THE NATIONAL LAW JOURNAL

THE TOP 100 VERDICTS OF 2016

VERDICTSEARCH

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Juries Return 4 Billion-Dollar Awards

BY JOHN SCHNEIDER

THE BILLIONS ARE BACK. AFTER A drop in 2015, which saw a top verdict of only $845 million, four verdicts in 2016 came in at more than a billion dollars each, according to the annual Top 100 Verdicts by ALM's VerdictSearch. The largest went to a computer company that alleged a software developer had breached a settlement agreement. The jury in *Hewlett-Packard v. Oracle* awarded Hewlett-Packard $3.01 billion.

Jeff Thomas, a partner in the Irvine, California, office of Gibson, Dunn & Crutcher, who represented HP, said while this verdict is large by any standard, it's especially so for what was essentially "a good old-fashioned breach-of-contract case."

The underlying agreement had resolved a dispute over trade secrets, and Oracle breached it by announcing plans to stop issuing updates and fixes for Oracle software that runs on HP servers. The impact on HP's highly profitable server business was devastating, Thomas said, as HP lost market share to other server providers, including IBM and Oracle itself. Thomas explained that the damages model, far from being inflated, was conservative.

"We could have included [harm to] ancillary product lines or used other ways of measuring damages," Thomas said, "[but] we wanted to present as solid and conservative a damages estimate as possible."

The second-highest verdict in VerdictSearch's 2016 list, $2.64 billion, went to the family of a freshman at a state college in Nebraska who was abducted and murdered by a student who lived a few doors down in the same student housing unit. Tyler Thomas' body was never found, and Joshua Keadle admitted that

he had been with her the night she disappeared. However, Keadle was not charged in her disappearance, but at the time of trial was in prison for an unrelated sexual assault of a minor.

Vince Powers, of Powers Law Group in Lincoln, Nebraska, the attorney for the family in *Estate of Thomas v. State of Nebraska*, said that the day Tyler's parents testified "was a hard day for the family and a hard day for the jury."

Although the judge had granted a default on liability, the verdict sheet included an option to find in favor of Keadle. "The jury was out for a long time," Powers said, but "gave much more than I asked for."

Powers acknowledges that the award is not collectible. Even if Keadle had assets, most of the award is punitive damages, which would not go to the estate. The Nebraska state constitution provides that any fines or penalties must go to the state's school districts, he explained.

The No. 3 verdict of 2016 was $2.54 billion, for a subsidiary of pharmaceutical giant Merck & Co. and other plaintiffs against a competing drugmaker. *Idenix Pharmaceuticals v. Gilead Sciences* involved infringement of patents relating to an antiviral compound used in the treatment of hepatitis C.

Merck won the 10th-largest verdict of the year, a $200 million award, and Gilead was on the losing side of that fight, as well. *Gilead Sciences v. Merck & Co.* involved infringement of different patents relating to the same drug compound as the *Idenix* case. The case was filed by Gilead as a declaratory judgment action, but Merck & Co. won on its counterclaim.

VINCE POWERS, ABOVE, WON A $2.64 BILLION VERDICT ON BEHALF OF THE FAMILY OF TYLER THOMAS, LEFT, WHO WAS MURDERED IN HER DORM IN NEBRASKA.

No. 4 on the Top 100, a $1.04 billion verdict, was in a bellwether trial in multidistrict litigation over metal-lined prosthetic hip implants. The plaintiffs in *Metzler v. DePuy Orthopaedics* were six hip-replacement patients and their spouses. Earlier in the year, a bellwether trial for five other plaintiffs in the same MDL resulted in a $502 million verdict, No. 8 on the Top 100.

In both cases, the plaintiffs' attorney, Mark Lanier of Lanier Law Firm in Houston, argued that DePuy, a Johnson & Johnson subsidiary, had aggressively marketed the devices while failing to test them properly and concealed their risks, which included metal particles wearing off and accumulating in the surrounding

tissues, where they caused chronic, debilitating pain.

Lanier said that when the defense team presented the defendants as deeply patriotic and concerned about humanity, then issues of character became admissible. He said his firm responded by entering evidence that showed "the dark side of the company," including regulatory violations and misrepresentations by the company's sales force.

Not until No. 5 is there a verdict below $1 billion in the Top 100. In a lawsuit primarily about misappropriation of trade secrets, a jury awarded $940 million to a software company suing a global consulting firm based in India. Epic Systems Corp. makes software for health care institutions to maintain electronic patient records. Other companies have similar products, "[but] Epic is the one used by all the blue-chip institutions, [such as] Cedars-Sinai, The Mayo Clinic and Johns Hopkins," said the plaintiffs' attorney Rick Richmond, managing partner of Jenner & Block's Los Angeles office.

Tata Consultancy Services Ltd. was developing a competing product, but under strict security protocols was also testing Epic software updates for Epic customers. Tata personnel violated the protocols and downloaded thousands of Epic documents containing trade secrets. The compromised computers were later wiped of data, and the court instructed the jury that it could make an adverse inference against Tata from the data's disappearance.

One of the biggest challenges, Richmond said, was the 10-day time limit that the judge imposed on the trial. The plaintiff alone had 50 witnesses, and the trial was bifurcated, which meant two opening statements and two closing arguments for each side. Squeezing it all in took some work.

"We narrowed the number of 'live' witnesses to a bare minimum," Richmond said, "[and] we substantially trimmed down the number of excerpts from the videotaped depositions that we showed to the jury." For about a dozen witnesses, both sides stipulated to one- or two-page deposition summaries, which Richmond read to the jury. Richmond said the judge told him he could read the summaries "with feeling, but no theater."

Attorney Brad Caldwell, of Caldwell Cassady & Curry, won three verdicts on the list this year, with two in the top 10. All three were against Apple. The sixth-largest and the ninth-largest verdicts of the year, $626 million and $302 million, respectively, went to technology patent-holder VirnetX Inc. for infringement by several Apple products, including iPhones and iPads. Caldwell's other Top 100 verdict for 2016 was $22 million: *Cellular Communications Equipment v. Apple* involved infringement of a patent relating to LTE, a wireless communication standard. Caldwell had also represented VirnetX in a 2012 trial against Apple, so there were no strangers here.

"Apple was certainly familiar with our firm, and to the extent you have a playbook, they had gotten a look at it," he said.

So how did he manage to achieve verdicts against Apple repeatedly?

"If we had been winning based on any superficial aspect of trial strategy, Apple probably could have adapted its strategy to counter that," Caldwell said. "I believe the verdicts are a reflection that, on a fairly deep level, our cases were solid on the merits, well prepared and ready for trial."

Despite the enormous verdict for breach of contract in the *Hewlett-Packard* case, intellectual property cases again dominated the Top 100 in terms of total dollars awarded. The 11 verdicts in this category totaled approximately $4.8 billion, more than a threefold increase from 2015, when the total was $1.43 billion. Eight breach-of-contract verdicts appear in the 2016 Top 100. This category comes in second, with a total of $3.67 billion, compared to just $496 million the previous year. The category in third place for 2016, wrongful death, didn't even make the top 10 categories in 2015. The four verdicts in 2016 totaled $3.22 billion.

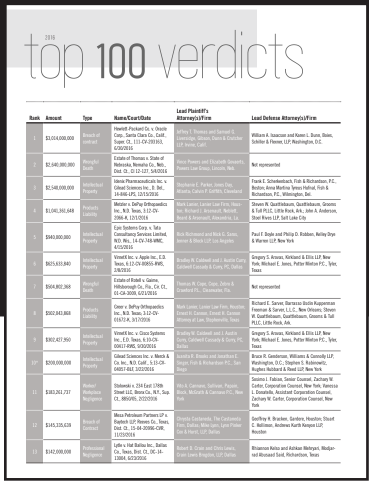
In fourth, products liability accounted for 16 verdicts. The total, $2.2 billion, represents a significant increase over 2015's $625.5 million.

WE OFFERED EVIDENCE "ON THE DARK SIDE OF THE COMPANY."

—MARK LANIER

Coming in fifth were motor-vehicle verdicts, 18 of them, totaling $700 million, down from the previous year's $1.41 billion. Medical malpractice came in sixth place, with nine verdicts totaling $317.8 million, down from 2015's $388 million. Placing seventh was worker/workplace negligence. The verdicts numbered just two, but they totaled $236.9 million, down slightly from $238 million in 2015. The fraud category was No. 8, with five verdicts totaling $226.9 million. Premises liability was the ninth category, with five verdicts totaling $193.9 million, down slightly from 2015's $221 million. Rounding out the top 10 categories this year was professional negligence; its two verdicts in 2016 totaled $170 million.

Contact John Schneider at jschneider@alm.com.


top 100 verdicts

THE TOP 100 VERDICTS

OF 2016

The National Law Journal's VerdictSearch affiliate scoured the nation's court records in search of 2016's biggest verdicts, also consulting with practitioners and reviewing reports by other ALM Media publications. The amounts listed here represent jury awards—they do not account for judicial reductions, offsets or appeals.

TOP 100 VERDICTS OF 2016

Top Verdict Categories

Dollar value of Top 100 verdicts by cause of action, in millions.

2015			2016		
1	Intellectual Property	$1,427	1	Intellectual Property	$4,827
2	Motor Vehicle	$1,409	2	Breach of Contract	$3,386
3	Breach of fiduciary	$713	3	Wrongful Death	$3,218
4	Assault and battery	$656	4	Products Liability	$2,201
5	Products liability	$626	5	Motor Vehicle	$677
6	Breach of contract	$496	6	Medical Malpractice	$318
7	Medical malpractice	$333	7	Worker/Workplace Negligence	$237
8	Workplace safety	$289	8	Fraud	$227
9	Worker/workplace negligence	$238	9	Premises Liability	$194
10	Premises liability	$221	10	Professional Negligence	$170

Source: VerdictSearch. Figures are rounded to the nearest $1 million.

ELEVEN

INDUSTRY: REAL ESTATE

WORKER/WORKPLACE NEGLIGENCE

Wrongful Death

Firemen claimed equipment's elimination led to injuries, death

VERDICT $183,261,737

CASE Eugene Stolowski, Eileen Bellew, as Administratrix of the Estate of John G. Bellew, Deceased, Jeffrey G. Cool, Sr., Joseph G. DiBernardo as Administrator of the Estate of Joseph P. DiBernardo, Deceased; Brendan K. Cawley; and Jeanette Meyran, as the Executrix of the Estate of Curtis W. Meyran, Deceased v. 234 East 178th Street LLC & City N.Y., No. 8850/05

COURT Bronx Supreme, NY

JUDGE Elizabeth A. Taylor

DATE 2/22/2016

PLAINTIFF ATTORNEY(S) **Vito A. Cannavo**, Sullivan Papain Block McGrath & Cannavo P.C., New York, NY

DEFENSE ATTORNEY(S) **Vanessa L. Donatello**, Assistant Corporation Counsel, Zachary W. Carter, Corporation Counsel, New York, NY (City of New York)
Sosimo J. Fabian, Senior Counsel, Zachary W. Carter, Corporation Counsel, New York, NY (City of New York)
None reported (234 East 178th Street LLC)

FACTS & ALLEGATIONS On Jan. 23, 2005, plaintiff's decedent John Bellew, 36, a firefighter, plaintiff Brendan Cawley, 34, a firefighter, plaintiff Jeffrey Cool, 36, a firefighter, plaintiff Joseph DiBernardo, 34, a firefighter, plaintiff's decedent Curtis Meyran, 46, a firefighter, and plaintiff Eugene Stolowski, 34, a firefighter, responded to a fire that was damaging a four-story building that was located at 236 E. 178th St., in the Mount Hope section of the Bronx.

Cawley, Meyran and Stolowski proceeded to the building's fourth floor, and they entered apartment 4-L. The fire had reached the apartment, but its presence was concealed by one of several illegal partitions that the apartment's tenant had constructed. The partitions also blocked access to the building's fire escape. Bellew, Cool and DiBernardo subsequently entered the apartment. The fire spread, and the six firefighters became trapped in rooms that could not access the fire escape. Windows provided their only route of escape. The men jumped out of the building, and they landed on a sidewalk. Bellew and Meyran sustained fatal injuries. Cawley sustained injuries of his back, a lung, his neck, several ribs, a shoulder and his skull. Cool sustained injuries of an arm, his pelvis, several ribs and his shoulders. DiBernardo sustained injuries of his ankles, his heels, his legs and his pelvis. Stolowski

sustained injuries of his ankles, his legs, his pelvis and his skull.

Cawley, Cool, DiBernardo, Stolowski, Bellew's widow, Eileen Bellew, who was acting as administrator of her husband's estate, and Meyran's widow, Jeanette Meyran, who was acting as executor of her husband's estate, sued the premises' owner, 234 East 178th Street LLC, and the firefighters' employer, the city of New York. The plaintiffs alleged that 234 East 178th Street had negligently failed to address a dangerous condition that contributed to the firefighters' injuries, that the city had negligently failed to provide equipment that could have prevented the firefighters' injuries, and that the city violated the New York State Labor Law.

DiBernardo died after the lawsuit had been filed. His claim was continued by his father, who was the estate's administrator.

Meyran's estate negotiated a pretrial settlement of its claims. Terms were not disclosed. The trial addressed the remaining plaintiffs' claims.

Plaintiffs' counsel noted that apartment 4-L's subdivision violated codes. He contended that 234 East 178th Street should have detected and reversed the subdivision.

Plaintiffs' counsel also contended that the firefighters had not been provided equipment that could have prevented their injuries. He noted that the city had stopped providing ropes that would have allowed a safe descent from the burning building, and he contended that the ropes were not replaced by a suitable alternative device. He argued that the city violated Labor Law § 27-a(3)(a)(1), which specifies that employers must provide safe workplaces and reasonable protection of workers. The city's fire-safety expert acknowledged that the firefighters' injuries could have been prevented by their use of ropes.

The city's counsel contended that the firefighters' injuries were a result of the illegal subdivision of the premises, and 234 East 178th Street's counsel contended that the firefighters' injuries were solely caused by the firefighters' lack of rope. The city's counsel also claimed that the ropes were eliminated because they were overburdening firefighters whose gear typically weighed 31 pounds.

INJURIES/DAMAGES *abdomen; arthritis; arthroscopy; blood loss; collapsed lung; coma; compartment syndrome; death; depression; emotional distress; epidural injections; fracture, ankle; fracture, arm; fracture, calcaneus/heel; fracture, fibula; fracture, leg; fracture, pelvis; fracture, rib; fracture, shoulder; fracture, tibia; glenoid labrum, tear; hardware implanted; herniated disc, cervical; herniated disc, lumbar; hip; internal bleeding; internal fixation; laparotomy; limp; open reduction; organ failure; physical therapy; pins/rods/screws; plate; quadriplegia; spastic quadriparesis*

Bellew sustained severe internal trauma. He was placed in an ambulance, and he was transported to a hospital, where he died.

Bellew, 36, died on Jan. 23, 2005. He was survived by his wife and four children. His estate sought recovery of wrongful-death damages that included past and future lost earnings and benefits, past and future loss of services, damages for Bellew's pain and suffering, and damages for his children's loss of parental guidance.

Cawley sustained a fracture of his skull, herniations of intervertebral discs of his spine's cervical and lumbar regions, a fracture of his right, dominant arm's shoulder, a tear of the same shoulder's glenoid labrum, and fractures of ribs. One fractured rib caused a collapse of a lung.

Cawley was placed in an ambulance, and he was transported to a hospital. He underwent arthroscopic surgery that addressed his right shoulder. His herniated discs were addressed via physical therapy that included administration of epidural injections of steroid-based painkillers.

Cawley claimed that he suffers residual pain and limitations. He also claimed that he suffers emotional distress, depression and survivor's guilt.

Cawley sought recovery of damages for past and future pain and suffering.

Cool sustained three fractures of his pelvis, a fracture of each shoulder, a fracture of an arm, and fractures of 13 ribs. His injuries produced extensive bleeding that led to the loss of 75 pints of blood. His abdomen developed compartment syndrome, which is a pressurized condition of muscles or muscles. He experienced resultant failure of organs.

Cool was placed in an ambulance, and he was transported to a hospital. His compartment syndrome was addressed via performance of a laparotomy. A surgeon also attempted open reduction of the fracture of Cool's pelvis, but the surgery was not successful.

Cool suffers permanent residual pain, arthritis of his hips and a shoulder, deterioration of bones and joints of his hips and pelvis, and a permanent alteration of his gait. He claimed that he requires use of a cane, that his residual effects prevent his resumption of work, and that he requires additional treatment.

Cool sought recovery of future medical expenses, past and future lost earnings and benefits, and damages for past and future pain and suffering.

DiBernardo sustained a fracture of each ankle, a fracture of each foot's calcaneus, which is the heel, a fracture of each leg's fibula and tibia, and a fracture of his pelvis. He became comatose.

DiBernardo was placed in an ambulance, and he was transported to a hospital. He underwent 20 hours of surgeries, which included open reduction and internal fixation of fractures. The hardware included 10 plates and 60 screws. DiBernardo's coma lasted 18 days.

DiBernardo suffered residual pain that necessitated his use of narcotic-based painkillers, which included hydromorphone. The medication's use was overseen by doctors, but DiBernardo developed a fatal dependency. He died on Nov. 22, 2011.

DiBernardo, 40, was survived by his parents and a sister. DiBernardo's estate sought recovery of wrongful-death damages that included past and future lost earnings and benefits, past and future lost services, and damages for pain and suffering.

Meyran sustained internal trauma that caused immediate death.

Meyran, 46, died on Jan. 23, 2005. He was survived by his wife and three children. Meyran's estate sought recovery of wrongful-death damages that included past lost earnings, future lost earnings, and damages for Meyran's children's loss of parental guidance.

Stolowski sustained a dislocation of the base of his skull, a fracture of his pelvis, a fracture of each ankle, and a fracture of each leg's fibula and tibia.

Stolowski was placed in an ambulance, and he was transported to a hospital. He underwent surgery that involved a reconnection of his head and neck. The procedure included implantation of hardware. He also underwent open reduction and internal fixation of the fractures of his ankles and pelvis.

Stolowski suffered months of quadriplegia. The condition was resolved via physical therapy, but Stolowski retains an exaggerated limp. He also suffers progressive arthritis, neurological injuries and spastic quadriplegia. He claimed that he requires assistance of many of his activities and chores, that he suffers emotional distress, depression and survivor's guilt, and that he requires additional treatment.

Stolowski sought recovery of future medical expenses, damages for past pain and suffering, and damages for future pain and suffering.

RESULT During the trial, the plaintiffs negotiated a settlement of their claims against 234 East 178th Street. The plaintiffs recovered a total of $50 million. The trial proceeded against the city.

The jury found that each defendant was liable for the accident. The city was assigned 80 percent of the liability, and 234 East 178th Street was assigned 20 percent of the liability. The jury determined that the plaintiffs' damages totaled $183,261,737.

ESTATE OF JOHN G. BELLEW
$823,000 past lost earnings
$980,000 future lost earnings (32 years)
$1,200,000 loss of pension (18 years)
$372,960 variable supplements fund (18 years)
$94,000 past lost house hold services
$6,500,000 past loss of parental guidance
$17,500,000 future loss of parental guidance
$25,000,000 survival
$526,000 future lost household services (32 years)
$52,995,960

BRENDAN K. CAWLEY
$7,000,000 past pain and suffering
$10,000,000 future pain and suffering (30 years)
$17,000,000

JEFFREY G. COOL, SR.
$805,000 past lost earnings
$15,000,000 past pain and suffering
$1,400,000 future lost earnings (12 years)
$2,500,000 future medical cost (17 years)
$20,000,000 future pain and suffering (30 years)
$1,200,000 loss of pension (17 years)
$40,905,000

ESTATE OF JOSEPH P. DIBERNARDO
$855,337 past lost earnings
$1,500,000 future lost earnings (17 years)
$1,500,000 loss of pension (15 years)
$400,440 variable supplements fund (32 years)
$15,000 past lost house hold services
$15,000,000 survival
$90,000 future lost household services (32 years)
$19,360,777

EUGENE STOLOWSKI
$20,000,000 past pain and suffering
$3,000,000 future medical cost (35 years)
$30,000,000 future pain and suffering (35 years)
$53,000,000

TRIAL DETAILS Trial Length: 3 months
Trial Deliberations: 2 weeks
Jury Vote: 6-0
Jury Composition: 4 male, 2 female

PLAINTIFF EXPERT(S) **Stanley H. Fein, P.E.**, safety, Syosset, NY

DEFENSE EXPERT(S) **Jon Malkin**, fires & explosions, New York, NY

POST-TRIAL The city's counsel has moved to set aside the verdict.

