The Indiana Jury Verdict Reporter

The Most Current and Complete Summary of Indiana Jury Verdicts

March, 2008 **Statewide Jury Verdict Coverage** **9 IJVR 3**

Unbiased and Independently Researched Jury Verdict Results

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Civil Jury Verdicts

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

Medical Negligence - In a two-pronged medical tragedy, an ob-gyn was accused first of botching a c-section that left a newborn baby with neurological deficits; in the second prong, the mother criticized the ob-gyn and the hospital nursing staff for leaving a sponge inside her

Lynch v. Bradley, et al.,
49C01-0503-CT-10725
Plaintiff: Michael S. Miller and Belinda Kunczt, *Miller Muller Mendelson & Kennedy*, Indianapolis
Defense: Daniel R. Fagan and Kelly R. Eskew, *Bingham McHale, LLP.*, Indianapolis, for Bradley and Women's Health Partnership; Angela M. Smith and H. Kent Smith, *Hall Render Killian Heath & Lyman*, Indianapolis, for St. Vincent Hospital and Health Services
Verdict: $3,700,000 for plaintiffs (allocated $3,000,000 for Shelby and $200,000 for Robin against Bradley and Women's Health Partnership; $500,000 for Robin against St. Vincent Hospital; zero for David)
County: **Marion**, Circuit
Court: J. Sosin, 2-25-08

As the month of October in 2001 drew to a close, the pregnancy of Robin Lynch, age 35, was not going well. On 10-30-01, Robin was admitted to St.

Vincent Hospital with a complaint of vaginal bleeding.

At the hospital, Robin came under the care of her ob-gyn, Dr. Sally Bradley, an employee of Women's Health Partnership, P.C. in Carmel. Based on Robin's condition, Dr. Bradley determined that the best course of action would be to perform a c-section.

It would later be alleged that there were various delays in performing the procedure. For one thing, the medical team neglected to begin fetal heart monitoring for some forty minutes. Also Dr. Bradley initially administered Robin an epidural block instead of proceeding immediately with the delivery.

In any event, the c-section was ultimately completed, and baby Shelby was born. Tragically, however, Shelby had suffered a lack of oxygenation that has left her with significant neurological and physical deficiencies.

As Robin was still struggling to come to terms with the reality of Shelby's condition, a further medical problem arose. On 11-2-01, three days after the delivery, Robin underwent an x-ray that revealed a sponge had been left inside her during the c-section. As a result, Robin had to undergo a laparotomy to remove the sponge.

Robin and her husband, David Lynch, both on their own behalf and on behalf of baby Shelby, presented the matter to a medical review panel that consisted of three ob-gyns. They were Dr. Roger Bosley of Lafayette, Dr. Rolf Loescher of Columbus, and Dr. Alice Wood of Bedford.

The Lynches were critical both of Dr. Bradley's performance of the c-section and of St. Vincent Hospital's staff for leaving the sponge inside her. The opinion of the medical review panel was unanimous that neither Dr. Bradley nor her employer, Women's Health Partnership breached the standard of care.

The panel went on to conclude, however, that St. Vincent Hospital did breach the standard of care, but only in making an incorrect sponge count. Furthermore, the panel concluded that the damage to Robin from the hospital's standard of care breach was limited to her having to undergo the subsequent procedure for the removal of the sponge.

The Lynches filed suit against Dr. Bradley, Women's Health Partnership, and St. Vincent Hospitals and Health Services and reiterated their claims as outlined above. In addition, David presented a derivative claim for his loss of consortium. The identified experts for the Lynches included Dr. J. Patrick Lavery, Ob-Gyn, Kalamazoo, MI; Dr. Donna Wilkins, Ob-Gyn, Muncie; and Dr. Anthony Dowell, Internal Medicine, Muncie.

According to Dr. Lavery, defendants breached the standard of care by the delay in beginning fetal monitoring, the delay in diagnosing a placental abruption, the administration of an epidural block instead of immediately delivering Shelby, and by getting the sponge count wrong. It was Dr. Lavery's opinion that Shelby's lack of oxygenation could have been avoided if proper care had been given in a timely fashion.

Dr. Bradley, Women's Health Partnership, and St. Vincent Hospital defended the case and denied any breach of the standard of care. In particular, Dr. Bradley explained she relied on the nursing staff to give her a correct sponge count, so she could not be held responsible for any errors in the count.

As the trial date approached, St. Vincent filed a motion to have separate trials on the issues of its own alleged negligence and that of Dr. Bradley. The record does not explicitly reveal the court's ruling, but the motion was apparently denied.

At the conclusion of a five-day trial in Indianapolis, the jury returned a verdict that was complex but decisively in favor of the plaintiffs. Against Dr. Bradley and Women's Health Partnership, Baby Shelby was awarded damages of $3,000,000 and Robin was awarded $200,000.

Against St. Vincent Hospital, Robin was awarded damages of $500,000. David's consortium interest was valued at zero against all defendants. The court entered a judgment that reflected the verdict. At the time the IJVR reviewed the record, no post-trial motions had been filed.

Employment Fraud - In a test case, five GM employees alleged they were defrauded upon promotion – that is, they believed that if circumstances changed (the circumstances later did change), they would be able to return to hourly work and accumulate enough years of service to retire with full benefits – GM countered that the plaintiffs were terminable at will and that there was no promise

Stuart et al v. GM, 1:95-1054
Plaintiff: Kevin W. Betz, Sandra L. Blevins and Elizabeth A. Mallov, *Betz & Associates*, Indianapolis
Defense: David M. Davis, *Hardy Lewis & Page*, Birmingham, MI
Verdict: $3,105,261 (spread among five plaintiffs)
Federal: **Indianapolis**
Court: J. Hamilton, 1-23-08

This case involved a class of 22 plaintiffs that worked as managers in the early 1990's for GM at its Allison Gas Turbine Plant. In 1993 GM sold the division for $325 million – at that time, the managers were out of work. Significantly, they missed out on generous retirement benefits that would have accrued to them had they remained on the job – implicitly, those managers had hoped they could have returned to hourly work through retirement.

That question went to the heart of the case. The class of plaintiffs believed GM made them a promise that while they were now managers, they could revert back to hourly work. Thus in taking a management position, the plaintiffs, all previously hourly workers, had an expectation that if circumstances changed, they could revert to the comfort of an hourly job and still accrue sufficient service to retire with full benefits.

But when the Allison division was sold, the theory went, the promise went up in smoke. In fact as the sale was pending, several of the plaintiffs sought to revert pursuant to this promise – they saw the writing on the wall associated

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with the sale, it indicating their careers as managers were over. However GM balked at the reversion, it being concerned that any change in the plant structure might interfere with the proposed sale.

Thus the plaintiffs believed GM hung them out to dry, favoring the $325 million sale over its promise to its workers. As the lengthy litigation progressed, the single fraud count was advanced by five test plaintiffs, Harold Hamilton, Judith Crawley, Donald Kappel, Roberta Stuart and Donald Livengood. While the circumstances of each plaintiff were slightly nuanced, they each shared the following common themes, (1) they became managers, but relied on a promise that they could revert, (2) they attempted to revert to hourly work, (3) GM didn't honor the promise and thus committed a fraud upon them. A count of promissory estoppel was also presented. If prevailing, they sought compensatory damages (the pay and benefits they would have received working to retirement) as well as the imposition of punitive damages.

GM defended on several different fronts. First it denied there was any promise, the plaintiffs enjoying only terminable-at-will status. Even if there was a promise, it was argued alternatively that it was barred by the statute of frauds as this oral promise couldn't be performed within a year. Finally any damages were called speculative as with the many plant closings in the 1990s, there was no way to predict how long the plaintiffs would have remained employed in auto manufacturing. Plaintiffs countered that with their seniority, had the promise been honored, they would have transferred to another GM facility and completed thirty years of service.

