

Verdicts & settlements

General contractor liable to injured subcontractor for failing to provide a safe place of work

by Michael E. Withey

Mortensen Construction Company, a general contractor, recently settled with Craig Katzer, an ironworker who suffered a closed-head injury in a fall from a gymnasium roof at a high school construction site. The case involved proving the Department of Labor and Industries Report wrong for placing sole blame of the accident on Craig Katzer, reconstructing the accident and thoroughly analyzing the limitations of the fall protection plans of both Mortensen Construction and Mr. Katzer's employer, State Wide Steel.

Facts of the Accident

On July 23, 1996, Mr. Katzer was working as an ironworker for State Wide Steel at the Issaquah High School construction site located in Issaquah, Washington. Defendant Mortensen Construction was the general contractor on site. On this job site, Craig Katzer worked as a foreman for State Wide Steel. On the date of the accident, Mr. Katzer and two coworkers were installing roof decking to the gymnasium area of the construction site. Because they were working approximately 25 feet in the air, all three men were using the available fall protection equipment, including body harnesses, belly bands and rope grabs. Mr. Katzer was tied off to a belly band wrapped around one of the support beams of the gymnasium roof. As Mr. Katzer stepped on to piece of roof decking, the decking slipped, causing Mr. Katzer to fall. As he fell, Mr. Katzer's safety line pulled taut for an instant, suspending him in mid-air. Then, the line gave way and Mr. Katzer fell to the concrete floor of the gymnasium, striking his head as he hit the ground.

The Department of Labor and Industries (L&I) investigated this accident. L&I examined the accident scene, Mr. Katzer's safety equipment, interviewed numerous eyewitnesses and employees of State Wide Steel and Mortensen Construction. The L&I report concluded that Mr. Katzer was not tied off at the time, resulting in his fall and injuries. It was this conclusion that Craig Katzer and his attorneys refused to accept.

As discovery proceeded, it eventually became evident that none of the parties and witnesses, including counsel for defendant Mortensen, supported L&I's conclusion that Mr. Katzer failed to tie off. At the time of the accident, Mr. Katzer had worked as an ironworker for 18 years. The two coworkers on the roof with Mr. Katzer at the time of the incident insisted that they saw Mr. Katzer tie off. Mr. Katzer's high degree of safety consciousness was uniformly praised by all employees of Mortensen and State Wide Steel.

Liability of defendant Mortensen

J. Nigel Ellis, PhD, CSP, PE, was plaintiff's expert on the issues of fall protection and accident reconstruction. He is a well-recognized, national authority on fall protection systems whose book, *Introduction to Fall Protection, 2nd Ed.*, American Society of Safety Engineers, 1993, is an authoritative reference on fall protection. Dr. Ellis was prepared to testify that the defendant Mortensen Construction Company had exercised control of the safety aspects of the Issaquah High School job, including the fall protection programs and work methods in effect at the job site. Dr. Ellis opined that Mortensen violated the standard of care and duties owed to employees of sub-contractors, including Craig Katzer, on the Issaquah High School job site to provide a safe place of work. He was prepared to testify that Mortensen violated these standards and duties as follows:

(1) by failing to institute and maintain an adequate fall protection program, in compliance with the requirements of industry standards and state laws and regulations;

(2) by failing to adequately train and instruct workers on its job site, including as to the potential of an unintentional disengagement of lanyard hooks;

(3) by failing to properly utilize horizontal lifeline systems and safety nets; and

(4) by failing to require that old and worn lanyard equipment was removed from the job site.

Finally, it was Dr. Ellis's opinion that Mortensen's breach of the standard of care and of such duties was a cause of the injury to Craig Katzer on July 23, 1997.

Injuries to Mr. Katzer

After his fall, Mr. Katzer was transported via air ambulance to Harborview Medical Center in Seattle, Washington. Mr. Katzer remained in a coma for six days post-accident. His diagnosis was traumatic brain injury, right occipital and basilar skull fractures, left frontoparietal contusion with multiple subarachnoid hemorrhages and aspiration pneumonia. Following his discharge from Harborview in August, 1996, Mr. Katzer transferred to Good Samaritan Hospital in Puyallup. Following discharge from Good Samaritan, Mr. Katzer underwent months of rehabilitation therapy at Evergreen Head Injury and Rehabilitation Center in Kirkland. He returned to work as an ironworker in the fall of 1996 and made a miraculous recovery from his closed head injury.

Mr. Katzer's medical specials exceeded \$67,000.

Prognosis for Mr. Katzer

On January 14, 1998, an examination of

Mr. Katzer was conducted by Medical Diagnostic Services. The panel concluded that Mr. Katzer has a 10% total body impairment due to his accident-related deficits.

Mr. Katzer was also evaluated by plaintiff's experts, Lloyd Cripe, Ph.D., a clinical neuropsychologist, John Fountaine, MA, CRC, of OSC Vocational Systems, Inc., and Richard Parks of Bassett, Parks and Silberberg. Dr. Cripe recommended that Mr. Katzer no longer work at heights and seek a less stressful occupation.

