

IN THE DISTRICT COURT
IN AND FOR THE SIXTH JUDICIAL DISTRICT
CAMPBELL COUNTY, WYOMING

THE AMERICAN NATIONAL BANK of) Civil Case No. 25736
Cheyenne, as Conservator of)
the Estate of LESLIE ROY)
"LES" BUTTS, et al.,)
)
Plaintiffs,)
)
v.) TRANSCRIPT OF
) PROCEEDINGS
MICHAEL HANNIFAN and)
KEVIN HAMPLEMAN,)
)
Defendants.)

BE IT REMEMBERED THAT ON THIS,
commencing the 14th day of February, 2007, the
same being a regular juridical day of Court, the
above-entitled cause came on duly for JURY TRIAL
before the HONORABLE JOHN R. PERRY, District Court
Judge in and for the State of Wyoming, and the
following proceedings were had, to-wit:

A P P E A R A N C E S:

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1 MR. FITZGERALD: Perhaps I should move the
2 exhibit table so not crowding the jury.

3 THE COURT: That would be fine.

4 MR. FITZGERALD: I'm going to display what's
5 in evidence as Exhibit 195 in enlarged form, if I
6 may.

7 THE COURT: You may.

8 MR. FITZGERALD: Now, I know this is hard to
9 see from where you are, but you'll have Exhibit
10 195 in the jury room with you. And you may
11 remember, this is approximately where we started
12 the case when I talked with you at the beginning
13 about the economic issues in the case.

14 Now, what we have here is the summary of
15 economic loss amounts for Les Butts, and these
16 numbers are put in present value. We're going to
17 be talking about present value just very briefly
18 here. The economist explained it to you. You may
19 remember our discussion about that. So there's a
20 few things that we ought to discuss in relation to
21 this document. The past losses were calculated
22 and the future losses were calculated. And since
23 you will have this document in the courtroom, I'm
24 going to -- I mean the jury room, I'm going to
25 talk about some of the concepts we have to deal

CLOSING ARGUMENT - BY MR. FITZGERALD

1 with here.

2 For one thing, you'll remember that I
3 asked the economist to set forth for you -- and I
4 saved the notes so I could have the numbers, and
5 you're going to see this in Instruction Number 7.
6 These numbers are all there. Okay. So we have
7 the Worker's Comp lien of \$1,182,015.46. I'm
8 going to come back to that because I want to make
9 sure that I have the correct number for the past
10 medical expenses.

11 You'll remember that we had this TBA
12 figure. Now, you won't be taking this big blowup
13 back to the jury room. I will be marking on it as
14 a guide. One thing you understand, I'm sure, is
15 that you're the boss. You will make the
16 calculations. You will make the determinations.
17 I'm just offering guidance here.

18 Okay. The figure of the amount of
19 medical bills that have been paid are \$567,323.95.

20 Now, you may say to yourselves, Well,
21 didn't Worker's Comp pay those? Of course,
22 Worker's Comp paid those numbers. Okay. Just
23 keep in mind that out of any recovery, Mr. Butts
24 would have to pay one-third of the amount back to
25 the Division of Worker's Compensation with a

1 ceiling on it of \$1,182,015.46. And you'll --
2 when you look at Instruction 7, it's worded better
3 than I can talk. Okay.

4 But, when you look at the instruction
5 that's got the elements of damage on it, it's got
6 them in order and it talks about, for example,
7 pain, which we'll talk about. It talks about lost
8 earnings and so forth. Under the law you are,
9 should you choose to do it, entitled to put the
10 number in for the past medical expenses, and if
11 you were to add that number to what Dr. Pacey
12 explained to be the present value of the total
13 loss she said had to be added, so if we add the
14 567323.95 to the bottom line figure there, we're
15 going to have a figure of \$7,398,723.95.

16 Okay. Now, these are the hard dollars.
17 I want to talk with you about Dr. Winkler's
18 statements about -- and testimony about some of
19 these figures.