The verdict was mixed at trial. In identical verdict forms, each plaintiff lost on fraud and prevailed on promissory estoppel. Then to damages, the five plaintiffs took sums ranging from $383,118 to $815,402, the combined verdict totaling $3,105,261. GM has since sought post-trial relief, arguing among other things, (1) improper argument by plaintiff in referring to the plush GM headquarters in Detroit filled with suntanned executives, and (2) repeating the statute of frauds arguments. The motion is pending as is the claim of the other 17 plaintiffs.

Auto Negligence - What should have been a simple car wreck case erupted into a battle royal when the defense attorney at the time attempted to name the presiding judge as a witness, and the judge retaliated by threatening sanctions

Zanandrea v. Estate of Tatlock, 83C01-0105-CT-7
Plaintiff: Keith L. Johnson, *Johnson Law Office*, Terre Haute
Defense: Jamie E. Lopez, *Collignon & Dietrick, P.C.*, Indianapolis
Verdict: $29,500 for plaintiff
County: **Vermillion**, Circuit
Court: J. Swaim (Special Judge), 3-14-07

In the late afternoon of 10-24-00, Pamela Zanandrea, then age 39, was driving east on S.R. 163 toward the Wal-Mart parking lot exit in Newport. At the same time, Jeanette Tatlock was just leaving the Wal-Mart parking lot and was about to head north across S.R. 163.

It is Zanandrea's recollection that as she approached the parking lot exit, Tatlock looked at her and paused as if she intended to stop, but then darted out into the street in front of Zanandrea. An instant later, the two collided.

As a result of the crash, Zanandrea claimed injuries to her knee and her chest that continue to cause her pain. The record does not reveal the amount of her medical expenses. Zanandrea filed suit against Tatlock and blamed her for failing to yield the right-of-way, pulling out in front of her, and causing the crash.

Tatlock admitted fault for the crash and defended on damages. She later died on 6-4-03 of causes unrelated to the crash, and her estate thereafter took her place as the named defendant. Perhaps the most interesting aspect of the case arose over a procedural complication.

It turned out that Zanandrea was employed as a deputy clerk with the office of the Vermillion County Clerk. Due to her work responsibilities, Zanandrea was well acquainted with the court staff, as well as with Judge Bruce Stengel, the judge who was presiding over the case.

When defense counsel at the time, Robert J. Smith, in-house counsel for Allstate Insurance, learned of Zanandrea's employment status, he became concerned about the possibility of a pro-plaintiff bias in the proceedings. Based on those concerns, Smith filed a motion to change venue.

He explained in the motion that a mere change of judge would be impractical inasmuch as Vermillion County has only one judge. Thus, only a change of venue would suffice. The court denied the motion for change of venue, but Smith would not let the issue rest.

Approximately eleven months later he filed an amended Witness and Exhibit List that identified none other than Judge Stengel as a potential witness in the case. According to Smith, Zanandrea's co-workers, including Judge Stengel, might be able to testify concerning their observations of her physical condition following the crash. At the same time, Smith also filed a motion for the court to reconsider its previous order denying the change of venue.

The court was not pleased with this move on Smith's part. For one thing, the court noted that under the trial rules, a judge cannot be called as a witness in a case over which he or she presides. Furthermore, the court expressed the opinion that Smith attempted to name the judge as a witness for the sole purpose of creating a conflict of interest that would force the judge off the case.

For both these reasons, the court again denied the motion for change of venue. In addition, the court called Smith's motion frivolous and warned him that sanctions might be appropriate for filing such pleadings.

Later, Judge Stengel recused himself from the case and noted that he did indeed plan to pursue sanctions against Smith. Sometime thereafter, Smith withdrew from the case. Following Smith's and Judge Stengel's departure,

there were a number of personnel changes behind the scenes.

First, the case was reassigned to Special Judge Ronda Brown. However, she later retired on 12-31-04, and the case was again reassigned, this time to Special Judge Swaim. Second, after the case passed through the hands of a couple of other defense attorneys, it finally came to rest with Jamie Lopez who took it through to trial.

A jury in Newport heard the evidence and returned a verdict that awarded Zanandrea damages of $29,500. The court entered a judgment for that amount, and it has been satisfied. Prior to trial, Tatlock's estate made a Qualified Settlement Offer of $3,660.

The jury asked several questions. They included the following: (1) "On the ambulance report, no sign of chest pains at that time was reported. Why?" and (2) "Why didn't the Tatlock heirs open the estate?" The court's responses to these questions are unknown.

FELA - A longtime railman linked a disc injury to the failure of his railroad employer to provide him a hydraulic spike puller, instead providing him only a manual device

Edsall v. CSX Transporation, 1:06-389
Plaintiff: Stephen J. Telken and Julia M. Eades, *Schlichter Bogard & Denton*, St. Louis, MO
Defense: John C. Duffey, *Stuart & Branigan*, Lafayette, IN
Verdict: $400,000 for plaintiff less 70% comparative fault
Federal: **Fort Wayne**
Court: J. Cosbey, 2-6-08

Ricky Edsall worked for many years as a railman for CSX at its Garrett (IN) Yard. On 2-26-05, Edsall was removing spikes as he repaired track. He did the work manually with a claw bar. Edsall has since linked this particular job assignment to a disc injury. He later underwent a fusion surgery – Edsall is no longer working.

In this lawsuit, Edsall alleged that CSX failed to provide him a reasonably safe place to work and that this led to his disc injury. In that regard, he cited that he should have been provided a hydraulic spike puller, instead of the manual claw puller. [Edsall had earlier presented a repetitive stress claim related to the vibrations of power tools, but this did not advance to trial.]

CSX defended the case on two grounds, (1) there was a tool available to Edsall and he could have elected to use it, and in any event, (2) his disc injury was related to degenerative conditions.

This jury assessed fault to both parties – it was then apportioned 30% to CSX, the remainder to Edsall. Then to damages, plaintiff took a general award of $400,000. It was reduced in the court's judgment to $120,000.

Social Services Negligence - A profoundly retarded man who cannot see, hear, or speak suffered burns on his legs when the staff of the group home in which he lived tried to bathe him in water that turned out to be scalding hot

McGhee v. Residential CRF, Inc., et al., 48D03-0203-PL-233
Plaintiff: Charles R. Clark and M. Edward Krause, *Beasley & Gilkison, LLP.*, Muncie
Defense: Gary L. Shaw, *Skiles DeTrude*, Indianapolis, for Residential CRF, Inc. and Indiana Family and Social Services Administration; Angela Pease Krahulik, *Ice Miller, LLP.*, Indianapolis, for Independent Case Management, Inc.
Verdict: $1,500,000 for plaintiff (allocated $1,125,000 against Residential CRF, Inc. and $375,000 against Indiana Family and Social Services Administration); defense verdict on comparative fault for Independent Case Management, Inc.
County: **Madison**, Superior
Court: J. Newman, 1-28-08

As a victim of cerebral palsy and severe mental retardation, Audrey McGhee is unable to see, speak, or hear, and he is barely able to move at all. On 7-5-84, McGhee, who was then age 19, was admitted to the New Castle State Developmental Center. He remained there until the facility closed fourteen years later on 7-23-98.

Following the closure of the New Castle facility, McGhee was transferred to a facility operated by a company called Residential CRF, Inc. (hereinafter, "Residential"). Residential is a for-profit corporation that provides services to disabled people through an agreement with the Indiana Family and Social Services Administration (FSSA).

The next year, in 1999, McGhee was transferred again to another of Residential's facilities, this one located at 1431 Whisperwood Way in Anderson. The following year, on 11-23-00, the staff of the facility was preparing to bathe McGhee, now age 42, when something went terribly wrong.

It turned out that the bath water into which McGhee was immersed was far too hot. As a result of his exposure to the scalding hot water, McGhee suffered 1st and 2nd degree burns on his legs. He received immediate medical treatment for his burns at a cost of more than $5,000, all of which was paid by the state.

Later medical testimony indicated that McGhee, who was unable to communicate, displayed signs of experiencing pain from his burns for approximately three to four days, or up to two weeks. Also, x-rays taken on the day of the burn incident revealed several rib fractures, some of which were in the process of healing and others of which had already healed.