Mediation was conducted on Monday,

June 28th, 1999 before Charles Burdell of JAMS/Endispute in Seattle. Mortensen Construction was represented by David Soderland of Dunlap & Soderland, P.S. of Seattle. The plaintiffs were represented by Mike Withey, Paul Whelan and Kevin Coluccio of Stritmatter Kessler Whelan Withey of Seattle. The amount of the settlement was \$900,000.

Michael E. Withey, WSTLA EAGLE member, is a partner of Stritmatter Kessler Whelan Withey in Seattle, Washington.

Verdicts & settlements

Failure to diagnose aortic aneurysm; Wrongful death

by James S. Rogers

Martin, 34, had just gone to bed about 10:15 p.m. on May 7, 1997. It would be read by the cardiologist.

Sometime after getting into bed, Martin complained to Carol that he didn't feel well and was tired. A few minutes later, he began coughing up blood. He collapsed in Carol's arms, and the Medics were called. Despite efforts to revive him, Martin was pronounced dead at 11:49 p.m. The cause of death was a ruptured thoracic aortic aneurysm.

Martin was born with a congenital heart condition, coarctation of the aorta. Martin had had two surgical repairs for the coarctation, at 5 and 18. The coarctation required medical monitoring throughout his life. In 1986, Martin began seeing defendant cardiologist. The cardiologist examined him and ordered certain tests, including a chest x-ray. Martin was told by the cardiologist that his condition was stable, and to return the next year for follow-up. Martin did not come back the next year, but returned in 1988. He was examined and given the same tests as in 1986, including a chest x-ray, which was essentially unchanged. Told to come back for follow-up in a year, Martin did not come back to see the cardiologist until 1994. Complaining of palpitations, he was again given an examination and tests, including a chest x-ray. The chest x-ray was sent to defendant radiologist for interpretation. The cardiologist never looked at the film.

The chest x-ray was reviewed, and a

report dictated by the radiologist was sent to the cardiologist's medical group for transcription. The transcribed report was then read by the cardiologist.

The report stated the following:

Two views show that there has been a marked change in appearance of the descending portion of the aortic arch since a previous study nearly six years ago. There is now a much more prominent and extensive saccular bulge of the vessel, and there may be some calcific deposit in the wall. The lungs are less well-expanded than before, but otherwise clear, except for the pleurodiaphragmatic lesion at the left base. The heart is normal in overall size. IMPRESSION: A localized saccular ectasia is present in the descending limb of the aortic arch, which represents a rather marked change in appearance since the study six years ago.

Unfortunately, the cardiologist testified at deposition that he did not believe the report was describing an aortic aneurysm or that Martin had a life-threatening condition. He asked Martin to come back in a year.

The cardiologist failed to recognize that "saccular ectasia" was synonymous with aortic aneurysm. The finding of aortic aneurysm was a significant finding, clearly a marked change from 1988; it required

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Practical resources

How to find invented wheels

There is an oft-quoted cliché that we should not reinvent the wheel. If you are trying to understand a scientific concept quickly—and not reinvent the wheel—there are four resources you can use for screened suggestions about where to start. They are Library of Congress Science Tracer Bullets, the National Library of Medicine's MEDLINEplus, Healthfinder, and the National Technical Information Service collections.



Richard Schenkar

Science Tracer Bullets, online at <http://tweb2.loc.gov/scib/scib.html>, provide weighted lists of subject headings for catalog searching, so you know what is important; lists of basic texts, so you are aware of what literature helps to formulate the standard of care; bibliographies, lists of reports, and conference proceedings, to update the search and to find experts; lists of journals that chronicle developments in your target subject so your knowledge is current; lists of indexes and database producers that follow your target subject area so that you can consult those sources; and names and addresses of organizations that follow the subject area and that could be your sources of other data or expert witnesses.

Of particular interest to trial lawyers may be the Tracer Bullets on Chemical Exposure: Toxicology, Safety and Risk Assessment (TB91011), Computer Crime and Security (TB94001), Noise Pollution (TB88006), and Stress: Physiological and Psychological Aspects (TB87006). There is a search tool online that allows you to search the whole list for what is of interest to you.

MEDLINEplus, online at <http://www.nlm.nih.gov/medlineplus>, offers a disease-oriented approach to the medical literature. Once you have a disease target, the database hypertext links you to an edited list of resources. Subjects include air pollution, back injuries and back pain, chronic fatigue syndrome, domestic violence, fibromyalgia, health insurance, motor vehicle safety, rape, post-traumatic stress disorder, stress, and veteran's health.

Healthfinder, online at <http://www.healthfinder.gov>, is a consumer-oriented, U.S. government-created health and human services resource that leads you to selected health and human services information

resources such as online publications, databases, web sites, and support and self-help groups, as well as the government agencies and not-for-profit organizations that produce health information.

