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March 2012

Statewide Jury Verdict Coverage

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Civil Jury Verdicts

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

Bad Faith - A thirteen year old at the wheel of a car (belonging to her friend's mother) was involved in a serious crash that injured a third party – the thirteen year old (through her parents) sought coverage from her UM carrier – the insurer denied the claim concluding the teen didn't have permission to drive the car – following the denial of the claim and a defense, the girl and her parents allowed a

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\$1,000,000 judgment to be taken against them by the third party – the family then sued the insurer and alleged both bad faith and consumer protection violations – prevailing on both counts at trial, the plaintiffs elected their treble damages and attorney fee remedies, the final judgment (on a \$50,000 UM policy) sky-rocketing to more than \$5,000,000

Sanders et al v. Tennessee Farmers, 13135

Plaintiff: Richard T. Matthews, Matthews & Associates, Columbia

Defense: Patrick A. Flynn, *Fleming Flynn & Murphy*, Columbia

Verdict: \$2,900,000 for plaintiff

Court: **Maury**

Judge: Jim T. Hamilton

Date: 9-3-10

This misadventure began on the evening of 12-21-08. Julia Sanders, then age 13, was visiting at the home of a friend. The friend's mother permitted her friend (age 16 and not licensed) to drive her car. [This car was not insured.] The friend later permitted Julia to take the wheel.

Julia obviously had no license and was

an exceptionally bad driver. She drove just a short distance before losing control and crossing the centerline. Sanders struck an oncoming vehicle driven by Wendy Leverette. Leverette suffered serious injuries and her leg was later amputated.

As the friend's car was not insured, Julia presented a claim for defense to Tennessee Farmers. The insurer provided UM coverage to her parents (Chad and Donna). The limits of coverage were \$50,000, there being \$12,000 more in medpay coverage. Tennessee Farmers denied the claim. It cited a policy exclusion that Julia didn't have permission to drive that car – that is, the friend's mother (while permitting her daughter to drive) had not given Julia permission to drive. Julia had countered that her friend did permit her to drive.

Julia later allowed a consent judgment to be entered against her by Leverette in the sum of \$1,000,000. She then assigned (to the extent they were assignable) her claims against Tennessee Farmers.

From this basic set of facts, the Sanders family (Julia and her parents) sued Tennessee Farmers and alleged breach of

contract, bad faith and a consumer protection violation regarding the denial of the claim. The trial judge directed a verdict on the contract count to the extent of the policy limits.

The bad faith and consumer protection counts were predicated on a theory that the denial of the underlying claim was not reasonable – Julia did have permission to drive the car and had not stolen it. If the plaintiffs prevailed, they sought not just their actual damages (\$1,000,000 regarding the settlement) but additional sums for inconvenience. This jury could also make an award of punitive damages. As the case was tried, the jury was aware of the role of the Leverettes and their assignment interest. Tennessee Farmers defended that it had properly adjusted the claim – it denied any conduct that justified the imposition of punitive damages.

This case was tried for three days in Columbia. The verdict was for the plaintiffs on both the consumer protection and bad faith counts. The damages were the same, but awarded in an odd way. The jury elected to award the parents \$1.2 million on each count, but Julia individually took nothing.

The jury continued that Tennessee Farmers had acted willfully and recklessly. It deliberated a second time and imposed punitive damages of \$500,000. The raw verdict totaled \$2,900,000 but that was far from the end of the story.

In the court's final judgment on the contract count, Leverette (the injured third party) took \$62,000 representing the policy limits. Julia (against whom the judgment was entered) took \$1,000,000, Tennessee Farmers getting a credit for the \$62,000 already paid. [As the \$1,000,000 has been assigned, presumably it will go to Leverette.] The remaining \$200,000 of the contract count was awarded to the parents. To accomplish this result, the court "reallocated" the jury's award (made exclusively to Julia's parents) to Julia herself. [Tennessee Farmers had opposed this, utilizing a juror affidavit that indicated the jury had made no mistake and didn't want Julia (who set off these events with her misadventure) to take

anything.

A separate judgment was entered on the consumer protection count. The court first reduced the award from \$1.2 million to \$1,001,845 to represent the actual damages. [That included the \$1,000,000 judgment against Julia plus her attorney fees.] The court then trebled that sum to \$3,005,535, awarding the plaintiffs \$1,202,000 more (40% of the trebled sum) in attorney fees. The plaintiff has since made an election of remedies to take the trebled damages and attorney fees instead of the actual damages of \$1,001,845.

