

January 9, 2006

Trial Report

Girl with brain injury from accident wins \$25 million

Two Jackson County jurors wanted to give more

By Amanda C. Tinnin

A 7-year-old girl who suffered a skull fracture and brain injury after the vehicle she was traveling in was rear-ended by a truck has won \$25 million in her Jackson County case against the truck driver's employer.

"It didn't shock or surprise me what the outcome was," said plaintiff attorney Paul Kavanaugh about the sizeable verdict. "The surprise I had was the way the insurance company basically assessed the case."

Plaintiff attorney Grant L. Davis agreed.

"Insurance adjusters look at cases and come up with not really fair representations of what cases are worth," Davis said. "What's fair is when you go to a jury and lay out the evidence."

Prior to trial, the plaintiff asked for \$14 million. The defendant's highest offer was \$2.5 million.

"The reason you get a big verdict in this case is because the tremendous amount of damage," Davis said. "She has suffered a lot over the last three years and will suffer a lot over the next 69 years."

Plaintiff attorney Scott S. Bethune added that the defense attorneys did a good job limiting the verdict to only \$25 million.

"We did a couple of focus groups and the mock juries were coming back with these numbers or larger," he said.

James C. Morrow, attorney for the defendant said: "In general, as with any case where the main issue is damages, we tried to focus the jury on an award that would be fair and just and did what we could to lessen plaintiff's special damages."

Morrow could not comment further about the specifics of the case as the time for filing post-trial motions and a possible appeal has not yet passed.

Family vacation

Anna Berthelsen, who was 7 years old at the time of the accident, and her family were stopped in traffic in a construction zone, known as the Grandview Triangle, near Kansas City. Anna was wearing her seat belt and seated in the right rear seat of her family's minivan.

A URS Corporation truck was driving east on I-435 into the Grandview Triangle. URS is one of the largest engineering design firms worldwide and a leading federal government contractor in the United States. The truck was pulling a trailer and had a combined weight of 14,500 pounds.

Based on evidence from the crash scene, accident reconstructionists estimated the truck was traveling 65 mph

through the construction zone, which had a posted speed limit of 45 mph.

The truck rear-ended the Berthelsen's minivan in the area where Anna was seated, crushing the rear of the minivan, pushing it into the vehicle stopped in front of it and then off the road, down an embankment and into a concrete culvert.

Anna was unconscious at the scene and was transported to Children's Mercy Hospital. She was in a coma for two days and hospitalized for more than a month before being discharged to The Rehabilitation Institute for Outpatient Physical, Occupational and Speech Therapies.

"When she first woke up she couldn't move and she was scared," Bethune said. "She had to learn how to walk again. And one of the things the doctor said was that she was a hard worker. They said they had never seen anyone work so hard to get better. Now she's making straight As. She walks. If you saw her you wouldn't know she ever had an injury. She walks with a limp, but she is in a regular curriculum in school and does well on standardized tests."

Anna continues to receive physical therapy as well as counseling as a result of this accident.

URS admitted fault the first day of trial, but continued to offer mitigating circumstances that a box truck obstructed the view of its driver. The defense contended the box truck switched lanes revealing stopped traffic, which then forced the URS driver to stop suddenly.

An independent eye witness who was called at trial testified that there was in fact no box truck obstructing the URS driver's view. She claimed she saw the driver pass her at a high rate of speed with his head down as if he was looking at something on his lap.

After a two week trial the jury returned a verdict in favor of the plaintiff for \$25 million. Two jurors, however, disagreed. They wanted to award \$45 million to Anna.

Work zone

"They didn't admit liability until the first day of trial three and half years later," Bethune said. "But then they still wanted to talk a little bit about the box truck."

Kavanaugh admitted that he was happy he was not one of the defense attorneys in this case.

"I think they knew this was a dangerous case," Kavanaugh said. "I look at cases in terms of conduct and consequences. You had a 14,000 pound construction vehicle going into an extremely well know construction zone. This wasn't thrown up over night. You've got someone going 65 mph through a construction zone with his head done and hits this little girl and crushes her skull. I was surprised they didn't take it more seriously."

With the evidence, plaintiff counsel figured, at first, the defendants would settle.

"This case was initially brought against the driver/employer as well as the car manufacturer alleging product defect," said Bethune. "What was unusual is the insurance company for the driver/company was not interested in resolving the case early in mediation, even though its insured rear-ended the plaintiff and there appeared to be little dispute about liability."

Bethune said the car manufacturer agreed to settle for a confidential amount.

"The car manufacturer and the driver could have both been held responsible under joint and several liability if both would have been in the case at trial," Bethune added.

And at trial, Bethune said the plaintiff's key exhibit, an aerial photograph of the construction zone, proved to the jury that this was not a traffic accident that "just happened."

"The area where this wreck occurred is known as the Grandview Triangle in the Kansas City area. It is where I-435, I-470 and 71 Highway all interchange," Bethune explained. "This area has been notorious for wrecks and has been under a long-term construction and renovation project to alleviate the congestion. This construction

was on-going at the time of the wreck in our case. The scene/configuration of the highway changed approximately a year after our wreck.

"We had an aerial photo taken shortly after we were retained, and it was a good thing we did because of the changes to the configuration of the highway. After getting the aerial photo, we then obtained the construction schematics from the Missouri Department of Transportation for the signage that was in place during the timeframe of our wreck. We also met with a police officer who had regularly patrolled the area for speeders and was in the area at the time of the wreck to verify that the signs were in place as depicted."

The locations of the traffic signs were laid over the aerial photo. It displayed 15 signs alerting motorists to the construction over a few miles.

"When I put this exhibit up in opening statement, several of the jurors reacted physically and some even verbally sighed," Bethune said.

