

The Indiana Jury Verdict Reporter

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April, 2010

Statewide Jury Verdict Coverage

11 IJVR 4

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In This Issue

Marion County

Auto Negligence - \$6,000	p. 2
Auto Negligence - Defense verdict	p. 4
Auto Negligence - \$100,000	p. 5
Premises Liability - Defense verdict	p. 8

St. Joseph County

Premises Liability - Defense verdict	p. 1
Auto Negligence - Defense verdict	p. 11

Jasper County

Neg. Supervision - Defense verdict	p. 4
------------------------------------	------

Harrison County

Premises Liability - Defense verdict	p. 5
--------------------------------------	------

Lake County

Dog Attack - \$3,000	p. 6
Medical Negligence - Defense verdict	p. 9
Premises Liability - \$24,638	p. 12
Underinsured Motorist - \$40,000	p. 13
Auto Negligence - \$5,351	p. 14

Porter County

Auto Negligence - \$6,000	p. 6
Underinsured Motorist - \$165,000	p. 13

Federal Court - Hammond

Civil Rights - \$1.00	p. 6
-----------------------	------

Elkhart County

Medical Negligence - Defense verdict	p. 7
--------------------------------------	------

Hamilton County

Auto Negligence - \$15,000	p. 8
----------------------------	------

Floyd County

Auto Negligence - \$15,000	p. 9
----------------------------	------

Marshall County

Auto Negligence - \$75,000	p. 9
----------------------------	------

Federal Court - Indianapolis

Law Firm Negligence - \$130,000	p. 10
---------------------------------	-------

Clark County

Utility Negligence - Defense verdict	p. 11
--------------------------------------	-------

Jennings County

Auto Negligence - Defense verdict	p. 12
-----------------------------------	-------

Allen County

Auto Negligence - Defense verdict	p. 13
-----------------------------------	-------

Sullivan County

Medical Negligence - \$25,320	p. 14
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Premises Liability - A roofer climbing up a ladder to search for the source of a leak suffered an open leg fracture when the ladder slipped out from under him and caused him to fall to the ground; the roofer blamed the property owner for providing him with a defective ladder

Davis v. Don's Liquor Oasis, Inc., 71D05-0810-CT-214

Plaintiff: Robert F. Gonderman, Jr.,
Gonderman Legal Corp., P.C.,
South Bend

Defense: Anthony F. Tavitas and Philip

T. King, *Law Offices of Anthony F. Tavitas, P.C.*, Munster

Verdict: Defense verdict on comparative fault

County: **St. Joseph**, Superior
Court: J. Manier, 1-15-10

In March of 2007, William Konieczny was the owner of a liquor store called Don's Liquor Oasis located at 3811 Lincoln Way West in South Bend. On 3-1-07, it was raining in the South Bend area, and in the late afternoon water

began gushing into Don's Liquor Oasis through a leak in the roof.

Konieczny borrowed a ladder from a neighbor's home and instructed his son, Eric Konieczny, to climb up onto the roof to locate the leak. In the meantime, Konieczny called a roofer in the person of Robert Davis, then age 46, to come over and deal with the problem.

Davis arrived a short while later and found the ladder that Eric had previously used was still leaning against the side of the building. Davis decided to leave the ladder in the same position and use it to climb up onto the roof himself.

As Davis climbed the ladder, it slipped out from under him and caused him to fall hard to the ground below. As a result of his fall, Davis suffered a chipped tooth, a cut to his right knee, and a comminuted open fracture of his right femoral shaft.

Davis subsequently underwent a total of three surgeries to repair the fracture and was off work for more than three months. He has been left with a steel rod in his leg, and he developed traumatic arthritis in his right knee that he attributes to the incident and that will cause him permanent pain. His medical expenses totaled \$72,014.

Davis filed suit against Don's Liquor Oasis and blamed it for Konieczny's actions in providing him with a defective ladder. In addition to his other damages, Davis claimed lost income in the amount of \$54,589. His wife, Rebecca Davis, also presented a derivative claim for her loss of consortium.

