roof.

Before more work could be finished, the weekend came. The first person on the scene the next week was the bank president. He described the inside of the bank as resembling Niagara Falls. Water had leaked into the bank from the holes created by Dean Construction – its principal would later explain they hadn’t considered the possibility of rain. They then made efforts to clean up the mess.

Thereafter the roof project was completed. Despite having a purportedly fixed roof, the bank still had problems. It continued to leak and a moldy smell was reported. The unusual smell was likened to that of a dead animal. Ultimately the bank presented a damages claim to its insurer, Federal Insurance.

The insurer paid the claim of some \$360,000. Then in this diversity subrogation action, it sought to recover that sum from Dean Construction. It pursued two theories, (1) negligence, and (2) breach of warranty. A simple case, as postured by Federal Insurance, Dean Construction first erred in leaving the holes in the roof temporarily (leading to the first wash-out), and then in substandard work in completing the roof.

Dean Construction conceded there was some initial leaking related to the holes – however that damage was limited, it promptly participating in a thorough clean-up. Then to the ongoing leakage, the defense explained this was related to the overall structure of the bank, not its repair. In fact, following the implementation of the new roof, the leaking was less than before.

The verdict was mixed. Plaintiff prevailed on breach of warranty, while the negligence count was rejected. Then to damages, the insurer was awarded \$90,000. A judgment in that sum followed.

Federal Insurance moved for a new trial, calling the verdict inconsistent – that is, it prevailed on warranty, but not negligence. The court rejected the challenge, positing that the plaintiff could not now argue the verdict was inconsistent when it was returned on the very verdict form the plaintiff had tendered. Albritton further wrote that one can’t invite error and then later cite that error as a basis for relief.

**First Amendment - A citizen came to a city council meeting and chastised the mayor regarding the operation of the water board – the mayor liked it very little and in turn, he swore out a criminal complaint against the plaintiff**  
*Myers v. Town of Parrish*, 6:03-571

**Plaintiff:** William M. Dawson and Stephen C. Wallace, Birmingham, AL

**Defense:** Thomas S. Hale and Victoria Franklin-Sisson, *Burgess & Hale*, Birmingham, AL

**Verdict:** \$175,000 for plaintiff

**Court:** Alabama Northern - Birmingham

**Judge:** U.W. Clemon

**Date:** 7-20-06

On 9-16-02, Sharon Myers of Walker County, attended a Parrish City Council meeting. Myers is not a resident of the city, but is served by the water board. She was not happy with its operation.

When it was her turn to speak, she let loose. Myers was critical of the Mayor and the water board. The sitting mayor, Wilford Cagle, replied and the two engaged in an argument of sorts. [This is apparently common at Parrish council meetings, which are frequently raucous.]

Following the meeting, Cagle was concerned that Myers had nearly incited a riot. Believing she had been abusive, harassing and divisive, he swore out a criminal complaint against Myers. It also provided for a restraining order.

Myers was promptly arrested – taken to jail, she bonded out. As the trial approached, the charges were dropped by the government. This civil rights case followed, Myers alleging the criminal complaint was taken by Myers to retaliate against her for having exercised her First Amendment rights. That is, she was lawfully present and was not disruptive – the mayor only pursued the charges because he disliked the content of her speech. If prevailing, Myers sought compensatory and punitive damages.

The Mayor thought Myers had it all wrong. To the initial criminal complaint, the Mayor denied that it was his intention to have criminal charges brought. He only thought it was a restraining order. Then as soon as he learned it was actually a warrant, he took steps to have the charges dismissed. To the merits, as discussed above, he still defended that he acted properly, not because of a concern about the content of her speech, but rather her abusive tone.

Myers prevailed on the civil rights claim and took \$150,000 in compensatory damages, plus \$25,000 more in punitives. A consistent judgment followed.

