The Louisiana Jury Verdict Reporter

The Most Current and Complete Summary of Louisiana Jury Verdicts

January 2011 **Statewide Jury Verdict Coverage** **2 LaJVR 1**

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Civil Jury Verdicts

Timely coverage of civil jury verdicts in Louisiana including court, division, presiding judge, parties, case number, attorneys and results.

Roadway Negligence - A teenager sustained a catastrophic brain injury when he lost control in water that had ponded on the highway – he struck another car head-on, that driver sustaining a serious hip fracture – both drivers sued the State of Louisiana and criticized the maintenance of the roadway

Hymel v. Louisiana Department of Transportation & Development, 32493
Plaintiff: Corey Oubre, *Duplass Zwin Bourgeois Pfister & Weinstock* Metairie and Donald T. Carmouche, Jr. and David W. Ardoin, *Naquin & Carmouche*, Thibodaux for Hymel
James M. Funderburk, *Duval Funderburk Sundbery Lovell & Watkins*, Houma for Percle
Defense: John H. Ayres, III, *Assistant Attorney General*, Baton Rouge
Verdict: $14,217,306 for Hymel assessed 68.7% to defendant; $1,414,400 for Percle assessed 68.75% to defendant
Parish: **St. James**
Judge: Guy Holdridge
Date: 3-26-10

It was early on the morning of 2-21-08 and Danny Percle, then age 50, was on his way to work at Northrop Grumman. He traveled on LA Hwy 20 near Chackbay. At the same time, Bradley Hymel, then age 19, approached from the opposite direction. Both were in pick-up trucks.

A heavy rain was falling. Hymel's truck hydroplaned through ponding and crashed head-on into Percle. A serious collision resulted. Hymel suffered a catastrophic brain injury. Percle was badly hurt too, suffering a crushed left foot and a complex hip fracture.

Percle and Hymel both blamed this crash on the Louisiana Department of Transportation and Development (DOTD). It was argued that Hymel lost control because of a patch of ponding where water one-third of an inch thick stretched for 20 yards. That DOTD knew of the hazard, the plaintiffs cited proof of written and verbal complaints that had been presented to the government. An investigating state trooper concluded the crash was caused by a hydroplane event.

Key accident experts for the plaintiffs were Andrew McPhate and Woody Triche. Randolph Rice, an economist, quantified Hymel's significant losses. At the time of the crash, he was a second-semester freshman at Nicholls State. Percle had maintained an individual claim against Hymel but it settled before trial leaving only DOTD to face the jury.

DOTD defended and denied there was any defect in the roadway. It blamed the crash on excessive speed by Hymel, noting he traveled 63 mph in a 55 mph zone. A key accident expert for DOTD was Kelly Adamson, College Station, TX.

As the jury deliberated, it had several questions. They were: Were they wearing seat belts? Have the current medicals been paid by Medicaid or Disability? How is the percentage of fault applied?

Back with a verdict, the jury found the roadway presented an unreasonable risk of harm and the DOTD knew or should have known of that condition. The jury additionally found fault with Hymel. That fault then was assessed 68.75% to DOTD and the remaining 31.25% to Hymel. The jury rejected apportionment to Percle. [**Ed. Note** - Such a result is highly suggestive of a quotient verdict.]

Then to damages, Hymel took medicals of $540,266 plus $4,000,000 for future care. Lost wages were $15,000, future lost wages being assessed at $1.862 million. Then to loss of ability to enjoy life, the jury selected $800,000. Pain and suffering was $4,000,000, Hymel's parents taking $1,000,000 each for their consortium interest. The raw verdict for Hymel totaled $14,217,306.

Percle too prevailed and took medicals of $142,400 plus $75,000 for in the future. Lost wages were $74,000, his future lost wages being valued at $530,000. His loss of ability to enjoy life was $100,000, the jury awarding $450,000 for suffering. Percle's award totaled $1,414,400. A consistent judgment less comparative fault was entered for the plaintiffs.

Percle later settled by consent judgment for $900,000. Hymel also entered an agreement, the state providing him an annuity that will pay $4,000 a month for life or at least for 188 months. It also agreed to pay his medicals of up to $2.65 million, plus a cash payment of $1,501,898. The case is closed.

Products Liability - A fryer in a restaurant (Capt. Sal's Seafood Shack) either spontaneously caught on fire because of a defect or instead it was misuse by a cook who failed to turn it off at the end of the evening – either way, it did catch fire and an insurer paid a $180,000 claim – the insurer then sued the manufacturer of the fryer

Vu & Sons v. Keating of Chicago, 07-5525
Plaintiff: Mark N. Stich, *Fowler Rodriguez Valdes-Fauli*, New Orleans and Ira J. Rosenzweig, *Adams Hoefer Holwadel & Eldridge*, New Orleans
Defense: Stephen N. Elliott, Margaret A. Cassisa and Carl J. Giffin, Jr., *Bernard Cassis Elliott & Davis*, Metairie
Verdict: Defense verdict on liability
Parish: **Orleans**
Judge: Kern A. Reese
Date: 10-14-10

Vu & Sons operated Capt. Sal's Seafood Shack on Claude Avenue in New Orleans. The restaurant (which has seafood in the name) actually serves a lot of chicken. It is cooked fresh starting in the morning.