20 And this has to do with you're the boss.
21 Okay. You had his summary before you when he
22 testified, and I'm sure you have some notes on
23 that and you have your collective memories about
24 his testimony. He talked about -- I'm just going
25 to give you an example -- for wheelchair mobility,

CLOSING ARGUMENT - BY MR. FITZGERALD

1 he talked about that I-Bot mobile wheelchair which
2 you saw up on the screen. If you were to
3 determine that Dr. Winkler's plan has things in
4 there that Mr. Butts should have and stuff he
5 shouldn't have, take it off. You're the boss. So
6 you could take off the wheelchair. Under -- and I
7 don't think you'll do that. I'm only suggesting
8 that as an example. Because under durable medical
9 items, Dr. Winkler had, for example, the exercise
10 table. We know he's already got one. That was
11 \$1,279. Not going to need it. You're the boss.
12 Take it off.

13 Okay. Exercise equipment. In his
14 summary and his testimony he said the exercise
15 equipment was \$2,795. It's obvious he has some of
16 that. Les testified about how he uses that
17 bicycle to keep his upper body strength going. So
18 if you figure he's got enough exercise equipment,
19 even though Dr. Winkler said we're starting that
20 in the year 2023 on the summary here, take it off.
21 Okay. That's the whole point here under the
22 medical and life care expenses.

23 So what we have here is the hard dollar
24 figure.

25 I'm going to move this out of the way a

CLOSING ARGUMENT - BY MR. FITZGERALD

1 minute so I can move around, but this
2 \$7,398,723.95 in hard dollars. And this amount --
3 and you'll see it set forth in Instruction 7 --
4 would have to be paid -- if you had your -- as
5 your award this sum -- we'll talk about my
6 recommendations on the award, but if you had your
7 verdict was this sum, well, he's not going to have
8 to pay a third of it, but he would have to pay
9 back this amount.

10 Okay. Worker's Comp has asserted a
11 lien. Let me just talk about paying back this
12 amount, and if you add that on to this, you can do
13 the math. Now, Mr. Butts, as you know, wants to
14 get this paid back and he wants to get off
15 Worker's Comp. As the instruction tells you,
16 they've got this lien. He can ask to be taken
17 off. And there's no guarantee that he will be,
18 but he would like to have that option so that he
19 can make his own health care choices, because as
20 you know, he's had difficulty, and you heard one
21 of the examples from him. You heard several
22 during the course of this trial, but when he was
23 concerned about his urinary tract infection, he
24 was informed that he should by a box of Depends
25 and wait a couple of weeks. So what we're

CLOSING ARGUMENT - BY MR. FITZGERALD

1 recommending is that you enable him to have the
2 opportunity to get out of Worker's Comp and to be
3 able to make his own care choices.

4 Obviously, if you make an award like
5 this, and he pays back Worker's Compensation and
6 they don't let him off, at least he'll have money
7 to make -- to get better care and to get the kind
8 of care that he needs and be hassle free, which
9 is, of all things, one of the things Les Butts
10 deserves.

11 Now, the reason that I've stayed up here
12 is because let's talk about what's in that
13 Worker's Compensation instruction. You'll read in
14 there that Worker's Comp estimates that it will
15 pay out \$2.4 million over 24 years.

16 Okay. A couple of points here. You
17 can't get there from here. We'll talk about that
18 in a minute. With what they've set aside,
19 470,000, you can't ever get to 2.4 million, even
20 if you don't spend a nickle. I'll explain that in
21 a minute.

22 Another point regarding this
23 \$2.4 million over 24 years is the Court has
24 instructed you that his life expectancy is 41 more
25 years. Okay. And if I get any of these numbers

1 wrong, you've got them in the instructions.

2 So 2.4 million over 24 years is not
3 enough. Why isn't it enough? Why couldn't you
4 subtract 2.4 million from this number? It's
5 because, if you'll recall, it's apples and
6 oranges. Okay. This \$2.4 million is the payout
7 from Worker's Comp. It is not the present value.
8 You've got an instruction in your packets about
9 present value, a dollar today will produce more
10 than a dollar later. Okay. These numbers,
11 7,398,000, those numbers have been reduced to
12 present value. So you can't compare the
13 2.4 million to the 7,398,000.

14 And how do you know that what I'm saying
15 is accurate? Take a look at the instruction on
16 the Worker's Comp payback. There's \$470,000 is
17 what Worker's Comp says it can grow to make these
18 payouts for Mr. Butts over 24 years. All right.