Kavanaugh agreed: "It was extremely effective. This isn't a situation where you have a temporary sign that says, 'Hey, watch out!' It made it crystal clear. Whatever happen with that driver that day, this wasn't an accident. Sometimes in these types of cases you hear, 'It just happened. I didn't see it coming.' But that wasn't the case. I don't think the driver was going to get the benefit of the doubt."

Experts

One reason Kavanaugh believed the driver's story was not going to hold up in court was that his account of the accident changed.

The first officer on the scene reported that the driver said, 'They just stopped in front of me.' Immediately after the accident, there was a possibility that Anna would die. In fatalities the police have accident reconstructionists come in to evaluate the scene. Kavanaugh said that's when the driver claimed traffic not only stopped, but that he was unaware that traffic was stopping because a box truck was obstructing his view.

"The problem with that for the driver was if the box truck got out of the way, why couldn't you get out of the way?" Kavanaugh said. "When you've got an eye witness, who's got no interest in the case, who said that just did not happen, I think he clearly had a reason to try to mitigate his conduct. He simply was not credible."

In addition to believing the driver was not a credible witness, two of the defendant's three experts were not called at trial, Kavanaugh added.

Kavanaugh said the plaintiff's team was ready for cross-examination on the defendant's life care plan expert and its vocational rehabilitation expert. But neither was called.

"In that deposition we found out some very, very significant things about her background that I don't think anyone else had discovered," Kavanaugh said about the life care plan expert. "There were questions about whether she was holding herself out as a licensed medical professional when she didn't have a license."

Kavanaugh said the expert presented a life care plan to plaintiffs counsel. On the front page he said she listed her credentials and added that it stated on her letterhead that she was a licensed professional. Kavanaugh said her deposition revealed that she did not actually have a license.

"We were very much expecting her to be there and I was going to be very specific in my cross examination of her," he said. "She did not show up."

The defendant's vocational rehabilitation expert was not called either.

"He was testifying about the needs of this girl and he had never done a case involving a child before," Kavanaugh said. "He had not looked at the medical records of the child. He had read some depositions, but he had not seen her medical records."

Tough case

What made this case particularly hard for plaintiff's counsel, however, was the fact that Anna was seven when she suffered her injury.

"It was difficult on Grant and me and Paul, for Grant and I in particular," Bethune said. "We have young kids and we see some of the things this family is going through and it's easy to see this happening to us."

Davis agreed: "Anna had no control over this. She was sitting in the back of the mini-van holding one of her stuffed animals and the corporation smashed into her and she has to live the rest of her life like that."

Davis also pointed out that children's injuries can be misleading.

"There's a thing called growth into deficit," he said. "Children won't appear as badly injured as they are sometimes. As they grow older their injuries become more apparent."

The plaintiff's life care expert estimated Anna will live another 69 years. In that time, Davis said her injuries could worsen.

"What caused her left hemi paresis is damage to the right side of her brain. Our evidence was that she not only had an injury to that part of the brain, but that's just the tip of the iceberg," Davis said. "There was the original MRI and CT scan, which showed the damage. She did greatly improve. This little girl's life has been consumed by physical therapy and psychological counseling."

But even though Anna is recovering, Davis said the injury will always be with her.

"This little girl was a normal energetic little girl who played sports and rode her bike and now she can't do those things," he said. "She's not going to dance like other kids are. And that's a thing everyone should be able to do. She's not going to go on a hike or jog. To have that taken away, just the ability to feel like you're a whole human being. And all this happened at no fault of her own. She was a little girl sitting in the back of a van watching Shrek on TV on her way to a family vacation."

* * *

Facts of the case

Type of Action: Truck/auto collision

Type of Injuries: Fractured skull resulting in brain injury and left-sided partial paralysis

Court/Case Number/Date: Jackson County Circuit Court/02-CV-229151/Dec. 9, 2005

Caption: *Anna Berthelsen, a Minor by her Father and Next Friend Eric Berthelsen, v. URS Corporation*

Judge, Jury or ADR: Jury

Name of Judge: Sandra C. Midkiff

Verdict or Settlement: \$25,000,000 verdict plus \$2,188,778.27 in prejudgment interest

Special Damages: N/A

Allocation of Fault: 100 percent to defendant

Last Offer: \$2,500,000

Last Demand: \$14,000,000

Attorney for Plaintiff: Grant L. Davis & Scott S. Bethune, Davis, Bethune & Jones, Kansas City, Mo. and Paul

Kavanaugh, Kenner and Kavanaugh, Kansas City, Mo.

Insurance Carriers: (AIG) American Manufacturers Mutual Insurance Company; National Union Fire Insurance Company of Pittsburg; American International Specialty Lines Ins. Co.; Columbia Casualty Company; Lloyds of London; Steadfast Insurance Company

Plaintiff's experts: Tom Green (accident reconstruction) Chicago, Ill.; Dr. Bernard Pettingill (medical economist) Palm Beach, Fla.; Dr. Peter Patrick (pediatric neuropsychologist) Charlottesville, Va.; Dr. Solomon Batnitzky (neuro-radiologist) Kansas City, Kan.; Dr. Gary Yarkony (physiatrist - life care plan) Elgin, Ill.; Wilbur Swearingin (vocational counseling & rehabilitation) Springfield, Mo.; Dr. Ann Modrcin (treating doctor — physical medicine & rehabilitation) Kansas City, Mo.

Defendant's experts: Dr. Robert Granacher (neuropsychiatrist) Lexington, Ky.; Dr. Jane Mattson (life care plan) Norwalk, Conn.; Terry Cordray (vocational rehabilitation) Kansas City, Mo.

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