

## UP STATE

## ERIE COUNTY

## MOTOR VEHICLE

Rear-ender — Multiple Vehicle — Negligent Entrustment

## Car crash led to man's bladder and sexual dysfunction

SETTLEMENT **\$4,500,000**

**CASE** Jason P. Lapp v. Skidmore, Inc., DCFS Trust, Daimler Chrysler Financial Services, Andrew Brzyski, Mary Brzyski, No. 3154/04

**COURT** Erie Supreme

**JUDGE** Joseph P. Glowonia

**DATE** 12/4/2006

**PLAINTIFF**

**ATTORNEY(S)** John E. Ballow, The Ballow Law Firm P.C.,

son C.

**DEFENSE**

**ATTORNEY(S)** Lisa Adcock, Goldberg Segalla LLP, New York, NY (DaimlerChrysler Financial North America, DCFS Trust, DaimlerChrysler Financial Services Americas LLC, DaimlerChrysler Financial Services Trust, DaimlerChrysler Motor Corp.)

Mark G. Giangreco, O'Brien & Boyd, P.C., Buffalo, NY (Andrew Brzyski, Mary Brzyski)

John J. Jablonski, Goldberg Segalla LLP, Buffalo, NY (Skidmore Inc.)

**FACTS & ALLEGATIONS** At about 7 p.m. on Sept. 15, 2003, plaintiff Jason Lapp, 30, a licensed practical nurse who was employed by the New York State Department of Correctional Services, was driving on Wehrle Drive, in Lancaster. His vehicle's rear panel was struck by a trailing vehicle that was being driven by Andrew Brzyski. Lapp claimed that he sustained a back injury.

Lapp sued Brzyski; the registered owner of Brzyski's vehicle, Brzyski's mother, Mary Brzyski; Mary Brzyski's employer, Skidmore Inc.; the lessor of Brzyski's vehicle, DaimlerChrysler Financial Services; and several of that company's related entities. Lapp alleged that Andrew Brzyski was negligent in the operation of his vehicle, that Skidmore was negligent in its entrustment of the vehicle, and that the remaining parties were vicariously liable for Brzyski's actions.

Plaintiffs' counsel claimed that Mary Brzyski and Skidmore

did not establish a written agreement that addressed Brzyski's use of the vehicle. Thus, he argued that Brzyski was entitled to full, unlimited use of the vehicle and that those privileges implied that Andrew Brzyski could also operate the vehicle.

The defendants contended that Lapp stopped abruptly and that his actions were a full or partial cause of the crash.

Skidmore's counsel also contended that Mary Brzyski was the vehicle's sole authorized user and that Andrew Brzyski was not a permissive user, as defined by Vehicle and Traffic Law § 388. He further contended that Mary Brzyski had about four years' of prior access to Skidmore-owned vehicles and that Andrew Brzyski has never previously operated any of those vehicles.

**INJURIES/DAMAGES** *catheterization; cauda equina syndrome; footdrop; fusion, lumbar; herniated disc at L5-S1; incontinence; microdiscectomy; sexual dysfunction*

Lapp sustained a disc herniation at L5-S1. The injury produced cauda equina syndrome—organ dysfunction and sensory difficulties that are caused by compression of nerve roots that occupy the spine's lumbar region. He underwent a microdiscectomy, which is the surgical removal of an intervertebral disc, but his condition ultimately necessitated fusion of three levels of his spine's lumbar region.

Lapp suffers residual impairment of his sexual function and residual footdrop—muscle weakness or paralysis that causes downward drooping of the front portion of a foot. He also suffers a residual loss of the control of his bladder. Thus, he must perform about four daily self-catheterization procedures.

Lapp claimed that his future medical expenses and future loss of earnings would total \$4.5 million. That amount was based on a present-day valuation of \$1.6 million. He sought recovery of \$4.5 million for those losses and unspecified damages for his past and future pain and suffering. His wife sought recovery of damages for her loss of services.

**RESULT** About two months before the scheduled start of the trial, the parties agreed to a \$4.5 million settlement. Skidmore's primary insurer agreed to tender its \$1 million policy, and its excess insurer agreed to contribute \$3.5 million from its \$4 million policy.

