

Success in the Courtroom in 2009!

Defense verdicts for WIM clients!



A tragic accident resulting in the death of a 19-year-old young man. A hunter falls 25 feet to the ground sustaining serious injuries. A surety company seeks a \$10 million recovery on its forfeited surety bond. A contractor seeks compensation of over \$1.5 million due to delays in his work. These are just a few of the cases that the trial lawyers of WIM tried to verdict in 2009, resulting in defense verdicts rendered by juries or arbitrators. 9 trial days in one case, 18 trial days in another, and 11 expert witnesses called in another case. Aggressive, prepared, and cost-effective representation is the hallmark of the work of Wayman, Irvin & McAuley, LLC's trial attorneys. Why did clients trust Wayman Irvin & McAuley to go to trial, no matter how horrific the injury or how large the claimed economic losses? How did so many large complex cases result in defense verdicts even though plaintiffs were represented by very competent, well-respected opposing counsel?

The answer to these questions, as this edition will demonstrate, lies in the firm's skills and dedication to its clients. This dedication begins with an early analysis and preparing for trial or the best

possible settlement at the inception of the case. Our clients must know that their counsel is prepared - prepared on the law, prepared with experts, prepared with evidence – so that their case, their interests and their position will win the day.

This issue spotlights a representative sample of the cases WIM attorneys tried in 2009. Kate Fagan, Paul Mannix, Jon Gesk and Mark Gesk discuss seven cases they tried to verdict in 2009 and how a complete vindication of our clients' conduct was achieved. We want our clients and potential clients to be aware of the exemplary quality of professional service they can expect to receive from Wayman, Irvin & McAuley, LLC.

If you know of anyone who you feel would enjoy or benefit from being on the e-mail list for Your Best Defense, please let us know at dforsythe@waymanlaw.com.



Products Liability – Vehicular Defect Claim

By Mark J. Gesk, Esq.

This case was a wrongful death and survival action that was instituted by the estate of a 19-year-old employee of Mt. Lebanon Township. He was driving a small low speed vehicle with a passenger on board. In May, 2005 on a relatively flat, dry, paved surface, plaintiff executed a hard U-turn which resulted in the passenger jumping to safety. Unfortunately, the vehicle overturned, killing plaintiff's decedent. This lawsuit was commenced in

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the Court of Common Pleas of Allegheny County by the decedent's parents on a products liability theory of strict liability. The plaintiffs were represented by a prominent Philadelphia trial attorney.

The jury was selected in November of 2009. This was the first trial that we were involved in using the new *voir dire* rules in the selection of the jury. Counsel was very aggressive in cross-examining the jurors and, in fact, seven jurors were stricken for cause.

A two-and-one-half-week trial ensued before the Honorable Timothy Patrick O'Reilly. There were 11 experts called to testify, six by the plaintiffs and five by the defense. A total of 14 jurors participated, as two of the jurors dropped out due to illness, and two alternates were substituted. After a lengthy charge by Judge O'Reilly and a nine page questionnaire that was submitted to the jury in the form of Jury Verdict Interrogatories, the jury returned a defense verdict in favor of our client, the vehicle manufacturer, rejecting each of the three theories of product defectiveness raised by the plaintiffs. Plaintiffs chose not to appeal.

The point here is how the use of technology during the jury trial can be an effective tool. We used Power Point technology for our opening and closing statements. All exhibits and depositions were graphically exhibited to the jurors on large screens. The experts used many visual aids including photographs, charts, diagrams and models.

In the jury questionnaires returned after the verdict, the jurors said that one of the most striking aspects of the case was a computer animation that was performed by one of our experts modeling the accident. Our contention that the use of the vehicle was the cause of the accident, and not any defective condition of the vehicle, was dramatically displayed in the model presented to the jury.

For any questions concerning this court case, please feel free to contact Mark J. Gesk at mgesk@waymanlaw.com or (412) 566-2970.

Professional Liability– Surety Claim Against Engineer for Misrepresentation/Unforeseen Conditions

By Mark J. Gesk, Esq.

This case was filed initially in February of 2001 in the Federal Western District Court by a surety company seeking to recover approximately \$5 million dollars on its performance bond issued on a sanitary sewer line project. The surety's principal had defaulted on its contract after only eight months of work. The surety had come in to complete the contract but it also then walked off the construction site a year into the project. A lawsuit was filed against the owner and our client, the design engineer and provider of construction administration services.

