

And the Defense Wins

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DRI member [Michael B. Langford](#) of the Indianapolis office of **Scopelitis Garvin Light Hanson & Feary PC** recently obtained a unanimous victory for the defendants from the Indiana Supreme Court in the case of *Humphrey v.*

Tuck and U.S. Xpress, Inc., 151 N.E.3d 1203 (Ind. 2020). The single issue on appeal was whether the trial court judge erred by giving a mitigation of damages jury instruction at the 2019 jury trial.

At the underlying trial, the defendants admitted fault for the two-vehicle interstate collision that gave rise to the lawsuit. The plaintiff claimed that, due to the crash, a benign and previously asymptomatic tumor that he had not known he had on his pituitary gland hemorrhaged and became symptomatic. He underwent surgery to remove the tumor. While the surgery was successful, the plaintiff's pituitary gland was damaged by the tumor or the procedure. The plaintiff claimed that this pituitary injury caused him to suffer from depleted hormones and related vision problems, lethargy, low libido, and mood swings. Therefore, the plaintiff sought to hold the defendants responsible for those resulting injuries.

The defendants argued that the plaintiff failed to mitigate his damages, contending that he did not follow his doctor's instructions on medications to address his pituitary injury, nor did he properly address his vision issues. Over the plaintiff's objection, the trial court judge issued a jury instruction on the defendants' failure to mitigate damages affirmative defense.

Plaintiff's counsel asked the jury for an award of \$947,500. Defendants' counsel recommended the jury award between \$10,000 and \$50,000. The jury returned a damage award of \$40,000.

The plaintiff appealed. The Indiana Court of Appeals held that the trial court erred by issuing the mitigation of dam-

ages jury instruction, finding that there was no proof that the plaintiff's lack of reasonable care caused an identifiable harm. The appellate court therefore ordered a new trial. However, the defendants sought and obtained transfer to the Indiana Supreme Court.

The state's high court found in favor of the defendants by reversing, in a 5-0 decision, the court of appeals. The Indiana Supreme Court expounded upon existing Indiana law in holding that the requirement of a "quantifiable" harm for a mitigation of damages instruction does not mean the defendant must prescribe a specific numerical value to the plaintiff's increased or prolonged harm. Rather, the respective burdens on plaintiffs and defendants are symmetric—a defendant's burden is no greater than plaintiff's. Just as the plaintiff did not need to quantify his request for damages to any degree of mathematical precision, neither did the defendants need to do so on their defense. Here, there was sufficient evidence that the plaintiff failed to follow his doctor's advice on hormonal replacement medication and vision improvement. Therefore, the defense was entitled to the mitigation of damages jury instruction. The original judgment of \$40,000 was reinstated by the supreme court's decision and that judgment has since been satisfied.

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