1860 - Auto Negligence - Medicals, but no suffering awarded after a minor rear-end wreck, the court then returning the panel to redeliberate, it finally valuing that suffering at $25

Large v. Pennington, 99 CI 0966
Plaintiff: Garis L. Pruitt and Lisa Pruitt-Thorner, Catlettsburg
Defense: David F. Latherow, *Hanbury Williams Hall & Latherow*, Ashland
Verdict $8,146 for plaintiff
Circuit: **Boyd** (1), J. Rosen, 6-4-01

John Large, age 30, a life insurance sales manager, was on a call on 8-13-99. On Blackburn Avenue, he was a passenger with a co-worker, driving to the home of an insured to deliver a life benefits check. At the same time, behind Large in traffic, was John Pennington, a long-time diesel repairman at AK Steel. In a late-model Cadillac, he was headed to pick up a friend for an afternoon golf game.

His cell phone rang and Pennington reached for it. In the confusion, his attention was diverted from the road and a moment later, Large's vehicle was rear-ended. The collision resulted in only a dent to his bumper, Large tending to posture the crash was more significant, pointing to undercarriage damage. Fault for the wreck would be no issue.

Large didn't make the check delivery that day and instead headed to the ER at King's Daughters. Immediately reporting a tingling in his neck and shoulder, he followed with Dr. Douglas Deitch, Neurology, Ashland. With continuing radiating pain, Deitch identified a C5-6 disc injury that affected a nerve root.

Large's medical bills were $8,121 and he also sought impairment damages of $274,001, as quantified by his vocational expert, Edward Berla, Louisville. Suffering was not capped in the instructions and Large also sought another category of damages -- punitives. His theory was predicated on Pennington's use of his cell phone while driving. If the jury imposed such an award, it would be the first time in Kentucky.

The most interesting exchanges in this case would concern a defense IME, Dr. Henry Goodman, Neurology, Ashland. He found just a strain injury, linking Large's problems to degenerative changes only. Additionally, he believed the nerve root involvement was minimal. On direct examination, by his employer, Goodman was polite, easygoing and willing to answer any question.

The tone changed on cross-examination. He resisted nearly every contention made by plaintiff, including, was he a medical expert? No, Goodman replied, just an examining physician. Would a diagram of the spine be helpful to the jury, Pruitt wondered? No, Goodman said, a little knowledge can be dangerous. Shifting gears in a strange legal flip-flop, Goodman moved from answering questions, to asking them of Pruitt. It got worse from there and the doctor expressed his belief Pruitt was an obnoxious asshole, especially for having suggested Goodman was a defense doctor. Goodman terminated the deposition and threatened arrest if the offending Pruitt did not immediately depart. Pruitt left and no peace officers were called.

Pruitt considered his options and post-deposition, he wanted the entire audio-tape as recorded by the court reporter. She wasn't obliging and he went to court, successfully receiving an order directing its production. The court also ordered the deposition to continue, this time conducting the examination in his presence.

Pruitt and Goodman had apparently not yet reconciled and the contentiousness continued. Goodman objected to Pruitt's leading questions, the court advising the medico-legal expert that such examination is appropriate on cross. Goodman had a new objection then, posturing the formerly leading question was now vague. Pruitt went on and later developed from Goodman that the doctor did disagree with Deitch's opinions as expressed in deposition and moreover, while he hadn't read the deposition, if he did, he would then too disagree. This matter aside, it proceeded through to a jury verdict, the case taking its second strange turn.

Deliberating damages only, the panel had its first verdict, awarding the claimed medicals of $8,121, but nothing for suffering or impairment, it also rejecting punitives. The court thought this result inconsistent and sent the jury back to award something for suffering. Deliberating again and tipping its hand, it asked is there some minimum amount that is required by law? Rosen didn't answer.

In that interim, Pennington had a copy of *Miller v. Swift*, and presented it to the court. As the jury redeliberated, the court indicated it would preserve the issues raised by *Miller*. More time passed and in its second verdict the panel valued Large's suffering at $25, the verdict now totaling $8,146. A judgment less PIP, representing the $25 has been entered and since satisfied.