EDITOR'S NOTE This report is based on information that was provided by plaintiffs' counsel. Additonal information was gleaned from articles that were published by the Daily News, New York magazine and the New York Times. Defense counsel did not respond to the reporter's phone calls.

–Jacqueline Birzon

FOURTEEN

INDUSTRY: MEDIA

PRIVACY

Breach of Privacy

Celebrity claimed blog's sex video violated privacy

VERDICT **$140,100,000**
ACTUAL **$31,000,000**

CASE Terry Gene Bollea, professionally known as Hulk Hogan v. Heather Clem, Gawker Media, LLC aka Gawker Media, Gawker Media Group, Inc., Gawker Entertainment, LLC, Gawker Technology, LLC, Gawker Sales, LLC, Nick Denton, A.J. Daulerio, Kate Bennert and Blogwire Hungary Szellemi Alkotast Hasznosito KFT aka Gawker Media, No. 12012447-CI-011

COURT Pinellas County Circuit Court, 6th, FL

JUDGE Pamela Campbell

DATE 3/18/2016

PLAINTIFF ATTORNEY(S) **Charles J. Harder**, Harder, Mirell & Abrams LLP, Beverly Hills, CA
Kenneth G. Turkel, Bajo Cuva Cohen and Turkel P.A., Tampa, FL
Shane B. Vogt, Bajo Cuva Cohen and Turkel P.A., Tampa, FL

DEFENSE ATTORNEY(S) **Michael Berry**, Levine Sullivan Koch & Schulz, LLP, Philadelphia, PA (A.J. Daulerio, Blogwire Hungary Szellemi Alkotast Hasznosito KFT, Gawker Entertainment, LLC, Gawker Media Group, Inc., Gawker Media, LLC, Gawker Sales, LLC, Gawker Technology, LLC, Kate Bennert, Nick Denton)
Barry A. Cohen, The Barry A. Cohen Legal Team, Tampa, FL (Heather Clem)
Rachel E. Fugate, Thomas & LoCicero PL, Tampa, FL (A.J. Daulerio, Blogwire Hungary Szellemi Alkotast Hasznosito KFT, Gawker Entertainment, LLC, Gawker Media Group, Inc., Gawker Media, LLC, Gawker Sales, LLC, Gawker Technology, LLC, Kate Bennert, Nick Denton)
Michael W. Gaines, The Barry A. Cohen Legal Team, Tampa, FL (Heather Clem)
Michael D. Sullivan, Levine Sullivan Koch & Schulz, LLP, Washington, D.C. (A.J. Daulerio, Blogwire Hungary Szellemi Alkotast Hasznosito KFT, Gawker Entertainment, LLC, Gawker Media Group, Inc., Gawker Media, LLC, Gawker Sales, LLC, Gawker Technology, LLC, Kate Bennert, Nick Denton)
Gregg D. Thomas, Thomas & LoCicero PL, Tampa, FL (A.J. Daulerio, Blogwire Hungary Szellemi Alkotast Hasznosito KFT, Gawker Entertainment, LLC, Gawker Media Group, Inc., Gawker Media, LLC, Gawker Sales, LLC, Gawker Technology, LLC, Kate Bennert, Nick Denton)
None reported (Bubba Clem)

FACTS & ALLEGATIONS On Oct. 4, 2012, plaintiff Terry Bollea, 59, who is professional wrestler Hulk Hogan, was seen in a one-minute and 41-second video that was published on the website Gawker.com. The video showed Bollea engaged in a sexual encounter with Heather Clem.

The video footage was recorded in a private bedroom in the home that Clem shared with her then-husband Bubba Clem. The full length video of the sexual encounter was approximately 30 minutes long, and was provided to Gawker by an unknown source. The shortened sex tape published by Gawker was accompanied by captioning and written commentary allegedly Gawker's former Editor-in-Chief A.J. Daulerio. Bollea claimed that he had no knowledge that he was being filmed at the time of this sexual encounter and that he had a reasonable expectation of

privacy. He further claimed that publication of this video was an invasion of his privacy, and caused him emotional distress.

Bollea sued Gawker Media LLC and five of its subsidiaries, Daulerio, Gawker founder Nick Denton, and former Gawker video producer Kate Bennert. Bollea alleged that Gawker invaded his privacy by intrusion upon seclusion, publication of private facts and violation of state common law right of publicity. Bollea also sued Clem for invasion of privacy by intrusion upon seclusion, and publication of private facts. Bollea sued all of the defendants for intentional and negligent infliction of emotional distress, as well as violation of Florida Statutes section 934.10. Heather Clem and Bubba Clem each agreed to settlements with Bollea. Bennert was dismissed from the case. The matter proceeded against the remaining Gawker defendants.

Bollea claimed that that through the actions of Clem, Gawker obtained a copy of the secretly-filmed recording. He claimed that the video showed him naked and having intercourse with Clem, without blocking, blurring or obscuring of the images. He claimed that Bennert, with the help of, or under the direction of Denton and Daulerio, edited the recording into a shortened video, and that Bennert, Daulerio and Denton wrote the accompanying, graphic narrative. He alleged that hundreds of millions of people were exposed to the video, and that the Gawker defendants have reaped tremendous revenues and profits from its publication and have thus been unjustly enriched.

The defense argued that Bollea is an international celebrity, and that his personal life, romantic affairs, and the explicit details of his sex life had been the subject of widespread media coverage and public discussion prior to publication of the video.

The defense asserted that the plaintiff's sex life was the subject of public discussion by the plaintiff, in vivid and explicit detail, in order to advance his career. This discussion, the defendants argued, was done through multiple media outlets including two autobiographies, the plaintiff's reality television series "Hogan Knows Best" and numerous media appearances including candid interviews on The Howard Stern Show.

The defense argued that prior public discussion and media coverage, routinely initiated by the plaintiff, made his sex life newsworthy as a matter of law, and the publication of the sex tape was therefore protected under the First Amendment.

The defense also argued that an internationally known celebrity is not permitted to sexualize his personal image to the degree Hulk Hogan has, and then seek to hold the defendants liable for reporting and commenting on the subject tape and its contents.

The defendants made a motion for summary judgment on liability. The motion was denied.

INJURIES/DAMAGES *emotional distress*

Bollea claimed that Gawker's publication of thevideo caused severe emotional distress and embarrassment, as well as economic damages.

Bollea sought recovery of $100 million in compensatory damages. He also sought unspecified punitive damages.

RESULT The jury rendered a verdict for the plaintiff. The jury found that Gawker publicly disclosed private facts about the plaintiff in a manner that a reasonable person would find offensive, and that the subject video was not a matter of legitimate public concern. The jury also found that the defendants invaded the plaintiff's privacy; posted the video in a manner as to cause shame or humiliation; violated the state Common Law Right of Publicity and Security of Communications Act, and intentionally inflicted emotional distress in a reckless and harmful manner. It awarded $140.1 million.

TERRY GENE BOLLEA	$15,000,000 punitive (against Gawker) $55,000,000 compensatory damages $10,000,000 punitive (against Denton) $60,000,000 emotional distress $100,000 punitive (against A.J. Daulerio) $140,100,000
INSURER(S)	**Nautilus Insurance Company** Gawker Media, LLC
TRIAL DETAILS	Trial Length: 2 weeks Trial Deliberations: 5 hours Jury Composition: 4 female, 2 female

POST-TRIAL The parties settled on Nov. 2, 2016, for $31 million.

EDITOR'S NOTE This report was written using information gleaned from court documents and published articles. Plaintiff's counsel and defense counsel were provided with copies of the report but did not contribute.

–Jack Deming

SEVENTEEN

INDUSTRY: MANUFACTURING/WHOLESALE

INSURANCE

Indemnity — Breach of Contract

Indemnification claimed for fatal food plant explosion

VERDICT **$108,913,521**

CASE	Jacobs Engineering Group Inc. v. ConAgra Foods Inc, No. C1 14-387
COURT	Douglas County District Court, NE
JUDGE	Gary Randall
DATE	3/25/2016
PLAINTIFF ATTORNEY(S)	**Robert G. Abrams** (co-lead), BakerHostetler LLP, Washington, DC **Gilbert S. Keteltas** (co-lead), BakerHostetler LLP, Washington, DC **Joanne Lichtman**, BakerHostetler LLP, Los Angeles, CA **Bruce A. Smith**, Woods & Aitken LLP, Lincoln, NE **Edward H. Tricker**, Woods & Aitken LLP, Lincoln, NE
DEFENSE ATTORNEY(S)	**William Hargens** (co-lead), McGrath North Mullin & Kratz, PC LLO, Omaha, NE **Patrick M. Meacham** (co-lead), McGuireWoods LLP, Raleigh, NC **Patrick E. Brookhouser**, McGrath North Mullin & Kratz, PC LLO, Omaha, NE **James P. Fitzgerald**, McGrath, North, Mullin & Kratz, PC LLO, Omaha, NE

FACTS & ALLEGATIONS In 2013, plaintiff Jacobs Engineering Group, a Pasadena, Calf.-based corporation, settled 68 claims made against it concerning deaths, personal injuries, and property damage sustained in a June 9, 2009, explosion in a Garner, N.C. food plant owned by ConAgra, an Omaha, Neb.-based corporation. ConAgra had contracted Jacobs to perform management services on a project to upgrade the plant's water heating system. As part of this project another corporation, Energy Systems Analysts (ESA), was contracted by ConAgra to install an industrial hot water heater. In the course of attempts to start the water heater, flammable gas was released into an enclosed room with ignition sources, resulting in an explosion that killed four people and injured more than 60.

Jacobs Engineering sued ConAgra, claiming breach of contract.

Jacobs' counsel maintained under the terms of Jacobs' contract it was entitled to indemnity for the claims it had settled and that ConAgra had failed to pay. Plaintiff's counsel claimed ESA and ConAgra were solely liable for the explosion. Jacobs' engineering expert testified the explosion occurred because ESA employees failed to properly purge vented gas and ConAgra

employees violated the company's own procedures and failed to properly purge the gas lines. Plaintiff's counsel claimed Jacobs' contractual responsibilities did not include oversight of the commissioning of the water heater. Further, Jacobs' counsel maintained ConAgra was controlling ESA's work and therefore liable for ESA's negligence. Plaintiff's counsel claimed state investigators determined Jacobs did not and could not have had knowledge of the hazardous conditions that caused the accident and did not contribute to those conditions.

Defense counsel for ConAgra denied breach of contract. The defense maintained ConAgra was not responsible for the explosion and therefore did not owe Jacobs indemnity under the terms of the contract. Defense counsel maintained and the defense's construction management expert testified Jacobs did have a contractual responsibility to oversee the commissioning of the heater. Defense counsel argued ESA was an independent contractor and was not controlled by ConAgra, hence ConAgra was not negligent.

INJURIES/DAMAGES Plaintiff's counsel claimed Jacobs had paid $108,913,520.89 to resolve claims by 67 individuals and a claim by ConAgra's property insurers, stemming from the 2009 explosion. These included claims from the estates and survivors of three individuals who died and 64 individuals who claimed various physical injuries and post-traumatic stress disorder. Jacobs' psychiatric expert testified the PTSD claims were substantiated and compensable. Jacobs legal expert testified the settlements were objectively reasonable given the event, the nature, and extent of the injuries and other factors. Jacobs' sought $108,913,502.89 in damages.

Defense counsel disputed the damages. The defense argued the defense's legal expert testified the settlements were excessive for the claimed injuries. Defense counsel specifically disputed the PTSD claims, arguing they were not substantiated.

RESULT The jury found ConAgra was 70 percent liable for the explosion and ESA 30 percent, and that ConAgra controlled ESA.

Jacobs Engineering Group was awarded $108,913,520.89.

TRIAL DETAILS	Trial Length: 4 weeks Trial Deliberations: 4 hours
PLAINTIFF EXPERT(S)	**Derek T. Nolen**, engineering, Houston, TX **Roger K. Pitman, M.D.**, psychiatry, Charlestown, MA **G. Gray Wilson**, legal services, Winston-Salem, NC
DEFENSE EXPERT(S)	**Richard McAfee**, construction, Orlando, FL **Dan J. McLamb**, legal services, Raleigh, NC

EDITOR'S NOTE This report is based on information that was provided by plaintiff's counsel. Defense counsel declined comment.

–Rick Archer

TWENTY-FOUR

INDUSTRY: HOSPITALITY

PREMISES LIABILITY

Inadequate or Negligent Security

Stalker secretly video-taped woman nude in hotel room

VERDICT	**$55,000,000**
CASE	Erin Andrews v. Marriott International Inc., a Delaware corporation; West End Hotel Partners LLC d/b/a Nashville Marriott at Vanderbilt University, a Delaware limited liability company; Windsor Capital Group Inc., a Colorado corporation; and Michael David Barrett, an individual, No. 11C4831
COURT	Davidson County Circuit Court, TN
JUDGE	Hamilton V. Gayden Jr.
DATE	3/7/2016
PLAINTIFF ATTORNEY(S)	**Bruce A. Broillet** (co-lead), Greene Broillet & Wheeler, LLP, Santa Monica, CA **Randall L. Kinnard** (co-lead), Kinnard, Clayton & Beveridge, Nashville, TN **Scott H. Carr**, Greene Broillet & Wheeler, LLP, Santa Monica, CA **Tobin M. Lanzetta**, Greene Broillet & Wheeler, LLP, Santa Monica, CA **Molly McKibben**, Greene Broillet & Wheeler, LLP, Santa Monica, CA
DEFENSE ATTORNEY(S)	**Marc O. Dedman** (lead), Spicer Rudstrom PLLC, Nashville, TN (West End Hotel Partners LLC, Windsor Capital Group Inc.) **J. Britt Phillips**, Franklin, TN (West End Hotel Partners LLC, Windsor Capital Group Inc.) **Brent S. Usery**, Spicer Rudstrom PLLC, Nashville, TN (West End Hotel Partners LLC, Windsor Capital Group Inc.) **None reported** (Marriott International Inc., Michael David Barrett)

FACTS & ALLEGATIONS On Sept. 4, 2008, a nude video was taken of plaintiff Erin Andrews, 30, a sportscaster/television personality, through the peephole of her hotel room by Michael David Barrett at the Nashville Marriott at Vanderbilt University, in Nashville.

According to Andrews, Barrett had asked the hotel to put him in a room next to her after an employee confirmed to him that she was staying there on a certain date. He then altered the peephole in her hotel-room door to shoot the video of Andrews, unknown to her, while she was changing. To do so, he removed the peephole and sawed off the threads, and put the peephole back into place to make it appear it was there. He then removed the peephole to shoot the video. Barrett recorded a number of segments, each of which was uploaded to the internet in 2009. The video totals 4.5 minutes in length, and has been viewed by millions of people.

That year Barrett was arrested and pleaded guilty to stalking Andrews and making the video. He was sentenced to 30 months in prison.

Andrews sued Barrett, West End Hotel Partners LLC (the investment group that owned the Nashville Marriott), Windsor Capital Group Inc. (the hotel's management company), and Marriott International Inc. (which was later dismissed on summary judgment), alleging claims of negligence. Barrett did not attend trial, and the court entered a directed verdict against him at the close of evidence.

In his deposition, Barrett said that he determined that Andrews would be at the hotel (it was the closest one to the Vanderbilt football game Andrews was covering) by calling the hotel and pretending to be in a group with Andrews and asking for confirmation of the reservations. According to Andrews' counsel, on Sept. 2, Barrett called the hotel and asked if Andrews was staying there, and the hotel confirmed that she was. Andrews was never told about this inquiry. He then asked the hotel to put him in a room next to Andrews' room, which the hotel did. Andrews was never told about this inquiry either.

Andrews' expert in hotel security faulted the hotel for telling Barrett that she was staying there in the first place. When Barrett asked if she was staying there, the hotel should have told him, "Sorry, we can't give you that information. If you know her, why don't you call and ask her yourself?" The expert further faulted the hotel for putting Barrett in a room next to her without first asking Andrews if she knew Barrett. The expert concluded that the hotel violated multiple industry and security standards by endangering Andrews' safety.

Andrews' expert in computer analytics explained the number of times the nude video has been viewed in the past seven years and how often it is currently being viewed.

The hotel denied giving Barrett Andrews' room number, and denied knowingly placing Barrett in the room next to Andrews. The hotel further maintained that Barrett was solely liable and there was no way the hotel could have foreseen what he did.

INJURIES/DAMAGES *anxiety; depression; emotional distress*

Andrews testified about how she was shamed and humiliated and how she suffered from depression, crying spells, anxiety and sleeplessness. She had treated with counselors in the ensuing years.

Andrews' therapist testified about the psychological trauma she suffered. Her parents talked about the impact the video had on Andrews' life and how she became a "shell" of her former self.

Andrews sought $75 million in damages.

RESULT The jury found West End Hotel Partners and Windsor Capital Group, as the agent of West End, 49 percent liable and Barrett 51 percent liable. Andrews was determined to receive $55 million.

TRIAL DETAILS Trial Length: 2 weeks
Trial Deliberations: 1 day
Jury Vote: 12-0
Jury Composition: 5 male, 7 female

PLAINTIFF EXPERT(S) **Lauren Comstock, L.C.S.W.**, psychotherapy, New York, NY (treating)
Fred Del Marva, P.I., P.P.O., hotel/motel, Glendale, AZ
B. Jim Jansen, Ph.D., internet, State College, PA

DEFENSE EXPERT(S) **Stephen C. Barth**, hotel/motel, Houston, TX
Kimberly Brown, Ph.D., A.B.P.P., psychology/counseling, Nashville, TN

POST-TRIAL The parties resolved the matter under undisclosed terms.

EDITOR'S NOTE This report is based on information that was provided by plaintiff's counsel. Defense counsel did not respond to the reporter's phone calls. Michael David Barrett and Marriott International Inc. were not asked to contribute.

–Aaron Jenkins

TWENTY-SEVEN

INDUSTRY: CONSTRUCTION

WORKER/WORKPLACE NEGLIGENCE

Wrongful Death

Demo worker in front-end loader that tipped fell 4 stories

VERDICT **$53,852,558**
ACTUAL **$55,834,971**

CASE Josefina Garcia individually and as heir to the Estate of Angel Garcia and Orbelinda Herrera as next friend of Ashley Garcia and Bryan Garcia, minors v. Manhattan Vaughn JVP, Texas Cutting & Coring L.P., Texas Cutting & Coring G.P. and Lindamood Demolition Inc., No. 2013-76550
COURT Harris County District Court, 80th, TX
JUDGE Larry Weiman
DATE 2/10/2016

PLAINTIFF ATTORNEY(S) **Jason A. Gibson** (lead), The Gibson Law Firm, Houston, TX
Casey Jordan, The Gibson Law Firm, Houston, TX

DEFENSE ATTORNEY(S) **Wade R. Quinn** (lead), Ramey, Chandler, Quinn & Zito, P.C., Houston, TX (Manhattan Vaughn JVP)
Brit T. Brown, Beirne, Maynard & Parsons, L.L.P., Houston, TX (Manhattan Vaughn JVP)
Jerry Knauff, The Miller Law Firm, Dallas, TX (Texas Cutting & Coring GP, Texas Cutting & Coring LP)
Michael A. Miller, The Miller Law Firm, Dallas, TX (Lindamood Demolition Inc.)