**INSURER(S)** The Hanover Insurance Co. for Skidmore (primary insurer)  
DCFS Trust for Skidmore (excess)

**PLAINTIFF**

**EXPERT(S)** Deidre Bastible, M.D., family medicine, Buffalo, NY  
Cameron Huckell, M.D., orthopedic surgery, Buffalo, NY  
Susan Keating, R.N., life-care planning, Rochester, NY  
Christopher Kopp, M.D., urology, Buffalo, NY  
Jeffrey Lewis, M.D., orthopedic surgery, Buffalo, NY

AS PUBLISHED IN

## The New York Jury Verdict Reporter

XVII/35-47 MEDICAL MALPRACTICE — CHILDBIRTH — FAILURE TO MONITOR AND TIMELY PERFORM CAESAREAN SECTION — SEVERE COGNITIVE DEFICITS

**SETTLEMENT:** Nathan and Mary Schlabach as p/n/g of Rachel Schlabach v. John Doe, M.D.; John Doe Medical Group, P.C.; John Doe, M.D.; and Doe Hospital 4373/94 Date of Settlement 7/19/99 Erie Supreme

**Pltf. Atty:** John E. Ballow of Ballow, Braisted, O'Brien & Rusin, P.C., Buffalo

This action settled during jury selection for \$3,200,000. On 2/15/87, Pltf.'s mother went into labor and presented to Deft. Hospital, where Deft. doctors found her to be only in the latent stages of labor and ordered a labor check; Pltf. was sent home after being given Seconal. Three days prior, she had undergone a non-stress test because she was slightly past her estimated due date. The test was interpreted as reactive, and Deft. doctors continued to monitor the progress of the pregnancy. Pltf. claimed that immediately after she was sent home on 2/15, she started having contractions that were 5 minutes apart. She returned to Deft. Hospital and was admitted, but was not placed on an electronic fetal heart monitor because Deft. Hospital had only two monitors at its disposal. Deft. Dr. Doe, who was Pltf.'s primary obstetrician, had a standing order that a baseline monitor strip should be done for at least three contractions, as long as "circumstances permitted." Pltf. contended that one of the two monitors could temporarily have been taken from another patient, so as to monitor her for three contractions and determine the condition of the fetus.

Pltf. was not fitted with the monitoring strip for more than 2 hours, at which time it revealed an extreme decrease in long term variability that was bordering on absent. Pltf. claimed that prior to being fitted with the monitor, Deft.'s primary care nurse departed from the accepted standards of care by failing to auscultate the fetal heart rate. Pltf. further claimed that Deft.'s obstetrical nurse never performed a pelvic examination, and that one was finally done by Deft. Dr. Doe, who did not arrive at the hospital until almost 3 hours after Pltf.'s admission, and more than 1½ hours after Deft.'s nurses first detected decreased variability by the fetal monitor. Deft. Dr. Doe testified in his deposition that Deft.'s nurses never informed him of the decreased variability. Pltf. contended that it was Deft. Hospital's responsibility to notify the doctor of the loss as soon as the monitor was placed.

Deft. Dr. Doe then performed an amniotomy, at which time he noted that the meconium was of "less than a pea soup consistency," and that there were continued variable decelerations on the monitor strip. Deft. Hospital's nurse testified at her deposition that the meconium was thick and that it contained actual "chunks." Pltf. claimed that after determining the extreme decrease of long-term variability, Deft. Doe should have applied an internal scalp electrode to monitor the fetal heart rate directly and should have performed a fetal scalp sample to evaluate the pH for acidosis. Deft. Doe informed Pltf. parents that there was a possibility that a Caesarean would have to be performed. Pltf. claimed that Deft. had enough evidence at the time of the amniotomy to call for an emergency Caesarean, which required that lab personnel, a pediatrician, and anesthesiologists all be called from outside Deft. Hospital. Instead, Deft. waited about 30 minutes before he called for the procedure. By that time, the heart monitor strips were exhibiting deep variable decelerations, as well as some late decelerations. Deft. Dr. Doe testified that he did not consider fetal distress as part of his differential diagnosis until there was severe bradycardia.