## GROCERY NEGLIGENCE

*Alabama Northern District - Tuscaloosa*

**Plaintiff bought pork ribs at a grocery and froze them – several months later, she cooked them, sustaining an injury to her mouth when she bit into a foreign object in the meat**

**Caption:** *Woods v. Bruno's Supermarkets et al*, 7:05-24

**Plaintiff:** Charles C. Tatum, Jr. and Thomas L. Carmichael, Jasper, AL

**Defense:** Ronald J. Gault, *Gaines Wolter & Kinney*, Birmingham, AL for Bruno's  
Turner B. Williams and Kermit L. Kendrick, *Burr & Forman*, Birmingham, AL for Smithfield Packing

**Verdict:** Defense verdict on liability

**Judge:** L. Scott Coogler

**Date:** July 18, 2006

**Facts:** Lamiko Woods shopped on 9-3-03 at the Bruno's Supermarket in Tuscaloosa. Among other things, she selected boneless pork ribs. Returning home, Woods put the meat in a freezer in her home. They stayed there until 11-3-03 when they were unfrozen and prepared by her husband.

As Woods bit into the cooked ribs, a sharp metal object stuck her in the roof of her mouth. It was later identified as part of a marinade injection needle. In this lawsuit, Woods sued Bruno's and its meat-packing supplier, Smithfield Packing. Her theory was simple – at some point in the manufacturing process, the defendants who controlled that process completely, permitted the foreign object to be introduced into the meat.

Smithfield Packing first defended that its meat has a shelf-life of 22 days and its last shipment to Bruno's before this sale was two months earlier. Thus any meat it had supplied was long gone by the time Woods made her purchase. There was also proof that there is no metal used in its packing process. [Plaintiff countered on the time issue that sometimes shipped meat is frozen at the store and can have a longer shelf life.]

Bruno's further defended that other than to stock the meat, it was unaltered. In disputing causation, the defendants pointed out that it was the plaintiff who exclusively controlled the meat in two months following its sale.

**Injury:** Dental

**Jury Instructions/Verdict:** The case advanced to a jury on a negligence theory – both defendants were exonerated and Woods took nothing. A defense judgment followed.

## Auto Negligence - Soft-tissue symptoms followed a rear-end interstate crash

*Nosbisch v. Adams*, 1:05-0006

**Plaintiff:** William Gary Holt, *Gary Eubanks & Associates*, Little Rock, AR

**Defense:** Kent J. Rubens, *Rieves Rubens & Mayton*, West Memphis, AR

**Verdict:** \$20,000 for plaintiff

**Court:** Arkansas Eastern - Batesville

**Judge:** James M. Moody

**Date:** 5-9-06

Urene Nosbisch was a passenger in a vehicle with Nancy Jumper that traveled on I-30 in Arkansas. They were rear-ended by Gerald Adams. Fault was no issue. Nosbisch has since treated for a soft-tissue injuries – her medical bills are not known.

Removed from state court by the defendant and tried on damages only, Nosbisch took a general award of \$20,000. A judgment in that sum followed.

## Sex Discrimination - A female aerospace manager alleged her co-workers resented a woman in the workplace and harassed her on a regular basis, giving her dirty looks, smirks and stapling her business cards together

*Pappas v. JSB Holdings*, 2:03-1449

**Plaintiff:** William P. Allen, Phoenix, AZ and David C. Larkin, Tempe, AZ

**Defense:** Sharon S. Moyer, *Sacks Tierney*, Scottsdale, AZ

**Verdict:** Defense verdict on liability

**Court:** Arizona - Phoenix

**Judge:** Paul G. Rosenblatt

**Date:** 6-29-06

Connie Pappas was employed in quality assurance for JSB Holdings, an aerospace machine shop. It was her allegation that co-workers resented a woman in the workplace – they then harassed her as a result. That included rude and offensive remarks and behavior – plaintiff described dirty looks and smirks, co-workers abusing her desk area. On several occasions, her business cards were stapled together. It became so bad, she ultimately quit.

In this suit, plaintiff alleged she was a victim of hostile work environment because of her sex. [It was not a traditional sexual harassment claim.] Employer defended that the conduct, while perhaps rude and sarcastic, was not based on plaintiff's gender and thus was not actionable. Plaintiff countered that she was frequently called "cunt", a word that certainly carried offensive gender-based connotations.

Plaintiff's claim was rejected on liability and she took nothing. A defense judgment followed.