Eventually the surety amended its Complaint to file a claim for fraud and negligent misrepresentation concerning the preparation of a budget for the sewer authority. The surety claimed that the contractor relied upon this cost estimate in preparing its bid. The case was eventually transferred from Federal Court to a three person Arbitration Board. The three arbitrators were selected by the parties and had to be acceptable to each of the parties.

In September of 2008, the arbitrators began taking testimony. The arbitration stretched over three months with numerous witnesses and experts being called by the three parties.

In March of 2009, a decision was issued by the three arbitrators when they entered a defense verdict in favor of our client, the design engineer. The owner was found to be responsible for certain contractual amounts owed to the surety. Pursuant to the arbitration agreement, there could be no appeals.

The lesson learned from this case was that the three arbitrators, who each specialized in construction law, were knowledgeable concerning the complex construction and engineering issues litigated. There was truly a search for justice as the arbitrators were able to ask probing questions of the numerous witnesses. In a case that had a great deal

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of engineering complexity, the trial lawyers did not have to worry about “dumbing it down” for a jury. This led to a successful defense of the negligent misrepresentation claims and the allegations of breach of contract and deviation from professional engineering standard of care. The fraud claims had been previously dismissed as groundless.

For any questions concerning this court case, please feel free to contact Mark J. Gesk at mgesk@waymanlaw.com or (412) 566-2970.



Products Liability – Defective Tree Stand Claim

By Kate Fagan, Esq.

This interesting case stems from the claim of a serious back injury resulting from the fall from a tree stand. The plaintiff’s brother purchased several lock-on tree stands for use in deer hunting through a sportsman’s catalogue. The plaintiff and his brothers are all long time, serious hunters who are experienced in the use and installation of lock-on tree stands. The plaintiff paid his brother for the cost of the stand, and as he had numerous stands which he was already using, did not open the box or use the stand for a period of two years.

The tree stand was manufactured in China by a company long since out of business by the time the incident occurred. A separate company designed the stand and had the Chinese company manufacture it. Prior to the instigation of the lawsuit, the designer was no longer in business and had no insurance coverage in place that could cover the date of the incident. The stand was imported by a co-defendant, which was uninsured. Designer had arranged a licensing agreement with licensee to sell the stand under the licensee’s name. Plaintiff brought suit against licensee, the catalogue entity, the importer and the designer. Designer remained unrepresented throughout the entire proceedings and even through

trial. The other parties defended the matter, with Wayman, Irvin and McAuley, LLC representing the catalogue entity.

The plaintiff attempted to install the tree stand in the company of his brother at his brother’s farm property. Prior to installation, the plaintiff did not use the safety strap that accompanied the stand, nor did he practice with the stand at ground level or inspect the straps prior to attempting installation. All of these directions were included in the instruction material which came with the stand. Plaintiff testified that he was familiar with all these instructions as he was experienced in installing tree stands, and owned and installed this same model in preceding years. He admitted that he did not follow each instruction, particularly the instruction to always wear and use the safety strap when installing, or ascending or descending to and from the stand.

The suit was brought solely as a 402(a) strict liability action, and no negligence was pled. The court ultimately ruled that the defendants could not introduce evidence as to the failure to wear and use the safety strap, as that was akin to introducing comparative negligence into the defense. The stand itself, upon examination, had a locking strap that had been glued, but not stitched in place. The plaintiff had not examined the strap before use, but the Court would also not allow that evidence to come in. The plaintiff did admit to an unusual method of “setting” the stand by rocking on his heels on the stand’s platform after attaching the locking strap, and while hugging the tree with both arms. The Court did allow the defendant’s to introduce evidence of this method of “setting” the stand. Defendants challenged this method as not being an intended use of the product.

When he fell from the stand, the plaintiff sustained a serious back injury, a fracture, which did not respond to more conservative treatment. Ultimately he had surgery to correct the fracture and had hardware permanently placed in his back. He also suffered a fractured wrist, which healed uneventfully. He had about a six month period of wage loss.