**Injuries:** spastic quadriplegia; severe cognitive deficits. The infant Pltf. was born cortically blind; she is permanently disabled and remains bedridden. Defts. would have claimed that the fetus was compromised and damaged prior to Pltf.'s admittance, and that any omissions on their part were therefore not a proximate cause of the resulting injuries sustained by the infant Pltf. Defts. would have contended that her life expectancy is less than 10 years, which Pltf. would have disputed. **Structured settlement details:** Deft. Dr. Doe paid \$1,750,000 (carrier MLM paid \$1,000,000 policy and carrier MMIA paid \$750,000 of a \$1,000,000 policy); Deft. Hospital paid \$1,450,000 (\$2,000,000 policy). A supplemental needs trust was established after a \$400,000 lien was paid to Erie County Social Services. **Carriers:** MLM and MMIA for Dr. Doe; Hospital Underwriter's Mutual for Hospital.

**Pltf. Experts:** Dr. William Cameron, ob-gyn, Kansas City, Missouri; Kenneth Reagles, Ph.D., life care planning, Syracuse.

**Deft. Experts:** Dr. Murray Yost, ob-gyn, Buffalo; Dr. Edmund Egan, neonatologist, Buffalo; Dr. Robert Sinkin, ob-gyn, Rochester; Dr. Robert Howard, pediatrician, Cincinnati, Ohio; Dr. Margaret McBride, pediatric neurologist, Rochester. **M**

## UPSTATE

### ALBANY COUNTY

#### WORKPLACE SAFETY

**Negligent Training — Government — Municipalities**

## Laborer run over, killed by front-end loader

**SETTLEMENT**      **\$2,325,000**

**CASE**      Debra J. Quattrini, Indiv & as Administratrix of the Estate of Edward Quattrini v. City of Albany, Innovative Municipal Products (US), Inc. a.k.a. I.M.U.S. Innovative Municipal Products, Inc., Innovative Building Products, Inc., No. 7/05

**COURT**      Albany Supreme  
**JUDGE**      Thomas J. McNamara  
**DATE**      1/17/2008

**PLAINTIFF**  
**ATTORNEY(S)**      John E. Ballow, The Ballow Law Firm, P.C., Buffalo, NY

**DEFENSE**  
**ATTORNEY(S)**      Patrick J. Berrigan, Harris Beach P.L.L.C., Niagara Falls, NY (Innovative Building Products Inc.)  
                          Justin O. Corcoran, O'Connor, O'Connor, Bresee & First P.C., Albany, NY (Innovative Municipal Products (US) Inc.)  
                          Eugene D. Napierski, Napierski, Vandenburg & Napierski L.L.P., Albany, NY (City of Albany)  
                          Scott M. Peterson, Napierski, Vandenburg & Napierski L.L.P., Albany, NY (City of Albany)

**FACTS & ALLEGATIONS** On Jan. 13, 2004, plaintiff's decedent Edward Quattrini, 43, a self-employed landscaper, worked at a municipal facility that stored treated salt for use during icy and snowy weather conditions. He was standing next to a pile of treated salt when a city employee backed over him with a front-end loader. Quattrini sustained fatal injuries.

Quattrini's widow, Debra Quattrini, acting individually and as administratrix of her husband's estate, sued the facility's owner and operator, the city of Albany; a city-contracted company that used the facility, Innovative Municipal Products (US)

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Inc.; and a related entity, Innovative Building Products Inc. The plaintiffs alleged that the defendants negligently failed to provide a safe workplace and that the city was also negligent in its training and direction of the front-end loader's operator.

Plaintiffs' counsel claimed that the city controlled the work site and was required to provide a safe workplace, according to federal guidelines, state guidelines, and good and accepted engineering principles. The plaintiffs' expert engineer opined that the city's failure to comply with these standards caused the fatal accident.

Evidence indicated that Albany city employees would use front-end loaders to place untreated rock salt into a hopper, which was attached to a conveyor or "stacker." The stacker had sprayers that would spray a molasses-based substance onto the rock salt as it went from the hopper, up the stacker and down into a pile. Mr. Quattrini's job was to ensure that the salt was coated properly and that the stacker operated appropriately at all times.