The combined result against Tennessee Farmers, including both of the tort counts, treble damages and attorney fees totaled \$5,407,535. Tennessee Farmers has since appealed. Michael R. Campbell, *Campbell & Campbell*, Chattanooga, has joined the insurer's trial counsel on the appeal.

Medical Negligence - A surgeon was blamed for closing a laparoscopic gallbladder surgery without first realizing he had injured the plaintiff's intestine – while this jury was originally deadlocked at 6-6, it ultimately returned a verdict against the doctor – the doctor subsequently criticized the verdict as an impermissible compromise

Marcum v. Hammond, CT-003098-05
Plaintiff: W. Bryan Smith and Peter Gee, *Morgan & Morgan*, Memphis
Defense: Albert C. Harvey and Marcy Dodds Magee, *Thomason Hendrix Harvey Johnson & Mitchell*, Memphis
Verdict: \$175,000 for plaintiff
Court: **Shelby**
Judge: Kay S. Robilio
Date: 11-22-11

Betty Marcum, then age 51, was seen at the hospital reporting abdominal pain. It was linked by testing to a gallbladder complication. Dr. Douglas Hammond, a surgeon, performed a laparoscopic surgical repair. The surgery appeared without incident and the wound was closed.

Marcum continued to exhibit pain symptoms over the next five days. On the fifth day Hammond performed a

second surgery to investigate. He discovered an intestinal tear related to the first surgery. The intestine had necrosed and a portion of Marcum's intestine had to be removed. Her complex course also included the development of a fistula complication.

Marcum sued Hammond and alleged error by him not in initially injuring her intestine during the surgery, but in failing to immediately notice it. Marcum framed the purported error by Hammond as a failure to do a required safety check. Marcum's liability expert was Dr. Ralph Silverman, Surgery, St. Louis, MO.

Hammond defended the case that his lifesaving surgery was properly performed and the injury (called a small tear) was described as a surgical complication. Experts for Hammond were Dr. Guy Voeller, Surgery, Memphis and Dr. Martin Fleming, Surgery, Memphis.

This case was tried for a week in Memphis. The jury then asked a question as it deliberated: Is the doctor responsible for the care of the wound care nurse? The court did not answer.

The jury later reported to the court on the second day of deliberations that it was deadlocked at 6-6. This was now the Tuesday before the Thanksgiving holiday. The jury continued its deliberations and finished the case that Tuesday.

The verdict was for Marcum on liability and she took a general award of \$175,000. A consistent judgment was entered in her favor.

Hammond moved for a new trial and/or to remit the verdict. He cited numerous errors. They started with the jury's deliberations and relying on an affidavit from its foreman, he explained the jury reached a compromise verdict. The jury really believed (according to the foreman) that the wound care nurse was to blame, the compromise being reached to avoid having to return for further deliberations on the Wednesday before the

Thanksgiving holiday. Hammond's motion also implicated the judge's own conduct in cross-examining his expert (Voeller) from the bench and interrupting his testimony some 24 times. The defense also thought the award was excessive,

Hammond's surgery having saved Marcum's life. The motions were denied

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Hensley's condition did not improve. He died two weeks later.

Hensley's family consented to a chest-only autopsy. [This would be the key issue in the case.] The autopsy (performed by a second-year medical student) indicated Imam had sewn the mechanical valve over the left coronary artery and essentially occluded it. The attending pathologist signed off on the autopsy. The attending also later testified that a cardiac pathologist also reviewed the heart and slides and concurred. [The name of the cardiac pathologist was not disclosed in the autopsy.]

In this lawsuit filed by Hensley's surviving wife, negligence was alleged by Imam in improperly placing the valve such that it occluded blood flow. It was also alleged that when he performed the emergency bypass, he should have done three rather than two arteries.

In developing its case, the plaintiff relied on both the earlier autopsy report and its liability expert, Dr. David Theodoro, Cardiothoracic Surgery, St. Louis, MO. If the estate prevailed, it sought Hensley's pain and suffering as well medicals, the funeral bill and Hensley's destruction. His wife also presented a consortium claim.