Lawyers Solving Problems

Defective Tree Stand Claim, continued from page 3

The plaintiff's initial demand was \$2.5 Million, but at time of trial, the demand was reduced to \$1.5 million. The defendants, collectively, offered \$400,000 prior to the start of trial. The jury found that, while the product had a defect, that defect was not the causative factor of the plaintiff's injury, and it returned a verdict for all the defendants. Despite the fact that the defense was limited by the Court's evidentiary ruling and that the tree stand had a defect, clearly the jury felt that the plaintiff's behavior in "setting" the stand was the cause of his injury.

For any further questions regarding this matter, please feel free to contact Kate Fagan at kfagan@waymanlaw.com or at (412) 566-2970.

Automobile Accident – Issue of Alcohol Consumption

By Kate Fagan, Esq.

This case involved a motor vehicle accident where the Plaintiff suffered serious injury, including permanent brain damage. The incident occurred on Rt. 22 near Blairsville, Pennsylvania at about three o'clock in the morning. A flat-bed driver was operating a company flat-bed truck in the course of his employment. Flat-bed driver stopped his vehicle behind an 18 wheeled tractor trailer as it made a right turn into a local truck stop. Automobile driver, operating his auto traveling behind the flat-bed operator, was distracted as he was focusing on his car's CD player. Auto driver hit his brakes and veered to the right, but he did not avoid hitting the rear of the flat-bed truck.

The auto operator's vehicle went off the roadway and stopped at the edge of the parking area adjacent to the truck stop. The flat-bed operator, feeling the impact, did not know if some vehicle was stuck under the flat-bed truck, so he put on his 4-way flashers, and he exited the truck with it remaining on the travel portion of the roadway. He ran to the automobile to see if anyone was injured. In that brief time, plaintiff plowed into the rear of the flat-bed

truck, leaving no skid marks or evidence of any application of his brakes

Plaintiff was horribly injured, and the State Police officers did not seek to investigate as to whether he was operating his vehicle under the influence of alcohol. However, two blood alcohol tests were taken by hospital personnel and documented in the medical records. Plaintiff brought suit alleging that the defendants were negligent in that the automobile operator caused the original accident and that the flat-bed operator failed to remove the flat-bed from the travel portion of the roadway, thus causing the plaintiff to strike the rear of the truck. Wayman, Irvin and McAuley, LLC, represented the flat-bed operator and his employer.

The primary issue in the case became whether or not the Court would allow evidence of plaintiff's blood alcohol content (BAC) to be admitted. No mention of the alcohol use appeared in the State Police accident report, and when deposed, the officers had no specific memory of any odor or evident involvement of alcohol. There was one witness, a bartender at a local private club, who could testify as to the fact that the plaintiff had been in the establishment and had been served alcohol. That testimony, however, did not include any observation that there were outward signs of intoxication such as slurring of words or unsteady gait.

The Court did not rule on the admission of this evidence until well into the trial after numerous offers of proof by the defendants on the factual witness, the bartender, and the expert testimony to be provided on the effects of the BAC levels on the plaintiff and his ability to operate his vehicle safely. The Court permitted the evidence to be presented, and it resulted in a defense verdict. The jury did assign small percentages of negligence to each of the defendants, but the evidence of the alcohol use was persuasive, and the jury attributed the largest share of negligence to the plaintiff himself.

For any further questions regarding this matter, please feel free to contact Kate Fagan at kfagan@waymanlaw.com or at (412) 566-2970.



Professional Liability – Contractor Claim Against Architect for Delay Damages/Retention Claim

By Paul Mannix, Esq.

This past year, Wayman, Irvin & McAuley, LLC., obtained another defense verdict in an arbitration proceeding with the American Arbitration Association (AAA). The firm represented an architect in a lawsuit arising out of a \$5 million construction project related to a school district's athletic fields and facilities. The action was filed by the excavator on the project against the school district and the architect.

At the time of substantial completion, the school district retained \$200,000 for work that was incomplete or in need of correction. Over the course of the next several months, it was the position of the school district that the excavator failed to complete the relevant punch list issues and furthermore, additional problems were discovered with the work. Therefore, the school district refused to release the \$200,000. After more than a year after substantial completion, the excavator initiated action with AAA seeking the unpaid retention. In addition, the excavator sought delay damages for alleged unforeseen conditions, including rock removal. The excavator claimed that it encountered rock that was harder than that described in the project specifications. During the course of the project, the contractor was granted a change order for additional direct costs for removing the unexpected rock conditions. The change order did not grant any form of time extension. However, when filing its AAA action, the excavator claimed that it was entitled to substantial delay damages related to the rock and other unforeseen conditions. According to the excavator, its total damages amounted to over \$1.5 million.