FACTS & ALLEGATIONS On Dec. 4, 2013, plaintiffs' decedent Angel Garcia, 28, was employed by Lindamood Demoltion on a construction project at Kyle Field, the stadium on the Houston campus of Texas A&M University, under general contractor Manhattan Vaughn JVP. Garcia was on the fourth floor of the stadium's spiral ramp operating a front-end loader to catch debris from concrete pillars being demolished by employees of another subcontractor, Texas Cutting & Coring. While he was engaged in this task, the loader fell over the side of the stadium, causing Garcia to fall four stories to the ground. He sustained fatal injuries.

Garcia's mother, individually and on behalf of his estate, as well as the mother of his two minor children, sued Manhattan Vaughn, Texas Cutting & Coring and Lindamood, claiming the original plans drafted by Manhattan Vaughn and Lindamood for the demolition of the pillars called for Texas Cutting & Coring employees to saw off 6 inches of the pillars at a time. Lindamood and Texas Cutting & Coring settled prior to trial for undisclosed amounts.

Facing contractual financial penalties for late completion of the project, Manhattan Vaughn and Lindamood increased the size of the slices to 2.5 feet, plaintiffs' counsel argued.

As a result of this increase in size at the time of the fall Garcia's loader was attempting to catch 3,340 pounds of debris striking with approximately 15,000 pounds of force in a loader rated for 2,700 pounds, according to plaintiffs' counsel.

The family claimed that this unbalanced the loader and caused the fall.

The federal Occupational Health and Safety Administration cited both Lindamood and Texas Cutting & Coring for the accident, and the plaintiffs' OSHA regulation expert testified that the defendants were in violation of safety regulations.

Plaintiffs' counsel maintained that Garcia did not have OSHA certification to operate the loader and that after the accident Lindamood attempted to file falsified paperwork claiming he had been certified.

Manhattan Vaughn JVP denied negligence.

The defense construction expert testified that the demolition plan was safe.

Defense counsel maintained that Garcia was liable for the fall, maintaining he was an experienced and certified equipment operator who failed to follow the approved demolition plan.

Manhattan Vaughn argued it did not control the details of the work of either Garcia or Lindamood.

INJURIES/DAMAGES *death; fracture, skull; internal bleeding*

Garcia fell approximately four stories and landed on construction debris where he sustained major injuries, including multiple skull fractures and lacerations to internal organs. He was transported by ambulance to the emergency room, where he was declared dead. He leaves two children and his mother.

The plaintiffs sought $40 million for pre-death pain and suffering and past and future pecuniary loss, loss of companionship and mental anguish.

Defense counsel disputed the damages.

Defense counsel maintained that the loss of companionship claims for Garcia's children were excessive, arguing they were living in Florida at the time of his death and had limited contact with him.

The defense economic expert testified that the lost income claims were excessive.

RESULT The jury found Manhattan Vaughn 75 percent liable and Lindamood 25 percent liable. It found no liability on

Texas Cutting & Coring or Garcia. The plaintiffs were awarded $53,852,558, which was reduced to $40,389,418.50 for comparative liability.

ESTATE OF ANGEL GARCIA	$5,000,000 past pain and suffering
JOSEFINA GARCIA	$2,500,000 past loss of society companionship $5,000,000 future loss of society companionship $16,563 past loss of pecuniary contribution $296,899 future loss of pecuniary contribution $5,500,000 past mental anguish $10,000,000 future mental anguish $23,313,462
ASHLEY GARCIA-HERRERA	$2,500,000 past loss of society companionship $7,500,000 future loss of society companionship $240,048 loss of inheritance $4,500 past loss of pecuniary contribution $25,000 future loss of pecuniary contribution $2,500,000 past mental anguish $2,500,000 future mental anguish $15,269,548
BRYAN GARCIA-HERRERA	$7,500,000 past loss of society companionship $2,500,000 future loss of society companionship $240,048 loss of inheritance $4,500 past loss of pecuniary contribution $25,000 future loss of pecuniary contribution $10,269,548
DEMAND	$10,000,000
OFFER	$150,000
INSURER(S)	**The Hartford Insurance Group**
PLAINTIFF EXPERT(S)	**Russ Elveston**, osha compliance, Humble, TX **Don Huddle, Ph.D.**, economics, Houston, TX
DEFENSE EXPERT(S)	**Jack McGinty**, architecture, Houston, TX **Helen Reynolds, Ph.D.**, economics, Dallas, TX **Dirk E. Smith**, accident reconstruction, Houston, TX **Jim Wiethorn, P.E.**, engineering, Houston, TX

POST-TRIAL On April 29, 2016, the amended final judgment of $55,834,971.47 was entered.

EDITOR'S NOTE This report is based on information that was provided by plaintiffs' and defense counsel.

–Rick Archer

TWENTY-NINE

INDUSTRY: MANUFACTURING

PRODUCTS LIABILITY

Design Defect

Car passenger was paralyzed by seat belt failure in sideswipe

MIXED VERDICT **$52,000,000**

CASE	Mendy Brockman and Jason Brockman v. Honda Motor Company, Ltd, American Honda Motor Co. Inc., Honda R&D Americas, Inc., Honda North America, Inc., Honda of America MFG. Inc., Honda Research Institute Japan CO. LTD., Honda Research Institute USA, Inc., Honda R&D Co. LTD., Honda Engineering North America, Inc., Honda Engineering CO. LTD, Takata Corporation, Takata Seat Belts, Inc., TK-Taito, Inc., TK Holdings, Inc., Asahi Glass Company, LTD a/k/a Asahi Garasu Kabushiki Kaisha, AGC Flat Glass North America, Inc., AGC Automotive Americas R&D, Inc., AGC Group, Kimberly Corsentino, John Does Nos. 1-40 and John Doe Companies Nos. 1-40, No. 2015cv32157
COURT	Denver District Court, CO
JUDGE	Shelley Ilene Gilman
DATE	11/15/2016
PLAINTIFF ATTORNEY(S)	**Thomas Metier** (lead), Metier Law Firm, LLC, Fort Collins, CO **James L. Gilbert** (co-lead), The Gilbert Law Group, P.C., Arvada, CO **Anthony P. Bolson**, The Gilbert Law Group, P.C., Arvada, CO **Phillip Chupik**, Metier Law Firm, LLC, Fort Collins, CO **Anne M. Dieruf**, The Gilbert Law Group, P.C., Arvada, CO
DEFENSE ATTORNEY(S)	**Charles L. Casteel** (lead), Davis Graham & Stubbs LLP, Denver, CO (TK Holdings Inc., TK-Taito Inc., Takata Corp., Takata Seat Belts Inc.) **Richard M. Kaudy** (lead), The Kaudy Law Firm LLC., Englewood, CO (Kimberly Corsentino) **David C. Holman**, Davis Graham & Stubbs LLP, Denver, CO (TK Holdings Inc., TK-Taito Inc., Takata Corp., Takata Seat Belts Inc.) **Darin J. Lang**, Hall & Evans, LLC, Denver, CO (Honda Motor Co. LTD., American Honda Motor Co. Inc., Honda Engineering Co. LTD., Honda Engineering North America Inc., Honda North America Inc., Honda R&D Americas Inc., Honda R&D Co. LTD., Honda Research Institute Japan CO. LTD., Honda Research Institute USA Inc., Honda of America MFG. Inc.) **Jordan Lee Lipp**, Davis Graham & Stubbs LLP, Denver, CO (TK Holdings Inc., TK-Taito Inc., Takata Corp., Takata Seat Belts Inc.) **Michael D. Plachy**, Lewis Roca Rothgerber Christie LLP, Denver, CO (Asahi Glass Co., LTD, AGC Automotive Americas R&D Inc., AGC Flat Glass North America Inc., AGC Group) **Christopher C. Spencer**, Spencer Shuford LLP, Richmond, VA (Honda Motor Co. LTD., American Honda Motor Co. Inc., Honda Engineering Co. LTD., Honda Engineering North America Inc., Honda North America Inc., Honda R&D Americas Inc., Honda R&D Co. LTD., Honda Research Institute Japan CO. LTD., Honda Research Institute USA Inc., Honda of America MFG. Inc.)

FACTS & ALLEGATIONS On July 5, 2013, plaintiff Jason Brockman, 35, a pastor, was driving his 1994 Honda Accord south on Interstate 25, near Larkspur, Colo. His

wife, Mendy Brockman, 35, was in the front passenger seat. They were in the left lane. On the road's right shoulder was a stopped 2008 Jeep Grand Cherokee.

When the Brockmans were parallel with Jeep, its driver, Kimberly Corsentino, suddenly swung into the road and tried to turn left, toward the median separating the north and south lanes, which had an emergency vehicle-passage.

Corsentino's Jeep struck the front right wheel of the Brockman's car, pushing it into a median guard cable, after which it rolled multiple times. Mendy Brockman's head and neck struck the roof of the Honda, causing a neck injury resulting in quadriplegia.

Mendy and Jason Brockman sued Corsentino. They alleged that she was negligent in the operation of her vehicle. Corsentino conceded liability prior to trial.

The Brockmans also sued Honda Motor Co. Ltd. and seven subsidiaries; windshield manufacturer AGC Automotive Americas R&D Inc. and three subsidiaries; and seat belt manufacturer Takata Corp. and three subsidiaries.

The lawsuit alleged that the companies were negligent and strictly liable for the defective design of their products and had breached their warranties by expressing or implying that their products were fit for the purpose for which they were designed and free from design and manufacturing defects.

Honda and AGC each reached confidential settlements with the Brockmans prior to trial. However, they remained on the jury's verdict form, as responsible non-parties. The matter proceeded to trial against Takata and Corsentino.

The Brockmans' counsel argued that Honda was strictly liable for the defective design of the Accord's roof, which collapsed from the vehicle rolling, and that AGC was strictly liable because the windshield it installed failed because of its defective design. Counsel asserted that AGC bonded the windshield to the car frame by a foam strip around the edge of the windshield, rather than by direct bonding of the glass windshield to the metal frame. This meant a weaker bonding and therefore a weaker roof, since 30 percent to 40 percent of roof's strength came from the windshield. The separation of bonding where the windshield's glass met the roof frame allowed the roof to fail more easily.

The Brockmans' counsel further claimed that Takata's safety-restraint system was defective, because its retractor malfunctioned and lacked a pretensioner and cinching latch plate. As a result, Mendy Brockman was allowed to move from her seated position and strike her head and break her neck. (The pretensioner is a mechanism in the safety restraint system which is activated by an explosive charge during an impact. The pretension instantly retracts the seat belt, removing slack prior to the full force of impact. A cinching latch plate is part of the seat belt's buckle and remains locked during impact.)

The couple's expert biomechanical engineer testified that Mendy Brockman's seat belt failed because it did not stay retracted during the accident and that the vehicle rolled two-and-a-half times. Their seat belt expert testified that Taketa's safety restraint system was defective in its design.

The Brockmans' counsel also presented evidence at trial concerning the airbags. The fact that the airbags deployed was significant, according to counsel, because a seat belt retraction system wired into the vehicle would have deployed from the same sensor. Moreover, the airbags deployed upward from the dashboard and struck the windshield in the crash, so that the Takata airbags may have contributed to the windshield deformation.

Honda denied that the Accord's design was defective.

AGC Automotive Americas contended that the windshield was designed to specifications provided by Honda, and was not defective.

Takata also asserted that the safety restraint system was not defective, and that Mendy Brockman was probably leaning forward when the accident occurred, and this changed her body position which combined with the collision caused her injury.

Takata's expert engineer/accident reconstructionist testified that the Brockmans' vehicle rolled three-and-a-half times during the accident, which was too violent for the safety restraint system to protect Mendy Brockman. Takata's seat belt expert testified that the safety restraint system was not defective and that Mendy Brockman was out of position prior to Corsentino's vehicle coming in contact with the plaintiffs' vehicle. Takata's expert biomechanical engineer testified that Mendy Brockman's head/neck were able to reach the roof of the car and sustain an injury without the seat belt being defective.

The Brockmans' counsel maintained that Mendy Brockman was not leaning forward or out of position prior to the accident.

INJURIES/DAMAGES *comminuted fracture; fracture, C6; fracture, C7; fracture, displaced; fusion, cervical; incontinence; neck; paralysis; paralysis, partial; physical therapy; shoulder; soft tissue; spastic quadriplegia; spasticity; stenosis*

Mendy Brockman suffered a flexion fracture of the spine at C6-7, with a comminuted fracture through the superior endplate of the C7 level. The injury is classified as a C6 ASIA space B spinal cord injury. The injury resulted in quadriplegia, rendering Brockman's body paralyzed from the chest down, and partial paralysis of her arms and hands.

Mendy Brockman was airlifted from the accident to Penrose Memorial Hospital, in Colorado Springs, where she had emergency fusion surgery at cervical intervertebral disc C6-7, to stabilize her neck and cervical spine. She was admitted to Penrose for 10 days, after which she was transferred to the rehabilitation center at Penrose-St. Francis, where she remained for about three months.

Mendy Brockman is permanently confined to a wheelchair. While she suffers from motor paralysis in her upper extremities, she also retains some sensory function. She has some strength remaining in her arms, but not enough to lift heavy objects or transfer her body weight from her wheelchair to her bed. She also retains a weakened ability to pinch her fingers on each hand, suffers from significant spasticity, and bladder and bowel incontinence.

Mendy Brockman takes orally administered medication and will undergo implantation of a baclofen pump (baclofen is a muscle relaxer and anti-spastic agent) to treat her spasticity. She requires daily care from a home health aide, who helps her bathe and stretch.

Mendy Brockman is the mother of four young children and cannot provide the care they require or perform household activities.

Mendy Brockman's counsel argued that she will be forced to sit and watch her children grow up instead of actively participating in their lives. She sought damages for past pain and suffering, past and future physical impairment, and past and future economic damages.

Jason Brockman sought $2 million for the past and future loss of his wife's consortium.

Corsentino's counsel argued that while Corsentino caused the accident, the injuries were caused by the Takata's defective seat belt.

RESULT The jury rendered a verdict for the Brockmans. They found that Mendy Brockman was caused injuries due to Kimberly Corsentino's negligence. They also found that designated non-parties American Honda Motor Co. and AGC Flat Glass North America were negligent or at fault in causing her injuries.

The jury placed 50 percent negligence on Kimberly Corsentino, 40 percent negligence on American Honda Motor Co., and 10 percent on AGC Flat Glass North America. The jury did not place any negligence on Takata Corp.

The jury awarded Mendy Brockman $50 million in damages and awarded Jason Brockman $2 million for loss of consortium.

JASON BROCKMAN	$2,000,000 loss of consortium
MENDY BROCKMAN	$5,000,000 past pain and suffering $15,000,000 economic losses $30,000,000 past & future physical impairment or disfigurement $50,000,000
INSURER(S)	**Tokyo Marine** Takata Corp. **None** Kimberly Corsentino
TRIAL DETAILS	Trial Length: 10 days Trial Deliberations: 8.5 hours Jury Composition: 4 male, 3 female
PLAINTIFF EXPERT(S)	**W. Ashley Ahrens, Ph.D.**, economics, Lyons, CO **John D. Fountaine, C.R.C, C.C.M.**, life care planning, Bothell, WA

Glen House, M.D., physical rehabilitation, Colorado Springs, CO (treating doctor)
Stephen R. Syson, restraint systems, Santa Barbara, CA
Mariusz Ziejewski, Ph.D., biomechanical, Fargo, ND

DEFENSE EXPERT(S)
Jarrod W. Carter, Ph.D., accident reconstruction, Spokane, WA
Eddie Cooper, restraint systems, Scottsdale, AZ
Stephen J. Fenton, P.E., accident reconstruction, Englewood, CO

POST-TRIAL On Dec. 5, 2016, Judge Shelley Gilman reduced Mendy Brockman's net award for pain and suffering, and Jason Brockman's net award for loss of consortium.

Mendy Brockman's $5 million award for pain and suffering was reduced to $2.5 million due to liability apportionment, and was further reduced to $936,030 by Judge Gilman, pursuant to C.R.S 13-21-102.5, which sets a cap on the amount of pain and suffering damages a plaintiff may receive. Jason Brockman's loss of consortium award of $2 million

EDITOR'S NOTE This report is based on information provided by counsel for plaintiffs and defendants and on court documents.

–Jack Deming

THIRTY

INDUSTRY: MANUFACTURING

PRODUCTS LIABILITY

Design Defect

Truck was only equipped with one set of spring brakes

MIXED VERDICT **$51,448,174.77**

CASE Connie Jones Marable v. Empire Truck Sales of Louisiana LLC, Curtis Wayne Hudspeth, Wayne Marable, Great West Casualty Co., Daimler Trucks North America LLC, St. Paul Fire and Marine Insurance Co., and KLLM Transport Services LLC, No. 2012-10471; 2012-10523; 2013-4560

COURT Orleans Parish District Court, LA

JUDGE Piper D. Griffin

DATE 4/12/2016

PLAINTIFF ATTORNEY(S)
Caleb Didriksen (lead), Didriksen, Saucier, Woods & Pichon, PLC, New Orleans, LA
Tony Clayton, Clayton | Frugè | Ward, Port Allen, LA
Erin B. Saucier, Didriksen, Saucier, Woods & Pichon, PLC, New Orleans, LA

DEFENSE ATTORNEY(S)
Colvin Norwood Jr. (lead), McGlinchey Stafford PLLC, New Orleans, LA (Daimler Trucks North America LLC)
Patrick J. O'Cain, McGlinchey Stafford PLLC, New Orleans, LA (Daimler Trucks North America LLC)
Janika D. Polk, Kuchler Polk Schell Weiner & Richeson, LLC, New Orleans, LA (Daimler Trucks North America LLC)
None reported (Empire Truck Sales of Louisiana LLC, Curtis Wayne Hudspeth, Great West Casualty Co., KLLM Transport Services LLC, St. Paul Fire and Marine Insurance Co., Wayne Marable)

FACTS & ALLEGATIONS On May 12, 2012, plaintiff Connie Jones Marable, in her early 60s, was run over and dragged by a 2007 Freightliner Columbia truck in New Orleans.

Marable and her husband were in a retail store's parking lot where Marable's husband, a truck driver, was preparing for his next trip. Marable's husband testified that he had the truck (a trailer was not attached) in neutral with the emergency brake on, when the truck unexpectedly and suddenly moved forward. Marable ran after the truck in an attempt to turn it off, at which point she was run over by the driver side tires and dragged a short distance. She suffered brain damage and multiple crush and degloving injuries.

Marable sued truck-manufacturer Daimler Trucks North America LLC, alleging claims under a theory of products liability, including design defect. Marable also sued her husband, Wayne Marable, and his carrier, Great West Casualty Co., alleging that he was negligent in the operation of the truck, which he owned. Marable further sued Empire Truck Sales of Louisiana LLC and repair-manager Curtis Wayne Hudspeth, alleging that it was negligent in its repair of the truck, which it had done shortly prior to the accident. KLLM Transport Services LLC, which employed Marable's husband, was sued for a claim of negligent entrustment, negligent purchase of options that did not include an additional axel of parking brakes, and ownership of the defective vehicle. Daimler was the only party that remained at trial. KLLM and Great West Casualty Co., as insurer for KLLM and for Marable's husband, settled for $6.75 million, two weeks before trial. The claims against Empire Truck Sales and Hudspeth were settled for confidential terms, two years earlier. St. Paul Fire and Marine Insurance Co., which was believed to insure KLM, was also sued, and later dismissed.

Marable's experts in automotive engineering maintained that the 2007 Freightliner Columbia truck was defective because it was equipped with one set of spring brakes (which function as an emergency brake and a parking brake) on a single-drive axel, instead of two sets, one set on each drive axel. A set of spring brakes should have been installed on each of the rear-drive axles, as the truck's singular set held only a single axel of wheels still, and the other drive axel was free to turn, so that the single axel of brakes was insufficient to hold the truck still in idle, the experts opined.

Marable's experts each performed different tests on an exemplar truck, and all concluded that there were multiple reasons why the truck might have gotten into gear and moved: Marable's husband could have started the truck from the ground (i.e., he was able to turn on the ignition while standing outside the cab); the truck may not have been in neutral to begin with; the truck's shift lever might have been accidentally bumped or knocked into gear; the secondary high-low transmission might have malfunctioned; or that the transmission detent key (the shifter bar that holds the transmission into each of the different gears) might have been worn and caused the truck to shift into gear. Whatever the reason, it is believed the truck would not have moved had it been properly equipped with two sets of spring brakes, according to the experts.