Imam defended the case on two fronts. The first was that Hensley suffered a known complication (a so-called myocardial protection injury) of an arrested open heart surgery. He also explained (through his expert, Dr. Creighton Wright, Cardiothoracic Surgery, Cincinnati, OH) that the autopsy findings were simply incorrect and Imam had not occluded the left coronary artery.

The defense also moved for a directed verdict on the wife's consortium claim at the close of proof. Imam cited that Hensley's wife did not file her consortium claim until ten months outside the one-year statute of limitation. Judge Burdette agreed and granted the motion.

Imam also made a *Fratzke* motion and cited that the estate had not filed CR 8.01(2) interrogatories quantifying the prayer for pain and suffering. [See *Fratzke v. Murphy*, 12 S.W.3d 269 (Ky. 1999) for this quirk of Kentucky law that

requires plaintiffs to quantify their non-economic damages in response to CR 8.01(2) interrogatories or forfeit that element of damages.] The estate quickly moved (on the fifth and final day of trial) to supplement those answers. Judge Burdette ruled the supplemented answers were not seasonable and the pain and suffering claim was extinguished.

The case continued to the jury on the merits. The deliberations lasted 35 minutes. The verdict was for Imam on liability and the estate took nothing. A defense judgment was entered.

A Notable Mississippi Verdict

Products Liability - A high school football player suffered a catastrophic spinal cord injury when his 1995 Toyota 4Runner rolled over in a single car crash on New Year's Eve in 2008 – he blamed the MVA on the SUV's propensity to roll over and the insufficient roof strength – a federal jury in Hattiesburg valued his life care plan at \$8.5 million, the plaintiff taking \$2.5 million for pain and suffering

Graves v. Toyota, 2:09-169

Plaintiff: Joe Sam Owen, Robert P. Myers, Jr. and Ben F. Galloway, III, *Owen Galloway & Myers*, Gulfport, MS
 Defense: David L. Ayers and Jennifer A. Rogers, *Watkins & Eager*, Jackson and James W. Halbrooks, Jr., *Bowman & Brooke*, Minneapolis, MN

Verdict: \$12,251,178 for plaintiff less 40% comparative fault

Federal: **Hattiesburg, Mississippi Federal Court**

Judge: Keith Starrett

Date: 2-24-12

On the morning of New Year's Eve in 2008, Will Graves, then age 16 and a junior footballer at West Jones High School in Laurel, was on his way to exercise with a friend. He traveled on Highway 84 in a 1995 Toyota 4Runner SUV. [Graves wasn't speeding and was wearing his seatbelt.] The roadway was flat and dry.

Graves dipped the right wheel of the SUV onto the right shoulder. He

overcorrected and steered left. The SUV began to roll-over multiple times before it came to rest on the driver's side. It was a catastrophic crash, the roof of the 4Runner closing on the passenger compartment.

The one-car crash has left Graves permanently paralyzed from the chest down. Graves, who has since graduated from high school, was described as a well-liked student and athlete. [His father (Wayne) was the defensive coordinator for his high school football team.]

In this lawsuit brought by his parents, Graves (referred to in the record as WAG) alleged the Toyota 4Runner was defective in two key ways. The first was its purported high center of gravity and propensity to roll over. The plaintiff's theory also implicated the inadequacy of the 4Runner's roof strength.

A key expert for the plaintiff, Micky Gilbert, Engineer, Wheat Ridge, CO, explained the SUV tended to become unstable even in mild conditions. He suggested a better design would have had smaller tires and a different track width, Gilbert pointing to the Dodge Durango as an alternative design.

Other liability experts for Graves included David Bilek, Engineer, Littleton, CO, Stephen Forrest, Engineer, Goleta, CA and Martha Bidez, Biomechanics (Roof Strength), Birmingham, AL. The plaintiff's damages were substantial, his prayer to the jury being \$25,000,000. His damage experts were Bruce Brawner, Vocational, Madison, Randall Thomas, Life Care Plan, Ridgeland and Richard Thompson, Economist, Clemson, SC.

Graves had also sought to impose punitive damages – he alleged that Toyota had not engaged in meaningful testing of the 4Runner. Judge Starrett concluded the proof did not warrant a punitive instruction and this issue did not go to the jury.

Toyota defended the case on several fronts, beginning with blaming the roll-over on the plaintiff's own driver error. It also denied the design of the 4Runner was unsafe. Toyota instead blamed the tragic outcome on this horrible crash, Graves suffering the injury before the roof of the SUV became deformed. Thus

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