19 How do we know that won't grow? Because
20 also in Instruction 7 you have Worker's Comp's
21 discount figure of 4.73 percent. Okay. Now, I
22 want to talk with you about what's called the rule
23 of 72. Some of you may be familiar with this.
24 It's a very simple rule. If you take the interest
25 rate that you might get on your money and you

CLOSING ARGUMENT - BY MR. FITZGERALD

1 divide it into 72, it will tell you how many years
2 it will take to double your money. You can't take
3 any out. Okay. If you got 8 percent --

4 MR. LYMAN: Excuse me, Your Honor. Sorry to
5 interrupt, Mr. Fitzgerald. May we approach?

6 THE COURT: You may.

7 (Conference at the bench without the
8 hearing of the jury, as follows:)

9 MR. LYMAN: I apologize for interrupting, but
10 there's been no testimony from any expert witness
11 on the rule of 72, and we're not talking about
12 simple arithmetic. It's unlikely to be in the
13 province of the ordinary understanding of the
14 jury. I think this is talking about a matter that
15 was never in evidence.

16 MR. FITZGERALD: You can go down, buy any
17 paperback investment book down here, it's going to
18 have the rule of 72 in it. It's all over the
19 internet. It's just a fact of life.

20 MR. LYMAN: I've never heard of it before. I
21 don't claim to be a financial wizard, but I don't
22 think it's a common ordinary thing for people
23 would know. We had the economist testify that
24 could have talked about rules.

25 THE COURT: I'm going to give you latitude,

CLOSING ARGUMENT - BY MR. FITZGERALD

1 Mr. Fitzgerald, because we're talking about
2 damages, but I'm sure you won't dwell on being an
3 expert, but I'll give him some latitude. At this
4 point I'm going to overrule your objection. Thank
5 you.

6 (Thereupon, the following proceedings
7 continued within the hearing of the
8 jury.)

9 MR. FITZGERALD: Okay. So I've done the math
10 for you. You can redo my math. All right. Now
11 I've got a purple marker. Who knows where my
12 other one went.

13 If you divide 4.73 into 72, okay, it
14 will take 15.2 years to double the money. So in
15 15.2 years you'd have twice 4,000 -- excuse me
16 470,000. Okay. So that's \$940,000 in 15 years if
17 you don't touch the principal. Okay.

18 And if you use that same discount factor
19 and you wait another 15.2 years, then you'd have
20 \$1,880,000. Okay. After 30 years. You can't get
21 to 2.4 million with \$470,000. Doesn't work.

22 Now, the present value -- keep in mind
23 over here, our present value for the medical and
24 life care expenses is \$3,680,600, and the present
25 value for the future losses is this number. So

CLOSING ARGUMENT - BY MR. FITZGERALD

1 you have to have a reasonable projection of how
2 much it will take -- that's what present value is
3 all about -- to cover his needs as Dr. Winkler
4 explained them and as you are free to choose to
5 accept, reject, accept part of it, reject all of
6 it, accept all of. That's the point.

7 Now I'm going to move these aside.

8 I want to talk with you about some other
9 matters. I'm mindful of your time. We're taking
10 time because we're going to be through with this
11 today, tomorrow, and we need to take the time to
12 explain this, because it is Mr. Butts' entire
13 future.

14 You know there's a bank involved. The
15 first witness, although many days ago, was the
16 bank's representative, and they will manage the
17 money conservatively. She testified about that.
18 Mr. Butts is not going to be managing whatever
19 judgment might arise from your verdict. Okay.

20 Setting aside the jury instructions,
21 we've talked about 7. The present value
22 instruction is number 27. Okay.

23 Let's talk about Jury Instruction Number
24 26. I mentioned it to you when we talked about
25 the elements of his damages. It is not easy to

CLOSING ARGUMENT - BY MR. FITZGERALD

1 make these kinds of determinations that you will
2 be making. That is why the law gives you
3 guidance, and you'll see it in Instruction Number
4 26 on the elements of damage.

5 You will be able to use that as a road
6 map for your discussion regarding the appropriate
7 measure of damages for someone in a case like this
8 where Mr. Butts, as we all know, has the
9 disability of his permanent brain injury, the
10 obvious disability of his paralysis, and the huge
11 level of pain that has been explained to you, and
12 which we now understand from Dr. Winkler's
13 explanation cannot be ameliorated, cannot be made
14 less by what we would all hope, simply cutting the
15 spinal cord. That won't work.