What makes Healthfinder helpful is its focus on the reliability of the information. Of particular importance in Healthfinder is the selection process used for items in the database. The source must be a U.S. government agency or other organization serving the public interest. The source must provide basic information with references or hyper-text links to original sources. Listed sources must be able to respond to requests, either online or by other means, from anyone in the USA. The bulk of the resources are free to access; there are some commercially available sources listed, but they are among many online journals, news web sites, and other free information available in the private sector.

Although Healthfinder does not endorse any product or service, many of the sites you may find with Healthfinder (as with many other search tools) may have a commercial motive.

One of the most massive resources online is the US Government's National Technical Information Service (NTIS), online at <http://www.ntis.gov>. The Service runs a number of databases itself, serves as a gateway connection to other government databases, web sites, and bulletin-board systems, and offers its reports on a number of media—including print, online, and on disc. Almost every government report issued is indexed in the NTIS database. In addition, there may be some published searches in proprietary databases available (for a fee) on your subject that are available from a list published by NTIS. There is a subject-oriented listing linked off the NTIS home page that can get you to specialized resources quickly. Fedworld, the major NTIS gateway service, is massive enough to get its own coverage here in a future column.

Richard Schenkar, WSTLA member, is an attorney connecting attorneys with information they need to be effective. He distributes a weekly information-finding tip free by electronic mail (called "Wednesday Wisdom") only to those requesting it who send an electronic e-mail message with name, address, phone number, and electronic mail address to Schenkar@aol.com. Practice specialties or interests are helpful to include, too, so that he can be on the lookout for sources relevant to those issues.

Failure to diagnose aortic aneurysm; Wrongful death

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prompt follow-up. The cardiologist should have requested a CT scan, the results of which would have led to immediate surgery. If surgery had been done, plaintiff's cardiothoracic surgeon expert states that Mr. Mousel would have had 85% - 90% survivability.

Carol brought suit against the cardiologist on the basis of failure to diagnosis and follow-up treatment of the aortic aneurysm, and against the radiologist for failure to directly communicate the urgent findings on the chest x-ray to the cardiologist, either over the phone or in person. A standard of the American College of Radiology (of which defendant radiologist was a Fellow) stated as follows:

C. Direct Communication

1. Radiologists should attempt to coordinate their efforts with those of the referring physician in order to best serve the patient's well being. In some circumstances, such coordination may require direct communication of unusual, unexpected, or urgent findings to the referring physician in advance of the formal written report. Examples include:

- a. The probable detection of conditions carrying the risk of acute morbidity and/or mortality which may require immediate case management decisions.
- b. The probable detection of disease with non-acute morbidity or mortality sufficiently serious that it may require prompt notification of the patient, clinical evaluation, or initiation of treatment.

2. In these circumstances, the radiologist, or his or her representative, should attempt to communicate directly (in person or by telephone) with the referring physician or his or her representative. The timeliness of direct communication should be based upon the immediacy of the clinical situation.

The radiologist contended that it was prudent and sufficient to send the report to the cardiologist. The radiologist contended that since the cardiologist read the report in a timely manner, there was no proximate cause.

At the time of his death, decedent was a design engineer employed by TMC Microelectronic Systems, Inc. in Colorado Springs, Colorado, earning \$62,488 annually. He was married and the father of a year-and-a-half-old son. A week earlier, Carol, his wife, had told him she was pregnant with their second child.

The cardiologist's defense focused on blaming the decedent for his lack of follow up despite the cardiologist's written (in the chart) request for follow-up in a year. Had Martin come back in a year, defendant claimed it was likely that the aneurysm would have been diagnosed and treated, preventing Martin's death.

Defendants contended that Martin's congenital heart condition meant he would have had a shortened life expectancy, even had he survived. The most compelling exhibit in the case was the June 14, 1994 chest x-ray. Comparing the 1986, 1988, and 1994 chest films, the increase in size in the dark mass in the 1994 x-ray is plainly visible to any lay person.

Plaintiff's experts were John V. Olsen, M.D., Cardiologist, Seattle; Reiley Kidd, M.D., Radiologist, Seattle; Robbin G. Cohen, M.D., Cardiothoracic surgeon, Los Angeles, and Lowell R. Basset, Ph.D., Economist, Seattle.

Defendants' experts were Michael J. Peters, M.D., Radiologist, Seattle; Peter B. Mansfield, M.D., Cardiothoracic surgeon, Seattle; George Pantely, M.D., Cardiologist, Portland; Thomas Jones, M.D., Cardiologist, Seattle; and Wolfgang Franz, Ph.D., Economist, Ellensburg.

A mediation by JoAnne Tompkins of JDR was held in June. The case later settled before trial for \$2,000,000 against the defendant cardiologist only.

Plaintiff was represented by James S. Rogers of Seattle, and Susan Cremer, Atlanta. The names of parties, defense counsel and cause number are confidential.

James S. Rogers, WSTLA EAGLE member, is with The Law Offices of James S. Rogers in Seattle, Washington. His practice is limited to personal injury and product liability litigation. Mr. Rogers is on the Board of Governors of the Association of Trial Lawyers of America and WSTLA, and is a past president of WSTLA.

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