McGhee's guardianship estate filed suit against a number of defendants. They included Residential, the FSSA, the Indiana Department of Health, and an entity called Independent Case Management, Inc. (ICM).

Plaintiff ultimately stipulated to the dismissal of the Indiana Department of Health. The litigation proceeded against the remaining three defendants. Plaintiff criticized defendants for failing to determine that McGhee's bath water was at a safe temperature and for failing to supervise him adequately.

Plaintiff also criticized the FSSA for failing to supervise the coordination of services provided to McGhee. The identified experts for McGhee included Dr. Mark Seib, Family Practice, Lapel, IN; and William Lybarger, Social Services, Wichita, KS.

Residential, the FSSA, and ICM all

defended the case and denied any wrongdoing. In particular, they noted that all of McGhee's injuries resolved within a few weeks at most, and all of his medical expenses had been paid by the state.

Regarding the rib fractures, defendants pointed out that there was no evidence they had abused McGhee. Finally, there was apparently some suggestion that perhaps McGhee himself inadvertently turned on the hot water in the bathtub and thereby caused his own injuries. Plaintiff dismissed that notion as absurd given McGhee's mental and physical condition.

The case was tried for three days in Anderson. The jury deliberated approximately two hours before returning a verdict in which Residential was assigned 75% of the fault. The remaining 25% was assigned to the FSSA. The jury also assigned zero fault to ICM and to McGhee's estate, and punitives were rejected.

McGhee's raw damages were set at $1,500,000. In accordance with the allocation of fault, $1,125,000 of the verdict was against Residential, while $375,000 was against the FSSA. The court entered a judgment that reflected the verdict, and the FSSA has joined with Residential in filing a motion to correct errors. At the time the IJVR reviewed the record, the motion was still pending.

Auto Negligence - Plaintiff was awarded slightly over twice her medical expenses for soft-tissue injuries she sustained in a rear-end crash

Kikkert v. Fassoth,
45D11-0405-CT-102
Plaintiff: Rhett L. Tauber and Michael J. Jasaitis, *Tauber Westland & Jasaitis, P.C.*, Schererville
Defense: Galen A. Bradley, *Querrey & Harrow*, Merrillville
Verdict: $39,000 for plaintiff
County: **Lake**, Superior
Court: J. Webber (*Pro Tem*), 10-17-06

In the morning of 5-20-02, Melody Kikkert, then age 27, was driving a 2000 Jeep Grand Cherokee, heading west on U.S. 30 in Schererville. Her minor child, Samantha, was riding with her as a passenger. At the same time, Laura Fassoth was driving a 1999 Ford Aerostar van behind Kikkert and also heading west.

As Kikkert reached the intersection with Route 41, she stopped in the right turn lane and waited for traffic to clear in order to make a right turn. Fassoth approached from behind at what Kikkert would later characterize as a high speed. Fassoth failed to stop in time, and an instant later she rear-ended Kikkert.

As a result of the crash, Kikkert sustained a cervical strain and whiplash. She also complained of pain in her neck and back, neck spasms, headaches, hip problems, dizziness, cervical joint arthritis, and right occipital neuralgia, all of which she attributed to the crash. Kikkert followed a course of physical therapy, and she incurred medical expenses of $18,586.

Kikkert filed suit against Fassoth and blamed her for causing the crash. Kikkert's husband, Scott Miller, also presented a derivative claim for his loss of consortium. However, it is unclear whether that claim survived to trial.

Fassoth offered her own explanation of how the crash occurred. According to her, Kikkert slowed or stopped unexpectedly in front of her at the intersection. Despite this explanation, however, Fassoth admitted fault and defended the case on damages.

The case was tried for two days in Crown Point. The jury returned a verdict for Kikkert and awarded her damages of $39,000. The court entered a judgment for that amount, plus costs of $109. The judgment has been satisfied.

Hospital Negligence - An elderly woman suffered catastrophic brain damage after falling from her hospital bed following surgery; the woman died of unrelated causes two years later, and her estate criticized the hospital nursing staff for failing to use sufficient fall prevention measures

Estate of Gehrich v. St. Francis Hospital, 49D02-0503-CT-7919
Plaintiff: Lance Wittry, *Wittry Law Offices*, Indianapolis
Defense: Kathleen A. DeLaney and Elizabeth A. Schuerman, *DeLaney & DeLaney*, Indianapolis
Verdict: $1,000,000 for plaintiff
County: **Marion**, Superior
Court: J. Johnson, 2-4-08

On 5-5-00, Sue Gehrich, age 84, was admitted to St. Francis Hospital in Indianapolis after suffering a heart attack. Gehrich underwent surgery for her condition and then spent the next several days post-op in a heavily sedated state of semi-consciousness.

By 5-9-00, Gehrich began a process of gradually regaining her consciousness. In the afternoon of the next day, she was able to use the bedside commode with the assistance of two nurses. Despite this progress, however, Gehrich was still intermittently disoriented, and she tried twice on 5-10-00 to get out of bed without assistance.

Gehrich's family, who had been at her side throughout the ordeal, witnessed these two episodes and were concerned for her safety. Their concern was so great, in fact, that they wanted to stay with her overnight in order to keep an eye on her. However, the nursing staff refused the request.

The following day, on 5-11-00, the nurses again witnessed Gehrich try to get out of bed, and again they were able to stop her before she injured herself. Gehrich would not be so lucky the next time. Only a few hours later she tried to get out of bed yet again. This time, however, the nurses were not there to stop her.

Gehrich fell out of bed and landed hard on the floor. In the process she suffered a fractured right hip, an injury to her right elbow and shoulder, and a

head injury. She underwent surgery to repair her hip, and she incurred medical expenses of $64,816.

The fractured hip would turn out to be perhaps the least of Gehrich's problems. Due to her head injury, she suffered significant brain damage that has left her with the mind of a child.

Whereas prior to the incident Gehrich had been an active and vibrant woman who served as a floor manager in her retirement community, she was now incapable even of attending to her personal hygiene. It quickly became obvious to Gehrich's family that she could no longer live alone. Instead, she moved in with her children, and they provided her with the necessary care for the remainder of her life.

On 7-30-02, more than two years after her fall in the hospital, Gehrich died of atherosclerotic disease. Her estate filed a proposed complaint that was critical of the hospital nursing staff for failing to take adequate fall prevention measures.

According to the estate, Gehrich's age and disoriented mental state following her surgery made her a fall risk. Under those conditions, the standard of care required the nursing staff to take precautions against falls and to re-evaluate Gehrich's fall risk every twenty-four hours.

Among other things, the nursing staff should have used bed rails to prevent Gehrich from getting up. Instead, the staff simply used a bed alarm monitor. Furthermore, the estate claimed there was no evidence the monitor had actually been activated.

The estate also noted that Gehrich was known to have attempted more than once to get out of bed. Yet the nurses apparently did not bother to re-evaluate her fall risk as they should have. Finally, if the nurses had allowed Gehrich's family to remain with her that fateful night, the entire incident could have been avoided.

The matter was considered by a medical review panel that consisted of two nurses, Susan Schoon and Donna Cardwell, as well as an internist from Indianapolis, Dr. R. Joe Noble. The opinion of the review panel was unanimous that the hospital nursing staff did not breach the standard of care.

Gehrich's estate filed suit against St. Francis Hospital and Health Centers, Inc. and reiterated its claims as outlined above. The retained nursing expert for the estate was Janet Elick of Carmel. It was Elick's opinion that the nurses should have used four bed rails to minimize Gehrich's risk of falling. The hospital defended the case and denied that its nurses breached the standard of care.

At the conclusion of a five-day trial in Indianapolis, the jury returned a verdict for the estate and awarded it damages in the amount of $1,000,000. In its judgment, the court reduced the amount to $250,000 pursuant to the statutory cap on medical malpractice awards.