Daimler's engineer, who had participated in the design of the 2007 Freightliner Columbia truck, opined that his calculations demonstrated that the truck was safe, properly designed, and fully complied to all federal and industry standards. Two sets of spring breaks were unnecessary and would not have prevented the accident, the expert said.

Although Daimler's engineer did not directly fault Empire Truck Sales and KLLM, its counsel indicated that Empire Truck Sales performed improper work on the truck's transmission and that KLLM was negligent in its hiring of Marable's husband. Daimler's counsel asserted that Marable's husband, as owner and operator of the truck, failed in his duty to properly put the truck into park.

Marable's counsel maintained that Daimler failed federal tests multiple times, which required them to repeatedly retest and modify the 2007 Freightliner Columbia, before it barely met governmental standards.

INJURIES/DAMAGES *anoxia; brain damage; cognition, impairment; crush injury, arm; crush injury, leg; degloving; diffuse axonal brain injury; emotional distress; head; hematoma; laceration; physical therapy; scar and/or disfigurement; skin graft; speech/language, impairment of; unconsciousness*

Marable lost consciousness just before emergency medical personnel arrived. She was taken by ambulance to a hospital, where she was diagnosed with anoxia to the brain, a diffuse axonal brain injury, lacerations, crush and degloving injuries to her arms and legs, hematomas, and a collapsed lung. Marable underwent multiple skin grafts and remained immobilized to heal her fractures. She was hospitalized for several weeks until she was transferred to a long-term nursing facility, where she will remain indefinitely.

In the ensuing years, despite efforts of speech, occupation, and physical therapies, Marable remained in a paralytic but minimally conscious state, referred to as locked-in syndrome. She is unable to move her limbs without assistance, and is unable to communicate.

Marable sought to recover $898,775.77 in past medical costs.

Marable's expert in neurology testified that being pinned under the 2007 Freightliner truck caused Marable to lose oxygen to her brain, resulting in brain damage, and severe cognition impairments. The expert opined that continued speech, occupation, and physical therapies will offer minimal improvement to her otherwise permanent condition. She will remain in a nursing-care facility indefinitely. Marable sought to recover $10,549,399 in future medical expenses.

Marable's husband, son, and daughter-in-law testified about the impact and devastating effect Marable's condition has had on their lives. They talked about visiting her daily and how she is able to recognize them by tracking them in the room with her eyes. She is able to laugh, cry (particularly when shown pictures of her grandchildren), feel pain, and able to follow family members with her eyes. She sought damages for past/ future pain and suffering, mental pain, and anguish.

RESULT The jury found that Daimler's truck owned by Marable's husband was unreasonably dangerous in its design and that the unreasonably dangerous design was a proximate cause of the damages sustained by Marable.

Marable's husband was found negligent and his negligence was a proximate cause of his wife's damages.

The jury found Daimler 90 percent liable and Marable's husband 10 percent.

No liability was found against Empire Truck Sales and KLLM.

Marable was determined to receive $51,448,174.77.

CONNIE JONES MARABLE	$898,776 past medical cost $10,549,399 future medical cost $10,000,000 scarring and disfigurement $10,000,000 past and future physical pain and suffering $10,000,000 past and future mental pain and anguish $10,000,000 past and future loss of enjoyment of life $51,448,175
TRIAL DETAILS	Trial Length: 7 days
PLAINTIFF EXPERT(S)	**Kevin Bedsworth**, engineering, Miami, FL **Cornelius E. Gorman, Ph.D.**, life care planning, New Iberia, LA **James Michot**, trucking industry, **Gerald Rosenbluth**, truck design, Tempe, AZ **Shelly N. Savant, M.D.**, neurology, New Iberia, LA (non-treating) **Peter J. Sullivan**, truck design, Houston, TX
DEFENSE EXPERT(S)	**Anthony Moore**, truck design, Portland, OR

POST-TRIAL Defense counsel motioned for new trial, which the court denied. The case is on appeal.

EDITOR'S NOTE This report is based on information that was provided by plaintiff's counsel. Defense counsel declined to contribute. Empire Truck Sales of Louisiana LLC, Curtis Wayne Hudspeth, Wayne Marable, Great West Casualty Co., St. Paul Fire and Marine Insurance Co., and KLLM Transport Services LLC were not asked to contribute.

–Aaron Jenkins

THIRTY-FOUR

INDUSTRY: DISTRIBUTORS

MOTOR VEHICLE

Pedestrian

Landscaper struck by car suffered multiple bodily trauma

VERDICT	**$46,000,000**
CASE	Faustino Torres Solorio v. Nissan of Fontana, Inc., Nissan of San Bernardino, Metro Nissan of Redlands, Gunnar Ayala, Louie Ayala Jr. and L.A.G.D.J. Courier Services, No. CIVDS1512469
COURT	Superior Court of San Bernardino County, San Bernardino, CA
JUDGE	Wilfred J. Schneider, Jr.
DATE	8/9/2016
PLAINTIFF ATTORNEY(S)	**Mark P. Robinson, Jr.** (lead), Robinson Calcagnie, Inc., Newport Beach, CA **Henry Y. Pan**, Robinson Calcagnie, Inc., Newport Beach, CA **Scot D. Wilson**, Robinson Calcagnie, Inc., Newport Beach, CA
DEFENSE ATTORNEY(S)	**Timothy P. McDonald**, Ford, Walker, Haggerty & Behar, LLP, Long Beach, CA (Gunnar Ayala, L.A.G.D.J. Courier Services, Louie Ayala Jr.) **Craig J. Silver**, Law Offices of Craig J. Silver, Costa Mesa, CA (Nissan of Fontana, Inc., Metro Nissan of Redlands, Nissan of San Bernardino)

FACTS & ALLEGATIONS On Sept. 10, 2013, plaintiff Faustino Torres Solorio, 53, a landscaper, was standing behind the tailgate of a Ford F-150 on the shoulder of Alabama Street, in Redlands. As Solorio was getting a gas canister out of the back of the Ford F-150 pickup truck, he was struck by a 1992 Honda Accord operated by Gunnar Ayala, a Nissan parts delivery driver, who had made a right turn off Interstate 10 -- also known as the Christopher Columbus Transcontinental Highway and the Redlands Freeway -- onto Alabama Street. The impact forced Solorio through the front windshield of Ayala's vehicle, causing injuries to Solorio's abdomen and legs.

Solorio sued the driver, Gunnar Ayala; the owner of the Honda Accord, Gunnar Ayala's father, Louie Ayala Jr.; Gunnar Ayala's employers, Nissan of Fontana Inc., Nissan of San Bernardino, and Metro Nissan of Redlands; and Louie Ayala's business, L.A.G.D.J. Courier Services.

Gunnar Ayala worked for the dealerships of Metro Nissan of Redlands and Nissan of San Bernardino, which is owned by the corporate entity of Nissan of Fontana. Gunnar Ayala was a parts delivery driver who used his father's vehicle to perform his job. Louie Ayala Jr. set up L.A.G.D.J. Courier Services to work with, and deliver parts between, the dealerships.

Plaintiff's counsel contended that Gunnar Ayala was negligent in the operation of the Nissan Accord while in the course and scope of his employment at the Nissan dealerships. Counsel also contended that Gunnar Ayala was an agent of the Nissan dealerships and was acting within the authority of those agencies when he struck Solorio. Counsel further contended that Louie Ayala Jr. was vicariously liable for his son's actions.

Specifically, plaintiff's counsel argued that Gunnar Ayala violated Vehicle Code § 22107, for unsafe turning movements, and that Gunnar Ayala was negligent for not using reasonable care while driving a vehicle. Counsel further argued that Gunnar Ayala was negligent for failing to keep a lookout for pedestrians and for failing to use reasonable care when turning.

Nissan's counsel contended that Gunnar Ayala was an independent contractor, so the Nissan companies were not liable for Gunnar Ayala's actions.

The parties ultimately stipulated that Gunnar Ayala was negligent and that his negligence was a substantial factor in causing Solorio harm.

INJURIES/DAMAGES *abdomen; amputation, leg; fracture, tibia; fractured spleen; internal bleeding; leg; multi-system trauma; multiple trauma; spleen; spleen, laceration; splenectomy*

Solorio sustained multiple trauma to his body system. He also sustained a right tibial shaft fracture, and his left, lower leg was mangled and essentially hanging on by a thread. As a result, Solorio was transported to Loma Linda University Medical Center, in Loma Linda, where, on the date of the accident, his left leg underwent a traumatic left knee disarticulation, which is an amputation done between bone surfaces, rather than by cutting through bone. Solorio also underwent two more surgeries, both revision surgeries to his left leg, above the knee. In addition, he required an emergency splenectomy due to lacerations to the spleen, as the ruptured spleen was flooding his abdominal cavity with blood, so the spleen had to be removed.

Ultimately, Solorio underwent nine surgeries over the course of almost three months at the hospital, before being discharged home with no physical therapy or rehabilitation. He then received a mechanical prosthetic. However, he claimed it ill-fitting, as it was too short and the socket did not fit.

As Solorio was a physical laborer, he will not be able to return to work.

Thus, Solorio sought recovery of future medical costs, and damages for his past and future pain and suffering.

RESULT The jury found that Gunnar Ayala was an employee/agent of Nissan and that Gunnar Ayala was in the course and scope of his employment/agency when he harmed Solorio. The jury also determined that Solorio's damages totaled $46 million.

FAUSTINO TORRES SOLORIO	$2,000,000 future medical cost $6,000,000 past pain and suffering $38,000,000 future pain and suffering $46,000,000
TRIAL DETAILS	Trial Length: 14 days Trial Deliberations: 3 hours Jury Vote: 12-0 as to all questions and damages
PLAINTIFF EXPERT(S)	**Bob Caldwell**, high speed accidents, Denver, CO **Carol R. Hyland, M.A.**, life care planning, Lafayette, CA **John W. Michael, M.Ed., C.P.O.**, prosthetics, Chicago, IL **Thomas A. Owings**, automotive, Pinetop-Lakeside, AZ (industry standards and practices, standard of care, dealership operation, factory/dealership relations) **Ted Vavoulis, M.S.**, economics, Los Angeles, CA **Lester M. Zackler, M.D.**, neuropsychology, Sherman Oaks, CA
DEFENSE EXPERT(S)	**Rick A. Chavez, C.P.O.**, prosthetics, Northridge, CA **Rhonda S. Renteria, R.N.**, life care planning, Anaheim, CA **Stephanie R. Rizzardi, M.B.A.**, economics, San Marino, CA **Kendall S. Wagner, M.D.**, orthopedic surgery, Yorba Linda, CA

POST-TRIAL The Nissan entities ultimately agreed to settle confidentially post-trial. The Ayalas and L.A.G.D.J. also agreed to a separate, confidential, post-trial settlement.

EDITOR'S NOTE This report is based on information that was provided by plaintiff's counsel, and defense counsel for the Ayalas and L.A.G.D.J. Defense counsel for the Nissan entities did not respond to the reporter's phone calls.

–Priya Idiculla

FORTY

INDUSTRY: REAL ESTATE

PREMISES LIABILITY

Dangerous Condition

Partygoer fell off of roof, sustained paralyzing injury

VERDICT	**$43,742,400**
ACTUAL	**$26,245,440**
CASE	Alexander Tirpack v. 125 North10 LLC, No. 13824/12
COURT	Kings Supreme, NY
JUDGE	Dawn M. Jimenez-Salta
DATE	4/28/2016
PLAINTIFF ATTORNEY(S)	**Alan M. Shapey**, Lipsig, Shapey, Manus & Moverman, P.C., New York, NY
DEFENSE ATTORNEY(S)	**John L.A. Lyddane**, Martin Clearwater & Bell LLP, New York, NY

FACTS & ALLEGATIONS During the evening of Sept. 25, 2010, plaintiff Alexander Tirpack, 26, a bartender, attended a party that was conducted on the roof of a residential building that was located at 125 N. 10th St., in the Williamsburg section of Brooklyn. The party was hosted by one of the building's tenants.

During the course of the evening, Tirpack requested use of the host's restroom. Tirpack indicated that he had to urinate. The host denied Tirpack's request, and he suggested that Tirpack could urinate in an unoccupied area of the roof. The host provided a plastic container. Tirpack accepted the container, and he ventured to the edge of the building's roof, which was surrounded by a 42-inch-high parapet. Tirpack mistakenly believed that the parapet marked the junction of the building's roof and a neighboring building's roof. The roofs were not connected. Tirpack climbed onto the parapet, fell off of the structure, plummeted a distance of 70 feet, and landed in an alley. He sustained injuries of an ankle, his back, his face, his neck, a thigh and a wrist.

Tirpack sued the owner and developer of the building that was the site of the party, 125 North 10, LLC. Tirpack alleged that 125 North 10 negligently created a dangerous condition that caused the accident.

Tirpack's counsel noted that the building's roof had received a zoning designation that permitted recreational use. He contended that the New York City Building Code specifies that such roofs must be protected by a 10-foot-tall fence. He noted that the roof housed cabanas that had been sold to tenants of the building, and he suggested that 125 North 10 prioritized preservation of the cabanas' views. Tirpack's expert architect opined that standard practice required construction of a 10-foot-tall fence. Alternatively, Tirpack's counsel contended that the roof's recreational use should have prompted construction of a restroom.

Defense counsel contended that the New York City Building Code separates active recreational uses and passive recreational uses. He claimed that the roof was not an active recreational site, and he contended that passive recreational sites do not require a fence.

Defense counsel also contended that the accident was a product of Tirpack having been intoxicated. The defense's expert toxicologist opined that Tirpack suffered intoxication that impaired his balance and judgment. In response, Tirpack's counsel contended that the accident was not a product of Tirpack's consumption of alcoholic beverages. He argued that the beverages merely produced Tirpack's need of urination.

INJURIES/DAMAGES *catheterization; fracture, C6; fracture, T7; fracture, T8; fracture, ankle; fracture, cervical; fracture, neck; fracture, vertebra; fracture, wrist; head; incontinence; laceration; paralysis; paraplegia*

Tirpack sustained fractures of his C6, T7 and T8 vertebrae, a fracture of his left,

nondominant arm's wrist, a crush-induced fracture of an ankle, and large lacerations of his head and a thigh.

Tirpack was placed in an ambulance, and he was transported to Bellevue Hospital Center, in Manhattan. He underwent two surgeries that addressed his spine. His hospitalization lasted 18 days, and it was immediately followed by a course of inpatient rehabilitation.

Tirpack suffers residual paraplegia that necessitates his use of a wheelchair. The condition also causes incontinence of the bladder and bowel, so Tirpack performs daily self-catheterizations. Tirpack can operate a car, but he claimed that the process is laborious. He also claimed that he had to move to a residence that could undergo modifications that would accommodate his disabilities.

Tirpack claimed that his disabilities will not permit his retention of any job that cannot be performed in his home. He claimed that he was an aspiring journalist, but that his disabilities prevent his pursuit of that career.

Tirpack also claimed that he requires periodic replacement of his wheelchair, that he will require a specialized vehicle that can accommodate his wheelchair, and that he will require fusion of portions of his spine.

Tirpack sought recovery of a total of $41 million for past and future medical expenses, past and future loss of earnings, and past and future pain and suffering.

Defense counsel contended that Tirpack's disabilities will not impair Tirpack's earnings. He contended that Tirpack possesses a good education.

RESULT The jury found that each party was liable for the accident. The defendant was assigned 60 percent of the liability, and Tirpack was assigned 40 percent of the liability. The jury decided that a restroom should have been constructed on the roof, and it also decided that the roof should have been protected by a fence.

The jury determined that Tirpack's damages totaled $43,742,400, but the comparative-negligence reduction produced a net recovery of $26,245,440.

ALEXANDER TIRPACK
$150,000 past medical cost
$10,000,000 future medical cost
$92,400 past lost earnings
$2,500,000 past pain and suffering
$30,000,000 future pain and suffering
$1,000,000 future impairment of earnings
$43,742,400

DEMAND $15,000,000
OFFER $4,500,000

INSURER(S) **Greater New York Mutual Insurance Co.** primary insurer
Ace Group of Cos. excess

TRIAL DETAILS Trial Length: 7 weeks
Trial Deliberations: 8 hours
Jury Vote: 6-0
Jury Composition: 2 male, 4 female

PLAINTIFF EXPERT(S)
Joseph Carfi, M.D., life care planning, New Hyde Park, NY
Jeffrey Kaplan, M.D., orthopedic surgery, New York, NY
Harry Meltzer, architecture, Great Neck, NY
Ronald E. Missun, Ph.D., economics, Louisville, KY
Jacquelyn Vega Velez, vocational rehabilitation, Louisville, KY

DEFENSE EXPERT(S)
James P. Colgate, A.I.A., land use, New York, NY
Fred Goldman, Ph.D., economics, New York, NY
Lewis Nelson, M.D., toxicology, New York, NY
Joseph Pessalano, vocational rehabilitation, Garden City, NY

POST-TRIAL Justice Dawn Jimenez-Salta denied defense counsel's motion to set aside the jury's finding of liability.

EDITOR'S NOTE This report is based on information that was provided by plaintiff's and defense counsel. Additional information was gleaned from court documents.

–Jack Deming

FORTY-TWO

INDUSTRY: SERVICE

DRAM SHOP

Hotel/Restaurant

Restaurant served alcohol before accident, plaintiff claimed

VERDICT **$41,956,473.73**
ACTUAL **$25,173,884**

CASE Patrick Osmond v. Neighborhood Restaurant Partners Florida, LLC, doing business as Applebee's Neighborhood Bar & Grill, a foreign limited liability company, Fallon Greenwald, an individual and Joseph Raub, an individual, No. CA-13-2125
COURT Hernando County Circuit Court, 5th, FL
JUDGE Richard Tombrink, Jr.
DATE 4/22/2016

PLAINTIFF ATTORNEY(S)
Shaun M. Cummings, Florin | Roebig, P.A., Palm Harbor, FL
Wil H. Florin, Florin | Roebig, P.A., Palm Harbor, FL
Frank Miller, Caglionone & Miller, Brooksville, FL
Thomas D. Roebig, Jr., Florin | Roebig, P.A., Palm Harbor, FL

DEFENSE ATTORNEY(S)
Laura H. Compton, Garrison, Yount, Forte, & Mulcahy LLC, Tampa, FL (Neighborhood Restaurant Partners Florida, LLC)
Terry Ford, Banker Lopez Gassler P.A., Tampa, FL (Joseph Raub)
Travis L. Garrison, Garrison, Yount, Forte & Mulcahy, L.L.C., Tampa, FL (Neighborhood Restaurant Partners Florida, LLC)
Kory J. Ickler, Garrison, Yount, Forte, & Mulcahy LLC, Tampa, FL (Neighborhood Restaurant Partners Florida, LLC)
Michael Reed, Wicker Smith O'Hara McCoy & Ford P.A., Tampa, FL (Fallon Greenwald)
Brandon R. Scheele, Banker Lopez Gassler P.A., Tampa, FL (Joseph Raub)
Scott P. Yount, Garrison, Yount, Forte, & Mulcahy LLC, Tampa, FL (Neighborhood Restaurant Partners Florida, LLC)

FACTS & ALLEGATIONS On the evening of Oct. 1, 2012, plaintiff Patrick Osmond, 20, and his friend Joseph Raub, 19, along with two others, patronized Applebee's Neighborhood Bar & Grill located at 20090 Cortez Boulevard in Brooksville. Osmond and his friends patronized the restaurant until they left the establishment at 11:45 p.m. Osmond climbed into the back of Raub's pickup truck while his two other friends got inside the vehicle. Raub proceeded to drive the vehicle. Raub ran a red light, lost control of the pickup, and slammed into a palm tree in the road's median at the intersection of Broad Street

and Ponce De Leon Boulevard in Brooksville. Osmond was propelled from the truck's bed and sustained incomplete quadriplegia.

