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Gary N. Stewart

On June 4, 2005 at about 5:00 a.m., Rolando Vega was returning home with his family from a night at a casino. The weather was clear and alcohol was not a factor. They were driving on I-95 near Branford, Connecticut when their car and a Werner Enterprises tractor–trailer collided causing the car to strike the center barrier and go off the road. Vega and two of the passengers suffered significant injuries.

Plaintiffs filed a lawsuit in Connecticut state court and we removed it to the U.S. District Court for the District of Connecticut. Following discovery and with the trial date looming, the parties agreed to proceed with binding arbitration to reduce expenses in comparison to the cost could be dramatically reduced from those that would be incurred in a lengthy jury trial.

Liability was contested because the state trooper noted in his Incident Report that plaintiff said that he fell asleep and did not know what happened. The trooper was adamant that this is what he was told by the plaintiff and he accurately recorded it.

The Werner truck driver testified that he was in the right lane and saw plaintiff's vehicle approaching when he felt a "bump" against the trailer. He then watched the car careen off the trailer, strike the barrier, and travel in front of his tractor-trailer. Fortunately, the tractor-trailer did not smash into it. Most importantly, the truck driver denied ever crossing into the left lane or even driving on the divided white line separating the two lanes.

Although the truck driver and the trooper's testimony supported our defense position, plaintiff vehemently denied that he fell asleep and caused this accident. He was a well spoken, educated man who claimed that he was talking with his mother and initially noticed the tractor-trailer about a mile to a mile and a half ahead of him moving gradually into the left lane. His mother swore that she noticed the movement of the truck because it was weaving back and forth and advised her son to be careful and either pass or stay behind it. Both of them testified that, as he went to pass, it swerved across the center lane markings, striking their door causing them to lose control.

Neither the mother nor plaintiff could explain why if the truck was weaving, they would 1)

pass it 2) not call 911 and report it or 3) just stay behind it since they were not in a hurry to get home.

It became apparent that the case was one that would turn on which motor vehicle operator was more believable. Fortunately, the Werner driver was willing to return to Connecticut to personally attend the proceeding, but he had a stutter which became worse when he was nervous. Accordingly, we spent much time with him so that he would be as comfortable as possible with the process and there was little doubt that he felt more confident because he testified in a straight forward manner and even challenged one of the plaintiff's attorneys about how the accident occurred.

Further, we believed that it was critical to show the arbitrator that the plaintiff was making up his story because he had, in fact, fallen asleep. Accordingly, we searched and analyzed numerous medical records and other documents where the plaintiff had provided in his own hand or verbally, versions of "what happened". Then we had plaintiff confirm that the version that he was testifying to at the arbitration, without a doubt, is what happened, that it was his "only version" and it was "the truth".

Our search revealed seven different versions of the accident and surprisingly, none reported that he had been "run off the road" or "cut off" by a tractor–trailer. For example, one noted "a 28 year-old male restrained driver's car which struck the guardrails at high speed." Additionally, in the trauma records, there was a statement that "plaintiff's car went under a guardrail." Ironically, there was no indication until more than a week after the accident that he was "cut off."

We argued that most people would be angry or upset and would want to tell a Trooper words to the effect of "the SOB cut me off" if they had been run off the road by a tractor-trailer. Further even if the Trooper's testimony was questioned, it was unclear why the plaintiff would not tell anyone who would listen that the truck almost killed him and his family.

The arbitrator found that the absence of any statements by the plaintiff that the truck cut him off supported our position that he was asleep and did not know what happened. These records were a crucial factor in deciding that maybe what the Trooper said about the plaintiff falling asleep was in fact, true and thus, he found that plaintiffs failed to satisfy their burden of proof.

Although medical and other records are critical in determining plaintiff's potential injuries and treatment, particular attention should be paid to the history and narrative sections which can assist in defending on the issue of liability. Further, applications for benefits or insurance, which are completed in the plaintiff's own hand, can be useful areas, especially when one considers that, many times, they are completed before the plaintiff has retained an attorney. One can argue that these are "more credible" because plaintiff provided the information closer to the event.

Gary N. Stewart, resident partner in Rawle & Henderson's Harrisburg office, concentrates his practice in the area of commercial motor vehicle defense and he has defended cases in Pennsylvania, New Jersey, Connecticut, Rhode Island, Massachusetts and Vermont.