School Negligence - A woman studying at a vocational school for a certificate in massage therapy suffered a career-ending back injury when a fellow student attempted to practice an unauthorized massage procedure on her; the woman blamed the school for failing to prevent the incident

Miles v. Indiana Business College, 06C01-0502-CT-126
Plaintiff: Stephen A. Oliver, *Boren Oliver & Coffey*, Martinsville
Defense: Tess White, *Liberty Mutual Litigation Counsel*, Carmel
Verdict: $651,600 for plaintiff less 20% comparative fault
County: **Boone**, Circuit
Court: J. Edens (*Pro Tem*), 2-28-08

The Indiana Business College is a vocational school with campuses at various locations around the state. In July of 2004, Erica Miles, then age 24, was a student at the Indianapolis campus where she was studying for a certificate as a practitioner of therapeutic massage.

One of the other students working toward the same certificate was Greg Tucker. On 7-15-04, Miles and Tucker were both in a class that was ordinarily taught by Robert Stalcup. On this particular day, however, Stalcup was away, and the class was being taught by a substitute teacher.

At some point (it is not clear from the record whether it was before, during, or after the class) Tucker told Miles he wanted to show her "something cool." Without telling her what he had in mind, Tucker had Miles lie down on the massage table. He then called everyone around to watch his demonstration.

Tucker placed his hands on Miles's shoulder blades and pushed hard on her vertebral column until it popped and her legs jumped. Miles exclaimed, "That hurt!" and she asked why he hadn't warned her what he was going to do.

Tucker explained the lack of warning by saying that he needed her to be relaxed rather than tense. He then moved his hands further down her back and repeated the procedure. Two days later, on 7-15-04, Miles approached instructor Stalcup with complaints of pain in her back.

When Miles explained what Tucker had done, Stalcup was not pleased. He suggested Miles seek medical attention for her back problem, then he turned his attention to what was to be done about Tucker.

Stalcup wrote an inter-office memo to the school administration noting that all massage students are taught never to manipulate the skeletal system. Tucker disregarded that instruction in an act that Stalcup called "deliberate, irresponsible, and dangerous."

Stalcup also noted he had personally failed Tucker in two other core courses in the massage program. Based on all these considerations, Stalcup recommended that Tucker be expelled from the program. The record does not indicate whether or not the school implemented Stalcup's recommendation.

In the meantime, Miles began to suffer the consequences of Tucker's clumsy massage treatment. Due to the lingering effects of her back injury, she was unable to complete the program, and her dreams of becoming a massage therapist have thus been dashed.

Miles filed suit in Boone County against both Tucker and the Indiana Business College. She blamed Tucker for injuring her back and thereby destroying her anticipated career. Miles later settled with Tucker on undisclosed terms and dismissed him from the case.

The litigation proceeded against the Indiana Business College. According to Miles, the school had a duty to supervise, instruct, and control its students so that incidents such as this one do not happen.

By not preventing Tucker from injuring her, Miles claimed the school failed in its duty. As a result, she will be unable to earn the $38,000 to $42,000 per year income she would have enjoyed as a massage therapist.

The Indiana Business College defended the case and named Tucker as a non-party. The school sought to place the blame for the incident both on Tucker and on Milers herself. In addition, the school denied having any duty to supervise, instruct, or control its students as Miles claimed, and it particularly denied having done anything to cause Miles's injury.

Finally, the school disputed the extent of Miles's claimed injury and noted that as a Medicaid recipient, nearly all of her medical bills had been written off. The total amount paid on Miles's behalf by Medicaid came to just over $54. The identified defense IME was Dr. Marc Duerden, Rehabilitative Medicine, Indianapolis.

The case was originally presided over by Judge Steve David. However, in July of 2007 Judge David informed the members of the Boone County bar association that effective 9-15-07 he was being called to active military duty to serve a one-year appointment as Chief Defense Counsel in the Office of Military Commissions in Washington, D.C.

During the period of Judge David's absence, J. Jeffrey Edens would take his place as Judge *Pro Tempore* in the Boone County Circuit Court. With Judge Edens presiding, therefore, the case went to trial in Lebanon.

The jury returned a verdict in which the Indiana Business College was assigned 80% of the fault. Non-party Tucker was assigned 18%, and the remaining 2% was assigned to Miles. The jury set Miles's raw damages at $651,600. After reduction for comparative fault, her final award came to $521,280. The court entered a judgment for that amount.

Auto Negligence - Plaintiff was awarded just over one and a half times her medical expenses for soft-tissue injuries she sustained in a failure-to-yield crash

Kretz v. Szulczewski, 45D11-0410-CT-216
Plaintiff: Stanley W. Jablonski, Merrillville
Defense: Kent S. Wilson, *State Farm Litigation Counsel*, Crown Point
Verdict: $12,000 for plaintiff less 20% comparative fault
County: **Lake**, Superior
Court: J. Dywan, 8-7-06

In the late afternoon of 9-20-04, Dawn Kretz was driving a 2001 Ford Escort, heading east on South Street in Crown Point. At the same time, Irene Szulczewski was driving in the same area in a 1992 Chevrolet Caprice.

Szulczewski was perhaps a bit distracted at the time because she was on her way home after having just come from the St. Anthony Medical Center where her husband, Jerome, was in the ICU. Upon reaching the intersection of South Street and South Main Street, Szulczewski accidentally applied her accelerator instead of her brake.

Due to that error, Szulczewski entered the intersection at the same time as Kretz. An instant later, the two collided. As a result of the crash, Kretz sustained injuries to her neck and back. Her incurred medical expenses came to $7,865.

Kretz filed suit against Szulczewski and blamed her for disregarding the traffic control device, entering the intersection illegally, and causing the crash. In addition to her other damages, Kretz also claimed lost wages in the amount of $300.

Kretz also named Szulczewski's husband, Jerome Szulczewski, as a co-defendant on the ground that he was the registered owner of the vehicle Szulczewski was driving. However, Jerome pointed out that he had not been present at the crash, and his wife was not traveling that day pursuant to any undertakings on his behalf.

In response to that argument, Kretz dismissed her claim against Jerome, and the litigation proceeded solely against Irene Szulczewski. She defended and implicated Kretz's fault. Szulczewski also disputed the nature and extent of Kretz's injuries, as well as the reasonableness and necessity of her medical treatment.

A jury in Crown Point heard the case and returned a verdict in which Szulczewski was assigned 80% of the fault. The remaining 20% was assigned to Kretz. Her raw damages were set at $12,000. After reduction for comparative fault, her final award came to $9,600. The court entered a judgment for that amount, and it has been satisfied.

Premises Liability - A woman suffered a fractured ankle when she fell while exiting a "haunted house"

Montgomery v. Haunted Underground, Inc., 49D07-0602-CT-8310
Plaintiff: Melissa A. Davidson, *Charles D. Hankey Law Office*, Indianapolis
Defense: Paul T. Belch, *Travelers Litigation Counsel*, Indianapolis
Verdict: $150,000 for plaintiff less 49% comparative fault
County: **Marion**, Superior
Court: J. Zore, 1-23-08

During the Halloween season in 2005, a company called Haunted Underground, Inc. was operating a haunted house at 2525 North Shadeland Avenue in Indianapolis. On 10-13-05, Samantha Montgomery was among the patrons who visited the haunted house.

Once Montgomery's visit was over, she left the premises through an exit in the back of the building. As she did so, she fell and sustained a fractured ankle. Her medical expenses are unknown. Due to her injury, Montgomery was off work from 10-13-05 until 2-12-06, and her lost wages totaled $5,092.

In this lawsuit, Montgomery originally targeted an entity identified as "Dark Armies, Inc. d/b/a Necropolis." She later amended her complaint and added Haunted Underground, Inc. and an entity identified as Western Select Properties, LP. as co-defendants.

Oddly, Montgomery's amended complaint describes Dark Armies and Haunted Underground as both being the owners and operators of the haunted

house. Western Select Properties is listed as the owner of the building and the land.

Montgomery later stipulated to the dismissal of Dark Armies and Western Select Properties for reasons the record does not explain. The litigation then proceeded solely against Haunted Underground, Inc.

According to Montgomery, the management of the haunted house directed patrons to exit the establishment through a door in the back of the building into an area that was poorly lit and where the ground was uneven. Haunted Underground, Inc. defended the case and blamed Montgomery for failing to exercise reasonable care for her own safety.