The chicken is fried in fryers provided by a manufacturer, Keating of Chicago. In the middle of the night on 6-12-06 and after the restaurant had closed, the fryers caught fire. A significant fire loss was sustained.

An insurer for Vu & Sons, Lloyds of London, paid a $180,000 insurance claim. Then in this subrogation lawsuit, the insurer sought to recover the sums it had expended. A products theory was alleged against Keating. Namely, there was a defect in the gas valve and safety shut-off, the fryer continuing to run. This led the fryer to go into melt mode, followed by over-heating and the resulting fire.

Following the fire, the fryer was initially investigated by a fire expert for the plaintiff, George Hero. He identified a defect. The fryer was then placed out behind the restaurant. It was subsequently stolen and thus by the time the litigation began, the fryer was long gone.

Keating defended the case and first explained that as the fryer is lost, it is impossible to say what caused the fire. However it pointed to proof that a Vu & Sons cook had recently (just two weeks before the fire) begun leaving the fryer on at night at 325 degrees. The purpose the cook explained was to be ready for the morning rush, there then being no warm up time to start cooking chicken. Thus the fire was most likely related not to a spontaneous fire, but instead to misuse in the form of leaving the fryer on all night.

As the case was tried, the court granted a directed verdict on design, warning and express warranty counts. The jury then would only consider a construction and composition count. This jury answered for Keating on liability and the plaintiff took nothing. A defense judgment closed the case.

Historical Louisiana Jury Verdicts

In this section, we include verdict reports from interesting and notable Louisiana civil jury trials from prior years. These reports originally appeared contemporaneously in our sister publication, The Federal Jury Verdict Reporter.

Premises Liability - Plaintiff slipped at Lowe's in a puddle on the floor – sustaining a knee injury, the plaintiff targeted a variety of contractors involved in the construction of the building – at a summary jury trial, the plaintiff took a raw award in excess of $10,000,000

Moorman v. Lowe's Home Centers, 3:02-518
Plaintiff: Gary Ruth and Ray Orrill, *Orrill Cordell & Beary*, New Orleans
Defense: Paul J. Politz, *Taylor Wellons Politz & Duhe*, New Orleans, for Lowe's
Harry J. Philips, Jr., *Taylor Porter Brooks & Philips*, Baton Rouge for Omnova/GenFlex
Thomas J. Eppling, *Staines and Eppling*, Metairie for All South Subcontracting
Leon A. Christ, Kenner for United Services Mechanical
Verdict: $10,700,000 for plaintiffs assessed 55% to Lowe's 14 % to Omnova/Genflex and 1% to All South
Court: **Federal - Baton Rouge**
Judge: Christine Noland
Date: 5-24-06

James Moorman was at a Lowe's Home Center on 3-2-01. As he walked in the store, Moorman slipped in a puddle on the floor. He sustained a complex knee injury. It was surgically repaired.

In this diversity suit, Moorman linked his injury to a variety of defendants that stretched back to the store's construction in 1995. Cited in this negligence action were: (1) Lowe's as the operator of the store, (2) Omnova/Genflex, which installed faulty components in the leaky roof, (3) All South Subcontracting, which performed repairs on the roof, and (4) United Services Mechanical, another contractor involved in the construction.

The heart of plaintiff's case focused that not only did the roof leak, because of a combination of errors by the defendants, the leak was never repaired. It was noted that just two months before the fall, All South had done repair work on the roof. The defendants denied fault and minimized the claimed injury.

The verdict in this summary jury trial was mixed on fault – it was assessed 55% to Lowe's, 14% to Omnova, 30% to All South and 1% to the plaintiff. United Services was exonerated. Then to damages, Moorman took a total of $10,700,000 – that included $5,000,000 for his suffering, plus $3,000,000 more for his wife's consortium interest. A summary jury trial, this result was not binding.

Products Liability - A cotton farmer was injured when he became caught beneath a cotton picker

Carter v. CNH America, 3:05-1875
Plaintiff: Richard L. Fewell, Jr., *Fewell Kitchens*, West Monroe and James M. Wilkerson, Ruston
Defense: Michael M. Noonan and Deirdre C. McGlinchey, *McGlinchey Stafford*, New Orleans
Verdict: Defense verdict on liability
Court: **Federal - Monroe**
Judge: Robert G. James
Date: 10-25-07

Bruce Carter was working for a cotton farmer, Trippet Faulk, on 10-27-04. Faulk was operating a Case-manufactured cotton picker. Carter entered the bottom of the picker to clear debris. Faulk, unaware that Carter was inside the picker, started to operate it. Carter suffered serious injuries as a result.

Carter alleged a defect in the picker that to clean the inside of it, it was necessary to enter an obscured area. That is, if someone was inside the picker cleaning the debris, it would be impossible for an operator to know it, nor would there be time for the person to evacuate before the machine started. Case's parent, CNH America, defended the case and denied fault.