Gary graduated *magna cum laude* from Widener University School of Law (Harrisburg campus) in 1992. He received his undergraduate degree from the U. S. Merchant Marine Academy at Kings Point, NY.

He is admitted to practice in Pennsylvania, New Jersey, Massachusetts, Connecticut, Vermont and Rhode Island as well as before the U. S. District Courts for the Eastern, Middle and Western Districts of Pennsylvania, the District of New Jersey, the District of Massachusetts, the District of Rhode Island, the District of Connecticut and the U. S. Court of Appeals for the First and Third Circuits.

He has been selected by his peers, as a Transportation Pennsylvania Super Lawyer in 2010, 2009 and 2007. It is an honor reserved for the top 5% of all Pennsylvania lawyers.

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ARCHITECTS & ENGINEERS

NEW YORK

ON-SITE SUPERVISION LIABILITY

Robert A. Fitch

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The New York Supreme Court, Appellate Division recently ruled that where a plaintiff puts forth proof that an architectural firm was responsible for supervising and overseeing the progress at a worksite and if that firm actually did exercise supervisory control and directed construction progress, then the firm can be held liable for failing to maintain the site in a safe and sound condition.

Plaintiff, a backhoe operator employed by a contractor hired to build a sidewalk, was injured when he slipped and fell on a muddy step while exiting his machine. The step in question, which was part of the machine, became muddy and slippery due to weather conditions at the worksite. Plaintiff sued the property owner and the architectural firm hired by the owner, asserting causes of action under Section 200 and Section 241(6) of the New York Labor Law.

Labor Law Section 200 is a codification of the common law duty of an owner or general contractor to provide construction site workers with a safe place to work. In order to be liable under Section 200, it must be shown that defendants exercised supervisory control over plaintiff's work and had actual or constructive knowledge of the unsafe manner in which the work was being performed. In this case, plaintiff was able to show that the defendant architecture firm had an employee on-site at all times who was directing progress and construction of the work. The firm's employee consulted with plaintiff on numerous occasions and directed how certain work was to be performed. Although the court noted that "general supervisory authority at the work site for the purpose of overseeing the progress of the work and inspecting the work product has been found insufficient to establish a cause of action under Labor Law Section 200," it nonetheless found here that the defendant architectural firm "actually exercised supervisory control and directed the plaintiff's work." As such, the court found that evidence of such actual control was sufficient to create an issue of fact as to whether the architecture firm exercised the requisite supervisory or safety control and thus, summary judgment was denied.

Labor Law Section 241(6) imposes a nondelegable duty upon owners, contractors and their agents to provide adequate protection and safety for workers and to establish a claim under this section, plaintiff must allege that defendants violated a rule or regulation promulgated by the Commissioner of Labor that sets forth a specific standard of conduct In this case, the plaintiff alleged that defendants violated 12 NYCRR 23-1.7(d), which provides that no employee shall be permitted "to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition" and further requires the removal of any "ice, snow, water, grease and any other foreign substance which may cause slippery footing."

In this case, the court ruled that the backhoe step constituted a "passageway" that plaintiff was required to use to access and exit his equipment. As such, and based upon the court's finding that the defendant architectural firm was directly in charge of worksite maintenance and supervision, the court held that summary judgment was not proper.

In short, this case indicates that the New York Appellate Division may not let an architectural firm out of a worksite related personal injury case when that firm is shown to be "actually responsible" for on-site supervision, rather than simply "generally responsible," but with no on-site presence.

Robert A. Fitch is the resident partner in the Rawle & Henderson's New York office. He has tried significant cases in New York state and federal courts in all areas of the firm's practice with a notable track record of defense verdicts in trucking, professional malpractice involving articles, engineers and health care professionals, as well as manufacturers of a variety of products.

He is a graduate of Syracuse University and received his law degree from Syracuse University College of Law. He is admitted to practice in the state and federal courts of New York as well as the U.S. Court of Appeals for the Second Circuit.

Mr. Fitch is a member of the Defense Research Institute, Federal Bar Council, Trucking Industry Defense Association (TIDA), International Association of Defense Counsel and the New York State Bar Association.

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Rawle & Henderson LLP's New York office now occupies the 27th floor of 14 Wall Street.

Rawle & Henderson currently has 23 attorneys admitted to practice in the state of New York.

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