City employees contended that Quattrini would often have to walk around the salt pile to ensure that the sprayers were working and that the salt was being treated uniformly. Other witnesses claimed that Quattrini would often climb the salt pile because the sprayers would get clogged. At the time of the accident, the salt pile was 20-to-30-feet tall at its peak.

Plaintiffs' counsel claimed that David Stay, the city employee operating the front-end loader that backed over Quattrini, had never before performed this type of work and had no training as to the process of moving the treated salt from the piles to a salt barn.

Plaintiffs' counsel contended that conditions became unsafe because Stay had been asked to remain past his shift and operate one front-end loader. Prior to this, two front-end loaders had been working together at all times. Plaintiffs' counsel claimed that it was the city's responsibility to get another front-end loader operator or have the stacker moved farther away from the doorway. He also claimed that Stay negligently operated the front-end loader, which did not have side-view mirrors. He contended that the mirrors were purposely removed by city employees or that they were knocked off by trees when the vehicle was used for snow removal. He claimed that the city had a standing policy to use a "ground person" during all backing operations, but that there was no ground person at the time of the accident. He also claimed that Stay did not attend a mandatory "Backing Safely Program" offered by the city's insurer three months prior to the accident.

Plaintiffs' counsel also reported that he possessed a taped statement taken from Stay the day after the incident and that the statement included Stay's claim that he had previously advised the city of the dangers of not using a ground man in backing operations, having loaders without radios, and performing such operations without barricades to keep pedestrians clear of dangerous areas.

The city's counsel contended that the other defendants were also responsible for the job site. They claimed that those defendants should have provided a second laborer to assist Quattrini and that their failure to do so was a proximate cause of the fatality.

The city's counsel further contended that Stay had sufficient and adequate experience operating heavy equipment and that this would not be an unusual job for him to perform. Stay opined that the stacker was too close to the entrance to the salt barn and that it was running at too high a rate. He claimed that this caused the pile to grow too large and block the doorway, impeding his ability to appropriately move in and out of the salt shed. Despite plaintiffs' counsel's claim that the city controlled the work site, the city's counsel contended that Quattrini, as a contractor, and the other defendants, as suppliers of the coating product and equipment in use, had the obligation to move the stacker and that they would have been in a better position to do so.

The city's counsel also contended that Quattrini may have climbed the salt pile to check the sprayers and may have fallen down the pile beneath the front-end loader. They claimed that even with mirrors, Stay would not have been able to see Quattrini.

**INJURIES/DAMAGES** *death; exsanguination; fracture, pelvis*

Quattrini sustained multiple pelvic fractures, resulting in exsanguination—a fatal loss of blood. He died Jan. 13, 2004, at age 43. He was survived by his 43-year-old wife and children ages 14 and 11. Plaintiffs' counsel claimed that Mr. Quattrini endured several minutes of conscious pain and suffering.

At the time of his death, Quattrini's annual income totaled about \$24,000. His estate sought recovery of wrongful-death damages that included the estate's lost earnings and damages for Quattrini's pain and suffering. Quattrini's wife sought recovery of damages for her loss of services.

The city's counsel contended that city employees reported that Mr. Quattrini was unresponsive and never moved after the incident.

**RESULT** The parties agreed to a \$2,325,000 pretrial settlement. The city's insurer agreed to contribute \$2.25 million, and Innovative Municipal Products' insurer agreed to contribute \$75,000. Innovative Building Products did not contribute.

**INSURER(S)** Admiral Insurance Co. for Innovative Building Products and Innovative Municipal Products (US)  
Travelers Property Casualty Corp. for the city of Albany

**PLAINTIFF EXPERT(S)** Michael M. Baden, M.D., forensic pathology, New York, NY (did not testify)  
Kevin R. Decker, economics, Valatie, NY (did not testify)  
Peter Kelly, M.D., occupational health & safety, Latham, NY (did not testify)  
Bernard Ng, M.D., forensic pathology, Voorheesville, NY (did not testify)  
Michael C. Wright, construction safety, New Carlisle, NY (did not testify)