

Hawthorne v. Roe Constr. Mgmt. Co., confidential ct. and docket no., Oct. 17, 2003.

Before his 14-foot fall, young Jay Hawthorne was athletic and in control of his life. Now, Jay cannot move anything below his shoulders, requires a ventilator to breathe, and is in constant pain. Disabled at 27, he will need 24-hour care for the rest of his life.

The accident that forever changed Jay's life happened during an ordinary work day at a construction site. Jay and several coworkers were laying decking sheets on the roof of a building when the wind started blowing the sheets around. Trying to prevent them from knocking his coworkers off the roof, Jay walked out onto a narrow bar joist to secure the sheets. One of them blew upwards, striking Jay in the legs and knocking him to the deck below. Had he been provided and required to wear appropriate fall protection gear, which was not available to him, he probably would not have been catastrophically injured.

ATLA member Mark LeWinter of Philadelphia, later joined by ATLA members Joel Feldman and Sol Weiss, both of Philadelphia, took on the task of trying to obtain justice for Jay. The biggest challenge LeWinter faced was that Jay was an ironworker instead of any other construction worker. At the time of Jay's injury, the Occupational Safety and Health Administration (OSHA) allowed ironworkers to ascend 30 feet without wearing safety equipment, while requiring safety mechanisms for all other construction workers. The rule was amended in 2002 to include ironworkers, but it still exempts them in certain situations. Thus, LeWinter says, a double standard exists.

"This historically has created work site scenarios where a carpenter and an ironworker could be working side by side 15 feet above a metal deck, and while the carpenter would be required to use a personal fall arrest system, the ironworker would not," LeWinter says.

Despite the low safety threshold set by OSHA, LeWinter says construction industry leaders have long required safety equipment for all workers, including ironworkers, who work at heights of six feet or higher. The Association of General Contractors has even criticized OSHA for failing to protect workers against fall hazards.

In litigating the case, LeWinter had to convince the court that the management company overseeing the construction site was liable even though it complied with OSHA rules. The company was prepared to fight, believing it would prevail because of its compliance. Jay's employer, a steel erector, was later joined as a third party for indemnity purposes.

During the discovery phase, LeWinter searched court dockets and discovered that a previous case had been filed against the company after an ironworker was severely injured in 1996 in a 13-foot fall. OSHA investigated and found no rule violations, but the company was on notice that a fall from those heights would have tragic results. Sadly, the company did nothing to prevent future injuries, and that case was still pending at the time of Jay's injury.

A critical turning point in Jay's lawsuit came during one of more than 50 depositions taken in the case. The company's independent safety consultant told LeWinter that he had worked as an independent contractor for the company for 20 years and frequently advised it regarding safety procedures. The consultant investigated the 1996 incident and told the management company it needed to require fall protection gear for all workers going higher than six feet. He testified that the company agreed the policy should be changed.

"The consultant continued, over a period of four years, to ask [the company] 'Whatever happened to that commitment for a six-foot policy?' The reply was always the same, 'We're working on it.' Tragically, they did nothing," LeWinter says. This was true even though the consultant also identified unsafe work practices by the steel-erector employees on three separate occasions, and warned the company just 30 days before Jay's injury that changes were needed.

Three years after Jay's fall, the case finally went before the court on the management company's motion for summary judgment. Defendant argued it had no duty because it had contracted out the structural steel work to Jay's employer, and the steel erector was responsible for its employees. The court denied the motion, saying LeWinter raised fact questions regarding whether defendant assumed the duty through the contract and, based on the consultant's statement, industry practice.

The court further rejected defendant's argument that punitive damages were not warranted because it complied with OSHA rules, and any wrongdoing was mere mistake, error in judgment, or inadvertence. LeWinter had effectively demonstrated, the court said, that OSHA rules are not designed to diminish employers' responsibility to protect their workers, and that the standard of care is determined not merely by OSHA, but also by accepted industry safety practices. Moreover, the court found, he had presented sufficient evidence of the several warnings defendants had received and ignored. The court also allowed LeWinter's request for punitive damages to proceed.

Court-ordered mediation began one week later. LeWinter had a strong advantage, he says, because there was a great possibility that a jury would award very high punitive damages, especially because the compensatory damages—Jay's life-care expenses are about \$500,000 annually—were already so high. Even with that advantage, LeWinter wanted to give the company a preview of what the jury would see during the trial.

He had prepared a 45-minute video that included brief statements from the experts, highlighting key parts of the testimony they would give at trial. The main focus of the video, however, was Jay, and what his life was like both before and after the accident. Significantly, the video also featured Jay's sister, Laura, a professional singer, singing a song during Spinal Cord Injury Awareness Day at Shea Stadium. Laura had written the song, "Ease the Pain," for Jay as he lay fighting for his life in a nursing facility.

The video worked. Two weeks before trial, the company agreed to settle the case for \$19 million. Workers' compensation has a lien of about \$2.7 million.

LeWinter's experts included Steve Estrin, construction safety, Sarasota, Florida; Lorraine Buchanan, life-care planning, Blue Bell, Pennsylvania; Andrew Verzilli, economics, Kinterville, Pennsylvania; and Cynthia Kraft-Fine, quadriplegia, Philadelphia.

"The song with the video and still photographs was highly effective and instrumental in settling the case," LeWinter says. He hopes this case will be a wake-up call for the construction industry, but at the very least it was a big victory for Jay, who has been living in nursing

facilities since the accident because he could not afford home care.

“Jay’s singular focus and dream has been to go home,” LeWinter says. “The most rewarding day of my career thus far was the day this case was settled, and I was able to walk into Jay’s room at the nursing home where his family members gathered, put my hand on his shoulder, look him in the eye, and say, ‘You’re going home.’”

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