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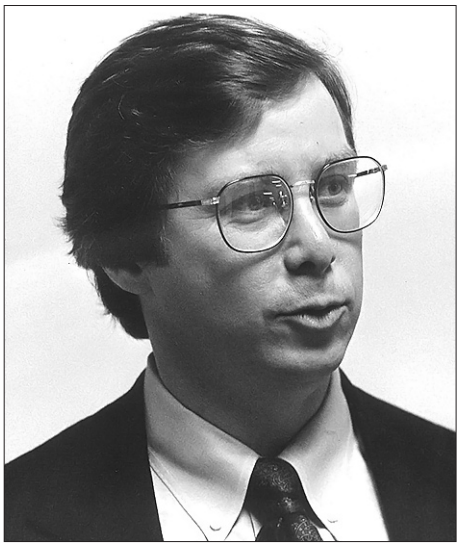
Sending Defense Lawyers a Message

Can Opponents Counter James Butler's Closing?

By S. Richard Gard Jr.
Staff Reporter



Although opposing counsel managed to restrict his closing argument, James E. Butler Jr. still won a $1.31 million award from a Cobb County jury.

Michael H. Schroder, representing Metro Ambulance Service Inc., tried to keep James E. Butler Jr. from elevating the trial to a referendum on an entire industry.

Plaintiff's attorney James E. Butler Jr.'s ability to put an entire industry on trial in an isolated torts case continues to confound the insurance defense bar.

Butler won the largest known verdict in state history, $30.2 million, after his closing argument asked a Fulton State Court jury February to send a message to the trucking industry. Mindful of that result, Butler's latest opponents studied the closing argument he used in *Ocilla* and had a judge restrict the attorney from asking the jury to send a message to the emergency medical services industry. Butler complied, but the jury sent a message anyway.

The Cobb State Court jury on Friday attached a hand written note to its $1.31 million award in *Jones v. Hospital Authority of Gwinnett County*, Civil Action no. 87A-17816-4: "We the jury feel that there should be more stringent regulations of ground and air ambulance services in the State of Georgia."

More astounding, in *Jones* Butler merely presented nominal damages, rather than an actual or compensatory loss, as a predicate for punitive damages against the two defendants in the case. The law provides nominal damages for a technical breach of a duty but where the plaintiff can show no actual injury. To a mere $5,001 in nominal damages the jury added punitive damages of $1.3 million against the Gwinnett hospital authority and $5,000 against Metro Ambulance Services Inc. Butler's case concerned the May 20, 1985, medical rescue of William H. O'Kelley, an automobile accident victim with severe burns. The hospital authority officials insisted on admitting O'Kelley to one of its own facilities before transferring him to a burn treatment center. A medical helicopter was diverted from the accident scene and ordered to meet the patient at the hospital, according to Butler. The established procedure, he argued, ensured that the hospital authority could count patients as its own, and bill them accordingly, before sending them elsewhere.

"We out the policy of the hospital on trial," Butler says. "The hospital authority let its own financial interest intrude upon the welfare of the public.

O'Kelley received some treatment at Duluth's Joan Glancy Hospital, including heavy doses of morphine, before attendants loaded him on the awaiting helicopter in the hospital parking lot. As it lifted off, the helicopter hit a light pole and tipped on its side. The roll killed the pilot and a medical technician, seated on the right side of the cab and suspended O'Kelley from his stretcher on the left side. He died several days later at an Augusta burn center.

Butler sued for the rescue's possible exacerbation of the mental and physical injury the automobile accident had caused. He cited the hospital authority for redirecting the helicopter and providing an unsafe take-off site. He brought in Metro, the helicopter ambulance company, on allegations of pilot error, use of an inadequate craft and improper maintenance of the equipment.

The earlier case of *Hilliard v. Ocill*a, Civil Action no. 122341 (Fulton State Ct.) (Daily Report, Feb. 29, 1988), increased Butler's notoriety among defense lawyers for his technique of extending the fault of the specific defendant on trial to an entire industry. Shortly after that jury awarded its eight-figure verdict, Butler's opponents in upcoming punitive damages cases scrambled to get a copy of his closing argument.

"Please remember that your verdict is

going to send a message, whatever that verdict is. A jury has the power to decide, folks, to draw the line in the industry and to send a message of what is and what is not permissible conduct in our society." Butler told the jury in *Ocilla*, asking it to calculate an amount of punitive damages "enough to absolutely, unequivocally send a message to every trucking company in the land."

Interviewed after announcing the verdict, *Ocilla* jury foreman Zanny Shealy said, "I think the jury sent a message to the trucking industry and, "he added, in a reference to some of the other defendants, "the mobile-home industry." At one point the jury, according to Shealy, discussed awarding $164 million. Butler settled the *Ocilla* case for an undisclosed amount prior to any appeal.

Michael H. Schroder, a partner at Swift, Currie, McGhee & Hires, represents Metro in *Jones*. He managed to get a copy of the *Ocilla* argument from a lawyer at Neely & Player who is defending a client of his own against Butler. Schroder made a copy for himself and one for Meade Burns, a partner at Long, Weinberg, Ansley & Wheeler, representing the hospital authority.

Poring over the 21-page transcript, Schroder prepared a pretrial motion to prevent Butler from doing to the *Jones* jury what he did to the *Ocilla* jury. Schroder argues that the punitive damages statute speaks of deterring the wrongdoing of the defendant only, not the conduct of non-parties. Therefore, Butler's elevating the trial to a referendum in an entire industry exceeds the compass of the statue.

Cobb State Court Judge Harris Adams simply told Butler not to ask the jury to send a message or deter the wrongdoing of others, according to the attorneys in the case. Defense lawyers Burns and Schroder agree that Butler stayed within the bounds of Adams' guidelines.

"His argument in this case was nothing as strong as the *Ocilla* case," says Schroder. "He felt constrained the judge's ruling." Butler says he did not plan to ask the jury to send a message anyway.

But the two arguments had certain parallels. In *Ocilla* Butler told the jury that only it had the power "to stop the slaughter" on the highways. He said, "You have got the power to regulate these trucking companies better than government, which is subject to special interest."

Butler made the same argument in *Jones*. He told the jury that only it, not the legislature could improve the coordination of emergency medical service in metropolitan Atlanta, remembers Butler's co-counsel and new partner Robert D. Cheely.

Schroder says Butler gives a jury a sense of "duty to do something about a problem in their community. You know, they're almost like a grand jury."

Samuel P. Pierce Jr., a partner at Drew, Eckl & Farnham, defended Ocilla Industries Inc.

Jones jury foreman Charles A. Peele, a financial consultant, says the jury wanted its verdict to communicate that "if you're in the business of providing emergency transportation service, we want you to do as much as you can." We were hoping that it got some attention."

Defense counsel Burns, whose hospital authority client suffered nearly all of the verdict, points to Butler's skill at tapping juror's anger. Burns says "He gets them outraged, no question about it. We're living in an era of consumerism and they just respond to it."

Butler claims the facts, not lawyers, get juries mad. But he says, "Defense lawyers in so many cases spend so much time trying to cover up and come up with defenses that their conduct sometimes makes jurors mad."

Or at least Butler likes to portray his adversaries that way. Samuel P. Pierce Jr., a partner at Drew, Eckl, & Farnham defended Ocilla, his only case with Butler. He says Butler "effectively draws upon the sympathies that people naturally have for an individual versus a company or a single industry."

Pierce adds, "He also attempts to drive wedges of distrust by intimating or suggesting when there is only a slim thread of evidence from which any inference could be drawn that there is any kind of cover up. In essence, it's playing the little person against the monolithic corporation." ❑

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