The case was tried for two days in Indianapolis. The jury returned a verdict in which Haunted Underground was assigned 51% of the fault and the remaining 49% was assigned to Montgomery.

The jury set Montgomery's raw damages at $150,000. After reduction for comparative fault, her final award came to $76,500. The court entered a judgment for that amount, plus costs, and it has been satisfied.

During the presentation of evidence, the jury asked several questions. Among them were the following: (1) "Does Haunted House Underground require patrons to tie their shoe laces?" and (2) "Who owns the building and grounds, and is Dark Armies/Haunted House, Inc. responseable [*sic*] for the ground maintance [*sic*]?" The record does not reveal the responses to the questions.

Auto Negligence - A herniated disc caused by a rear-end crash was valued at $29,000 in Valparaiso

Matthews v. Floros,
64D05-0410-CT-9481
Plaintiff: Tracey S. Wetzstein, *Blachly Tabor Bozik & Hartman*, Valparaiso
Defense: John H. Halstead, *Querrey & Harrow*, Merrillville
Verdict: $29,000 for plaintiff
County: **Porter**, Superior
Court: J. Harper, 5-24-07

On 10-7-03, Allen Matthews, then age 26, was driving west on U.S. 30 in Lake County. Matthews was the second in a line of three cars. In front of him was a vehicle being driven by Jessica Payne, while behind him was Anthony Floros.

At a certain point, Payne stopped in a line of traffic due to a red light at an upcoming intersection. Matthews followed suit and also came to a stop. After doing so, he took the opportunity to look behind him to check on his one year-old daughter who was sleeping in a car seat directly behind him.

When Matthews looked back to check on his daughter, he saw through his rear window that Floros was coming up fast and was not going to stop. Instinctively, Matthews put his hand on his daughter's chest to brace her for the impact.

In the next instant, Floros rear-ended Matthews and pushed him into the rear of Payne's vehicle. As a result of the collision, Matthews suffered a herniated disc. His medical expenses are unknown. Also, Matthews's vehicle sustained property damage in the amount of $2,276, all of which was paid by his insurer, State Farm.

Matthews filed suit against Floros and blamed him for the crash. According to Matthews, Floros failed to stop because he had been distracted by talking on a cell phone.

In addition, Matthews also named Payne as a co-defendant, and he targeted Floros's employer, EBI Medical Systems, Inc., on the ground that Floros had been acting within the scope of his employment at the time of the crash. Finally, Matthews's wife, Leanne Matthews, presented a derivative claim for her loss of consortium. However, that claim apparently did not survive to trial.

There would later be a shake-out in the alignment of the case. First, the parties stipulated to the dismissal of EBI Medical Systems, and Payne then named the company as a non-party. That move became moot, however, when Payne filed a motion for summary judgment and Matthews did not oppose it.

That left Floros as the sole remaining defendant. He admitted fault for the crash and disputed the nature, extent, and causation of Matthews's claimed injuries.

The case was tried for three days in Valparaiso. The jury returned a verdict for Matthews and awarded him damages of $29,000. The court entered a judgment for that amount, plus costs, and it has been satisfied.

Race Discrimination - A black clerical worker at a medical group alleged she was fired because of her race

Northington v. Welborn Clinic, 3:05-27
Plaintiff: Jay Meisenhelder and Paul A. Logan, *Haskin Lauter & LaRue*, Indianapolis
Defense: Andrew J. Manion and Rebecca T. Kasha, *Kinney Kasha & Buthod*, Evansville
Verdict: Defense verdict on liability
Federal: **Evansville**
Court: J. Young, 2-13-08

April Northington, a medical transcription clerk, started working in 1983 for the Welborn Clinic in Evansville. She stayed with the medical group until her firing in March of 2002. Welborn Clinic cited that she was let go because of insubordination and excessive errors (it cited 37 in her transcriptions). Her attitude was also cited, there being proof she didn't participate in the Christmas present exchange. Finally Welborn Clinic cited diminished paperwork as requiring less transcription.

Northington, who is black, thought all these excuses were just a pretext to mask race discrimination and retaliation. She cited a history of a hostile environment including (1) a co-worker that whistled Dixie literally, and (2) an offensive doctor that once asked if another black employee was her sister, all blacks looking the same. Summary judgment was granted on this count.

Northington advanced to trial on discrimination and retaliation only. She cited that prior to her firing, she had above-average reviews and that while four transcriptionists were employed, (the other three were white), it was she who was selected for firing. The retaliation was predicated on increased scrutiny of her work after she

complained about the whistling Dixie event. Welborn Clinic denied either discrimination or retaliation as noted above.

The jury's verdict was for Welborn Clinic on both discrimination and retaliation, Northington taking nothing. A defense judgment was entered.

Medical Negligence - A woman criticized her ob-gyn for his management of her c-section; when the woman later died of breast cancer, her estate added a count that accused the same doctor of failing to diagnose her condition

Estate of Nadesan v. Schwartz, 45D01-9702-CT-198
Plaintiff: Bridgett J. Repay, *Sachs & Hess*, Hammond; and Amy C. Wright, *Ashman & Stein*, Chicago, IL
Defense: Gregory A. Crisman and Matthew S. VerSteeg, *Eichhorn & Eichhorn, LLP.*, Hammond
Verdict: Defense verdict on liability
County: **Lake**, Superior
Court: J. Dywan, 7-20-07

In December of 1994, Janette Nadesan was anticipating the birth of her new baby. What should have been a happy time for Nadesan was overshadowed somewhat by her concerns upon noticing a lump in her breast.

Nadesan would later claim that on 12-14-94 she reported the lump to her ob-gyn, Dr. Jack Schwartz of Munster. According to Dr. Schwartz, he responded to Nadesan's concerns by performing a clinical examination of her breast. The result was that he was unable to detect any mass.

With the issue of the possible lump having apparently been resolved, Nadesan turned her attention to the management of her pregnancy. Unfortunately, the course of her pregnancy would not be without problems.

On 2-28-05, Dr. Schwartz admitted Nadesan to the St. Margaret Mercy Health Care Center in Hammond with a diagnosis of preeclampsia (i.e., pregnancy-induced hypertension). This is a potentially dangerous condition that can threaten both the mother and the fetus if not resolved promptly.

The treatment plan was for Dr. Schwartz to perform a repeat c-section. He did so that same day, and the crisis thus seemed to have been averted. However, Nadesan's post-surgery recovery was difficult.

In the days following the surgery, Nadesan suffered substantial abdominal hemorrhaging, a drop in her blood pressure, severe dizziness, fluid loss due to excessive perspiration, infection, and eventually coma. It is unclear from the record whether Nadesan ever emerged from the coma.

Nadesan filed separate lawsuits against a number of different entities involved in her treatment. Those cases were later consolidated, and later still the parties stipulated to the dismissal of all defendants except Dr. Schwartz and the Schwartz Medical Corporation.

The litigation proceeded against those two remaining defendants with plaintiffs criticizing them for the handling of Nadesan's c-section. Nadesan's husband, Arumagam Nadesan, also presented a derivative claim for his loss of consortium.

Before the case could be resolved, however, the matter of Nadesan's health took yet another unexpected turn when the issue of the lump on her breast resurfaced. Nadesan was diagnosed with breast cancer from which she ultimately died on 6-7-98. Thereafter, her estate stepped into her shoes as co-plaintiff in this case and filed an amended complaint that added a count for Dr. Schwartz's failure to diagnose the cancer.

According to plaintiffs, if Dr. Schwartz had diagnosed Nadesan's breast cancer promptly when she first reported the lump on her breast, she could have received life-saving treatment. Instead, the delay in diagnosis allowed the tumors to grow so that the cancer metastasized to her bones and liver. As a result, Nadesan was deprived of any chance of survival.

Plaintiffs identified a number of experts. Among them were Dr. Eugene Angone, Oncology, Roseville, MI; and Dr. Fred Duboe, Ob-Gyn, Hoffman, IL. Interestingly, the record does not identify the members of the medical review panel, nor does it reveal the panel's opinion.

