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Statewide Jury Verdict Coverage

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Grocery Negligence - An elderly customer was pushing a full shopping cart at a Kroger – unknown to her, the shopping cart's front right wheel was missing – as the woman made a turn at an aisle, the shopping cart turned over and pulled the woman down – she sustained a broken hip in the fall – a Memphis jury awarded the woman \$2.6 million in non-economic damages

Wortham v. Kroger, CT-003147-17

Plaintiff: Patrick M. Ardis, Geoffrey G. Gaia and Kip E. Whittemore, *Wolff Ardis*, Memphis

Defense: Christopher M. Myatt, *Spicer Rudstrom*, Memphis

Verdict: \$2,700,000 for plaintiff

Court: **Shelby**

Judge: Robert S. Weiss

Date: 1-18-19

Zula Wortham, then age 88, shopped on 8-25-16 at a Kroger grocery on Shelby Drive in Memphis. She was a regular customer. Wortham was accompanied by her daughter. Wortham (and her daughter who assisted her) selected a shopping cart from the interior vestibule of the store where shopping carts are stacked by store employees. As was Wortham's custom, she remained with the cart and pushed it as her daughter walked up and down the aisle retrieving items

and placing them in the cart.

What Wortham didn't know was that the shopping cart was broken. The front right wheel was missing. With the shopping cart now nearly full, Wortham made her first right turn of the shopping trip to turn down an aisle towards check-out. As Wortham did so, the three-wheeled shopping cart tipped over and pulled her down with it. Wortham sustained a broken hip in the fall and later underwent a repair surgery.

Wortham sued Kroger and alleged

negligence in maintaining the shopping cart. She cited that the shopping cart was missing the entire right front wheel caster, wheel and all – the hazard was unknown to Wortham as the cart rolled like any other cart until it was loaded and she made the right turn. A retail safety expert for Wortham was Lila Laux, Texas, who was critical of the inspection and maintenance of the carts, Kroger's only inspection being done by "baggers" as they collect and retrieve shopping carts in the parking lot.

Wortham received an adverse inference instruction at trial. There was proof that while Kroger had 22 cameras in the store and many more in the parking lot, only a small portion of the video was retained even though Wortham had requested it, first by her daughter two days after the incident and by a letter from her attorney within 28 days. Wortham argued the missing video would have shown the broken cart being returned to the store and who knows how many Kroger employees who would have observed it without alerting Wortham.

In valuing her damages and the effect of these injuries, there was proof that Wortham was very active and healthy for her age. She was independent, mobile, drove her own car and was the matriarch of her family. Wortham attended church, cleaned her own house, prepared her own meals and did her own shopping. She visited her senior center in Whitehaven several times a week and enjoyed trips to Tunica with her friends.

After this fall, Wortham became homebound, could neither prepare her meals nor clean her house. She could not get to or from church without imposing on family members

and she could no longer go to the community center or church.

Wortham also presented a claim against Peggs Company. Peggs had a contract to maintain the shopping carts for Kroger. Peggs moved for summary judgment on the eve of trial and it was granted without meaningful opposition by Wortham. The case went to trial against Kroger alone.

Kroger denied that a three-wheeled cart is dangerous, the condition essentially being benign. The defense also implicated that the condition, whatever it was, was an open and obvious one that Wortham should have appreciated. Much like Wortham didn't know the wheel was missing when she selected the shopping cart, Kroger too had no notice of the defect.

This case was tried for four days in Memphis. The jury found Kroger solely at fault and rejected the imposition of any comparative fault to Wortham. She then took \$100,000 in economic damages, plus \$2.6 million more for non-economic damages. The verdict totaled \$2.7 million. Judge Weiss' judgment reduced the non-economic damages from \$2.6 million to \$750,000 to comply with Tennessee's tort scheme.

Wortham has since moved to declare the tort scheme unconstitutional and has cited among other things that it violates, (1) Tennessee's right to a jury trial, and (2) the separation of the powers. At the time of this report, Kroger had not yet replied. The State of Tennessee has moved to intervene in this constitutional challenge and Judge Weiss entered an order permitting that intervention.

Kroger has also filed a notice of appeal. It has challenged the court having granted summary judgment to

Peggs and failing to allow the jury to apportion fault to that third-party.

Ed. Note - Readers will recall the case of *McClay v. Airport Management Services*, 16 TJVR 2 at page one, where a plaintiff in an airport slip and fall case took \$1,374,500 in damages including \$930,000 in non-economic damages. That verdict was returned one week before Wortham's verdict.

McClay has moved in that federal case in Nashville to declare the Tennessee tort scheme unconstitutional. The plaintiff had asked the presiding neophyte Judge Eli Richardson for oral argument on the question. Richardson indicated in an order he didn't need any oral argument and the matter has been briefed for the court.

