

The Indiana Jury Verdict Reporter

The Most Current and Complete Summary of Indiana Jury Verdicts

October, 2012

Statewide Jury Verdict Coverage

13 IJVR 10

Unbiased and Independently Researched Jury Verdict Results

In This Issue

Marion County

Medical Negligence - \$4,100,000 p. 1
Auto Negligence - \$142,500 p. 10

Federal Court - South Bend

Premises Liability - \$75,000 p. 2

Lake County

Auto Negligence - Defense verdict p. 3
Auto Negligence - Zero damages p. 6
Premises Liability - \$177,000 p. 10

Grant County

Premises Liability - Defense verdict p. 4

Madison County

Auto Negligence - \$161,287 p. 5

Putnam County

Truck Negligence - \$2,500,000 p. 5

Vigo County

Government Negligence - \$250,000 p. 7

Blackford County

Auto Negligence - Defense verdict p. 7

Porter County

Insurance Contract - Defense verdict p. 8

Monroe County

Auto Negligence - \$86,085 p. 8

Tippecanoe County

Medical Negligence - Defense verdict p. 9

St. Joseph County

Underinsured Motorist - \$95,000 p. 11

Civil Jury Verdicts

Timely coverage of civil jury verdicts in Indiana including court, division, presiding judge, parties, cause number, attorneys and results.

Medical Negligence - An infant suffered permanent brachial plexus injuries during a difficult delivery; the baby and his parents criticized the delivering ob-gyn for pursuing a vaginal delivery instead of recommending a cesarean despite the mother's multiple risk factors for producing a macrosomatic baby

Matthews v. Lupton, et al.,
49D12-1011-CT-48963

Plaintiff: Lance D. Cline and Kathy Lee, *Cline Farrell Christie & Lee, P.C.*, Indianapolis

Defense: Jon M. Pinnick and Julia Conduct, *Schultz & Pogue, LLP.*, Indianapolis

Verdict: \$4,100,000 for plaintiffs

County: **Marion**, Superior Court: J. Welch, 8-20-12

In the second half of 2001, Michelle Matthews, then age 27, had twice tested positive on a home pregnancy test. She consulted on 9-24-01 with the office of Dr. Jonathan Lupton, one of the shareholders of Southside Ob-Gyn, P.C., in Indianapolis.

Dr. Lupton initially saw Matthews for prenatal care on 10-1-01 and then saw her again multiple times over the subsequent months. During that time, Matthews gained a great deal of weight. This caused her and her husband, Michael Matthews, some concern, especially since Matthews had previously given birth to a large child.

In addition, Matthews herself was obese and had a family history of diabetes. These factors, together with her alarming weight gain and having previously given birth to a large baby, placed Matthews at high risk of producing a macrosomatic infant. Yet despite these risk factors, Dr. Lupton anticipated a spontaneous vaginal delivery.

On 5-17-02, Matthews went to St.

Francis Hospital South for the delivery. By this time Matthews had gained 60 lbs. and was convinced the baby needed to be delivered. Dr. Lupton disagreed and initially wanted to discharge Matthews from the hospital.

Matthews and her husband resisted this and asked that labor be induced because the baby was so large and was at 39 weeks gestation. Dr. Lupton finally agreed, and Matthews was given drugs aimed at inducing labor. It would prove to be a lengthy labor and a difficult delivery that included a shoulder impaction, an episiotomy, the use of forceps, and the application of significant physical pressure by Dr. Lupton.

Baby John Matthews was eventually delivered. Immediately after the delivery, however, it became evident that all was not well. Among other things, John's right arm did not move, and he had minimal movement in his right hand. He also had bruises on his right cheek and on both ears.

Further examination revealed that John had multiple rib fractures and was in respiratory distress. He was transferred to Riley Hospital for Children on 5-28-02 and remained there until he was discharged home on 6-4-02. John continued to suffer from brachial plexus palsy. In an effort to deal with that problem, he wore a splint and had physical therapy.

A subsequent surgical exploration of John's right brachial plexus complex revealed that his C6 root nerve had been pulled off his spinal cord and that he had sustained damage to his C5, C7, and C8 nerve roots. Some of this damage was surgically repaired, and this was followed by more physical therapy.

John later went to the Texas Children's Hospital in Houston for more

surgery on 5-12-04. This, again, was followed by still more physical therapy. These efforts have resulted in some improvement in John's condition. However, he will remain permanently impaired.