Dr. Schwartz defended the case and denied any breach of the standard of care, either in the management of Nadesan's pregnancy or in the diagnosis of her breast cancer. Regarding the latter, Dr. Schwartz claimed Nadesan did not report the lump to him until shortly before he was to perform the c-section.

He went on to explain that when she did report the lump to him, he performed a proper examination that turned up negative results. In short, Nadesan's death was not caused by anything Dr. Schwartz did or failed to do. His identified experts included Dr. Emily Cline, Ob-Gyn, Franklin; and Dr. Steven Rosen, Oncology, Chicago, IL.

The case was bifurcated for trial on the issues of the management of Nadesan's c-section and the diagnosis of her breast cancer. The first trial was on the issue of the cancer diagnosis. A jury in Crown Point heard evidence for five days before returning a verdict for Dr. Schwartz.

If the court entered a judgment, it was not part of the record when the IJVR reviewed it. It is also unclear from the record when, or if, the issue of the management of Nadesan's c-section went to trial.

Auto Negligence - Based on different accounts of what happened, each party blamed the other for a failure-to-yield crash in Terre Haute

Reef, et al. v. McKinney, 84D02-0502-CT-1093
Plaintiff: John P. Nichols, *Anderson Frey & Nichols*, Terre Haute
Defense: Katie A. Jones, Indianapolis
Verdict: $24,221 for plaintiffs (allocated $23,571 to Reef and $650 to McKillop) less 33% comparative fault
County: **Vigo**, Superior
Court: J. Adler, 6-29-07

On 5-7-04, Shelley Reef, then age 33, was operating a 1988 Chevrolet Astrovan on eastbound Elm Street in Terre Haute. Her minor son, Damon McKillop, was riding with her as a passenger. At the same time, Samuel McKinney was driving east on Elm Street in a 1997 Ford Taurus.

At a point just west of the

intersection with 16th Street, McKinney collided with Reef's vehicle. Although the record does not reveal the nature of Reef's or McKillop's injuries, it is known that Reef's incurred medical expenses came to $7,087. McKillop's medicals were $435.

Reef filed suit, both on her own behalf and on behalf of her son, and blamed McKinney for crashing into them. McKinney defended and disputed the nature, extent, and causation of the claimed injuries.

McKinney also blamed the crash on Reef. According to McKinney, Reef had been parked next to the curb on the south side of Elm Street and suddenly pulled into the lane of traffic directly in front of him. Reef disputed this account of how the crash happened.

In any event, the case was tried for two days in Terre Haute. The jury returned a verdict in which McKinney was assigned 67% of the fault and Reef was assigned the remaining 33%. Reef's raw damages were set at $23,571, while McKillop's damages were set at $650.

After reduction for comparative fault, Reef's final award came to $15,792 and McKillop took $435. By pure coincidence, McKillop's final award happens to be exactly the amount of his incurred medical expenses. The court entered a judgment that reflected the verdict, and it has been satisfied.

Premises Liability - A man suffered a broken leg when he slipped and fell on an accumulation of ice and snow on a sidewalk in his apartment complex

Jacob v. Willow Lake Apartments, 49D04-0512-CT-47916
Plaintiff: Jon C. Abernathy, *Goodin Abernathy, LLP.*, Indianapolis
Defense: Michael L. Carter and Benjamin I. Terhune, *Spangler Jennings & Dougherty, P.C.*, Indianapolis
Verdict: $150,000 for plaintiffs (allocated $148,000 to Solomon and $2,000 to Patricia) less 20% comparative fault
County: **Marion**, Superior
Court: J. Ayers, 1-16-08

In February of 2004, Solomon Jacob, then age 56, was living with his wife, Patricia Jacob, in the Willow Lake Apartments complex in Indianapolis. In the morning of 2-11-04, Solomon was walking from his apartment to his car when he slipped and fell on an accumulation of ice and snow on the sidewalk.

Solomon suffered a broken leg due to his fall. The record does not reveal the amount of his medical expenses. He filed suit against Willow Lake Apartments and blamed it for allowing the snow and ice to accumulate on the sidewalk.

According to Solomon, the apartment complex should have salted or otherwise treated the sidewalk in order to eliminate the hazard. Solomon's wife, Patricia, also presented a derivative claim for her loss of consortium.

Willow Lake Apartments defended the case and insisted it exercised reasonable care in maintaining the sidewalk in a safe condition. Instead, the apartment complex blamed Solomon for failing to exercise reasonable care to avoid hurting himself. The identified defense IME was Dr. Carlos Berrios, Orthopedics, Indianapolis.

The case was tried for two days in Indianapolis. After just under two hours of deliberation, the jury returned a verdict in which Willow Lake Apartments was assigned 80% of the fault and the remaining 20% was assigned to Solomon.

The jury set Solomon's raw damages at $148,000, and Patricia's consortium interest was valued at $2,000. After reduction for comparative fault, Solomon's final award came to $118,400, while Patricia took $1,600. The court followed with a judgment that reflected the verdict.

Dog Attack - A workman who was loading up his truck after having hung new wallpaper in a residential bathroom was attacked and bitten on his upper leg by the owner's German Shepherd puppy

Anderson v. Elashawah, 22C01-0609-CT-614
Plaintiff: David E. Mosley, *Mosley Bertrand Jacobs & McCall*, Jeffersonville
Defense: Kenneth G. Doane, Jr., *Ward Tyler & Scott*, New Albany
Verdict: $614 for plaintiff
County: **Floyd**, Circuit
Court: J. Cody, 9-24-07

It was 5-26-06, and Tom Anderson, then age 37, was on the job hanging wallpaper in the bathroom of the residence of Muhammed Elashawah, located at 2500 Forrest Creek Court in Georgetown. Anderson had just finished his work and was taking his tools back out to his truck when disaster struck.

As Anderson went out the front door, Elashawah's German Shepherd dog appeared on the scene. Anderson would later estimate the dog weighed from sixty to seventy pounds. He would also claim he had no idea until just that moment that the dog was on the premises.

According to Anderson, the dog came out of the garage, ran up behind him, and bit him on his upper right leg, just below the buttocks. As a result of the attack, Anderson claimed to have suffered multiple puncture wounds and one abrasion. He also claimed to have lost two days of work, which added up to $500 in lost wages.

Anderson filed suit against Elashawah and blamed him for allowing the dog to roam free, thus setting the stage for the attack. Elashawah defended the case and in a *pro se* Answer told a somewhat different story.

According to Elashawah, the dog was a mere six month-old puppy that was kept in a crate in the garage. Elashawah also claimed he informed Anderson of the puppy's presence in the garage.

As Anderson proceeded to load his tools into his truck, Elashawah was

standing with the puppy in front of the garage. At just that moment, Anderson came around the corner and saw the puppy. For some unaccountable reason, Anderson reacted to the sight of the puppy by turning around and running for his truck.

The puppy apparently thought this chase game was just too good to pass up, and the dog took off in hot pursuit after Anderson. All the while, Elashawah was repeatedly shouting to Anderson to stop running.

It was too late. In the next instant, the puppy got hold of Anderson's pants. It was only then that Anderson finally stopped running. As far as the puppy was concerned, this took all the fun out of the game, so the dog let go of Anderson's pants and sat down in front of him.

Elashawah took the puppy back to its crate in the garage, and he took Anderson back inside the house to the bathroom so they could inspect the damage. According to Elashawah, there was no blood or broken skin at the location of the bite. At most, there might have been a bruise.

Nevertheless, Elashawah asked as a precautionary measure that Anderson apply some peroxide to the area. After that was done, Anderson went back outside and finished loading up his truck in the driveway.

In short, Elashawah denied that Anderson was actually injured in the attack. He also sought to place blame on Anderson for running in the first place, and then for not obeying Elashawah's instructions to stop.

A jury in New Albany heard the case and returned a verdict in which Elashawah was assigned 100% of the fault. The jury went on to award Anderson damages of $614. The court entered a judgment for that amount, and it has been satisfied.