Plaintiffs' identified experts included Dr. Bryan Boyer, Orthopedics, South Bend; Dr. Henry Kim, Orthopedics, South Bend; and Stephen Fournier, P.E., Charleston, SC. It was Fournier's opinion that the ladder was unsafe due to the fact that the rubber foot pad on one side of the ladder was missing and the pad on the other side was only partially attached.

Fournier explained that this condition would have made the ladder prone to twisting or tilting and thereby increased the probability of movement at the base.

According to Fournier, Konieczny should either have secured the base of the ladder, or warned Davis of the danger, or at least inspected the ladder before allowing Davis to use it.

Don's Liquor Oasis defended the case and blamed Davis himself for the incident. According to defendant, Konieczny warned Davis not to use the ladder. Davis disputed that account but admitted that Konieczny had told him to be careful because the ladder was old.

The identified defense experts included Gary Mackela, P.E., South Bend. According to Mackela, the ladder slipped because it had been placed on a slippery surface without a proper foot pad. Mackela noted the ladder was festooned with ample warnings not to use it in that manner.

The case was tried in Mishawaka. The jury returned a verdict in which fault was allocated 49% to Don's Liquor Oasis and the remaining 51% to Davis. Based on the allocation of fault, the court entered a defense judgment.

Auto Negligence - A woman was compensated for soft-tissue injuries she received in a rear-end crash; the parties engaged in post-trial motion practice over the fact that plaintiff's and defendant's insurers arbitrated the issue of med-pay outside the scope of the litigation

Felder v. Pierle,
49D10-0710-CT-41939

Plaintiff: Nicholas F. Baker and Thomas E. Hastings, *The Hastings Law Firm*, Indianapolis

Defense: Michael P. Pritchett, *State Farm Litigation Counsel*, Indianapolis

Verdict: \$6,000 for plaintiff

County: **Marion**, Superior

Court: J. Dreyer, 1-26-10

On 4-4-06, Marita Felder, then age 43, was driving north on Delaware Street in Indianapolis. Behind her was a vehicle being driven by Noreen Pierle. When Felder stopped in traffic, Pierle rear-ended her.

Felder suffered soft-tissue injuries in the crash. She later underwent a course of chiropractic treatments and physical therapy. Her medical expenses came to

\$8,728.

Pierle's insurer was State Farm, and Felder was insured by Nationwide. The two companies got together and entered into an arbitration agreement concerning the issue of med-pay. Pursuant to the agreement, State Farm paid Nationwide \$4,509. That arrangement would be the focus of some interesting post-trial motion practice.

In the meantime, Felder filed suit against Pierle and blamed her for following too closely and failing to yield for stopped traffic. Pierle admitted 100% fault for the crash disputed the nature, extent, and causation of Felder's claimed injuries. The identified defense IME was Dr. Jon Sieber, Orthopedics, Indianapolis.

The case was tried in Indianapolis. The jury returned a verdict for Felder and awarded her damages of \$6,000. The court entered a judgment for that amount. However, the case was not yet over.

Prior to trial, Pierle made a Qualified Settlement Offer in the amount of \$6,509. Significantly, that figure was to include the previous payment by State Farm to Nationwide for med-pay. Felder thought this was unfair.

In particular, Felder argued that the arrangement between State Farm and Nationwide in arbitrating the med-pay issue outside the scope of the litigation violated Ind. Code § 34-53-1-2 and denied plaintiff's counsel its one-third fee and costs in bringing the action. Based on that argument, Felder filed a motion to strike the Qualified Settlement Offer.

The court agreed with this reasoning and granted Felder's motion striking the settlement offer. Pierle has partially satisfied the court's judgment in the amount of \$1,490. The balance of \$4,509 (i.e., the amount previously paid in med-pay) was retained in the attorney's trust account pending the court's ruling on Pierle's argument that the funds should be deducted from the judgment. At the time the IJVR reviewed the record, that issue had not yet been resolved.