Among other things, John's right arm is shorter than his left, and his right hand is smaller than his left. He also has less strength and range of motion in his right arm, and the arm hangs in an abnormal position. Finally, his right eye shows excessive tearing, and his right eyelid droops.

Both on John's behalf and on their own behalf, Michelle and Michael Matthews presented the case to a medical review panel comprised of three ob-gyns. They were Dr. Lee Bauer of Batesville, Dr. Jeffrey Cain of Elkhart, and Dr. Kathryn Garner of Fort Wayne.

Plaintiffs criticized Dr. Lupton for his failure to recognize that Matthews was at risk of delivering a macrosomatic baby. According to plaintiffs, Dr. Lupton never discussed the possibility of delivering the baby by cesarean and instead continued with a vaginal delivery despite all the warning signs and despite his own later admission that a cesarean delivery would have been both possible and prudent under the circumstances.

The panel's unanimous opinion was that Dr. Lupton's treatment of Matthews and John did fall below the ob-gyn standard of care and that it was a factor in plaintiffs' damages. Plaintiffs filed suit against Dr. Lupton and Southside Ob-Gyn and reiterated their claims as outlined above. Michelle and Michael initially included claims for their own emotional distress and loss of services. However, they later dropped those claims, and the litigation continued solely on John's claim for medical malpractice.

Plaintiffs identified a number of experts. They included Dr. Leslie Iffy, Ob-Gyn (retired), Summit, NJ; Dr. James O'Leary, Ob-Gyn (retired), Naples, FL; Dr. Daniel Adler, Pediatric Neurology, New York, NY; Dr. Robert Allen, Biomedical Engineering, Baltimore, MD; Dr. Ronald Missun,

Vocational Economics, Louisville, KY; and Lawrence Forman, Life Care Planning, Miami, FL.

Drs. Iffy, O'Leary, Adler, and Allen were all of the opinion that there was a 95 to 99% likelihood that John's brachial plexus injuries were due to downward traction Dr. Lupton had applied to his head during delivery and while the shoulder impaction existed. It was Missun's opinion that the cost of John's future medical care would range between \$1,999,954 and \$2,681,460. Missun also estimated John's lost earning capacity at between \$668,474 and \$1,173,048.

Dr. Lupton and Southside Ob-Gyn defended the case and denied having breached the standard of care. The identified defense experts included Dr. John Elliott, Ob-Gyn, Phoenix, AZ; Dr. Robert Demott, Ob-Gyn, Green Bay, WI; Dr. Jeffrey Phelan, Maternal/Fetal Medicine, Hacienda Heights, CA; and Dr. Stephen Coats, Ob-Gyn, Fort Wayne.

It was the opinion of Dr. Phelan (who also happens to be a lawyer and operates an expert witness service that works exclusively for the defense) that brachial plexus injuries in newborns are never caused by the actions of the delivering doctors. According to Dr. Phelan, doctors can pull as hard as they want on a baby's head without causing any nerve damage.

This opinion was echoed by Dr. Demott. According to him, it has never been proven that permanent brachial plexus nerve injuries can be caused by a doctor applying too much downward traction on a fetal head during delivery. Dr. Demott was dismissive of the contrary view and characterized plaintiffs' theory as "old dogma." That characterization reportedly did not sit well with the jurors in this case, all but one of whom were in their 50's or older.

By contrast, Drs. Elliott and Coats were more moderate in their opinions. Dr. Elliott, for example, acknowledged that plaintiffs' theory on injury causation was plausible and does sometimes occur during delivery. He also agreed that if certain of the facts alleged by plaintiffs were actually true,

then Dr. Lupton would indeed have breached the standard of care. Reportedly, some of Dr. Coats's most important opinions were more helpful to plaintiffs' case than defendants'.

The case was tried for eight days in Indianapolis. During closing arguments, plaintiffs' counsel asked the jury to return a verdict of between \$3.7 million and \$4.3 million. The jury deliberated for one hour and 55 minutes. The issue of liability was decided for plaintiffs in the first 15 minutes, and the remaining time was taken up with deliberation on damages.

In the end, the jury returned a verdict for plaintiffs and awarded them damages of \$4,100,000. The court reduced the award to the statutory cap and entered a judgment in the amount of \$1,250,000. We have learned that the defense in this case never made a settlement offer, and the court-ordered mediation lasted only 15 minutes.