2622-Slip and Fall - Plaintiff fell in the parking lot over a drainage cap, sustaining both a knee and disc injury; prevailing at trial, $160,000 in suffering was awarded

Whitmer v. Burger King, 00 CI 0254
Plaintiff: Garis L. Pruitt and Lisa Pruitt-Thorner, *Pruitt & Thorner*, Catlettsburg
Defense: Daniel E. Murner and Michael E. Hammond, *Landrum & Shouse*, Lexington
Verdict: $168,000 for plaintiff
Circuit: **Scott**, J. Overstreet, 8-15-03

On 6-10-99, Kathryn Whitmer, age 40 and of Ashland, was in Georgetown as a part of a field trip with the local community college. Her bus tour stopped for lunch at Burger King. Exiting the restaurant, Whitmer was carrying a thirty-two quart cooler. She was heading for the bus.

Whitmer never made it. She tripped in the parking lot over a storm drainage cap. The cap extended one-eighth of an inch off the ground. Landing hard, Whitmer has since treated for two injuries, (1) a compressed nerve at L5-S1 as discussed by Dr. Bal Bansal, Neurology, Ashland and (2) soft-tissue knee per Dr. Michael Goodwin, Orthopedics, Ashland.

Whitmer's incurred medicals were $8,796 and she also claimed suffering in an uncapped category. In this lawsuit, she targeted Burger King, asserting the parking lot was not in a reasonably safe condition. Particularly, she called the cap a low-

laying hazard that created a trap for patrons.

Burger King defended the case and called the condition open and obvious as the cap was a different color than the asphalt parking lot. In explaining Whitmer's fall, it pointed to the fact that she was carrying a 32 quart cooler which may have distracted her. Damages were also diminished with an IME, Dr. Robert Love, Ashland, Orthopedics, who minimized the claimed injury, pointing instead to pre-existing arthritis.

In this regard, Burger King also sought to buttress its case with proof from a prior treating, physician, Henry Goodman, Neurology, Ashland. Notably, Goodman treated Whitmer for similar conditions in the 1980's and linked her ongoing symptoms to arthritis. He also suggested his former patient had magnified her symptoms.

The case became interesting as Burger King prepared to take Goodman's deposition. [Readers may recall that Goodman and attorney Pruitt have a history of acrimony.] As the deposition was to begin, Goodman warned Pruitt that if there was a repeat of inappropriate conduct by Pruitt as occurred in a 2000 deposition in another case, the good doctor would physically eject Pruitt. Pruitt rather than rise to the bait, simply left the deposition and took the matter up with Judge Overstreet.

To their history, in the earlier trial, *Large v. Pennington*, Case No. 1860, *Verdicts on Disc*, Goodman was the IME in a car wreck case. Pruitt represented the plaintiff. During Goodman's deposition, Pruitt cross-examined him -- Goodman resented that process and expressed his belief that Pruitt was an asshole. He then threatened to call the police if the examiner didn't leave his office. Pruitt went to the presiding Judge Rosen who ordered Goodman's deposition to continue in the court's presence. During that second deposition, Goodman made his own objections to Pruitt's case, (1) objecting to leading questions (overruled by Rosen as it was on cross) and failing that, (2) Goodman objected that the question was vague. *Large v. Pennington* ultimately was tried to a jury on 6-4-01, plaintiff taking $8,146.

That history spilled into this case, Pruitt citing it in his motion to Overstreet. Overstreet ruled for Pruitt and concluded Goodman "willfully interfered" with the court process. He ordered Goodman to be deposed again, this time before the master commissioner in Ashland. When Pruitt examined Goodman on Overstreet's order that indicated the doctor willfully interfered, Goodman responded that the judge was misinformed.

The adventures of Dr. Goodman aside, and to a jury in Georgetown, the court's instructions described a two-pronged either/or liability standard, (1) there was a defect in the sidewalk such that it was not in a reasonably safe condition, *or* (2) Burger King should have known of the hazard and failed to warn. While Whitmer prevailed, the instructions are not clear as to which prong it was. In any event, the panel further rejected comparative fault and moving to damages, she took her medicals as claimed. The suffering award was $160,000, the verdict totaling $168,796. A consistent judgment followed.