Auto Negligence - Plaintiff was awarded approximately one twentieth of her medical expenses for soft-tissue injuries she sustained in a rear-end crash

Sprouse v. Miller, 79D01-0606-CT-127
Plaintiff: Lee Baker, *Nunn Law Office*, Bloomington
Defense: Robert F. Ahlgrim, Jr., *State Farm Litigation Counsel*, Indianapolis
Verdict: $4,184 for plaintiff
County: **Tippecanoe**, Superior
Court: J. Johnson, 2-26-08

In the morning of 12-27-04, Cynthia Sprouse, age 30, was driving a 2002 Chevrolet Malibu, heading north on North 9th Street in Lafayette. Sprouse was traveling in the course of her employment with Greater Lafayette Health Services, Inc. Behind her was a vehicle being driven by Mariah Miller, age 26, who was on her way home.

At a certain point during her journey, Sprouse stopped in traffic. Miller would later recall she didn't see Sprouse's brake lights until it was too late. Miller applied her own brakes, but the road was wet that day, and she slid into the rear of Sprouse's car.

Sprouse claimed widely-ranging soft-tissue injuries that she attributed to the crash. Her incurred medical expenses totaled $84,904, and the cost to repair her car came to $806.

In this lawsuit, Sprouse blamed Miller for causing the crash. In addition, Sprouse's husband, John, presented a derivative consortium claim. However, that claim apparently did not survive to trial. Sprouse's retained medical expert was Dr. Carolyn Kochert, Pain Management, Lafayette.

Miller ultimately admitted fault for the crash and defended on damages. In particular, she noted that Sprouse had been treating with Dr. Kochert for chronic neck pain prior to the date of the accident.

The defense IME was Dr. Herbert Biel, Orthopedics, Indianapolis, who performed a records review. Dr. Biel noted that the collision was sufficiently minor that Sprouse's air bag did not deploy. He also expressed the opinion that Sprouse's injuries were pre-existing and had nothing to do with the crash.

The case was tried in a single day in Lafayette. The jury returned a verdict for Sprouse and awarded her damages of $4,184. The court entered a consistent judgment.

Fire Truck Negligence - A man entered an intersection on a green light and then swerved to avoid colliding with a truck ahead of him; instead, the man collided with a fire truck that seems to have been on an emergency run

Gibelyou v. City of Bloomington, 53C01-0403-CT-438
Plaintiff: William H. Kelley and Darla S. Brown, *Kelley Belcher & Brown*, Bloomington
Defense: Paul T. Belch and Patricia Mulvihill, *Traveler's Litigation Counsel*, Indianapolis
Verdict: Defense verdict on liability
County: **Monroe**, Circuit
Court: J. Hoff, 5-24-07

In the evening of 9-21-03, Peter Gibelyou, then age 52 and a K-9 police officer with Crane Naval, had just pulled out of the Dairy Queen parking lot on South Walnut Street in Bloomington. Gibelyou was driving south toward the intersection with Country Club Drive when he saw a westbound ambulance proceed through the intersection.

By the time Gibelyou himself got to the intersection, he had a green light. Unbeknownst to him, a fire truck being driven by Jason Hines was also headed west not far behind the ambulance. Gibelyou proceeded into the intersection but saw an unidentified truck in front of him at the last minute.

Gibelyou swerved to the right in an effort to avoid a collision with the unidentified truck. In doing so, however, he instead collided with the fire truck. It was a significant crash and caused Gibelyou's air bag to deploy.

The vehicle Gibelyou was driving was totaled in the collision, and he would later complain of widely-ranging injuries to his nose, back, neck, shoulder, and hip. He would also later claim to have no memory of the immediate aftermath of the collision.

As a result of the crash, Gibelyou

was off work for five days, and he also missed ten to eleven hours of training with his police dogs. The record does not reveal either the amount of his incurred medical expenses or his lost wages.

In this lawsuit, Gibelyou targeted the City of Bloomington on a theory of vicarious liability. He blamed the city for the actions of Hines in operating the fire truck. In particular, Gibelyou insists he had a green light and that Hines was facing a red light.

Gibelyou also does not recall hearing any emergency warning of the fire truck's approach. His accident reconstructionist was Joseph Badger. Gibelyou's wife, Donna, also presented a derivative consortium claim, but that claim apparently did not survive to trial.

The city defended the case and suggested the possibility that perhaps Gibelyou failed to appreciate the approach of the fire truck because he was talking on a cell phone at the time. For his part, Gibelyou does not recall whether he was talking on a cell phone or not.

The case was tried for three days in Bloomington. The jury deliberated slightly over three hours before returning a verdict for the city. The court followed with a consistent defense judgment.

The jury asked several questions. Among them were the following: (1) "Has Jason had any other accidents with a fire truck?" (2) "Do the Crane K-9 police officers have training on how to operate an automobile?" and (3) "Did Joeseph [*sic*] Badger have the information to do a full reconstruction of the accident?" The court refused the first question but allowed the other two.

Auto Negligence - A teenager that was rear-ended by her boyfriend has complained of persistent shoulder pain – while fault was acknowledged, the jury awarded no damages

Thompson v. Beasor,
67C01-0508-CT-271
Plaintiff: Elizabeth A. South, Greencastle
Defense: William W. Drummy, *Wilkinson Goeller Modesitt Wilkinson & Drummy*, Terre Haute
Verdict: Defense verdict on damages
County: **Putnam**, Circuit
Court: J. Headley, 1-31-08

It was 12-10-04 and Amber Thompson, then age 16, was traveling on U.S. 41. Sam Beasor, also a teen, was behind her. [Thompson said Beasor was an ex-boyfriend – he thought of himself as a current boyfriend.] Whatever his status, a moment later Thompson stopped – Beasor rear-ended her.

The impact knocked Thompson into the next vehicle. Her relatively small Chevrolet Lumina was then sandwiched between two pick-up trucks. Thompson's mother rushed to the scene and took her to the ER.

Thompson's ER bill for apparent soft-tissue symptoms was $3,814. She later followed with a chiropractor for a single visit – it cost $35. Beyond that, Thompson did not treat again. However she has continued to complain of persistent shoulder pain.

In this lawsuit, Thompson sued her boyfriend of sorts and sought money damages. He admitted fault for the wreck, but diminished the claimed injury. It was his suggestion that at best, she had a temporary strain injury that quickly resolved. He also noted that despite her purported chronic pain, the spring following this wreck, Thompson was well enough to play first-string varsity tennis at her high school.

Tried on damages only, this jury returned a verdict for Beasor awarding no damages. A defense judgment was entered.

Excessive Force - A rookie campus cop burst into a backyard on the report of an apparent break-in – the cop fatally shot a highly intoxicated, well-liked and unarmed college senior

McKinney v. Ball State University Police, 1:04-294
Plaintiff: Geoffrey N. Fieger and Robert M. Giroux, Jr., *Fieger Fieger Kenney Johnson & Giroux*, Southfield, MI
Defense: Bradley L. Williams, *Ice Miller*, Indianapolis, IN, Scott E. Shockley, *Defur Voran*, Muncie, IN and John Kautzman, *Ruckelshaus Kautzman Blackwell Bemis & Hasbrook*, Indianapolis
Verdict: Defense verdict on liability
Federal: **Indianapolis**
Court: J. Young, 2-4-08

Michael McKinney, age 21 and a well-liked senior at Ball State University, spent the last night of his life drinking at Muncie bars with his friends. A business major from Bedford and a member of Delta Chi fraternity, McKinney had only recently moved into off-campus housing as the fraternity house had been repossessed. This unfamiliarity would become important later that night as he tried to go back home to the area known as The Village.

McKinney drank to excess, so much so that his BAC was later measured at .34. That included stops at several nightspots, including Stirling's, The Locker Room and BW3's. His friends recalled that as the night wore on, McKinney was very intoxicated. He could barely walk and was slurring his speech.

McKinney apparently headed home and attempted to enter his apartment through the backdoor. The door was locked, so McKinney banged on the door. In fact it wasn't his apartment at all. The frightened resident, a woman that lived alone, called the police.