The case proceeded to an arbitration hearing for a full week in October with the AAA, at which the arbitrator heard testimony from party representatives and expert witnesses. Thereafter, the parties filed

extensive post-hearing briefs and a Final Award was entered in December. Although the school district was obligated to pay a portion of the excavator's claim, the Arbitrator absolved the architect of all liability.

For any questions concerning this court case, please feel free to contact Paul Mannix at pmannix@waymanlaw.com or (412) 566-2970.

Professional Liability – Engineering and Construction Management

By Paul Mannix, Esq.

This firm recently secured a defense verdict in a lawsuit against an engineering and construction management firm in the Venango County Court of Common Pleas. The case arose out of the Oil City Revitalization Project in which various renovation work was performed on the streets and sidewalks of Oil City. The owner of a large commercial building, which was formerly operated as a bank, experienced water infiltration in its basement following the completion of work on the Project. This water infiltration caused extensive property damage to the basement of the building and the owner claimed that it had experienced substantial loss of rental revenue and a reduced value of the property.

The primary dispute in the case revolved around the cause of the water damage. In renovating the streets and sidewalk outside the former bank building, the project called for the erection of an impervious wall along the basement of the bank. The owner claimed that the water infiltration resulted from a faulty design of this wall, which permitted water to seep through into the basement. The owner-plaintiff retained an expert engineer from Franklin, Pennsylvania who explained what he believed to be the flawed nature of the design and the cause of the water problems. In response, the defendant design professionals provided testimony defending the design, along with an expert witness who explained that the cause of the water damage in the basement was from water leaking from the roof and upper

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floors of the building due to improper maintenance of the building, as opposed to through the wall.

Judge White of Venango County presided over the trial, which took place in August. Following a week-long trial involving extensive factual testimony, as well as the conflicting expert testimony, the jury returned a defense verdict in favor of the defendants.

For any questions concerning this court case, please feel free to contact Paul Mannix at pmannix@waymanlaw.com or (412) 566-2970.



Automobile Accident – Rear End Collision

By Jon Gesk, Esq.

Plaintiff filed a negligence action against defendant for bodily injuries allegedly sustained in a motor-vehicle accident that occurred on March 10, 2002, in which defendant rear-ended plaintiff while he was at a stop light.

Early in the litigation process we stipulated to liability and focused our defense on the injuries allegedly sustained by plaintiff. Specifically, plaintiff had a history of back pain and treatment and had previously filed a civil lawsuit for injuries suffered to his back. Because this case was based on soft-tissue injuries to the back and neck, we believed the lack of objective medical evidence supporting plaintiff's claim provided us with an opportunity to focus on plaintiff's pre-existing health and his lack of credibility.

The case went to trial in March 2009 in front of Judge O'Reilly. At trial, we benefitted greatly from our firm's thorough investigation into plaintiff's past. Aided by the cooperation of his former employers and medical providers, we were able to discover several incidents, dating back to his teenage years, involving potential injuries to his neck and back and extensive treatment records regarding the

same. At trial, we displayed a large timeline with the dates of each particular incident. Plaintiff was questioned as to whether he recalled anything occurring on those dates. Initially, as expected, plaintiff denied anything occurring on those dates. However, when impeached by the medical records detailing what had occurred on each particular date, plaintiff reluctantly admitted to injuring and/or re-injuring his back on each separate occasion.

Ultimately, we rested without needing to call an expert witness to address plaintiff's claims. The six-person jury returned a verdict in our client's favor, finding that she was not the factual cause of plaintiff's alleged injuries. Plaintiff's counsel polled the jury, which voted unanimously six to zero that defendant's actions were not the cause of the alleged injuries.

The case swung in our favor due to our willingness to concede liability and focus on our strongest defense: plaintiff's lack of objective medical evidence. Specifically, plaintiff was unable to demonstrate an immediate need for treatment following the incident and even reported to work the following week. We were able to highlight that his back continued to experience flare-ups intermittently prior and subsequent to the incident, and the treatment he received nearly a month after the incident had no causal relation to the incident, but rather to his preexisting condition.

For any further questions regarding this matter, please feel free to contact Jon Gesk at jgesk@waymanlaw.com or at (412) 566-2970.



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