Auto Negligence - The defendant, a repeat drunk driver with a blood alcohol level of .22, rear-ended the plaintiff – a Nashville jury assessed punitive damages of \$800,000

Bates v. Harbour, 17-413

Plaintiff: Jason Gichner and Burke Keaty, *Morgan & Morgan*, Nashville
 Defense: Nathaniel K. Cherry, *Howard Tate Sowell Wilson Leathers & Johnson*, Nashville

Verdict: \$821,271 for plaintiff

Court: **Davidson**

Judge: Joe P. Binkley, Jr.

Date: 3-6-19

Chrissa Bates was returning home from the grocery on 2-20-16. She was stopped at a red light on the Andrew Jackson Parkway. A moment later she was rear-ended by Mary Harbour. Harbour was drunk – her BAC was measured at .22.

Bates has since treated for soft-tissue injuries including with a chiropractor. Her medical bills were \$6,771. A defense IME, Dr. David

West, confirmed the plaintiff's injuries.

Bates sued Harbour in this lawsuit and sought to impose both compensatory and punitive damages. She cited the egregious conduct by Harbour in driving drunk. Making matters worse, this was Harbour's fourth drunk driving conviction.

As the case came to trial, the parties agreed to bifurcate the compensatory and punitive damages phases as required by Tennessee law. Harbour defended the case as well as she could in light of the difficult facts.

There was interesting motion in limine practice before trial. Harbour sought to exclude her drunk driving history. She had a conviction in the late 1980s as well as another in both 1998 and 1999 for a total of three. Her motion argued those convictions were too remote in time to be relevant. The court ruled there would be no proof of that history in the compensatory damages phase, but the jury would hear about them in the punitives phase.

This case was tried for three days. In the first phase on compensatory damages, Bates took her medical bills of \$6,771. The jury added \$11,000 for pain and suffering and \$3,500 more for loss of enjoyment of life. The compensatory damages totaled \$21,271. The court made a decision as a matter of law that Harbour's conduct was reckless and this triggered a second phase on punitive damages. The jury was not asked if Harbour's drunk driving was reckless.

The jury then heard proof in the second phase including about Harbour's prior drunk driving history. The jury deliberated and assessed punitive damages of \$800,000. The combined verdict for Bates totaled \$821,271. At the time of

this report, no judgment had been entered.

Case Documents:

[Compensatory Jury Verdict](#)
[Punitive Jury Verdict](#)

Food Server Negligence - The plaintiff purportedly died of an asthmatic event (brought on by a seafood allergy) after being served seafood at a Japanese restaurant despite advising the chef of the allergy – the restaurant denied fault and contested whether there was an exposure at all or that it had caused the asthmatic event

Smith v. Benihana, CT-001573-14

Plaintiff: Terrell Tooten, Memphis

Defense: Lauren L. Holloway, *Law Office of Lauren Holloway*, Schaumburg, IL and Molly A. Glover and William D. Irvine, Jr., *Burch Porter & Johnson*, Memphis

Verdict: Defense verdict on liability

Court: **Shelby**

Judge: Gina Higgins

Date: 5-25-18

Elliott Smith, age 31 and a sometimes brick mason, was a regular patron at the Benihana's restaurant in Memphis. He went almost every week and ordered chicken. This is because he had a seafood allergy – he also had asthma. As was his custom, Smith was a guest at the Benihana's on 12-10-10.

Smith advised his chef of the seafood allergy and it was noted. The chef prepared Smith's food first and then went to cook that of other guests at the table. Benihana's features hibachi-style cooking where patrons share communal tables.

After Smith's first bite of the chicken, he felt very hot. After a few more minutes, he told his companion he was going to step outside and get some fresh air. When Smith didn't

return in ten minutes, his friend went to look for him. Smith had collapsed outside. A call was made to 911 and Smith was taken to St. Francis Hospital. He died at the hospital of an asthmatic event.

Smith's estate (representing his minor children) sued Benihana's and alleged negligence by it in serving him chicken that was contaminated by seafood. His lawyer argued to the jury that apparently a mistake was made in the kitchen and seafood was added (and then removed) from his order.

That contamination of Smith's food, the theory went, led to an allergic reaction which triggered the fatal asthmatic event. The plaintiff's pathology expert was Dr. Peter Acetta, Columbus, OH, who drew the causal link between the exposure and Smith's death. An identified restaurant practices expert for the estate was Howard Cannon, Chelsea, AL. If the estate prevailed, it could take the funeral bill, lost wages, Smith's conscious pain and suffering and the consortium interest of his children.

The lawsuit was originally filed in November of 2011. The estate non-sued the action in February of 2014 and then refiled again in April of 2014. The case had originally alleged a broader course of negligence by Benihana's, namely negligence both in not having a reasonable response to his allergy and not calling 911 fast enough. By the time of trial, it was a more simple negligence claim in serving him seafood in spite of his allergy.

Benihana's defended on several fronts. The first was to deny that it had served Smith seafood and it noted that his friend (who also had an allergy) was served the same food and suffered no reaction. Benihana's also developed expert proof that the cause