Premises Liability - A convenience store slipped on a wet floor and sustained a rotator cuff tear
Cole v. Speedway, 3:11-267
Plaintiff: Daniel J. Armstrong, *Keller & Keller*, St. Joseph, MI
Defense: Thomas Davis, *Frost Brown Todd*, Indianapolis
Verdict: \$75,000 for plaintiff less 50% comparative fault
Federal: **South Bend**
Court: J. Nuechterlein, 9-12-12

Lisa Cole, then age 53, pumped gas in Elkhart on 1-5-10 at a Speedway convenience store. There was a defect with the pump and gas doused Cole. She walked inside the store to advise a clerk of the problem.

Just as Cole did so and to add insult to injury, she slipped and fell on a wet floor. She landed hard on her shoulder. Cole has since treated for a full thickness tear of her rotator cuff. Her medical bills were \$34,155, the jury being instructed that the bills could be satisfied for \$23,925.

In this lawsuit (removed from Elkhart County by Speedway), she alleged negligence by the convenience store operator in failing to maintain its premises. Speedway defended the case

Have you tried a case lately? We are traveling all over the state and communicating with court personnel, but if we know about a verdict, we'll get on it right away
Let us know about it at the
 Indiana Jury Verdict Reporter

Case Style _____

Jurisdiction _____ Case Number _____

Trial Judge _____ Date Verdict _____

Verdict _____

For plaintiff _____ (Name, City, Firm)

For defense _____ (Name, City, Firm)

Fact Summary _____

Injury/Damages _____

Submitted by: _____

Return to the Indiana Jury Verdict Reporter or use any other format to reach us with verdict news
 Call us toll-free at 1-866-228-2447
 Email to: info@juryverdicts.net

and denied fault – it also implicated the plaintiff’s own look-out.

This case was tried to a South Bend jury. The jury asked questions during the trial. Those questions are a court secret. The jury also returned a verdict – that too is a court secret.

However the IJVR has learned the contents of that secret verdict. Fault was apportioned equally to the parties. Then to damages Cole took a general award of \$75,000. A consistent judgment less comparative fault was entered for Cole in the sum of \$37,500.

Auto Negligence - A 13 year-old boy suffered a traumatic brain injury when the dirtbike he was riding collided with a passing SUV; the driver of the SUV claimed the boy had been riding adjacent to the road and then suddenly veered onto the road, leaving the SUV driver no time to react

Osinski v. Claus, 45D05-1005-CT-92
 Plaintiff: Daniel B. Vinovich, *Hilbrich Cunningham Schwerd Dobosz & Vinovich, LLP.*, Highland
 Defense: Michael P. Blaize, *State Farm Litigation Counsel*, Crown Point
 Verdict: Defense verdict on liability
 County: **Lake**, Superior

Court: J. Davis, 5-15-12

In September of 2009, 13 year-old Brandon Osinski was living with his parents, Brian and Kathy Osinski, at their home located at 14525 Arthur Henry Gibbs Street in Hebron. The property is situated near the intersection of S.R. 231 and 145th Avenue.

In the late afternoon of 9-12-09, Brandon was operating a 2006 Suzuki DRZ dirtbike in the area. Although Brandon would later claim he was on private property, he was apparently traveling parallel to 145th Avenue and heading east in close proximity to the flow of traffic.

At the same time, Craig Claus, then

The Indiana Jury Verdict Reporter
9462 Brownsboro Road, No. 133
Louisville, Kentucky 40241
1-866-228-2447
Online at Juryverdicts.net

From Evansville to Fort Wayne, Lake County to Jeffersonville
Comprehensive and Timely Indiana Jury Verdict Coverage

The Indiana Jury Verdict Reporter
The Most Current and Complete Summary of Indiana Jury Verdicts

Ordering is Easy - Call to Place your MasterCard/Visa order

Order the 2011 Year in Review for just \$225.00

Call 1-866-228-2447 to pay by MasterCard/Visa/AMEX

Name

Return with your check to the
The Indiana Jury Verdict Reporter
at the above address

Firm Name

_____ \$275.00 for a one year subscription to the
Indiana Jury Verdict Reporter (12 issues)

Address

_____ \$225.00 to Order the
IJVR 2011 Year in Review

City, State, Zip

The 12th Edition is shipping