16 On -- in your consideration of the
17 elements of damage, please keep in mind that
18 there's no evidence whatsoever in this case that
19 Mr. Butts has a reduced life expectancy.
20 Dr. Winkler's testimony was that if Mr. Butts gets
21 the kind of care -- and doesn't he deserve it.
22 Dr. Winkler testified if he gets the kind of care
23 that Dr. Winkler outlined in his minimum life care
24 plan, that Mr. Butts can expect a normal life
25 expectancy. The defense has offered no evidence

CLOSING ARGUMENT - BY MR. FITZGERALD

1 to the contrary, and so you have the evidence of
2 his normal life expectancy.

3 Now, I want to discuss with you
4 something that we talked about very early in this
5 case during the voir dire, and this relates to
6 Instruction 8. And on the second page of
7 Instruction 8 you will see that the Court has read
8 this, and you'll see it in writing, the law
9 forbids you to be governed by sympathy.

10 Now, we have brought you testimony about
11 the concrete hard dollar figures that it is going
12 to take for Mr. Butts to be able to live as he
13 should. He shouldn't have to live like he does,
14 but considering where we are now, we've brought
15 you the hard dollar figures regarding what it
16 takes to make his life reasonable.

17 He does not want any sympathy. I think
18 it was Ron Watson who said if you tried to offer
19 him any, he'd probably clobber you. That's the
20 kind of person that Les Butts is. Likewise, and
21 we talked about this in voir dire, this is very
22 important and you now see in the law the Judge has
23 given you the importance of not letting sympathy
24 for the defendants guide you.

25 It's not just a suggestion. The law

1 forbids you to be governed by sympathy. And I
2 don't mean to seem -- probably do seem kind of
3 harsh on that point, but that's why we have
4 trials. It's a matter of great import. We're all
5 adults here, and we need to decide the case based
6 not upon sympathy for Mr. Butts or for the
7 defendants. As Mr. Cok explained to you, soon the
8 responsibility will pass from him and from me on
9 to you. And you will be making determinations
10 that will last Mr. Butts for the rest of his life,
11 and in doing that, you assess -- you assess the
12 losses. You assess the damages.

13 We didn't bring Davis and Dawson in
14 here. I don't think I need to say much about
15 that. You all know from your life experiences --
16 and you're allowed to use them. You will find
17 when you read those instructions again you can use
18 your life experiences. You know what it means to
19 those boys to have a father they love very, very
20 much. That's a wonderful thing, and they will
21 always love him. Their love is not diminished.
22 You know some of the things about their
23 relationship now, and you know what it means to
24 Les not to be able to hug them.

25 All right. Mr. Mortimer, would you

CLOSING ARGUMENT - BY MR. FITZGERALD

1 please put up Exhibit 44. Yes, we've already
2 looked at the first page here.

3 Exhibit 44. You will see and you have,
4 ladies and gentlemen, in the jury room Exhibit 44,
5 and you know well by now you'll be able to go
6 through all of this. I want to direct your
7 attention to the bottom of Exhibit 44, page 2, and
8 I want to talk about this issue that the defense
9 talked quite a bit about during the course of
10 their presentation about whether there's
11 production over safety. Okay.

12 Now, what do we know from Exhibit 44?
13 It's Mr. Hampleman's contract to do the things
14 he's supposed to do, which he breached, by the
15 way. Black Thunder Mine is one of the largest
16 coal mines in the United States. Okay.

17 The mining program is the key to
18 ensuring the level of production required by coal
19 contracts. The potential cost for failing to
20 produce is substantial.

21 This position has the responsibility for
22 all production, all maintenance, all reclamation
23 at the operating expense budget of over \$40
24 million per year, and coal production worth over
25 \$250 million per year. That's a quarter of a

CLOSING ARGUMENT - BY MR. FITZGERALD

1 billion -- billion with a "B" -- dollars per year.

2 Thank you, Mr. Mortimer.

3 Mr. McCue, one of the first, if not the
4 first defense witness, testified -- perhaps not
5 quite in these words; you'll have the memory --
6 all the coal in the mine is not worth a wrecked
7 life.

