

SUMMER 2008

# CERTIORARI

Journal of Consumer Advocacy



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## CASE FILE

# Fire Victims Win Judgment

Angela and Dick Wyatt purchased a used mobile home in Ottawa County where they planned to make their home. It needed some work prior to moving in and so the seller had a local electrician do the wiring work.

Soon after the Wyatts moved in, the defective wiring caused a fire and the entire place burned down, burning both the Wyatts. Mrs. Wyatt especially required extensive medical care.

When the state fire marshal determined that the re-wiring work was the cause, the Wyatts came to Frasier, Frasier & Hickman, LLP. A lawsuit was brought.

Recently, judgment was entered in favor of the Wyatts for a substantial sum to be paid by the electrician's insurance carrier.

certiorari, (ser-she-eh-ra-re) noun [Latin, to be informed]; to be informed as a means of gaining appellate review; a common writ.

When at least four of the nine U.S. Supreme Court justices vote to hear a case, the court issues a writ of certiorari.

**Drug testing laws  
are complicated.  
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**Only you can  
make a difference.  
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## Journal of Consumer Advocacy

CONSUMER INFORMATION FOR THE CLIENTS AND  
FRIENDS OF FRASIER, FRASIER & HICKMAN, LLP

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### CASE FILE

## Lawsuit Exposes Defective Machinery

When Hoa Bui was injured during a work-place accident in 2002, little did he know that it would take six years for his case to work its way through the legal system.

"There is much truth to the saying, 'the wheels of justice turn slowly'. But they do indeed turn," said Jim Frasier, after Bui's case was settled out of court recently.

"Hoa Bui's case is a good example of this fact. But the court system ultimately worked and Mr. Bui received justice," Frasier said.

Bui worked at Southwestern Wire Cloth when his hand and arm were severely injured. He operated a "slip-roll" machine which uses two large rollers, moving in opposite directions, to bend sheet metal or wire cloth into a cylinder shape. One of Bui's gloves became caught in the rollers and pulled his hand into the machine.

Bui filed a Worker's Compensation case and received Permanent Partial Disability benefits. After investigating the accident, a lawsuit alleging the machine was "unreasonably dangerous and defective" was filed against its manufacturer, Tennsmith Corp., in Tulsa County District Court.

Tennsmith Corp. alleged there was no problem with the machine and that Bui misused it by inserting material from the back of the

machine instead of its front side. The company further claimed that Bui was negligent because he wore gloves while operating the machine.

An investigation by Frasier, Frasier & Hickman, LLP, revealed that the machine could be operated "hands free" by a foot switch that allowed the operator to work from either end of the slip roll. Also, safety features were positioned at both the front and rear of the machine, indicating that it could be operated from either direction, despite the manufacturer's claim to the contrary.

"The company put on a full-court press to prove that Mr. Bui was himself negligent – not the company. However, our thorough investigation and persistence in fighting for Mr. Bui's rights finally prevailed," Frasier said.

Frasier noted that companies and their insurers often attempt to "wait out" individual plaintiffs in a lawsuit. "If they can delay long enough, many times they cause plaintiffs in a good lawsuit to hurry things up by settling for compensation that is much lower than they are entitled to.

"Experienced trial attorneys know when to settle and when to insist on a trial. And that is a service we provide for our clients on a regular basis," Frasier said.

# Violations of Oklahoma Employee Drug Testing Law Remedied

Attention: Employees in Oklahoma who are not subject to federal Department of Transportation (DOT) testing.

There is a state law requiring strict compliance for employee drug and alcohol testing procedures. And it applies to both the public and private sectors.

A few years ago, when Conoco and Phillips Petroleum merged, the new company revamped its drug testing policies. The union at the company's Ponca City refinery objected that the revamped policy was not in compliance with the state drug testing laws, but the company chose to proceed anyway.

Subsequently, the company drug-tested a particular employee. Although the test came back "negative" on each one of the panel of nine drugs, it came back "positive" for a drug not listed in the policy. The employee was fired.

Frasier, Frasier & Hickman, LLP, brought suit on behalf of the worker. The company requested the Court to throw the case out on the grounds that the company had "substantially" complied with the state law in conducting its drug test. The court relied on a scholarly article the com-

pany lawyer had written 20 years before pointing out the law must be "strictly" complied with.

The trial court agreed.

Rather than throw the case out as the company wanted, the trial court ruled that the testing of the employee was illegal.

ConocoPhillips then requested mediation. Recently the case was successfully settled, with the company requiring that the settlement compensation amount be confidential.

"Employers are constantly pushing the line on drug testing and commonly crossing it," Steve Hickman said. "We find public and private sector employers regularly violating the law."

An example is that the City of Tulsa requires all applicants for jobs to take a drug test, a procedure that is clearly illegal under current law.