Osmond sued Neighborhood Restaurant Partners Florida, LLC, doing business as Applebee's Neighborhood Bar & Grill, a foreign limited liability company, Fallon Greenwald, an Applebee's employee, and Raub.

Osmond's counsel alleged Greenwald served or furnished both he and Raub alcohol. Osmond alleged they were served a pitcher of beer, with the furnishing of the beverage causing Oswald and Raub then to become intoxicated. Further, Osmond's counsel alleged that Greenwald knew at the time of selling and furnishing alcoholic to him and his three friends that they were all below the legal drinking age of 21 because they were not asked for an I.D. by the bartender. In addition, Osmond's counsel alleged Raub lost control of his vehicle, due to his alcohol-induced impairment, and smashed the vehicle into a tree. Counsel maintained that it was foreseeable that ingesting alcoholic beverages would intoxicate Raub and that Raub would thereafter operate a motor vehicle while intoxicated, which would pose a danger to himself or others. Moreover, Osmond's counsel alleged that Raub drove while voluntarily intoxicated and acted in willful, wanton, and total disregard of the rights, interests, and safety of Osmond, and that the alcohol Osmond consumed caused him to become intoxicated, and make the poor decision to ride in the bed of Raub's pickup truck when they left Applebee's. Osmond's toxicology expert opined that Raub's blood-alcohol level was approximately .041 percent at the time of the crash event, and that at those levels driver impairment can be present.

Defense counsel for Raub denied Raub was intoxicated. Raub was not arrested or charged with DUI after the accident. Defense counsel for Greenwald claimed Osmond presented Greenwald with what she thought was a valid I.D. that indicated he was above age 21. The I.D. was later determined to be fake. Raub's toxicology expert opined that Raub consumed the equivalent of a glass of beer and that would not have had any role in the accident. He opined that Raub's prior drinking of vodka at Osmond's home would have been the cause of any impairment.

Defense counsel for Neighborhood Restaurant Partners Florida denied willfully serving or furnishing alcoholic beverages to persons under age 21, including Osmond and Raub. Neighborhood Restaurant argued that Osmond and Raub drank vodka from a 1.75-liter bottle at Osmond's residence on the afternoon of the accident. The defense argued that Osmond admitted to being intoxicated from vodka when he and his friends arrived at Applebee's, that Osmond ordered a pitcher of beer after showing his I.D., and that Raub ordered beer but Greenwald denied him service. Defense counsel argued that Raub apparently snuck in a few sips of beer from Osmond's glass. Neighborhood Restaurant's toxicology expert opined that Raub was not impaired, given the low levels of blood-alcohol content found after the scene of the crash. He opined that the on-site traffic deputy saw no signs of impairment in Raub at the scene of the crash. He also noted that Raub was not arrested and charged with DUI after the accident. In addition, defense counsel argued comparative negligence, contending that Osmond should not have climbed into the back of the pickup truck. The defense further argued that any alcohol consumed by Raub inside the restaurant was snuck by Raub and that this alcohol was so minimal that it played no role in Raub's state of intoxication. Neighborhood Restaurant's toxicology expert opined that, at most, Raub consumed a glass of beer, and that he could never be impaired by drinking that amount of alcohol. The defense also argued that Raub was at fault for Osmond's injuries, due to his negligent driving behavior.

Prior to trial, Osmond dismissed Greenwald with prejudice. The trial proceeded only against Neighborhood Restaurant and Raub.

INJURIES/DAMAGES *crush injury, spine; fracture, cervical; quadriplegia; vertebral subluxation*

Osmond was taken by helicopter to a local emergency room where he was diagnosed with a C5-6 subluxation and a T-5 fracture, which damaged his spinal cord and caused incomplete quadriplegia. Emergency surgery was performed to save Osmond's life. He was hospitalized for 10 weeks.

Osmond was then transferred to Shands Hospital where he underwent 45 days of rehabilitation. Osmond is paralyzed from the chest down, leaving him with limited strength and dexterity in his arms and no movement in his legs. He requires daily physical and occupational therapy. Osmond will require a home and vehicle that can accommodate his wheelchair.

Osmond sought to recover damages for past/future medicals, past/future loss of earnings, and past/future pain and suffering.

Osmond's counsel suggested the jury award $55 million in non-economic damages and more than $26 million in economic damages.

The defense's economist opined that Osmond's life-care plan was not accurately calculated and therefore was inflated in its economic conclusions.

RESULT The jury found Neighborhood Restaurant Partners Florida, LLC, doing business as Applebee's Neighborhood Bar & Grill 20 percent liable, Patrick Osmond 40 percent, and Joseph Raub 40 percent.

The jury determined that Osmond's damages totaled $41,956,473.73. Because of Osmond's comparative negligence, the award was reduced to $25,173,884. Because of a high/low stipulation prior to the verdict between Neighborhood Restaurant and Osmond, Applebee's liability was reduced to $4.3 million.

PATRICK OSMOND	$436,474 past medical cost $15,000,000 future medical cost $20,000 past lost earnings $1,500,000 future lost earnings $5,000,000 past pain and suffering $20,000,000 future pain and suffering $41,956,474
INSURER(S)	**USAA** for Joseph Raub ($25,000 policy limit.) **Liberty Mutual (excess)** for Neighborhood Restaurant Partners Florida, LLC
TRIAL DETAILS	Trial Length: 2 weeks Trial Deliberations: 6.5 hours Jury Composition: 2 male, 4 female
PLAINTIFF EXPERT(S)	**Santo Steven BiFulco, M.D.**, physical medicine, Tampa, FL **Daniel E. Buffington, Pharm.D., M.B.A.**, toxicology, Tampa, FL **Joyce Eastridge**, economics, Tampa, FL **George D. Giannakopoulos, M.D.**, neurosurgery, Brooksville, FL (treating doctor)
DEFENSE EXPERT(S)	**Ronald R. Bell**, toxicology, Largo, FL **Finnie B. Cook, Ph.D.**, economics, Tampa, FL **Antony Dalton, P.E.**, accident reconstruction, Tampa, FL **Bruce A. Goldberger, Ph.D.**, alcohol toxicology, Gainesville, FL **John H. Russell, Ph.D.**, vocational rehabilitation, Melbourne, FL

EDITOR'S NOTE This report is based on information that was provided by plaintiff's counsel and defense counsel for Neighborhood Restaurant Partners Florida, LLC, doing business as Applebee's Neighborhood Bar & Grill, a foreign limited liability company, Fallon Greenwald, an individual and Joseph Raub, an individual.

–Gary Raynaldo

FORTY-FIVE

INDUSTRY: SERVICE

DEFAMATION

Hedge fund principals claimed defamation by investor reports

VERDICT **$40,407,446**

CASE NuWave Investment Corp., Troy W. Buckner and John S. Ryan v. First Advantage Litigation Consulting LLC (f/k/a BackTrack Reports Inc.), Hyman Beck & Co. Inc., Alexander Hyman and Richard DeFalco, No. MOR-L-0411-06
COURT Morris County Superior Court, NJ
JUDGE W. Hunt Dumont
DATE 9/22/2016

PLAINTIFF ATTORNEY(S) **John F. Olsen**, The Law Office of John F. Olsen, LLC, Montclair, NJ
Thomas J. Smith, K&L Gates LLP, Pittsburgh, PA

DEFENSE ATTORNEY(S) **Daniel Mateo**, Reed Smith LLP, Princeton, NJ (First Advantage Litigation Consulting LLC)
Mark S. Melodia, Reed Smith LLP, Princeton, NJ (First Advantage Litigation Consulting LLC)
Gregory Noonan, Walfish & Noonan LLC, Norristown, PA (Richard DeFalco)
None reported (Hyman Beck & Co. Inc.)

FACTS & ALLEGATIONS Between 2002 and 2006, plaintiffs Troy Buckner and John Ryan were principals of Parsippany-based commodities investment management firm NuWave Investment Corp. During this period, BackTrack Reports Inc., now known as First Advantage Litigation Consulting LLC, published several informational background reports purchased by potential NuWave investors.

The reports included excerpts from interviews with the principals of Buckner and Ryan's former employer Hyman Beck & Co., in which they accused the two of incompetence, dishonesty, and theft. Buckner and Ryan claimed damage to their reputation.

Buckner, Ryan, and NuWave sued First Advantage Litigation Consulting, alleging that 22 of the statements made by the Hyman Beck principals and published by the defendant were false and defamatory.

The matter initially went to trial in May 2011. (Hyman Beck & Co. and its principals, Alexander Hyman and Richard DeFalco, were initially named as defendants but were dismissed prior to trial due to expiration of the statute of limitations.) At the conclusion of the five-week trial, First Advantage was found 37 percent liable for defamation made in 13 published statements (Hyman Beck and its principals, all of whom had been dismissed, were found liable for the remaining 63 percent). The plaintiffs were awarded $250,000 in punitive damages, $1.2 million in presumed (or "nominal") damages, and $1.4 million in actual, or compensatory, damages.

Both parties appealed. Due to changes in case law following the verdict, the awards for presumed damages (which allows recovery of nominal damages, without proof, for intangible, reputational harm) and actual damages were thrown out in appellate court under the New Jersey Supreme Court's recent case of W.J.A. v. D.A., 210 N.J. 229 (2012), which held that both categories of damages -- nominal and actual -- could not be awarded in the same trial. The appellate court remanded the case for a new trial to determine damages only, with the prior liability determination upheld.

INJURIES/DAMAGES Buckner and Ryan, individually and on behalf of NuWave Investment, argued that the false statements made about their character damaged their professional reputations. They argued that they suffered monetary damages related to lost potential management and incentive fees and other expenditures NuWave was required to make as a result of the publication by BackTrack of the defamatory statements. The plaintiffs claimed more than $2 million in special damages.

The plaintiffs' called a former NuWave investor to provide testimony on their behalf. The investor testified that he had delayed and reduced the size of his investment with the firm after reading a report published by First Advantage.

First Advantage disputed the plaintiffs' claimed damages, arguing there was no evidence to support that the individual plaintiffs or NuWave had sustained monetary damages from its publication of the 13 defamatory statements made by Hyman and DeFalco.

The defense's finance expert argued that there were many reasons investors may have chosen not to invest with NuWave and that there was no proof that the reports published by First Advantage caused investors not to invest with the firm.

RESULT The jury awarded NuWave $2,057,446 in actual special damages (damages for factually proved loss) and $12.3 million in actual general damages (damages based on intangible loss inferrable from evidence). It awarded Buckner $18.5 million in actual general damages and awarded Ryan $6.75 million in actual general damages. Punitive damages of $800,000 were awarded to the plaintiffs.

TROY W. BUCKNER $18,500,000 general damages

NUWAVE INVESTMENT CORP.
$2,057,446 special damages
$12,300,000 general damages
$800,000 punitive damages
$15,157,446

JOHN S. RYAN $6,750,000 general damages

TRIAL DETAILS Trial Length: 10 days
Trial Deliberations: 5 hours
Jury Vote: unanimous on all questions but punitive damages, which was 7 to 1
Jury Composition: six female, two male

PLAINTIFF EXPERT(S) None reported

DEFENSE EXPERT(S) **Amy Hirsch**, investment banking, Clifton, NJ

POST-TRIAL First Advantage Litigation Consulting's motions for remittur, a new trial, and judgment notwithstanding the verdict are pending. Counsel argued that, as First Advantage was found 37 percent liable in the initial trial, the damages awards should be reduced accordingly.

Counsel for NuWave is moving to apply pre-judgment and post-judgment interest to the total award. These motions are opposed by defense counsel.

EDITOR'S NOTE This report is based on information that was provided by plaintiffs' counsel and on court documents. Defense counsel did not respond to the reporter's phone calls.

–Max Robinson

FIFTY

INDUSTRY: SERVICE

MOTOR VEHICLE

Bicycle

Bicyclist struck by valet driver allegedly taking short cut

VERDICT **$38,259,238**

CASE Thyce W. Colyn and Amy J. Colyn, individually and as husband and wife v. Standard Parking Corporation, a foreign corporation; Taylor Warn, individually; and Unknown John Does, No. 15-2-16945-9 SEA
COURT King County Superior Court, WA
JUDGE Mary Roberts
DATE 12/15/2016

PLAINTIFF ATTORNEY(S) **Patricia Anderson**, Luvera Law Firm, Seattle, WA
David M. Beninger, Luvera Law Firm, Seattle, WA

DEFENSE ATTORNEY(S) **Ramona N. Hunter**, Andrews Skinner, P.S., Seattle, WA
Stephen G. Skinner, Andrews Skinner, P.S., Seattle, WA

FACTS & ALLEGATIONS On Oct. 8, 2012, plaintiff Thyce Colyn, 47, a traffic signal electrician for the Seattle Department of Transportation, was riding his bicycle on Eighth Avenue near the Washington State Convention Center in Seattle when he was struck by the front passenger side of a car driven by Taylor Warn. Colyn claimed injuries of the hip and shoulder and a traumatic brain injury. Warn was working for Standard Parking Corp. as a valet parker at the time of the accident.

Colyn sued Warn and Standard Parking for his negligent operation of a motor vehicle.

Plaintiff's counsel argued that Warn illegally took a short cut and crossed through two lanes of traffic without yielding when he struck Colyn.

Plaintiff's counsel argued that Standard Parking was aware of this practice by its valet parkers and had complaints about it, but did nothing to end it. Counsel argued that this practice was a way for valet parkers to return cars to their owners quickly, as it avoided city streets and traffic lights.

Defense counsel argued that the route was not illegal, and Colyn was comparatively negligent for the accident.

INJURIES/DAMAGES *fracture, hip; hip; loss of consortium; rotator cuff, injury (tear); shoulder; traumatic brain injury*

Colyn was taken by ambulance to Harborview Medical Center in Seattle. He sustained a shattered right hip; a torn rotator cuff of the right dominant shoulder; and a traumatic brain injury. He remained in the hospital for 10 days and underwent three surgeries at that time to repair his hip.

Colyn is wheelchair dependent. He can walk with crutches for about 500 feet and claims to have pain while doing so. He will need surgery of his shoulder and hips. With a successful hip replacement, the prognosis is that he will be able to walk with crutches and with pain for 500 yards. Colyn also sustained visual spatial learning impairment.

Colyn was unable to work for one year. He is able to work now on a modified schedule of four hours per day. He claims to have continued sharp, chronic pain and walks distances with the use of arm crutches.

Colyn sought recovery for past and future economic damages; and past and future pain and suffering.

Wife Amy Colyn claimed loss of consortium.

Defense counsel argued that Colyn's injuries were not serious and that he needed to work harder to return to full mobility. They also disputed the costs associated with the treatment of his injuries.

RESULT The jury found the defendants' negligence a proximate cause of injury and awarded $38,259,238.

AMY COLYN	$2,000,000 past loss of consortium $9,000,000 future loss of consortium $11,000,000
THYCE COLYN	$312,469 past lost earnings $6,946,769 future lost earnings $4,000,000 past pain and suffering $16,000,000 future pain and suffering $27,259,238
DEMAND	$19,000,000
OFFER	$2,100,000
INSURER(S)	**AIG** for both defendants.
TRIAL DETAILS	Trial Length: 10 days Trial Deliberations: 2.5 days Jury Vote: 12-0 Jury Composition: 4 male, 8 female
PLAINTIFF EXPERT(S)	**Anthony J. Choppa, M.Ed.**, vocational rehabilitation, Bothell, WA **Christina P. Tapia, Ph.D.**, personal injury (economics), Seattle, WA
DEFENSE EXPERT(S)	**Rebecca Bellerive, R.N.**, life care planning, Seattle, WA **Kevin Berry, M.D.**, physical medicine, Issaquah, WA **Alan Breen, M.D.**, neuropsychology, Seattle, WA **John Hunter**, accident reconstruction, Seattle, WA **Stanley A. Kopp, M.D.**, orthopedic surgery, Seattle, WA **Roman Kutsy, M.D.**, neurology, Everett, WA **William Partin, C.P.A.**, economics, Bellevue, WA **Gerald M. Rosen, Ph.D.**, psychology/counseling, Seattle, WA **Cris Simmons, M.D.**, dentistry/odontology, Seattle, WA

POST-TRIAL Post-trial motions for a new trial and remittitur were denied.

EDITOR'S NOTE This report is based on information provided by plaintiff's counsel. Defense counsel did not respond to the reporter's phone calls.

–Christine Barcia

FIFTY-ONE

INDUSTRY: RETAIL

MOTOR VEHICLE

Wrongful Death

Suit: Employer's flawed safety protocols contributed to crash

VERDICT	**$37,945,000**
ACTUAL	**$9,000,000**
CASE	Irasema Hinostroza Garcia, as next friend of Jazmin Elizabeth Galindo Hinostroza and Yatzari Nohemi Galindo Hinostroza, for the wrongful death of Manuel Galindo Camacho under the Texas Wrongful Death and Survival Statutes v. O'Reilly Auto Enterprises, LLC d/b/a O'Reilly Auto Parts, and David Shoots, No. DC-15-02606
COURT	Dallas County District Court, 116th, TX
JUDGE	Tonya Parker
DATE	7/19/2016
PLAINTIFF ATTORNEY(S)	**Philip G. Bernal**, Ketterman Rowland & Westlund, San Antonio, TX (Estate of Manuel Galindo-Camacho, Neida Galindo, Sophia Galindo) **Kevin W. Liles**, Liles Harris White PLLC, Corpus Christi, TX (Irasema Hinostroza Garcia, Jazmin Elizabeth Galindo Hinostroza, Yatzari Nohemi Galindo Hinostroza) **Stuart R. White**, Liles Harris White PLLC, Corpus Christi, TX (Irasema Hinostroza Garcia, Jazmin Elizabeth Galindo Hinostroza, Yatzari Nohemi Galindo Hinostroza)
DEFENSE ATTORNEY(S)	**Paul A. Bezney**, Adkerson, Hauder & Bezney P.C., Dallas, TX **J. Kevin Kindred**, Adkerson, Hauder & Bezney P.C., Dallas, TX

FACTS & ALLEGATIONS On Feb. 28, 2015, plaintiffs' decedent Manuel Galindo-Camacho, 42, a drywall laborer, was driving a minivan in the left eastbound lane of Highway 29 outside Burnet. It was about 6 a.m., drizzling and below freezing, and the roads were icy. Several miles to the east, David Shoots was traveling westbound in an 18-wheeler, transporting hazardous materials. He allegedly crossed a railroad track at 51 mph without stopping and a quarter mile later lost control on a curve while traveling 57 to 59 mph. The 18-wheeler hit a guardrail and jackknifed. The trailer came to rest with its lights out and blocking Galindo-Camacho's lane. Galindo-Camacho collided with the unlit trailer and was killed.

Galindo-Camacho's daughters sued Shoots and Shoots' employer, O'Reilly Auto Enterprises LLC, operating as O'Reilly Auto Parts, with whom Shoots was in the course and scope of his employment at the time of the accident. The suit alleged that Shoots' driving was unsafe and that O'Reilly failed to take Shoots off the road months before the crash, due to an unsafe driving record. The suit alleged negligence and gross negligence. The decedent's widow, mother and estate later joined the suit.

Plaintiffs' counsel argued that Shoots was involved in prior unsafe-driving incidents during several years of employment with O'Reilly, which should have disqualified him from driving. Although O'Reilly had an internal driver review points system that was intended to keep unsafe drivers off the road, plaintiffs' counsel maintained that the points system was flawed and failed to identify problem drivers, such as Shoots.

Plaintiffs' trucking industry expert opined that O'Reilly did not enforce its policies. This expert also mentioned that Shoots had a conviction for driving under the influence. However, this statement reportedly violated a defense motion in limine and, following objection by defense counsel, the court

instructed the jury to disregard it. A mistrial was also requested by the defense, but the motion was denied. Plaintiffs' counsel contended that the testimony in question had been solicited by defense counsel.

The plaintiffs alleged that Shoots lost control of the truck because he was driving too fast for the existing conditions and using his cell phone. Accident reconstruction experts for both sides opined that Shoots was traveling 57 to 59 mph when he lost control, with plaintiffs' accident reconstruction expert stating that Galindo-Camacho was going 35 to 46 mph at the time of the accident.