### **Pregnancy Discrimination - The manager for a pizza chain alleged she was demoted after becoming pregnant**

*Gomez v. Grandma Tony's Pizza*, 4:04-93

**Plaintiff:** Charles R. Hamm, Tucson, AZ

**Defense:** Andrea E. Watters, *Watters Law Office*, Tucson, AZ

**Verdict:** Defense verdict on liability

**Court:** Arizona - Tucson

**Judge:** Raner C. Collins

**Date:** 6-30-06

Elisa Gomez worked for six years for Grandma Tony's Pizza. In September of 2001, she was promoted to area manager – the franchise operates several restaurants. Nearly a year later, Gomez reported she was pregnant. Soon after she was demoted from area manager back to a store manager spot.

Gomez thought the demotion represented pregnancy discrimination – she noted that until she became pregnant, she had no disciplinary history. Grandma Tony's defended that Gomez had struggled as an area manager, unable to handle the pressure of that spot. It flatly denied her pregnancy had anything to do with the decision to make her a store manager again.

The verdict on liability was for Grandma Tony's on the discrimination claim, Gomez taking nothing.

was substandard or that there had been a promise to work for free.

**Jury Instructions/Verdict:** The law firm prevailed on the contract count and having so found, the jury did not reach quantum meruit. Then to damages, the plaintiff was awarded \$218,030.

**Ed. Note** - The law firm of Greenberg Traurig purchased Livingston & Mattesich in the Fall of 2005.

### **Excessive Force - Plaintiff alleged San Jose Police Tasered him (twice) after having taken offense at finding a "Bad Boys Bail Bonds" matchbox on the plaintiff's person**

*Hudson v. San Jose Police*, 5:05-3015

**Plaintiff:** Anthony E. Pagkas and Christopher J. Anjoun, San Jose, CA

**Defense:** Michael J. Dodson and Nkia Richardson, *Assistant City Attorney*, San Jose, CA

**Verdict:** Defense verdict on liability

**Court:** California Northern - San Jose

**Judge:** Richard Seeborg

**Date:** 6-19-06

Just after midnight on 7-11-04, Donald Hudson was pulled over by Joseph Freitas, a police officer in San Jose, CA for an expired registration. Hudson recalled that during a quick search, Freitas found a "Bad Boys Bail Bonds" matchbox in his pocket.

Then for no reason, apparently other than anger about the matchbox, Freitas and two other officers on the scene, Ryan Brennan and Pete Gonzalez, attacked him. That included using a Taser on him twice. Hudson sued the police and alleged the officers used excessive force – a state-law battery claim was also presented.

The police defended and raised fact disputes. That is, Hudson tried to flee and he then fought. The Taser was used on him only to bring him under control.

Tried to a federal jury in San Jose, this jury rejected the excessive force and assault counts against all three defendants. A defense judgment concluded this litigation.

## **BREACH OF CONTRACT**

*California Eastern District - Sacramento*

### **A law firm, now in the process of winding up, sued a client to recover unpaid fees**

**Caption:** *Livingston & Mattesich Law Firm v. Arizona Beverage Company*, 2:05-393

**Plaintiff:** Lisa L. Halko, *Greenberg Traurig*, Sacramento, CA

**Defense:** Kevin J. Tully, San Mateo, Ca

**Verdict:** \$218,030 for plaintiff

**Judge:** William B. Shubb

**Date:** July 26, 2006

**Facts:** The law firm of Livingston & Mattesich of Sacramento, CA was hired by the Arizona Beverage Company and other alter egos (hereinafter ABC) to represent it in a Los Angeles County Superior Court class action. [ABC makes Arizona-brand iced tea.] Over six months, the firm, through its primary partner, Gene Livingston, billed ABC for \$200,000.

The bill wasn't paid and the firm sued ABC. A simple theory was alleged – that is, the bill was incurred and ABC didn't pay it. ABC defended that the bill was unreasonable and excessive. Beyond that, it also thought the advice was crummy, ABC alleging that because of poor representation, it was drawn further into the class action. In developing more fact disputes, ABC countered that when it told the firm of a potential malpractice problem, the firm indicated it would continue the representation gratis. Livingston & Mattesich flatly denied its representation