The first to arrive on the scene was Robert DuPlain, a Ball State University police officer. DuPlain, then age 24, was still so new on the job that he had not yet even been to the police academy. DuPlain rushed into the dark backyard to confront the apparent

intruder.

DuPlain recalled that as he entered the backyard, he shouted "Hey" at McKinney. McKinney, DuPlain further recalled, then charged at him. In response, DuPlain fired four shots. The unarmed McKinney was fatally wounded.

In this lawsuit McKinney's estate alleged excessive force by DuPlain. That is, DuPlain was characterized as a reckless rookie that rushed in and shot an innocent man. The notion that McKinney charged at him was also diminished, there being proof from a pathologist, Dr. Werner Spitz, that McKinney was shot on the side. Plaintiff countered that alternatively, even if McKinney was charging, DuPlain should have been able to appreciate his obvious drunkenness and not fire his weapon. If prevailing, the estate sought damages of some $67,000,000, that sum including punitives.

DuPlain, who has since left the police force and returned to his home in Canton, OH, defended the case on several fronts, (1) he didn't know McKinney wasn't armed, (2) he thought it was a possible burglary, and (3) there was no way for him to know in that dark backyard if McKinney was drunk or not.

The jury's verdict was for the government on the excessive force claim and the estate took nothing. A defense judgment was entered. The estate has since moved for a new trial citing assorted errors during trial.

Auto Negligence - On a one-way street, a woman attempted to make a left turn from the right lane; in doing so she collided with a motorist in the adjacent lane

Guenin v. Kapoor,
27D01-0607-CT-365
Plaintiff: Dennis H. Geisleman, *Law Office of Dennis H. Geisleman*, Fort Wayne
Defense: Herbert A. Spitzer and Michael D. Connor, *Spitzer Herriman Stephenson Holderead Musser & Connor, LLP.*, Marion
Verdict: $392 for plaintiff less 66% comparative fault
County: **Grant**, Superior
Court: J. Todd, 6-6-07

On 9-3-97, Heiddii Guenin was riding as a passenger in a 1985 Pontiac Sunbird being driven by Jaclyn Smith. The two were traveling north on Adams Street in Marion. Adams is a one-way street, and Smith was driving in the left lane.

At the same time, Suman Kapoor was driving north in the far right lane of Adams Street in a 1993 Toyota Camry. Upon reaching the intersection with 26th Street, Kapoor attempted to make a left turn from the right lane. She did so in Smith's path, and the two collided.

Guenin claimed injuries to her head, neck, and back that she attributed to the crash. Her medical expenses are unknown. She and Smith filed separate lawsuits against Kapoor and blamed her for the crash.

Smith's lawsuit against Kapoor was resolved in 2005. Guenin's lawsuit continued with Kapoor denying being the sole cause of the crash. Instead, Kapoor named Smith as a non-party and blamed her for failing to use her horn to warn Kapoor of Smith's presence and approach and for failing to brake or slow down. Kapoor also implicated Guenin's fault and minimized the claimed damages.

The case was tried for three days in Marion. The jury returned a verdict in which Guenin and non-party Smith were each assigned 33% of the fault. The remaining 34% was assigned to Kapoor.

The jury set Guenin's raw damages at $392. After reduction for comparative fault, Guenin's final award came to $133. The court entered a judgment for that amount, plus costs of $100. The judgment has been satisfied.

Auto Negligence - Plaintiff claimed defendant pulled into his path from a "T" intersection and rendered him unable to avoid rear-ending her; defendant filed a counterclaim and blamed the crash on a combination of plaintiff's drinking and speeding

Northcutt v. Ginter,
02D01-0504-CT-166
Plaintiff: Jordan I. Lebamoff and Jeffrey Stewart, *Lebamoff Law Offices*, Fort Wayne
Defense: Thomas M. Kimbrough, *Barrett & McNagny*, Fort Wayne
Verdict: Defense verdict on comparative fault on plaintiff's claim; $3,109 for defendant on counterclaim
County: **Allen**, Superior
Court: J. Avery, 7-25-07

In the afternoon of 7-31-04, a collision took place near the intersection of Fisher Road and Butt Road in Allen County. It happened when a 1994 Dodge Ram 1500 pickup truck being driven by Kerry Northcutt rear-ended a 1990 Ford Lincoln Mark VII being driven by Amy Ginter.

The parties explained the crash differently. According to Northcutt, he was traveling south on Butt Road while Ginter was driving west on Fisher Road and was facing a "T" intersection. As Northcutt approached the intersection, Ginter attempted to make a left turn. In doing so, she pulled into Northcutt's path, and he could not avoid crashing into her.

Ginter, however, tells a slightly different story. According to her, she stopped at the intersection and checked for traffic. When the way seemed clear, she proceeded to make a left turn. Just as Ginter completed her turn, Northcutt arrived on the scene.

He crested a hill at high speed and clipped the rear of Ginter's car. Northcutt then went off the side of the road and sheared a telephone pole in half. It was Ginter's belief that Northcutt had been drinking.

Regardless of how the crash

happened, Northcutt claimed to have been injured by it. Unfortunately, the record does not reveal the nature of his claimed injuries or the amount of his medical expenses.

Northcutt filed suit against Ginter and blamed her for pulling into his path and thereby causing the crash. Ginter defended the case and disputed causation. In particular, she claimed that the injuries of which Northcutt complained were pre-existing and due to causes unrelated to the crash.

In addition to defending the case, Ginter also went on the offensive and filed a counterclaim in which she blamed the crash on Northcutt. The record does not indicate whether Ginter claimed any personal injuries. However, she did claim property damage to her car in the amount of $3,109.

Ginter identified several experts. Among them were the following: Dr. Mark Reecer, Physical Medicine, Fort Wayne; Dr. J. Paul Kern, Rehabilitation, Indianapolis; Alfred Bowles, Biomechanics, San Antonio, TX; and John Wiechel, Accident Reconstruction, Columbus, OH.

The case was tried for two days in Fort Wayne. The jury deliberated for one hour and ten minutes before returning a verdict in which Northcutt was assigned 100% of the fault. The effect was a defense verdict on Northcutt's claim.

On Ginter's counterclaim, the jury awarded her damages of $3,109. That was the exact amount she sought for her property damage. The court entered a judgment that reflected the verdict, and it has been satisfied.

Premises Liability - While shopping at Lowe's a packaged garage door fell from the shelving and struck the plaintiff in the head

Davidson v. Lowe's Home Center et al, 2:06-250
Plaintiff: Steven A. Kurowski, Schererville
Defense: Clint A. Zalas, *Lee Groves & Zalas*, South Bend for Lowe's
Daun A. Weliever, *Lewis Wagner*, Indianapolis for Washington Inventory
Verdict: $35,000 for plaintiff assessed 80% to Lowe's and 20% to Washington Inventory
Federal: **Hammond**
Court: J. Rodovich, 2-6-08

Paul Davidson shopped on 10-26-04 at a Lowe's Home Center in Michigan City. As he shopped, a sub-contractor, Washington Inventory Services, was doing an inventory of the store. In that process, it had stacked and restacked the shelving.

Suddenly as Davidson traversed an aisle, a pre-packaged garage door fell from the shelf. It struck Davidson in the head, knocking him to the floor. He has since complained of a mild brain injury and memory loss. His injury was confirmed by Thomas Devine, Neuropsychology and Dr. Paul Pasulka, Neurology. Beyond plaintiff's primary claim, his wife presented a consortium count.

In this lawsuit, Davidson targeted both Lowe's and Washington Inventory. His theory was simple – merchandise should not rain down upon customers. The defendants agreed and fault was not disputed. The jury would still decide comparative fault.

In that regard, Lowe's blamed the incident on Washington Inventory, which at the time was in exclusive control of the merchandise. Washington Inventory countered that it was Lowe's stacking that was to blame. Both defendants minimized the claimed injury, citing that a CT scan on the day of the incident was normal.

While fault was no issue, in that the defendants were at fault, this jury did consider apportionment. It was assessed 80% to Lowe's, the remainder to Washington Inventory. Then to damages, plaintiff took a general award of $35,000 – consortium was rejected. A consistent judgment followed.

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