The jury's verdict was for CNH America on liability and Carter took nothing.

A Notable Out of State Verdict
(Involving a Louisiana Lawyer)

Products Liability - As the plaintiff heated a can of corn in her nearly new oven, the oven suddenly erupted in fire and she was injured – the trial court directed a verdict for the manufacturer, finding that plaintiff's proof of defect was inadequate

Siegel v. Dynamic Cooking Services, 3-08-429
Plaintiff: Alfred A. Olinda, Jr., *Reasonover & Olinda*, New Orleans and John R. Shelton, *Sales Tillman Wallbaum Catlett & Satterley*, Louisville, KY
Defense: Robert E. Stopher and David E. Crittenden, *Boehl Stopher & Graves*, Louisville, KY
Verdict: Directed verdict
Federal: **Louisville, Kentucky**
Judge: James Moyer
Date: 11-10-10

It was 2-19-08 and Nancy Siegel of Breckinridge County, KY was using a gas oven range manufactured by Dynamic Cooking Services. It was relatively new. As she heated a can of corn, she heard a noise and opened the oven door. Fire escaped and she suffered painful 1st and 2nd degree burns to her hands, feet and face. Siegel was bedridden for months.

It would later be agreed by all that the range failed because of a malfunctioning gas regulator. In this lawsuit, Siegel sued Dynamic Cooking and alleged a defect in the oven caused her injury. She relied on proof from two experts from Donan Engineering, David Riggs, Engineer and Miranda Hewlett, Fire Investigator. [The experts had originally been hired by an intervening insurer, Farm Bureau.]

Dynamic Cooking defended and filed a third-party lawsuit against Burner Systems, the manufacturer of the regulator. It prevailed by summary judgment, explaining it had tested the

regulator for leaks. [The regulator itself was badly damaged in the fire.]

To the merits of the surviving claim presented by Siegel, Dynamic Cooking denied there was a defect in its range. It also postured that plaintiff's proof of defect was merely circumstantial. [Siegel had not sued Burner Systems.] A defense expert was Marc Mulcahy.

On the third day of proof, Judge Moyer granted a directed verdict for Dynamic Cooking. Several weeks later he entered an order explaining his decision. Moyer wrote that it was odd that the plaintiff would lose her case when she was painfully injured by a relatively new oven. However she explained that was because of plaintiff's litigation choices.

Namely, the plaintiff abandoned a breach of warranty claim and proceeded in tort. That products theory then required her to prove not just a malfunction, but also a defect. Moyer believed her proof of a design defect was circumstantial at best and the litigation was terminated.

A Notable Natchez, MS Verdict

Medical Malpractice - The plaintiff blamed his failed knee replacement on the purported substandard technical performance by his orthopedist

Ford v. Fairbanks, 09-61
Plaintiff: David C. Dunbar, *DunbarMonroe*, Ridgeland
Defense: Diane V. Pradat and Bradley K. Overcash, *Wilkins Stephens & Tipton*, Jackson
Verdict: $511,621 for plaintiff
Court: **Adams Circuit Court Natchez, MS**
Judge: Forrest Johnson
Date: 11-11-10

Johnny Mack Ford underwent a left knee replacement surgery on 12-3-07 at Natchez Community Hospital. It was performed by an orthopedist, Dr. John "Rusty" Fairbanks. Following the surgery, Ford developed an infection in his knee. Because of the infection and swelling, Ford later underwent a total of three knee surgeries, including a revision of the original replacement. Ford continues to complain of pain in his knee.

In this lawsuit, Ford sued Fairbanks and alleged negligence by him in the technical performance of the surgery. That included selecting the wrong sized components and screws. Ford's expert, Dr. Forbes McMullin, Orthopedics, St. Louis, MO, opined that errors by Fairbanks led to the complex repair course.

Fairbanks defended that his technical performance was compliant with the standard of care. He blamed the poor result on a post-surgical complication. The defendant also pointed to the fault of a non-party, Dr. Ronald Gregg. Gregg had treated Ford and to relieve the swelling had inserted a penrose drain into the knee. The insertion of the drain was linked to the increased infection. [Ford countered that there was no error by Gregg and even if there was, it flowed from Fairbanks's original error.] A defense expert was Dr. Leo Whiteside, Orthopedics, Des Peres, MO.

Following a three-day jury trial, the verdict was for Ford that Fairbanks was negligent and that this negligence proximately caused Ford's injury. Then to damages, Ford took $300,000 for non-economic damages and $211,621 for economic damages. The jury further rejected any apportionment to the non-party Gregg. The verdict totaled $511,621. A consistent judgment was entered.

Fairbanks has since sought JNOV relief. He has first argued that the evidence required that some fault be assigned to Gregg – even the plaintiff's expert (McMullin) was critical of Gregg's use of a penrose drain. The defense has also alleged juror misconduct. In an affidavit, a juror indicated her vote came under duress – apparently in the jury room, any opposition to the plaintiff's case was called racist. [The record does not indicate the race of the parties or this juror.] The motion is pending.

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