Shoots was also negligent, the plaintiffs argued, for leaving his unlit trailer blocking lanes of traffic without putting out warning cones or triangles to warn approaching motorists of the disabled vehicle in the roadway. Plaintiffs' counsel introduced police dash camera video showing the dark, low-visibility conditions.

Plaintiffs' counsel also asserted that Shoots violated federal regulations by not stopping at the railroad crossing. Had he stopped, plaintiffs' counsel argued, he would not have been going as fast around the curve and would not have lost control.

The defense did not dispute that Shoots' negligence was a proximate cause of the accident, but it argued that Galindo-Camacho was also negligent in driving too fast for the existing conditions and not keeping a proper lookout. Defense counsel also argued that Galindo-Camacho should have been able to stop in time. The defense asserted that, because of reflective tape on the disabled trailer, Galindo-Camacho should have seen the trailer from 1,200 feet away. Also, defense counsel noted that several drivers arriving on the scene later were able to stop and avoid any collision. In response, plaintiffs' counsel maintained that Shoots' loss of control resulted in a sudden emergency for Galindo-Camacho.

O'Reilly argued that it was a safe company and that it met and exceeded all applicable motor carrier regulations. Defense counsel introduced a company snapshot from the Federal Motor Carrier Safety Administration's website to support this argument. The defense also noted that most of Shoots' prior incidents took place on O'Reilly property.

The defense further argued that weather conditions caused the accident. Police dash-camera video showed the investigating officer pulling up to the scene and losing control of her car on the ice. The video also showed the officer slipping on the ice when she exited her vehicle.

The defense's accident reconstruction expert opined that, because the air bag control module in Galindo-Camacho's vehicle lost power in the accident, its data was incomplete. Therefore, the defense expert asserted that the calculations of the plaintiffs' accident reconstructionist were faulty and likely underestimated the decedent's speed. He agreed, though, that it was possible the decedent's speed was as low as 46 mph.

Shoots did not attend trial. He testified in his deposition that he stopped at the railroad track and that he was going 45 mph when he lost control. Defense counsel reportedly acknowledged at trial that this testimony was not true.

INJURIES/DAMAGES *death*

Galindo-Camacho was killed instantly. He is survived by his wife, two teenage daughters, and his mother, all of whom sought damages for past and future pecuniary loss, loss of companionship and society, and mental anguish.

The decedent's wife was plaintiff Neida Galindo, 48, a housekeeping manager. His daughters were plaintiffs Jazmin Elizabeth Galindo Hinostroza, about 17, a student, and plaintiff Yatzari Nohemi Galindo Hinostroza, about 14, also a student. They lived in Fredericksburg. The biological mother was initially a plaintiff as their next friend. However, by the time of trial, because Jazmin was 18 and could serve as her sister's next friend, their mother was no longer in the case. The decedent's mother, plaintiff Sophia Galindo, 71, retired, lived in Mexico.

The estate sought damages for the decedent's mental anguish, which was limited to his anticipation of the impending accident.

RESULT The jury found negligence and gross negligence on the part of the defendants, but no negligence on the part of Galindo-Camacho. The jury attributed 60-percent liability to O'Reilly and 40-percent to Shoots. The jury awarded $37,945,000. However, the verdict was subject to a high/low agreement of $9 million/$3 million, which reduced the jury's award to $9 million.

NEIDA GALINDO	$500,000 past loss of society companionship $4,000,000 future loss of society companionship $60,000 past loss of pecuniary contribution $1,800,000 future loss of pecuniary contribution $1,000,000 past mental anguish $3,000,000 future mental anguish $10,360,000
SOPHIA GALINDO	$250,000 past loss of society companionship $1,000,000 future loss of society companionship $15,000 past loss of pecuniary contribution $600,000 future loss of pecuniary contribution $1,000,000 past mental anguish $2,000,000 future mental anguish $4,865,000
ESTATE OF MANUEL GALINDO-CAMACHO	$2,000,000 past mental anguish
JAZMIN ELIZABETH GALINDO HINOSTROZA	$500,000 past loss of society companionship $3,000,000 future loss of society companionship $60,000 past loss of pecuniary contribution $1,800,000 future loss of pecuniary contribution $1,000,000 past mental anguish $4,000,000 future mental anguish $10,360,000
YATZARI GALINDO HINOSTROZA	$500,000 past loss of society companionship $3,000,000 future loss of society companionship $60,000 past loss of pecuniary contribution $1,800,000 future loss of pecuniary contribution $1,000,000 past mental anguish $4,000,000 future mental anguish $10,360,000
DEMAND	$17,000,000(per defense counsel); confidential (per plaintiffs' counsel)
OFFER	$750,000 (per defense counsel); confidential (per plaintiffs' counsel)
INSURER(S)	**Safety National Casualty Corp. (excess)** for both defendants
TRIAL DETAILS	Trial Length: 6 days Trial Deliberations: 5 hours Jury Composition: 4 male, 8 female
PLAINTIFF EXPERT(S)	**Matthew Meyerhoff,** trucking industry, Baltic, SD **Michael Reyes, Ph.D.,** accident reconstruction, San Antonio, TX
DEFENSE EXPERT(S)	**James Evans, P.E.,** accident reconstruction, College Station, TX

EDITOR'S NOTE This report is based on information that was provided by plaintiffs' and defense counsel.

–John Schneider

FIFTY-FIVE

INDUSTRY: MANUFACTURING

MOTOR VEHICLE

Wrongful Death

Van driver negligent in fatal collision, plaintiffs claimed

VERDICT	**$35,129,371**
CASE	Theresa L. Swenson individually and as Special Administrator of the Estates of Aaron M. Swenson; Baby Doe A; Praetorian Insurance Co. & Joseph LeSanche v. Adam Troy, Hussmann Refrigeration; Hussmann Corp., No. 2012-L-006440

COURT Cook County Circuit Court, IL
JUDGE Thomas J. Lipscomb
DATE 4/18/2016

PLAINTIFF ATTORNEY(S) **Michael B. Barrett**, Barrett & Sramek, Palos Heights, IL (Joseph LeSanche)
Colin H. Dunn, Clifford Law Offices PC, Chicago, IL (Estate of Aaron M. Swenson, Estate of Baby Doe A, Theresa L. Swenson)
Kevin P. Durkin, Clifford Law Offices PC, Chicago, IL (Estate of Aaron M. Swenson, Estate of Baby Doe A, Theresa L. Swenson)

DEFENSE ATTORNEY(S) **Jeffrey H. Lipe**, Lipe Lyons Murphy Nahrstadt & Pontikis Ltd., Chicago, IL (Adam Troy, Hussmann Corp., Hussmann Refrigeration)
Kelly V. McHale, Cray Huber Horstman Heil & VanAusdal LLC, Chicago, IL (Adam Troy, Hussmann Corp., Hussmann Refrigeration)
John V. Schrock, Sabuco, Beck, Hansen, Massino, Shrock and Pollack, P.C., Joliet, IL (Adam Troy)
Jordan M. Tank, Lipe Lyons Murphy Nahrstadt & Pontikis Ltd., Chicago, IL (Adam Troy, Hussmann Corp., Hussmann Refrigeration)

FACTS & ALLEGATIONS On May 22, 2012, plaintiffs' decedent Aaron Swenson, 31, an insurance investigator, was driving a Dodge Avenger north on Interstate 294 near the Roosevelt Road exit in Hillside. Meanwhile, plaintiff Joseph LeSanche, 22, a student, was driving a Ford truck directly in front of Swenson's vehicle. The plaintiffs were involved in a five-car collision with a northbound van owned by Hussmann Corp. and driven by Hussmann employee Adam Troy. Aaron Swenson's wife, plaintiff Theresa Swenson, who was pregnant at the time of the collision, subsequently experienced a miscarriage of the one viable gestational sac she was carrying in her uterus. Aaron Swenson sustained severe blunt force trauma and other serious injuries, and despite first-responders' efforts, he was declared dead on arrival at a local emergency room.

Swenson, on behalf of her husband's estate and the estate of Baby Doe A, sued Troy and Hussmann, claiming negligence and willful and wanton conduct.

Plaintiffs' counsel claimed Swenson had stopped due to stopped traffic ahead of him in a construction zone when Troy, acting in his capacity as an employee of Hussmann, failed to keep a proper lookout or control his speed and collided with the rear of his car. LeSanche filed a separate action against Troy and Hussman, claiming negligence willful and wanton conduct.

In October 2012, approximately five months after suit was filed, Aaron Swenson's workers' compensation carrier, Praetorian Insurance Co., joined the action as a third-party intervenor.

Plaintiffs' counsel claimed a data recorder in the van showed Troy was doing 58 mph in a 45 mph construction zone, where the speed limit is ordinarily 55 mph. Plaintiffs' counsel maintained post-collision blood tests showed Troy had a sedative and a prescription painkiller in his system at the time of the collision, and alleged he did not have a script for prescription for the painkiller.

Troy and Hussmann stipulated that they negligently caused the death of Aaron Swenson and stipulated to causing some injuries to Joseph LeSanche. However, Troy and Hussmann did not stipulate negligence related to Baby Doe A's death. Defense counsel contended that Troy's conduct was not willful and wanton, and denied the plaintiffs were entitled to punitive damages.

Defense counsel asserted that Troy was not impaired at the time of the accident and denied that any alleged impairment was the proximate cause of the collision. Further, the defendants argued that on cross-examination, the plaintiffs' expert toxicologist failed to establish whether Troy's alleged impairment was a cause of the accident and argued that an Illinois State Trooper who supervised Troy after the accident had testified that Troy did not appear to have been impaired during the 15-hour period following the accident. During his deposition and at trial, Troy invoked the Fifth Amendment and was not called as an adverse witness at trial. Defense counsel alleged that approximately 15.5 hours after the accident, the Illinois State Police had illegally obtained and tested samples of Troy's urine and blood at a hospital without his consent or a warrant.

INJURIES/DAMAGES *ablation; bulging disc, lumbar; death; disc protrusion, lumbar; epidural injections; leg; lumbar facet injury; nerve damage/neuropathy; physical therapy; radiculopathy*

Swenson sustained severe blunt force trauma, which caused multiple displaced skull fractures and severed his spinal cord. A passerby who attempted to assist, as well as a registered nurse, testified Swenson was unconscious moments after the collision, had stopped breathing, and had no detectable heartbeat by the time first responders arrived. He was transported by ambulance to the emergency room, where he was declared dead on arrival.

Swenson is survived by his wife and an eight-year-old son from a previous relationship.

Estate's counsel maintained the emotional distress resulting from her husband's death caused Theresa Swenson, who was three weeks pregnant at the time of the collision, to experience a miscarriage one month after the collision. At the time of the accident, Theresa Swenson's ultrasound results revealed two gestational sacs in her uterus, but only one of the sacs was determined to be a viable fetus.

The Swenson's economics expert put Swenson's total past/future lost wages at $2,750,000.

Swenson sought $32,750,000 for past/future economic losses, loss of society, grief and sorrow.

LeSanche was taken by ambulance the hospital. He complained of pain that stemmed from his back and bilateral radiating pain that ran down his legs. He was released from the hospital that day. He was diagnosed with bulging and protruding discs in his lumbar spine, lumbar facet syndrome, and a chronic irritation of several lumbar nerve roots and radiculopathy of his legs.

LeSanche immediately came under the care of an orthopedic surgeon, who prescribed MRIs, and recommended a course of conservative treatments. The treatments administered included epidural injections, facet injections, and physical therapy, which was rendered two-to-three times per week over a period of eight weeks. LeSanche was referred to a pain management specialist when the conservative therapies failed to provide any permanent relief.

In or around November 2012, LeSanche began a course of radiofrequency ablation therapy, which he claims provides temporary pain relief. Since late 2012, LeSanche has undergone approximately three-to-four ablation procedures to each side of his body every two-to-four months. Since the accident, LeSanche has regularly taken a narcotic prescription pain medication to manage his pain.

LeSanche, a college student, contended that he could not obtain employment in either profession he wanted to pursue after college -- as an EMT or communication electronics technician. He claimed that the physical limitations caused by the accident preclude his performance of physical tasks that are required for either profession.

LeSanche's expert life care planner testified that the cost of his future treatments and would total approximately $2.2 million, an estimate which included the expense of a potential future spinal procedure, if ablation treatments failed.

LeSanche claimed he incurred past medical bills of $200,000.

LeSanche's treating pain management specialist opined that his injuries are permanent, that he is disabled by his injuries, and that his chronic nerve condition and need for medication resulted in emotional distress and depressive episodes.

The defense maintained Theresa Swenson's miscarriage occurred due to pre-existing medical conditions and that the emotional distress caused by the collision was not the proximate cause.

Defense counsel contended that Theresa Swenson had only learned that she was pregnant with twins four days before the accident, and that she and the decedent had tried to get pregnant using fertility treatments, for the two years prior to the accident.

Defense counsel alleged that two weeks after the accident, Theresa Swenson learned that one of two gestational sacs, Baby Doe A, had a heartbeat and was a viable pregnancy while the second sac was not a viable pregnancy.

The defense alleged that three and a half weeks after the accident, doctors noted that Swenson's pregnancy was compromised, and four weeks after the accident, doctors determined Swenson had miscarried Baby Doe A. Swenson underwent a dilation and curettage to remove Baby Doe A from her uterus. The defendants contended that 25 percent of all pregnancies result in a miscarriage and that Theresa Swenson's pre-existing risk factors, including genetic, polycystic ovarian syndrome, and the fact that she had become pregnant via intrauterine insemination, were most likely the cause of her miscarriage, rather than a miscarriage induced by the stress from learning of her husband's death. Further, the defense alleged that the plaintiffs' expert/treating fertility specialist opined that stress only "might or could have been a cause" of the miscarriage.

The defense's economics expert testified the plaintiffs' expert's opinion on the economic losses was faulty and excessive.

Defense counsel alleged that LeSanche exaggerated the extent of his injuries and alleged he only suffered a lumbar sprain. The defense argued that LeSanche was not required to undergo any inpatient overnight treatments, that his orthopedic surgeon stopped treating him approximately seven months after the accident, that his only treatment has been through the administration of narcotic pain medication, and that he would not require the extensive level of future treatments claimed by his life care planning expert.

RESULT The jury found the defendants were liable for Aaron Swenson's death, but not for any personal injuries against Theresa Swenson and also found the accident was not the proximate cause of her miscarriage.

The jury awarded Swenson's estate $22,729,371. The jury awarded LeSanche damages totalling $12.3 million.

Further, the jury awarded LeSanche $100,000 in punitive damages for Troy's willful and wanton conduct.

JOSEPH LESANCHE	$2,300,000 future medical cost $2,000,000 future lost earnings $3,000,000 future pain and suffering $4,000,000 future loss of normal life $1,000,000 future emotional distress $100,000 punitive damages $12,400,000
ESTATE OF AARON M. SWENSON	$2,729,371 loss of money, benefits, good and services $10,000,000 loss of society $10,000,000 grief and sorrow $22,729,371
DEMAND	$15,000,000 (for Swenson)
OFFER	$7,000,000 (for Swenson)
INSURER(S)	**Chubb Group** **Zurich Insurance Co.** **American Assurance**
TRIAL DETAILS	Trial Length: 2 weeks Trial Deliberations: 2.75 hours Jury Composition: 5 male, 7 female
PLAINTIFF EXPERT(S)	**Rebecca S. Busch, R.N.**, life care planning, Westmont, IL **Julie R. Favia, M.D.**, ob-gyn, Crystal Lake, IL (treating physician) **John M. Goebelbecker, P.E.**, accident reconstruction, Morton Grove, IL **Laurence A. Jacobs, M.D.**, fertility/infertility, Buffalo Grove, IL (treating physician) **Ebby Paul Jido, M.D.**, chronic pain, Oak Lawn, IL (treating physician) **Michael J. McCabe**, toxicology, Philadelphia, PA **Thomas M. Roney**, economics, Fort Worth, TX **Stan V. Smith, Ph.D.**, economics, Chicago, IL
DEFENSE EXPERT(S)	**Charles H. Breeden, Ph.D.**, economics, Milwaukee, WI **Leon M. Gussow, M.D.**, medical toxicology, Chicago, IL **Mark R. Hutchinson, M.D.**, orthopedic surgery, Chicago, IL **Gregory Utter, M.D.**, ob-gyn, Kalamazoo, MI

EDITOR'S NOTE This report is based on information that was provided by plaintiff's counsel and defense counsel.

–Jacqueline Birzon

FIFTY-SIX

INDUSTRY: MANUFACTURING

PRODUCTS LIABILITY

Failure to Warn

22-month-old in forward-facing child seat was paralyzed

VERDICT	**$34,438,000**
CASE	Nicole Hinson, individually and as next friend of C.H., a minor; and Cameron Hinson, Texas residents v. Dorel Juvenile Group, Inc., a Massachusetts corporation, No. 2:15-cv-00713-JRG
COURT	United States District Court, Eastern District, Marshall, TX
JUDGE	Rodney Gilstrap
DATE	6/17/2016
PLAINTIFF ATTORNEY(S)	**Jeffrey T. Embry** (lead), Hossley & Embry LLP, Tyler, TX **Kyna Adams**, Hossley & Embry LLP, Tyler, TX **George Cowden, IV**, Hossley & Embry LLP, Tyler, TX
DEFENSE ATTORNEY(S)	**Jonathan Judge** (lead), Schiff Hardin LLP, Chicago, IL **Anthony A. Avey**, Avey & Associates PLLC, San Antonio, TX **Matthew G. Schiltz**, Schiff Hardin LLP, Chicago, IL

FACTS & ALLEGATIONS On May 15, 2013, plaintiff Cameron Hinson was driving a 2012 Chevrolet Silverado extended-cab pickup truck on Highway 80 near Big Sandy with his wife, plaintiff Nicole Hinson, 21, a homemaker, and their 22-month-old son, also a plaintiff. The parents were in front and the child was in back in a Safety 1st Summit five-point harness car seat, which was designed and manufactured by Dorel Juvenile Group Inc. An oncoming Chevrolet Suburban hydroplaned, crossed the center line and struck the plaintiffs head-on. The Hinsons' son sustained a spinal cord injury, and the parents claimed that he also sustained a brain injury.

The plaintiffs had bought the seat new about eight months earlier. The seat was built in March 2012.

The plaintiffs sued Dorel on theories of strict products liability, negligence and gross negligence, based on failure to properly warn the plaintiffs of the risks of forward-facing car seats for children under 2 years old. The car seat was designed for facing forward only and was labeled as appropriate for children 1 year and older who were at least 34 inches tall.

According to plaintiffs' counsel, internal Dorel communications showed that Dorel knew as early as 2009 that, for children between 1 and 2 years of age who are in a frontal collision, facing forward significantly increases the likelihood of spinal cord injury, brain injury, paralysis and death. In March 2011, the American Academy of Pediatrics announced a formal guideline change recommending rear-facing-only seats for children until they are 2 years old or exceed their seat's height and weight limits.

Over Dorel's objection, the plaintiffs were allowed to argue that, after the subject accident, Dorel changed its warnings on new seat models to conform to the new guideline, but did not update the warnings on older models, such as the Safety 1st Summit.

The plaintiffs' biomechanical expert testified that, if the child had been in a rear-facing seat, the back of the front seat would have cushioned his head, neck and back and kept them aligned during the impact, preventing his serious injuries.

Plaintiffs' counsel argued that solely Dorel was responsible for the injuries.

The defense denied any responsibility for the injuries. The defense argued that the Safety 1st Summit car seat is safe and effective; that it meets or exceeds all applicable safety standards; that no other child had sustained an injury like this one; and that no child had ever been known to sustain such an injury in any company's five-point harness seat, whether forward- or rear-facing.

The defense further argued that the average 2-year-old is over 34 inches tall, which is the minimum height for the seat, and that harness bruising was present in the child's waist area only, which indicated that he was not wearing the shoulder harness.

The defense car-seat expert opined that the seat is safe; that it conforms to all federal standards; that it has an exemplary safety record; and that he is not aware of any significant safety issue for toddlers under age 2 seated in a forward-facing car seat.