8 Well, what are the things that are
9 wrecked in Les' life? There are really three big
10 areas here. There's his brain injury. We all
11 know he went to the University of Wyoming, got an
12 engineering degree, took a job, would have worked
13 his way up, had a bright future, earnest, hard-
14 working young man, always has been, always taken
15 responsibility, always will. He'll take all the
16 responsibility he can.

17 But he can't be gainfully employed, and
18 you know what's really unfortunate is that
19 Mr. Butts is not so brain damaged as to be unaware
20 of his limitations. He's aware of them.

21 So that's a large part of the elements
22 of his damage, his disability from his brain
23 injury. Not to mention knowing that he -- and he
24 knows this -- can't recall, can't keep track of
25 things, doesn't find the right words, struggles,

CLOSING ARGUMENT - BY MR. FITZGERALD

1 struggles mightily, and undoubtedly everyone here
2 commends him for that, but that's a big area for
3 him.

4 You'll remember when Dr. Long came and
5 testified. He gave us the explanation for this
6 heterotopic ossification.

7 If I may just step over so far as here,
8 Your Honor.

9 We know he's growing bone where he
10 should not be growing it, and it's in the area of
11 his body where -- where it affects his -- his
12 range of motion, and it's painful. And he gets
13 the spasms and we know about those spasms.
14 Gigantic charley horses. And that's his pain.
15 That's the second big element.

16 And what about his ability to move? He
17 moves all he can. He does all he can. He rides
18 that horse, bless him for that. Rides that horse,
19 and it's good for him. He does not move like he
20 should be able to, and he never will. So that
21 goes into the elements of damage.

22 His disability, his loss of enjoyment of
23 life. I'm not going to belabor it here; I don't
24 want you to forget Dr. Long's explanation of the
25 lack of bowel and bladder control. Something to

CLOSING ARGUMENT - BY MR. FITZGERALD

1 keep in mind.

2 Okay. Now, if we think about the job of
3 Mr. Hampleman and the fact that his contract says
4 the potential cost of failure to produce is
5 substantial, let's also think about that these
6 gentlemen have the power -- they had the power to
7 prevent what happened to Mr. Butts here. They had
8 it. And soon you will have the power to set
9 things as right as you can. You have the power of
10 the law.

11 I'm going to suggest for you that when
12 you consider the damages to Mr. Butts, you take
13 these possibilities into account. That you make
14 him an award for all of the hard dollars, the
15 figure that you will see on Exhibit 195, the
16 summary; that you put him in a position not to
17 have his award diminished by paying back the lien;
18 that you award him the amount of the lien.

19 That for his pain, which I've described,
20 and you and we know something about now, that you
21 award him \$4 million.

22 That for his disability, the brain
23 injury, the fact he will spend the rest of his
24 life in a wheelchair -- now, Les Butts, of all
25 people, if there's ever going to be anybody who

CLOSING ARGUMENT - BY MR. FITZGERALD

1 can get up and get out of that wheelchair, it will
2 be him -- but for his disability, your award
3 should be the \$4 million.

4 For his paralysis, \$4 million.

5 For his brain injury, \$4 million.

6 For his pain, \$4 million.

7 And if you add those numbers together,
8 with the hard dollar figures, you will be at
9 approximately \$20 million. And I ask you to do
10 that for Les Butts, who, as we know, is blameless
11 here, didn't ask for this, didn't deserve it.
12 They had the power to prevent it.

13 You have the power to make it right.
14 You're the boss. I'm just another person. These
15 are my thoughts.

16 Now I want to talk with you about one
17 last thing. You will remember this trial for the
18 rest of your lives. You will never forget Les
19 Butts. Ten years from now something will cause
20 you to think back on this day. Something will
21 cause you to think about your verdict. You will
22 think about the justice in this case, about how
23 you heard the evidence and you arrived at what you
24 deemed to be justice.

25 That's the way it will be. Just like

CLOSING ARGUMENT - BY MR. FITZGERALD

1 anytime that you work with a child, you have an
2 impact on that child for the rest of the life of
3 that child, and you will have that kind of impact
4 on Les Butts for the rest of his life and for the
5 rest of your life. It's going to take courage.
6 Now, if we need a model for our courage, can we
7 not find it in Les Butts? Thank you.