"The drug testing laws are complicated enough that anyone fired as a result of a drug test should have a lawyer look at the situation to make sure the testing was valid," said Hickman.

## CASE FILE

# Arbitration and Pension Plan Case Finds for Employee

Jerry Norton was a long-time employee of the Byron Jackson pump plant in east Tulsa. During his time there, the plant sold several times. It was finally sold by Flowserve to Ruhrpumpen effective January 1, 2001. The prior owners had all carried over the same pension; but the new company started over.

The union-negotiated pension plan from Byron Jackson to Flowserve had a "62+25" benefit – a person who had 25 years of service and reached the age of 62 would receive a full pension as though he was 65. Shortly after the sale to Ruhrpumpen, Norton turned 62 and claimed the benefit. Flowserve denied the claim, adding an additional requirement – that the person be employed at the time he turned 62.

Frasier, Frasier & Hickman, LLP, filed

a lawsuit to obtain benefits for Norton – and which would also affect numerous other employees who would later turn 62. Claims for pension benefits in the private sector are governed by a Nixon-era law known as "ERISA." This law stacks the deck against workers and in favor of companies to the extent that even the federal court of appeals has said that ERISA can be a "fruitless and thorny" ground for employees.

Because the pension plan had been made pursuant to a collective bargaining agreement and because it provided for arbitration, the federal court referred the case to arbitration. Attorneys for Frasier, Frasier & Hickman, LLP, argued, on behalf of Norton, that the plan only had two requirements to get the benefit – that the person be 62 years of age and have

25 years of service with the company.

The company argued that there was a third requirement, not written in the plan, but obviously true, that the person must also be employed at the age of 62. The arbitrator held that the federal law required the plan to be interpreted as it was written, not as the company wished that it had been written. The arbitrator ruled in favor of Norton.

The federal court upheld the arbitrator's decision and ordered the Flowserve pension plan to pay Norton his back benefits.

In a subsequent development, the company has amended the plan to comply with the arbitrator's award and make it clear that each person with 25 years of service will receive the benefit upon reaching age 62.

## TOMY DEE'S CORNER

Fuel prices have skyrocketed. Food prices are on the rise. Housing costs more and foreclosures are up. Insurance premiums are increasing and benefits shrinking. Paychecks are tightening. Can layoffs be just over the horizon?

Our world is changing right before our eyes. Gasoline cost less than \$1 a gallon just a few short years ago. Attractive adjustable rates made home loans easy until recently. Good jobs were plentiful.

It will only seem like yesterday. But those will be the "good old days."

Somebody somewhere will be getting rich. But it won't be working folks who keep this country strong. The direction we seem to be headed will eliminate the middle class as the nation is divided into "haves" and "have nots." And the rich get richer and the poor get poorer.

Then it may seem that the only thing we really have left is our rights guaranteed by contract and the constitution. But there are forces trying to erode those, too. Unions are under attack because Big Business knows that workers are stronger when they are united. Our rights to assembly, privacy, free speech, and protection from predatory commercialism would be eliminated, if we would let the "haves" have their way.

One thing stands in the way of this bleak future.

You. Your vote. In the polling booth. And in the market place.

You still have freedom of choice. And you should exercise it ... or you just might lose it.

Important elections will be held this summer and fall. July 29 will be the primary election and there are several important legislative races on the ballot. Laws protecting worker rights are under attack at the state Legislature and all citizens should be aware of the candidates in these races. The runoff primary will be August 26.

The November 4 general election will decide who our next president will be and the direction of this nation. Oklahomans, as a rule, have voted for social conservatives in the the presidential and many legislative races in recent memory. The Republicans have used this to enrich the "haves." Can we afford this anymore?


Only you can make a difference.

Make sure you are registered to vote. Then study the candidates and their positions on the issues that directly affect you and your family. Then vote. And get your friends and coworkers to vote.

Don't let our world, our country, our way of life, change without sounding off and exercising our rights.

Vote.

—*Jim Frasier*



**“The test of our progress is not whether we add more to the abundance of those who have much; it is whether we provide enough for those who have too little.”**

**Franklin D. Roosevelt**  
**January 20, 1937**

## SCHOLARSHIP

### Andrew Flippo wins Fulbright Scholarship

Andrew Flippo has been awarded a prestigious J. William Fulbright Foreign Scholarship.

Flippo is the son of Frasier, Frasier & Hickman, LLP, attorney John Flippo. The Claremore resident attended American University and George Washington University before graduating last year from Georgia State University with a degree in linguistics.

The Fulbright program sends outstanding young college graduates to more than 150 countries, to help increase mutual understanding with the people of the United States.

Flippo will go to East Germany where he will teach English to high school students.

“This is a great opportunity for Andrew to put to good use the knowledge he obtained through his college studies,” said John Flippo.

## WEBSITE

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[www.frasierlaw.com](http://www.frasierlaw.com)

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