

## RECENT JURY VERDICTS

BY STEPHEN S. GEALY

*This edition marks Baylor Evnen's twenty-first annual article sampling recent Nebraska jury verdicts. Interestingly, however, the number of jury verdicts available for presentation in this article has dwindled significantly in recent years. When the first installment of this series of articles was written, the district courts in Lincoln and Omaha often had thirty to forty civil cases on the list for each jury term. It was not uncommon under those circumstances to wait several months for a case to be called. Today, a jury term with more than five civil cases on the list is a rarity. As a general proposition, if a case is on the list for a given jury term, it will more likely than not be called for trial during that term.*

*Mediation has had a major impact on the number of civil cases which are actually tried. In the early years of this annual survey, mediation was not a common practice. Today, however, mediation is discussed as a potential tool in a very high percentage of cases we defend. When mediation is employed, it is highly successful in resolving cases without the need for trial. While we have not maintained a comprehensive log of mediated cases, it is reasonable to believe that approximately 90% of cases which are mediated settle either at the time of the mediation or after mediation but prior to trial. As successful as mediation is, among its downsides is a reduction in the number of cases tried to juries which, in turn, tends to reduce the number of verdicts available to review as we evaluate cases.*

*Notwithstanding the declining number of civil cases tried to a jury, the following represent cases tried during 2006 in which juries have found in favor of the plaintiff. We hope this survey will provide you with another valuable resource for the evaluation of personal injury claims.*

### Adams County (Hastings)

In *Poblson v. Georgiana*, the plaintiff was injured when the defendant turned his vehicle from a private drive across the plaintiff's lane of traffic. The plaintiff's vehicle struck the defendant's vehicle broadside. Ms. Pohlson, a 27-year-old public school teacher, sustained a cervical strain as

a result of the accident. Her physicians determined that surgery was unnecessary for treatment of her injury and opted for conservative care. Nevertheless, her physicians offered the opinion that her injury caused her a permanent disability. As a result of the accident the plaintiff sustained approximately \$11,000 in medical expenses. She offered evidence of lost wages in the sum of \$5,000, but did not make a claim for diminished earning capacity. The jury returned a verdict for the plaintiff in the amount of \$175,000.

### Box Butte County (Alliance)

The plaintiff in *Fought v. Vrbka* was a machinist employed by Burlington Northern Santa Fe Railroad. On the date of the accident, Mr. Fought took his unleashed dog for a walk in an alley adjacent to the defendant's fenced property. As the plaintiff and his dog neared the defendant's property, the defendant's dog charged the inside of the chain link gate which separated the defendant's yard from the alley. The gate was installed in such a way that it opened when sufficient pressure was applied from inside the yard. When the defendant's dog struck the gate, it opened and the defendant's dog attacked the plaintiff's dog. As the plaintiff attempted to separate the two dogs, he fell and injured his knee. The plaintiff ultimately underwent knee surgery. His medical expenses were approximately \$11,000 and he claimed \$5,000 in wage loss with no claim of loss of earning capacity. The plaintiff's orthopaedic surgeon determined that the plaintiff had a 1-2% permanent impairment to his knee. The jury found in favor of the plaintiff, but assigned 30% contributory negligence to the plaintiff for failure to have his dog on a leash. The jury awarded the plaintiff \$26,540.

### Douglas County (Omaha)

The plaintiff in *Keber v. American Family Mutual Insurance Co.* was a 35-year-old female veterinary technician who was injured in an automobile collision with an uninsured motorist.

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Stephen S. Gealy

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She brought this direct action under her uninsured motorist coverage. As a result of the accident, Ms. Keber sustained a soft tissue neck injury with some residual headaches. Her medical expenses were \$1,980 and she sustained a wage loss of approximately \$200. The jury awarded the plaintiff \$9,200 plus attorney fees.

#### **Hall County (Grand Island)**

*Meyer v. Baker* involved a vehicular accident in which the plaintiff was stopped in a line of traffic. The defendant's car struck the plaintiff's car from the rear and pushed it into the vehicle ahead of it. The matter was tried solely on the issue of the plaintiff's damages. The plaintiff, a 51-year-old unemployed male, sustained a cervical strain and was assigned a 5% whole body impairment. His medical expenses totaled \$5,683 and his complaint alleged \$394,000 in past and future wage loss. There was no evidence offered at trial to support the lost income and diminished earning capacity claims. The jury awarded the plaintiff \$11,365.

#### **Lancaster County (Lincoln)**

The plaintiff in *Benes v. Scruto* was a 41-year-old female home healthcare aide whose vehicle was struck from the rear while waiting at a stop sign. As a result of the accident, she was diagnosed with cervical strain and thoracic outlet syndrome. Her doctor testified that she was no longer physically able to work. This opinion was supported by testimony from a vocational rehabilitation consultant. Prior to the accident Ms. Benes had earned approximately \$29,000 per year. Her medical expenses were approximately \$7,500 and her total income loss claim (past and future) amounted to \$696,000. The jury awarded the plaintiff \$175,000.