8 THE COURT: Ladies and gentlemen of the jury,
9 lunch is here for you, so I'm going to have the
10 bailiffs take you back. Please remember, don't
11 discuss the case yet. It has not been handed to
12 you. We still need to hear the closing arguments
13 of defendant. We're going to take about 40
14 minutes for lunch. If we need longer, the
15 bailiffs will tell me. Otherwise, about 12:45
16 we'll be back.

17 (The jury left the courtroom.)

18 THE COURT: All right.

19 (Proceedings recessed from 12:12 p.m. to
20 12:50 p.m.)

21 THE COURT: All right. Good afternoon. I
22 did want the record to reflect one thing so that
23 everybody would be perfectly clear. We did get a
24 note from one of the jurors, it was Juror Stewart.
25 You'll recall during voir dire Juror Stewart had

CLOSING ARGUMENT - BY MR. FITZGERALD

1 MR. COK: Your Honor, may Mr. Fitzgerald have
2 five minutes to rebut the damages and then have my
3 liability rebuttal? Is it okay to split it?

4 THE COURT: Yes.

5 MR. FITZGERALD: May I do this, Your Honor?

6 THE COURT: Yes.

7 MR. FITZGERALD: Okay. So their lawyer says,
8 Well, look at this. Now, there's an answer to
9 this. Okay. They didn't ask the expert, so now
10 I've got to do it. I'm not an economist, but I'll
11 just show you a few things. And, you know, they
12 also could have called their own economist, if
13 there was something wrong with Dr. Pacey's
14 analysis, but it's not as simple as the defense
15 lawyer would have you believe.

16 Okay. Let me show you. Let's just take
17 for simplicity sake a thousand dollars. Okay.
18 It's going to earn 4 percent interest. Okay. And
19 they say, Well, you take that thousand dollars and
20 earn 4 percent interest, and next year you'll
21 still have it. And the year after that you'll
22 still have it. And the year after that you'll
23 still have it.

24 Okay. But what happens to its buying
25 power? If -- you know, let's take inflation into

REBUTTAL CLOSING - BY MR. FITZGERALD

1 account. It's part of your life experience. If
2 you have a 4 percent inflation rate, then the
3 buying power of this thousand dollars next year is
4 \$960. Like I say, I'm no expert, and I know there
5 are people among you who have expertise on these
6 sorts of things, and so I'm giving you my
7 observation here.

8 Now, the next year it's going to have
9 less buying power, and the next year it's going to
10 have less buying power. So, yeah, you'll have it
11 at the end, but what's it going to buy you?

12 A couple earthly examples. Gasoline.
13 Okay. We're talking about 41 years of life
14 expectancy. This is 2007. Let's take -- let's go
15 back 41 years. It's 1966. Lyndon Johnson is the
16 President of the United States. Okay. What's gas
17 cost you? I don't know. If you get it for a good
18 buy, can you get it for 17.9 for regular? Anybody
19 remember Ethyl? 19.9 for Ethyl. Or maybe you're
20 spending 27.9 for regular and 29.9 for Ethyl.
21 Okay. In your own life experiences, you will come
22 up with examples.

23 What are we going to do about the rise
24 in medical care costs? Okay. What's an x-ray
25 cost in 1966? Or 1976? Or '86? Or even '96?

REBUTTAL CLOSING - BY MR. FITZGERALD

1 How about a MRI? Couldn't get one in
2 1996. Suppose Mr. Butts needs one in 41 years,
3 what's it going to cost?

4 You can't simplify this stuff to the
5 point where you can just get up and make an
6 argument like this when you have an economist
7 here. These are sophisticated kinds of
8 calculations. And I don't mean to suggest, as I
9 said, that I'm any expert on it, but I want --
10 just want you to have a chance to think about some
11 of these things. Thank you.

12 MR. COK: May I proceed, Your Honor?

13 THE COURT: You may, sir.

14 MR. COK: Thank you. Members of the jury,
15 it's over. It's time for the argument to end and
16 let you do what you came to do, reach a verdict.
17 We thank you for your attention and for your time.
18 We thank you for giving up your days and good
19 service for this jury system, which is the best
20 system we have for resolving disputes in the
21 entire world. We believe in it.

22 Les Butts believes in it, and the
23 lawyers here and the Judge believe in it. I just
24 have a couple of responses to some of the things
25 that Mr. Lyman said. When he started his

REBUTTAL CLOSING - BY MR. COK