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Parties Reach \$1.9 Mil. Accord Over Scaffold Failure

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Of the Legal Staff

A scaffold failure has resulted in a \$1.9 million settlement in Philadelphia County for a contractor who fell about eight feet, injuring his back, neck and left knee.

In *Davia v. Damien Construction Inc.*, according to the plaintiffs' amended pretrial memorandum, 57-year-old contractor Mark Davia went to the home of defendant Joseph Derry to provide an estimate on renovating a kitchen.

The plaintiffs' memorandum said defendant Damien Butler was also there because his company, defendant Damien Construction Inc., was performing porch and stucco construction on the house.

While Davia was there, the plaintiffs' memorandum said, he noticed "loose, electrical wires for front entrance lights that should have been buried/boxed into the wet, or newly placed stucco, before the stucco dried overnight."

Davia, who is a carpenter and electrician, offered to bury and secure the wires while the stucco was still wet, and Butler and Joseph Derry accepted the offer, the plaintiffs' memorandum said.

According to the plaintiffs' memorandum, Butler and Derry watched as Davia climbed the scaffold.

"When Davia stepped on a scaffold plank on an elevated level, the opposite end of the scaffold plank unexpectedly dislodged, causing Davia to fall to the ground some 7 or 8 feet below," the plaintiffs' memorandum said.

The plaintiffs' memorandum said the cause of the fall was that "the scaffold plank was placed short of its frame."

Davia was bedridden for about nine months following the incident, according to the plaintiffs' memorandum, and had to have back surgery.

Three neurosurgeons, as well as his family physician, have concluded that his back pain and spasms are chronic and that he will be unable to



TOM DUFFY



KEN FULGINITI

return to his job as a master electrician and carpenter for Davia Construction Inc., of which he is also president and construction manager, the plaintiffs' memorandum said. The plaintiffs, Mark Davia and his wife Sue Ann, said in their memorandum that Butler and his company were primarily responsible to make sure the scaffold was safe.

Butler testified that he has used scaffolding for more than 20 years, is trained in its safe use and is certified by OSHA to use it, but admitted he had not inspected the scaffold Davia fell from, the plaintiffs' memorandum said.

The plaintiffs also said in their memorandum that Derry, as landowner, was responsible for identifying and correcting any unsafe conditions on his land.

According to the plaintiffs' attorney, Ken Fulginiti of Duffy & Partners in Philadelphia, the issue of Derry's liability was made more complicated by the fact that he, too, is in the construction business.

Because of this, Damien Construction Inc. said in its pretrial memorandum that Derry was more than just a landowner and that he had "acted as the general contractor and played a role in creating the unsafe condition of a scaffold that was improperly planked or erected on the work site."

Damien Construction, in its memorandum, said Frank Farenchak, its liability expert, opined that Joseph Derry was the general contractor and was therefore responsible for frequently inspecting the worksite for safety hazards.

In their memorandum, Joseph Derry and Benjamin H. Derry, executor of the estate of Joan Derry, said "any injuries sustained by Mr. Davia are the result of his own negligence or in the alternative the negligence of the co-defendant for utilizing inappropriate scaffolding."

Damien Construction said in its pretrial memorandum that the scaffolding had been erected by Frank O'Kane, an independent stucco contractor Butler had referred Derry to.

Farenchak, according to Damien Construction's memorandum, said it was O'Kane's responsibility to correct the scaffolding safety hazard.

But Fulginiti said O'Kane was never named as a defendant because he was only in the country for a short period of time before returning to his home in Ireland and could not be tracked down and had no insurance.

According to Fulginiti, it was these issues that contributed to his clients' decision to settle rather than go to trial knowing there was a strong possibility that the case would go all the way to the state Superior Court.

He said his clients had originally demanded \$3 million but settled with Damien Construction for \$1.8 million Sept. 23, a week before jury selection.

A week later, he said, the Derrys bumped up their original offer from \$40,000 to \$100,000 and the plaintiffs agreed to settle.

"We felt good with the settlement," he said. "I think [if we had gone to trial] we certainly could have gotten a higher number or we could have lost."

Thomas J. Duffy and Michael Durst, both of Duffy & Partners, also represented the plaintiffs.

Damien Butler and Damien Construction's attorney, John H. McCarthy of Rawle & Henderson, said he felt the settlement was "reasonable" given the fact that the injuries were "quite severe" and a plaintiffs verdict could have cost his clients considerably more money.

"Liability was difficult for us," he said.

The Derrys' attorney, M. Elizabeth Naughton Beck of Swartz Campbell, could not be reached at press time.