*Chapp v. Wait* involved an accident in which the defendant violated a stop sign and broadsided

the vehicle in which the plaintiff was a passenger. The injured passenger was an 8-year-old boy. As a result of the accident his parent, who appeared as a plaintiff in a representative capacity for the minor child, claimed the young man had sustained an injury to his chest wall and chronic pain as a result of pressure applied during the collision by the seat belt and shoulder harness. The plaintiff also claimed that the injury caused a deformity which manifested itself as a "dent" in the boy's chest. The defendant admitted that her negligence caused the accident, but denied that the injury was of the nature, severity or extent claimed by the plaintiff. Two of the young man's treating physicians testified that the chest deformity was caused by the accident. Two additional treating physicians testified that any dent in the chest was genetic and was not caused by the accident. The total medical expenses associated with the accident were \$1,329. The jury awarded the boy \$5,000.

In *Scheer v. Anderson*, the plaintiff was a 16-year-old high school junior. Her vehicle was struck from the rear by the defendant's vehicle at a relatively high rate of speed. As a result, plaintiff was diagnosed with a thoracic strain which caused a permanent injury. The defendant's IME physician testified that the injury was not permanent. The plaintiff had played soccer for most of her life, but was unable to continue after the accident. However, there was no evidence of lost earning capacity. The plaintiff's medical specials totaled \$6,037. The jury awarded her \$50,000.

*Yousef v. Peak 9, Inc. and Gould* resulted from a low-impact rear-end collision. The defendants admitted liability and certain injury to the plaintiff, but challenged the nature, severity and extent of the claimed injury. The plaintiff, a man in his

early thirties, had been employed in several jobs which required manual labor. On the date of the accident (June 2, 2003), Mr. Yousef presented to the emergency room where he complained of neck and low back discomfort. The plaintiff saw his family physician twice in the two weeks following the accident complaining only of low back pain. He did not see a doctor again until early October 2003, when he went to the emergency room after he had injured his low back while lifting a heavy item at work. The emergency room physician who examined him on this occasion testified that the plaintiff denied neck pain and that an examination of the plaintiff's neck was grossly normal. In late October, the plaintiff again presented with complaints of neck pain. Ultimately, in May 2004, the plaintiff underwent a cervical fusion. He informed his orthopaedic surgeon that his neck had hurt since the time of the June 2003 accident. On that basis, the surgeon testified that the surgery was necessitated by the accident. The defendant had the plaintiff examined by a neurosurgeon who testified that the neck injury was not caused by the accident. The plaintiff claimed medical expenses of approximately \$43,000, but offered no evidence of lost earnings. The jury determined that the cervical fusion was not necessitated by the accident and awarded the plaintiff \$10,000.

#### **Madison County (Norfolk)**

The plaintiff in *Higginbotham v. Soukup* was a 38-year-old woman who was employed as a custodian. She was stopped to make a left turn when the defendant's vehicle struck her car from the rear. The defendant admitted liability. The plaintiff claimed carpal tunnel syndrome and cervical strain. Her doctor assigned her a 4% whole body impairment due to chronic neck pain. Her medical expenses totaled \$18,669 and she presented evidence of

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\$17,000 in necessary future medical treatment. She also claimed lost wages of \$7,666. The plaintiff claimed she could no longer work as a janitor but took a job as a secretary, which increased her income. At trial, significant questions were raised of causation regarding both the chronic neck pain and the carpal tunnel syndrome, due to evidence of the plaintiff's pre-existing neck pain. The defendant offered to confess judgment in the sum of \$40,000. The jury awarded the plaintiff \$6,465.

*Steffensmeier v. Graham* involved a 46-year-old woman who was involved in a rear-end accident. The plaintiff was stopped waiting to make a left turn. The defendant admitted liability for the accident. At the time of the accident Ms. Steffensmeier worked part time as an independent cleaning contractor. She cleaned commercial businesses, homes, and

cars for a local dealer. She missed no work due to the accident and made no claim for lost income or diminished earning capacity. The only complaint Ms. Steffensmeier had after the accident was neck pain. An MRI showed no objective injury. She was evaluated by three medical doctors, all of whom determined that there existed no objective evidence of injury. The plaintiff was also treated by a chiropractor who testified plaintiff had a ligamentous injury in the front of her neck which caused a permanent injury. Ms. Steffensmeier's total medical expenses were \$5,500. The jury awarded her \$175,000.

#### **Scotts Bluff County (Scottsbluff)**

The plaintiff in *Diedrich v. Baker* was a 26-year-old woman whose vehicle was struck from the rear by the defendant's vehicle while the plaintiff was stopped at a stoplight. As a result, Ms. Diedrich

sustained a cervical strain. Her treatment was mostly chiropractic, but she was also treated by a neurologist. Her chiropractor testified that her injury was permanent in nature and that she would require chiropractic adjustments once a month. Her neurologist also testified that she would require trigger point injections on an as-needed basis. Her medical expenses at the time of trial totaled \$15,000. Ms. Diedrich made no claim for lost wages and there was no evidence presented on the issue of lost earning capacity. The jury awarded the plaintiff \$87,500.