Dorel's statistics and product safety expert witness testified that, for children between 1 and 2 years of age, field data showed that forward-facing seats were performing much bettter than rear-facing seats in real-world accidents. Plaintiffs' counsel argued that this testimony conflicted with language on Dorel's website, which said that "all the doctors, researchers, and pediatricians say children face more danger forward-facing."

The defense also argued that the Chevrolet Suburban driver was negligent for failing to maintain control of her vehicle and crossing the center line, and that Mrs. Hinson negligently failed to fasten the child's shoulder harness.

The defense alleged that the Suburban's tires had been installed improperly, which contributed to the hydroplaning. The defense designated the entity that sold and installed the tires as a responsible third party.

The trial was bifurcated on liability and damages.

INJURIES/DAMAGES *cognition, impairment; paralysis; traumatic brain injury*

The minor plaintiff was taken to the emergency room by ambulance. He sustained a T11-12 spinal cord injury resulting in permanent paralysis. The plaintiffs also claimed that the accident caused mild to moderate traumatic brain injury, which was diagnosed two years after the accident. (Defense counsel stated that the plaintiffs argued the traumatic injury was moderate to severe.)

The plaintiffs' neuropsychology expert performed standardized neuropsychological testing and concluded that the child had significant cognitive deficits consistent with a traumatic brain injury.

The boy's legs are paralyzed. Using his hip muscles and full lower-body bracing, he can with difficulty ambulate up to 20 feet, but he generally has to use a wheelchair. He will require some level of 24-hour care for the rest of his life, including help with basic functions of daily living and changing his catheter every three hours. He lacks bowel and bladder control.

On behalf of her son, Nicole Hinson sought $73,000 for past medical bills; $350,000 for future medical bills before age 18; $12.5 million for future medical bills after age 18; $15,000 for past lost earning capacity; $1.2 million for future lost earning capacity; $100,000 for past physical pain and mental anguish; $4 million for future physical pain and mental anguish; $100,000 for past physical impairment; $3 million for future physical impairment; $100,000 for past disfigurement; $3 million for future disfigurement; and $20 million in punitive damages.

The defense argued that the spinal cord injury was caused by the severity of the accident and the mother's misuse of the seat, and that neither the seat design nor the warnings were a factor. The defense denied that the child sustained a traumatic brain injury or that the findings of the plaintiffs' neuropsychology expert indicated such an injury. No independent doctor made such findings, the defense noted.

The defense medical expert opined that the injuries were unrelated to which way the seat was facing and that the child did not sustain a traumatic brain injury.

The defense also argued that the cost of the child's future care would be only $3 million to $5 million.

RESULT The jury found that a defect existed in the warnings or instructions when the seat left Dorel's possession, and that the defect was a producing cause of the injury. The jury also found negligence in the warning or instructing regarding use of the seat when it left Dorel's possession, and that this negligence was a proximate cause of the injury. Also, the injury resulted from Dorel's gross negligence, the jury found.

The jury found negligence by the other driver, but not by Nicole Hinson or the company that sold and installed the Suburban's tires.

Comparative responsibility was 80 percent on Dorel and 20 percent on the other driver, the jury found.

The amounts found by the jury, for the child's actual and punitive damages, totaled $34,438,000.

The jury deliberated a little more than two hours in the first phase and only 5 minutes in the second.

The plaintiffs settled for confidential amounts with the Suburban driver and the entity that sold and installed her tires, and Dorel is entitled to a setoff for those settlement amounts.

C. H.	$73,000 past medical cost $100,000 past physical impairment $3,000,000 future physical impairment $100,000 past disfigurement $3,000,000 future disfigurement $10,000,000 punitive damages $1,200,000 future lost earning capacity $100,000 past physical pain and mental anguish $350,000 future medical costs before age 18 $4,000,000 future physical pain and mental anguish $12,500,000 future medical costs after age 18 $15,000 past lost earning capacity $34,438,000
DEMAND	$6,750,000
OFFER	None
TRIAL DETAILS	Trial Length: 4 days Trial Deliberations: 2.5 hours Jury Vote: 8-0 Jury Composition: 4 male, 4 female
PLAINTIFF EXPERT(S)	**David Altman, M.D.**, life care planning, San Antonio, TX **Michelle R. Hoffman**, biodynamical, Phoenix, AZ **Rodney Isom, Ph.D.**, vocational rehabilitation, Irving, TX **Arthur Joyce, Ph.D.**, neuropsychology, Vernon, TX **Amy Mackenzie, Ph.D.**, life care planning, Austin, TX **Ralph D. Scott, Ph.D.**, economics, Conway, AR **Gary Whitman**, car seats, Philadelphia, PA (did not testify)
DEFENSE EXPERT(S)	**Lisa Gwin, D.O.**, biomechanics of injury, San Antonio, TX **Jeya Padmanaban**, statistics, Mountain View, CA **Gregory Stephens**, accident reconstruction, Gig Harbor, WA **William Van Arsdell, Ph.D.**, car seats, Natick, MA

EDITOR'S NOTE This report is based on information that was provided by plaintiffs' and Dorel's counsel.

–John Schneider

SIXTY

INDUSTRY: RETAIL

PREMISES LIABILITY

Dangerous Condition — Wrongful Death

Lack of barriers contributed to woman's death, per lawsuit

VERDICT	**$32,369,034**
CASE	Albert R. Dubuque, Jr., Executor of the Estate of Kimmy A. Dubuque v. Cumberland Farms, Inc. and V.S.H. Realty, Inc., No. 1279CV00448
COURT	Hampden County, Superior Court, MA
JUDGE	Mark Mason
DATE	2/23/2016
PLAINTIFF ATTORNEY(S)	**John J. Egan** (co-lead), Egan, Flanagan & Cohen (Estate of Kimmy Dubuque) **Paul S. Weinberg** (co-lead), Weinberg & Garber, P.C., Northampton, MA (Estate of Kimmy Dubuque) **Robert J. Lefebvre**, Gelinas & Lefebvre, P.C., Chicopee, MA (Estate of Kimmy Dubuque) **Stephen Edward Spelman**, Egan, Flanagan & Cohen, Springfield, MA (Estate of Kimmy Dubuque)
DEFENSE ATTORNEY(S)	**Richard L. Campbell**, Campbell Campbell Edwards & Conroy PC, Boston, MA **Richard P. Campbell**, Campbell Campbell Edwards & Conroy PC, Boston, MA **Diana A. Chang**, Campbell Campbell Edwards & Conroy PC, Boston, MA

FACTS & ALLEGATIONS On Nov. 28, 2008, plaintiff's decedent Kimmy A. Dubuque, 43, the manager of a Western Massachusetts civic center, was struck by a Ford Explorer sport utility vehicle, as she was walking into a Cumberland Farms convenience store located at 197 Grove Street in Chicopee. The driver of the vehicle, 81-year-old Edwin Skowyra, had been operating his vehicle northbound on Front Street. As he approached the intersection of Front Street and Grove Street, Skowyra accelerated, speeding through the intersection and into

the Cumberland Farms parking lot, finally crashing into the front of the store. Skowyra exhibited symptoms of aphasia following the collision, and it was contested as to whether Skowyra had suffered a stroke prior to the accident. Dubuque was declared dead at the scene of the accident.

Kimmy Dubuque's husband, Albert R. Dubuque, Jr., acting as executor of the estate of his late wife, sued Cumberland Farms, Inc., and the owner of the property, V.H.S. Realty, Inc. V.H.S. was merged into Cumberland Farms, so the case proceeded against Cumberland Farms only.

The estate alleged that Cumberland Farms was negligent in failing to install vehicle barriers or bollards in front of the store for the purpose of ensuring better safety for customers. The estate also alleged that Cumberland Farms maintained an apex driveway on the property, that is, a driveway entrance that has a direct line of travel with a street. The estate alleged that although the apex entrance was exempt from city zoning violations due to its grandfathered status, the city of Chicopee had asked Cumberland Farms to close the entrance on numerous occasions. The estate claimed that, if Cumberland Farms had replaced the entrance with barriers, the accident may not have occurred.

The estate also sued Cumberland Farms for gross negligence, alleging that the company did not install vehicle bollards at the subject location, despite knowledge that its stores and pedestrians had been struck by vehicles at a rate of once per week over the course of 20 years. The estate claimed this showed that Cumberland Farms was persistently negligent in failing to install vehicle barriers.

The estate's traffic expert testified that Cumberland Farms' parking lot was not properly designed, in that it failed to clearly define and separate pedestrian movements from traffic in the vicinity of the building's doorways, and that vehicle barriers are the best form of segregating pedestrians from vehicular traffic. A second traffic expert testifying for the estate opined that vehicle bollards should have been used by the store and that such precautions would have had a great effect in stopping or re-directing Skowyra's vehicle and preventing the deceased from being struck.

The defense contended there was no law, requirement or code that required Cumberland Farms to install vehicle barriers or bollards. The defense also argued that, even with the existence of a guardrail at the apex entrance, the accident would not have been prevented.

The defense's accident reconstruction expert testified that, due to the high rate of speed at which Skowyra was traveling at the time of the accident, neither a barrier at the location of the apex driveway nor bollards in the front of the building would not have prevented Dubuque from being struck by Skowyra's vehicle.

The parties contested the speed at which Skowyra's vehicle was traveling when it struck Mrs. Dubuque. The estate's counsel argued that the vehicle struck her at a rate of speed of 57 mph, while defense counsel argued that the vehicle was traveling at 72 mph.

INJURIES/DAMAGES *death*

Kimmy A. Dubuque was pronounced dead at the scene of the accident. She was survived by her husband and a teenage daughter.

The Dubuque estate sought recovery of damages for Kimmy Dubuque's loss of life, and the loss of guidance for her daughter.

RESULT The jury rendered a verdict for the estate. The jury found that Cumberland Farms was negligent and that this negligence was a substantial contributing factor in Kimmy Dubuque's death. The jury also found that Cumberland Farms' conduct constituted gross negligence. The jury awarded compensatory damages of $32,369,024.30, and punitive damages of $10, for a total of $32,369,034.30.

ESTATE OF KIMMY DUBUQUE	$10 punitive damages $32,369,024 compensatory damages $32,369,034
INSURER(S)	**National Union Insurance (AIG) (Primary)** (**$1,500,000**) Cumberland Farms
TRIAL DETAILS	Trial Length: 2 weeks Trial Deliberations: 2 days Jury Composition: 10 female, 2 male
PLAINTIFF EXPERT(S)	**James D'Angelo**, traffic, Watertown, MA **Joel Howe**, mechanical, Sutton, MA (did not testify; submitted report) **Craig L. Moore, Ph.D.**, economics, Northhampton, MA **Robert Reiter**, vehicle, Los Angeles, CA (did not testify; submitted report) **Paul Roland**, mechanical, Greenwich, NY **Eino Thompson**, accident investigation & reconstruction/ failure analysis/product liability, Springhill, FL
DEFENSE EXPERT(S)	**Catherine F. Corrigan, Ph.D.**, injury biomechanics, Philadelphia, PA (did not testify) **Jeffrey J. Croteau**, accident reconstruction, Maynard, MA **Sridhar Natarajan, M.D.**, forensic pathology, Phoenix, AZ (did not testify) **Richard Sypek**, zoning, Springfield, MA (did not testify)

EDITOR'S NOTE This report is based on information that was provided by plaintiff's counsel and information gleaned from court documents. Defense counsel did not return the reporter's phone calls.

–Jack Deming

SIXTY-SIX

INDUSTRY: TRANSPORTATION

MOTOR VEHICLE

Worker/Workplace Negligence — Negligent Training

Pickup truck driver paralyzed in foggy crash with tractor-trailer

VERDICT	**$30,438,225**
CASE	Ronald Lee Stutes and Carroll Lyn Stutes v. R+L Carriers, Lexington Insurance Co., American Guarantee and Liability Insurance Co., and Gerald James Pitre, No. C-20131119-F
COURT	15th Judicial District, Parish of Lafayette, LA
JUDGE	David Smith
DATE	10/27/2016
PLAINTIFF ATTORNEY(S)	**Blake R. David** (lead), Broussard & David, Lafayette, LA **Robert B. Brahan Jr.**, Broussard & David, Lafayette, LA **J. Marshall Montgomery**, Law Office of Marshall Montgomery, Lafayette, LA
DEFENSE ATTORNEY(S)	**Ernest P. Gieger Jr.** (lead), Gieger, Laborde & Laperouse, LLC, New Orleans, LA **Virginia Y. Dodd**, Phelps Dunbar, Baton Rouge, LA **Emily E. Eagan**, Gieger, Laborde & Laperouse, LLC, New Orleans, LA

FACTS & ALLEGATIONS On Jan. 23, 2013, at about 5 a.m., plaintiff Ronald Lee Stutes, 57, a master carpenter, was driving a pickup truck when he broadsided a tractor-trailer on Interstate 90 (Cameron Street) at Austria Road, in Duson. Gerald James Pitre, of R+L Carriers, was driving the truck and Stutes struck the rear axles of the tractor-trailer. Stutes was paralyzed.

Stutes and his wife sued Pitre, R+L, and its carriers, Lexington Insurance Co. and American Guarantee and Liability Insurance Co., alleging that Pitre was negligent in the operation of a vehicle, and R+L failed to properly train Pitre and its drivers.

Stutes' expert in accident reconstruction maintained that Stutes was not speeding (the posted speed limit was 45 mph) and calculated that he was driving 23 mph to 29 mph at the time of impact.

There was low visibility due to foggy conditions at the time, which was when Stutes was commuting to work. He testified that he drives the same road every day. According to Stutes, he is always cautious when driving the road, because Interstate 90 is bumpy and there is a chance a motorist could pull out in front of him. Even under the best conditions, he never travels the speed limit, Stutes said. He testified that, just prior to the accident, as he approached the intersection he began to slow down, due to the low visibility from the fog.

Plaintiff's counsel argued that R+L should have trained Pitre when driving in foggy conditions, it should have ensured that he read federal and state safety manuals, and the company should have tested him on the safety manuals.

Stutes' expert in transportation faulted Pitre for not using one of the four nearby truck stops to wait until the fog passed. Pitre and other R+L drivers testified that the company had never told them what to do in foggy conditions. The expert faulted R+L for failing to teach its drivers about the dangers of driving in fog, and cited a federal safety manual that likened driving in fog to driving blindfolded.

The defense argued that Stutes was speeding.

R+L's expert in accident reconstruction calculated that Stutes was driving 52 mph at the time of impact.

R+L's expert in human factors discussed perception and reaction time, and concluded that, had Stutes been traveling under the speed limit as he alleged, he would have been able to brake in time and prevent the accident.

R+L's expert in transportation opined that Pitre was adequately trained and supervised and that R+L had the appropriate safety protocols in place.

INJURIES/DAMAGES *arm; brain damage; catheterization; colostomy; concussion; decreased range of motion; depression; emotional distress; fracture, T5; fracture, clavicle; fracture, neck; fracture, rib; fracture, scapula; frozen shoulder (adhesive capsulitis); hardware implanted; head; internal fixation; leg; open reduction; paraplegia; physical therapy; pins/rods/screws; plate; traumatic brain injury; urinary tract infection*

Stutes was taken by ambulance to a hospital where he was diagnosed with a fracture to intervertebral disc T5, which rendered him paraplegic from the chest down with limited use of his arms. He was further diagnosed with 19 rib fractures, a fracture of a cervical vertebra, bilateral clavicle fractures, a right (dominant) scapula fracture, a concussion, and a traumatic brain injury.

Stutes underwent emergency spinal surgery to repair his fractured thoracic spine. He also underwent an open reduction and internal fixation on his fractured clavicles, in which plates and screws were implanted. He remained hospitalized for three months and was transferred to a nursing home for two months; subsequently, he was transferred to a rehabilitation facility, where he went two months of physical therapy. He was also catheterized and received a colostomy bag.

In the ensuing years, Stutes treated with physical therapy and underwent multiple hospitalizations for complications related to his paralysis, including urinary tract infections. He developed right frozen shoulder and had the surgical hardware removed from his shoulders. Stutes continued to see multiple physicians at the time of trial. He sought to recover approximately $1.5 million in past medical expenses.

Stutes' physiatrist, who described him as a "functional quadriplegic" (he can push down with his arms, but cannot lift them), testified that he requires additional inpatient care at a spinal cord facility, follow-ups with his urologist to monitor his catheter and urinary tract infections (which are expected to continue indefinitely), kidney ultrasounds and other diagnostic imaging, 24-hour attendant care, physical therapy, psychiatric care (Stutes experiences depression), medical equipment (e.g., catheters, colostomy bags, impression stockings), a urinary-diversion surgery (since catheterization is not a long-term solution), a handicap-accessible van that is equipped with a lift, wheelchairs and regular checkups with an internist. Stutes sought to recover $7.5 million in future medical expenses.

Stutes' orthopedic surgeon, who performed the shoulder surgery, opined that Stutes' shoulder injuries were of the worst the doctor has ever treated. A shoulder replacement was considered but then ruled out as an unviable option, since Stutes would not recover to a point where he would attain functional use. Stutes' shoulders will continue to worsen and deteriorate, the surgeon said.

According to Stutes' urologist, until he undergoes a urinary-diversion surgery, he will continue to suffer urinary tract infections two to three times a year and will need ongoing hospitalizations.

Stutes' general surgeon (who performed his spinal surgeries) and internist further discussed his condition and future outlook.

Stutes' expert in vocational rehabilitation/life-care planning deemed Stutes permanently disabled, and opined that he has a life expectancy of age 82. He sought to recover about $160,000 in past lost wages and about $400,000 in future lost earnings.

Stutes requires 24-hour care, which is a combination of assistance from a certified nursing assistant and his daughter. He is able to grab things but that is the extent of his motor skills, as he has weakened grip strength, cannot raise his arms and prop himself up, and has severe decreased range of motion.

Stutes testified that he does not remember the accident, and he only remembers waking up in the hospital. He misses being a master carpenter, including fixing and building things. His daughter and son-in-law adopted a child soon after the accident, and had it not been for the accident, he would have built furniture for the child. He talked about not being able to play and physically interact with his grandchild.

He further detailed his depression and how it takes three to four hours to perform his morning routine of getting out of bed, bathing and putting on his clothes. He sought damages for past and future pain and suffering. His wife's estate (she died prior to trial) sought to recover damages for its claim for loss of consortium.

R+L's expert in physical medicine, who performed a records review, opined that Stutes was not as impaired as he alleged, as he was able to move himself out of bed and perform other functions.

The company's expert in vocational rehabilitation and life-care expectancy opined that Stutes' spinal cord injury diminished his life expectancy, and he only had another 13 years to live. Therefore, his life-care plan amounted to approximately $558,656.45 to $615,799.66.

RESULT The jury found Pitre 65 percent liable and R+L Carriers 35 percent liable. No liability was found against Stutes. Stutes and his wife's estate were awarded $30,438,225. American Guarantee and Liability provided a $25 million policy and Lexington Insurance provided a $6 million policy.