*W. Scott Davis*

Baylor Evnen is pleased to announce two new partners. **W. Scott Davis** was admitted to the Nebraska Bar in 1974. He received a B.A. from the College of William and Mary and his J.D. from the University of Nebraska College of Law in 1974. Before joining Baylor Evnen, Scott served as a law clerk for the Honorable Robert Van Pelt, U.S. Senior District Judge, in Lincoln, was a lecturer for legal writing and research at Indiana University School of Law, and has been a long-time Lincoln attorney. Scott also served as adjunct faculty for legal writing for the University of Nebraska College of Law from 1978 -1983. With significant experience in commercial law, probate issues, bankruptcy and corporate law, he represents numerous business and not-for-profit organizations in matters involving business planning, business formation, taxation, commercial disputes and creditors rights issues. He has actively represented clients on ballot issues and matters of public interest.

**Jenny Panko** has been associated with the firm since August 2001. Prior to joining Baylor Evnen, Jenny was a

law clerk for the Nebraska Supreme Court with the office of Chief Justice John V. Hendry, now retired. Jenny obtained her law degree from the University of Nebraska College of Law with distinction in 1999. She was a member of the Nebraska Law Review.

The majority of Jenny's present practice consists of workers' compensation cases for employers, specifically in large production settings. It would not be unusual for Jenny's professional attire to include a hard hat and steel-toed boots when visiting work areas on clients' premises. Many of the cases Jenny handles involve complex, repetitive trauma claims. Jenny also provides opinions to clients regarding insurance coverage issues, both in the workers' compensation area and in the general liability area. Jenny further assists individual clients with estate planning matters, primarily from Baylor Evnen's office in Syracuse, where she lives with her husband Tim and three young sons. As a native of the Village of Table Rock, Nebraska, Jenny is pleased to be able to serve clients in Nebraska's smaller communities.



*Jenny Panko*

## MEET OUR NEW PARTNERS

## NEBRASKA SUPREME COURT CONSIDERS ORAL ARGUMENTS IN MENTAL – MENTAL CASE

In recent Baylor Bulletins (Baylor Evnen's e-mail alert on developing issues), we reported on a case to be heard by the Nebraska Supreme Court which could open the door to the compensability of conditions due solely to mental stress. Baylor Evnen, on behalf of 14 entities, including Nebraskans for Workers' Compensation Fairness and Equity, filed a brief of amicus curiae. Oral arguments were heard by the Nebraska Supreme Court on December 7. On behalf of our clients, Dallas Jones argued that if conditions due to mental stress are to be considered compensable, that is for the Legislature, and not the courts, to decide. Dallas pointed out

that the Court of Appeals ruling in *Zach v. Nebraska State Patrol* is contrary to over 60 years of judicial decisions, which prior decisions held that an employee may recover for mental injuries only if the employee suffered physical injuries in an accident, and later developed mental injuries as a result of the employee's physical injuries. Dallas also discussed the significant cost to business if mental stress alone is sufficient to result in compensable claims.

Trooper Zach's family claimed an entitlement to workers' compensation benefits, asserting that his suicide was the result of physical changes in his brain which

were caused when he learned that he may have made a mistake in transmitting the serial number of a gun during a routine traffic stop. The gun was actually stolen, but because of the error Zach presumed it was legal. The gun was later used during a robbery of the U.S. Bank in Norfolk in which several people were killed. The Nebraska Court of Appeals allowed the Zach family to proceed on the theory that a condition caused by mental stress alone is compensable.

There is no set timetable for the Court to issue its decision. We expect a decision in early 2007.

## BAYLOR EVNEN CLIENT SEMINAR

Baylor Evnen will host its annual client seminar on March 22, 2007, for insurance claims professionals and employers. The seminar will focus on workers' compensation and employment issues. For those new to this area of the law or for those who just want a refresher course, we are offering "Basics in Workers' Compensation" from 8:00 a.m. to 8:45 a.m. The remaining topics to be addressed throughout the day include:

- Hearing Loss Claims
- Effectively Communicating with Medical Professionals
- Legislative and Case Law Update
- Calculating Disability Benefits

- Using Science to Assess Causation -Guest speaker, Dr. James Horrocks, Certified Independent Medical Examiner and current Medical Director of Nebraska Occupational Health Center
- Notice Defense
- Modifications - Proving and Defending
- Aggravations, Recurrences, and Intervening Causes
- Protecting Medicare's Interests

If you did not receive an invitation and are interested in attending, call Susan Blackwell at (402) 475-1075 or e-mail [sblackwell@baylorevnen.com](mailto:sblackwell@baylorevnen.com) for further information. We hope you can join us.



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## NEW RATES

Effective January 1, 2007, the maximum weekly workers' compensation indemnity benefit in Nebraska was increased to \$617. The mileage rate was increased to 48.5 cents per mile. The minimum weekly benefit of \$49 remains unchanged.