CARROLL LYNN STUTES	$300,000 loss of consortium
RONALD LEE STUTES	$1,488,225 past medical cost $7,500,000 future medical cost $4,000,000 past pain and suffering $6,000,000 loss of enjoyment of life $5,000,000 past mental pain and suffering $4,000,000 permanent disability $1,750,000 diminished life expectancy $400,000 past and future lost wages $30,138,225
INSURER(S)	**American Guarantee and Liability Insurance Co.** excess carrier for R+L Carriers **Lexington Insurance Co.** second-tier carrier for R+L Carriers
TRIAL DETAILS	Trial Length: 8 days Trial Deliberations: 3 hours
PLAINTIFF EXPERT(S)	**Roger C. Allen,** transportation regulations, Friendswood, TX **Harold A. Asher, C.P.A.,** economics, New Orleans, LA (was not called to testify) **Kenneth J. Champagne, M.D.,** gastroenterology, Lafayette, LA (treating; did not testify, physician's report cited at trial) **James S. Garcelon, M.D.,** general surgery, Lafayette, LA (treating) **Michael S. Gillen,** accident reconstruction, Baton Rouge, LA

Cornelius E. Gorman, Ph.D., vocational rehabilitation, New Iberia, LA
Wayne T. Lindemann, M.D., physical medicine, Lafayette, LA (treating)
Thomas J. Montgomery, M.D., orthopedic surgery, Lafayette, LA (treating)
Scott Neusetzer, M.D., urology, Lafayette, LA (treating)
Hector A. Robles, M.D., internal medicine, Lafayette, LA (treating)
Shelly N. Savant, M.D., life care planning, New Iberia, LA
John W. Theriot, C.P.A., accounting (forensic), Metairie, LA

DEFENSE EXPERT(S)

Kenneth J. Boudreaux, Ph.D., economics, New Orleans, LA
Susan J. Garrison, M.D., physical medicine, Houston, TX
David A. Krauss, Ph.D., human factors -- see also technical-engineering-ergonomics, Los Angeles, CA
Rob Perillo, meteorology/climatology, Lafayette, LA (was not called to testify)
Ginny Stegent, R.N., C.R.R.N., C.D.M.S., life care planning, Houston, TX
Lane VanIngen, transportation, Daphne, AL
Wayne Winkler, accident reconstruction, Metairie, LA

POST-TRIAL Defense counsel motioned for a new trial and judgment notwithstanding the verdict.

EDITOR'S NOTE This report is based on information that was provided by plaintiffs' counsel. Defense counsel did not respond to the reporter's phone calls.

–Aaron Jenkins

SEVENTY-EIGHT

INDUSTRY: CONSTRUCTION

PRODUCTS LIABILITY

Design Defect — Construction

Family claimed negligent wall design caused fatal fall

VERDICT **$26,920,170**
ACTUAL **$16,345,170**

CASE Rosa B. Gonzalez; Aaron E. Gonzalez, a Minor, by and through Rosa B. Gonzalez, his Guardian Ad Litem; Atareh E. Gonzalez, a Minor, by and through Rosa B. Gonzalez, her Guardian Ad Litem, v. Atlas Construction Supply Inc., Reda M. Basalous, Mr. Crane Inc., and Does 1 through 100 / National Union Fire Insurance Company of Pittsburgh v. Atlas Construction Supply Inc., Atlas Forming Systems, Mr. Crane Inc., and Does 1-50 / USS Cal Builders Inc. v. Atlas Construction Supply Inc., and Does 1 through 100, No. BC507755; BC516740; BC553489

COURT Superior Court of Los Angeles County, Los Angeles, CA

JUDGE Suzanne G. Bruguera

DATE 7/27/2016

PLAINTIFF ATTORNEY(S)

Lars C. Johnson, Grassini, Wrinkle & Johnson, Woodland Hills, CA (Aaron E. Gonzalez, Atarah E. Gonzalez, Estate of Edgar Gonzalez, Rosa B. Gonzalez)
None reported (National Union Fire Insurance Company of Pittsburgh, USS Cal Builders Inc.)

DEFENSE ATTORNEY(S)

Donald H. Dawson, Jr. (lead), Dawson & Clark P.C., Detroit, MI (Atlas Construction Supply Inc., Atlas Forming Systems, Reda M. Basalous)
Kathleen A. Clark, Dawson & Clark P.C., Detroit, MI (Atlas Construction Supply Inc., Atlas Forming Systems, Reda M. Basalous)
Joseph C. Owens, Lewis Brisbois Bisgaard & Smith, Los Angeles, CA (Mr. Crane Inc.)
Douglas C. Purdy, Morris, Polich & Purdy, Los Angeles, CA (Atlas Construction Supply Inc., Atlas Forming Systems, Reda M. Basalous)

FACTS & ALLEGATIONS On Aug. 2, 2011, plaintiffs' decedent Edgar Gonzalez, 30, a carpenter, was helping to construct a wall at the Los Angeles Hyperion Treatment Plant, a waste disposal facility near Playa del Rey.

The construction of a gas compressor facility was commissioned by the city of Los Angeles, which hired Gonzalez's employer, USS Cal Builders Inc., to act as the general contractor. At the time, USS Cal Builders was in the process of erecting "wall-form panels," which are temporary walls that are used to support poured concrete that dries in place to form permanent concrete walls. Once the concrete is dry and fully formed, the wall forms are removed, leaving only the permanent structure in place.

USS Cal Builders hired Atlas Construction Supply Inc. to design the wall-form system and supply the wall-form components. Atlas Construction also provided engineering drawings for the construction and assembly of the wall-form system at the site. The wall-form systems were provided to USS Cal Builders unassembled. As a result, the contractor assembled the wall forms into panels measuring 30-feet by 8-feet, and a crane moved the panels into place, where they were secured and attached to each other. However, while Gonzalez was on top of a 30-foot-high form panel "plumbing and leveling" it, the panel tilted and fell over. Gonzalez, who was tethered to the panels, as is industry standard, fell 30 feet and died at the scene.

The decedent's wife, Rosa Gonzalez, and their two minor children, Aaron Gonzalez and Atarah Gonzalez, sued Atlas Construction Supply Inc.; the Atlas Construction engineer who stamped the wall-form design plans, Reda Basalous; and the crane operating company that placed the wall-form panel in its location, Mr. Crane Inc.

The workers' compensation carrier for USS Cal Builders, National Union Fire Insurance Company of Pittsburgh, subsequently brought a separate claim against Atlas Construction Supply Inc.; Atlas Construction's affiliated name, Atlas Forming Systems; and Mr. Crane Inc.

In addition, USS Cal Builders Inc., which was immunized from liability due to the workers' compensation exclusive remedy rules, brought a separate suit against Atlas Construction Supply Inc. USS Cal Builders sought recovery for financial losses due to the accident.

The matters were ultimately consolidated. However, prior to trial, Mr. Crane settled with the decedent's family and Basalous was dismissed from the case. National Union also dismissed its complaint and USS Cal Builders settled with Atlas Construction just before trial. Thus, the matter proceeded to trial with the decedent's family's claims against Atlas Construction only.

Plaintiffs' counsel argued that the wall collapse and the decedent's subsequent fall occurred due to the negligence of Atlas Construction and its defective wall-form system. Specifically, counsel argued that Atlas Construction was negligent in providing consulting and engineering services to USS Cal Builders. Counsel also argued that Atlas Construction's plans and guidance were deficient because its design plans called for a panel to be placed at the site without proper support. Plaintiff's counsel contended that the wall-form system did not have adequate support, as it was designed and intended to be built. According to plaintiff's counsel, the panel that the decedent was on at the time of the incident was cantilevered off the underlying concrete slab for about half its width and was only supported by two small "leveling jacks," which are flat metal pads that are screwed into a starter wall at the base upon which the form panel was set. Thus, counsel argued that the associated wall-form system was defective and inadequate, causing the panels to be unstable and ultimately causing the decedent's fall.

Atlas Construction denied responsibility and contended that the wall fell due to the negligence of the general contractor (USS Cal Builders), the city, and Mr. Crane. Its

engineer claimed that he believed that there was going to be concrete beyond the edge of the slab, which would have supported the panel that fell, and that he didn't realize it would be cantilevered. Atlas Construction denied having any notice of that discrepancy and denied ever talking to anyone at USS Cal Builders about the issue. Thus, it claimed that the incident was the fault of USS Cal Builders, the crane operator who released the panel even though he allegedly had concerns about its stability, and the city for failing to identify the discrepancy and intercede despite having inspectors on site.

INJURIES/DAMAGES *death; head; loss of parental guidance; loss of society; multiple trauma*

Edgar Gonzalez suffered severe head trauma when he fell 30 feet from the wall and when parts of the wall collapsed on him. He was ultimately declared dead at the scene. He was survived by his wife, plaintiff Rosa Gonzalez, age 33; his son, plaintiff Aaron Gonzalez, age 12; and his daughter, plaintiff Atarah Gonzalez, age 7.

The Gonzalez family testified that the decedent was a loving and supportive father, as well as an active member of his community. They also claimed that the decedent coached soccer and was a youth leader at his church. Thus, the decedent's family sought recovery of wrongful death damages. (They did not seek emotional-distress damages, as such damages are not recoverable to survivors under California law.)

RESULT The jury found that Atlas Construction distributed the wall-form system and that the wall-form system was not misused or modified after it left Atlas Construction's possession in a way that was so highly extraordinary that it was not reasonably foreseeable to the company. The jury also found that the wall-form system was defective and that the defect was a substantial factor in causing harm to the plaintiffs. Thus, it determined that Atlas Construction was negligent and that its negligence was a substantial factor in causing the plaintiffs harm. In addition, it found that USS Cal Builders, Mr. Crane and the city were negligent, but that the negligence of Mr. Crane and the city were not substantial factors in causing harm to the plaintiffs. Thus, the jury allocated 45 percent fault to the decedent's employer, USS Cal Builders, which was immune from liability under California workers' compensation laws, and 55 percent fault to Atlas Construction.

The jury determined that the plaintiffs' damages totaled $26,920,170, including $3,420,170 in economic damages and $23.5 million in non-economic damages.

Based on California's joint-and-several liability rules, under California Proposition 51, economic damages are fully recoverable against Atlas Construction, but the defendant cannot be held jointly liable for non-economic damages. Thus, Atlas Construction is only responsible for its portion of non-economic damages. As such, the Gonzalez family should recover $16,345,170 from Atlas Construction.

AARON E. GONZALEZ
$122,661 past economic
$732,382 future economic
$1,000,000 past non-economic
$8,000,000 future non-economic
$9,855,043

ATARAH E. GONZALEZ
$122,661 past economic
$732,382 future economic
$1,000,000 past non-economic
$8,000,000 future non-economic
$9,855,043

ROSA B. GONZALEZ
$245,322 past economic
$1,464,763 future economic
$1,500,000 past non-economic
$4,000,000 future non-economic
$7,210,085

DEMAND $8,000,000 (policy limits)
OFFER $3,000,000 (before closing arguments)

TRIAL DETAILS Trial Length: 12 days
Jury Vote: 12-0 liability; 11-1 damages

PLAINTIFF EXPERT(S)
David T. Fractor, Ph.D., economics, Pasadena, CA
Mohamed Hassan, Ph.D., structural, Los Angeles, CA
David A. Stern, general contracting, Santa Monica, CA

DEFENSE EXPERT(S)
Gregg E. Brandow, Ph.D., structural, Rancho Santa Margarita, CA
Terry Lysek, general contracting, Mission Viejo, CA
Daniel P. Montrenes, economics, Los Alamitos, CA
William D. Powers, cranes, Phoenix, AZ (crane operation)

POST-TRIAL Plaintiffs' counsel moved to recover costs.

Defense counsel for Atlas Construction moved for new trial, but the motion was denied. Atlas Construction subsequently offered the remaining policy limits, but it was denied and judgment was entered. Atlas Construction's counsel subsequently filed a notice of appeal.

EDITOR'S NOTE This report is based on information that was provided by plaintiffs' counsel for the Gonzalez family and defense counsel for Mr. Crane. Defense counsel for the remaining defendants did not respond to the reporter's phone calls.

–Priya Idiculla

EIGHTY-SEVEN

INDUSTRY: MANUFACTURING

INTELLECTUAL PROPERTY

Trademarks — Infringement

Competing energy drink's name confused consumers: plaintiff

VERDICT **$22,136,992**

CASE Innovation Ventures, LLC dba Living Essentials v. N.V.E., Inc., No. 08-11867
COURT U.S. District Court, Eastern District, MI
JUDGE R. Steven Berg
DATE 2/26/2016

PLAINTIFF ATTORNEY(S)
Mark A. Cantor (co-lead), Brooks Kushman P.C., Southfield, MI
Marc Lorelli (co-lead), Brooks Kushman P.C., Southfield, MI
Chanille Carswell, Brooks Kushman P.C., Southfield, MI
Thomas W. Cunningham, Brooks Kushman P.C., Southfield, MI
Brian C. Doughty, Brooks Kushman P.C., Southfield, MI

DEFENSE ATTORNEY(S)
Anthony J. Davis, Nicoll, Davis & Spinella LLP, Paramus, NJ
Leigh C. Taggart, Honigman Miller Schwartz & Cohn LLP, Bloomfield Hills, MI
Emily J. Tait, Honigman Miller Schwartz & Cohn LLP, Bloomfield Hills, MI

FACTS & ALLEGATIONS In 2004, plaintiff Innovation Ventures LLC, operating as Living Essentials, a Farmington Hills-based limited liability corporation, introduced a two-ounce liquid energy supplement marketed as "5-Hour Energy". In May 2007, New Jersey-based N.V.E. Inc. began manufacturing a similar product, "6 Hour Power". Living Essentials claimed the product manufactured by N.V.E. violated its registered trademark.

Living Essentials sued N.V.E. for trademark infringement.

Living Essentials alleged that the product name "6 Hour Power" for N.V.E.'s two-ounce bottled energy shot violated Living Essentials' trademarked name "5-Hour Energy". Living Essentials cited Frisch's factors, which evaluates the likelihood of confusion between two trademarks on eight criteria, including brand strength, similarity between the goods and intent. Living Essentials argued that N.V.E chose the name of its product to deliberately confuse consumers into believing "6 Hour Power" was a product manufactured by or associated with Living Essentials.

N.V.E. disputed any trademark infringement, maintaining that the name "6 Hour Power" was chosen independent of Living Essentials' product name because it accurately described N.V.E.'s energy supplement.

N.V.E. brought a counterclaim against Living Essentials in 2008 for false advertising. The counterclaim alleged that a notice issued by Living Essentials in which retailers were ordered to remove another energy shot supplement from their stores because it infringed on its trademark, which caused

retailers to mistakenly remove "6 Hour Power" from shelves.

In testimony, the founder of Living Essentials related that he created "5-Hour Energy" as an original product meant to differ from traditional 12- to 16-ounce energy drinks. He maintained that the notice issued by Living Essentials regarding a counterfeit product was not intended to target N.V.E.'s product.

Living Essentials' expert on brand identity related that, in a survey he conducted, 26.2 percent of respondents confused "6 Hour Power" with "5-Hour Energy," or otherwise believed them to be related products from the same company. N.V.E.'s brand identity expert disputed these survey findings, arguing that there were issues with the questions asked in the survey.

Living Essentials' expert on statistics and surveys opined that a 2009 consumer survey showed "5-Hour Energy" to be a strong brand name.

Living Essentials' retained brand specialist testified that "5-Hour Energy" was a "pioneering brand" which created a new marketplace. He concluded that N.V.E.'s loss of market share was unrelated to the actions of Living Essentials.

INJURIES/DAMAGES Living Essentials alleged that it have been deprived of millions in sales due to confusion created by 6 Hour Power's name. Living Essentials demanded the full profits made from N.V.E.'s infringement, as well as the lost profits created by N.V.E.'s actions.

Living Essentials' accounting expert testified that Living Essentials lost sales of approximately 17 million units of "5-Hour Energy". He found that N.V.E. has manufactured and sold over 72 million bottles of the infringing product at a profit of over $17 million dollars.

N.V.E. disputed Living Essentials' alleged damages. N.V.E. argued that Living Essentials would have sold 5 million additional units of its product, at best.

Under the counterclaim, N.V.E. alleged that the actions of Living Essentials caused N.V.E. to lose $60 million in profits. N.V.E. further alleged that the notice issued by Living Essentials caused its nine-percent market share to decrease. In testimony, the CFO of N.V.E. related that he believed this notice damaged N.V.E's share of the emerging marketplace.

N.V.E.'s accounting expert disputed the value of Living Essentials' damages, arguing the damages totaled roughly $5 million. He testified that N.V.E.'s counterclaim for lost sales was worth approximately $3.4 million.

RESULT The jury found that Living Essentials proved that N.V.E.'s use of the name "6 Hour Power" infringed on Living Essentials' trademark. Living Essentials was awarded $10,616,992.19 in lost profits. It found that N.V.E. derived $11,520,000 in profits from the infringement. Disgorgement of these profits is pending approval from Judge Berg.

The jury found that N.V.E. was unable to prove that Living Essentials had "unclean hands" that would prevent it from enforcing its trademark. It also found that N.V.E. was unable to prove false advertising and a judgment of no cause of action was entered on the claim.

TRIAL DETAILS Trial Length: 4 weeks
Trial Deliberations: 6 hours
Jury Vote: 6 to 2 on trademark infringement; unanimous on damages award; 7 to 1 on false advertising claim
Jury Composition: 5 male, 3 female

PLAINTIFF EXPERT(S) **Gregory Carpenter**, brands, Chicago, IL
Rodney L. Crawford, CPA, accounting, Detroit, MI
Howard Marylander, statistics & surveys, Encino, CA
Dan Sarel, Ph.D., brand identity, Miami, FL

DEFENSE EXPERT(S) **Carl G. Degen**, accounting, Madison, WI
Jacob Jacoby, Ph.D., brand identity, New York, NY

POST-TRIAL Counsel for Living Essentials filed a motion seeking a permanent injunction against N.V.E. to prevent N.V.E. from selling "6-Hour Power". Plaintiff's counsel was also seeking pre-judgment interest, along with treble damages and the reimbursement of court costs and attorneys' fees. Post-trial motions were pending at the time of publication.

EDITOR'S NOTE This report is based on information that was provided by plaintiff's counsel. Defense counsel did not respond to the reporter's phone calls.

–Max Robinson

NINETY-NINE

INDUSTRY: TRANSPORTATION

MOTOR VEHICLE

Tractor-Trailer — Intersection

Driver sustained brain damage in collision with tractor-trailer

VERDICT **$20,000,000**

CASE Michael T. Smith, as the Conservator for Ehsan Khan, and Ghulam Khan v. Moore Freight Service Inc. and John Teal, No. 14 A-27627

COURT Cobb County, State Court, GA

DATE 8/10/2016

PLAINTIFF ATTORNEY(S) **Joseph A. Fried** (co-lead), Fried Rogers Goldberg LLC, Atlanta, GA
Michael L. Goldberg (co-lead), Fried Rogers Goldberg LLC, Atlanta, GA
Mark G. Wallace, Murrin & Wallace, LLC, Roswell, GA

DEFENSE ATTORNEY(S) **Roger E. Harris** (lead), Swift, Currie, McGhee & Hiers, LLP, Atlanta, GA
R. Matthew Shoemaker, Swift, Currie, McGhee & Hiers, LLP, Atlanta, GA

FACTS & ALLEGATIONS In 2013, plaintiff Eshan Khan, 57, was driving through an intersection of Cobb Parkway when a tractor-trailer driven by John Teal struck him. Teal worked for Moore Freight Service Inc. Khan sustained brain damage.

Khan and wife Ghulam Khan sued Moore and John Teal for his vehicular negligence.

Liability was admitted and the trial proceeded on damages.

INJURIES/DAMAGES *brain damage; traumatic brain injury; cognitive deficits*

Khan sustained permanent brain damage and orthopedic injuries. He has stroke-like symptoms that make it difficult for him to use the left side of his body and has left him with cognitive deficits and inability to talk well. He requires 24-hour assistance with daily activities, which is handled by his family.

The plaintiff's life care planning expert testified that he will need assistance for the rest of his life.

In opening statements, plaintiffs' counsel said the damages were worth $25 million. Khan's past medical bills were approximately $692,000. He claimed lost wages of $322,734 and future medical expenses of $3.8 million.

Mrs. Khan claimed loss of consortium.

RESULT The jury awarded $20 million. Earlier settlements with two of three insurers will set off the award by $2.5 million.

INSURER(S) Great American Insurance Group (excess policy)

TRIAL DETAILS Trial Length: 3 days
Trial Deliberations: 2 hours

POST-TRIAL The case remains unresolved due to the ongoing declaratory judgment action in federal court regarding Greater American Insurance's obligation to provide coverage. The court has not ruled yet if the insurance carrier is obligated to provide its $10 million excess policy. Defense counsel indicated that the case has been appealed.

EDITOR'S NOTE This report is based on information that was gleaned from an article that appeared in The Daily Report, an ALM publication, and interviews of plaintiffs' and defense counsel.

–Jeff Skruck

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