

Construction Accident / Brain Injury

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Construction Litigation

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Nicholas B. Kosiavelon

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Boyle | Shaughnessy Law Shareholder Nick Kosiavelon recently obtained a defendant's verdict following a two week jury trial in the Massachusetts Superior Court of Norfolk County. Attorney Kosiavelon represented a national construction company from Texas hired by a national retailer to construct a retail store in downtown Boston. The Plaintiff's Complaint alleged that the Plaintiff suffered a traumatic brain injury as a result of a fall from mobile scaffolding and that the defendant, as the general contractor for the project, was negligent for failing to provide a safe work environment in violation of a number of state and federal regulations.

The Plaintiff admitted during discovery that at the time of the accident he was "surfing" the mobile scaffolding, which involved using his weight to ride the scaffolding while elevated six feet in the air, but claimed that this conduct was encouraged by his employer, a sub-contractor at the site. The Plaintiff further claimed that the defendant placed improper time pressure on everyone at the site, forcing him to meet production through surfing. The Plaintiff also claimed that the scaffolding was defective and fell apart, rather than tipping over, as a result of the defendant's failure to require scaffolding inspections pursuant to OSHA.

As a result of the accident, the Plaintiff suffered a fractured skull and a significant brain injury, as evidenced by areas of dead tissue in the brain revealed on MRI imaging. The Plaintiff claimed that he suffered from severe cognitive deficits, with a current IQ of 61 as well as debilitating headaches and light/sound sensitivity. The Plaintiff, who was 43 years old at the time of his injury, claimed that he could no longer work in any capacity and presented special damages of over \$3 million in lost earning capacity and future medical care.

At trial, the liability defense focused primarily on the Plaintiff's comparative negligence, emphasizing the Plaintiff's extensive experience as a union carpenter using mobile scaffolding and the fact that mobile scaffolding is a simple piece of equipment to use and maintain. The defense called the Plaintiff's union trainer to testify that he had informed the Plaintiff of the hazards of surfing as well as the need to inspect scaffolding before use. Notably, because of collateral evidence developed during discovery, the Plaintiff decided not to testify at trial, a decision that undermined his ability to dispute the comparative negligence defense as well as establish the extent of his damages.

With respect to damages, the defense did not dispute that the Plaintiff suffered a significant brain injury at the time of the accident, but rather argued that the Plaintiff was greatly

exaggerating the extent of his current disability. The defense presented evidence that, despite the testimony of several treating doctors and therapists that the Plaintiff was severely impaired, the Plaintiff continued to drive in Boston traffic, cared for his two young children under the age of 3, took numerous out-of-state vacations and continued to work out and maintain a physical physique consistent with his pre-accident hobby as a power lifter. Through the cross-examination of the Plaintiff's neurologist, the defense effectively undermined the claim that the Plaintiff's brain injury was more pervasive than depicted in the conventional MRI imaging, arguing that the neurologist improperly used diffusion tensor imaging to show brain injury beyond the frontal lobes. The defense also presented a neurophysiologist who testified that the extensive cognitive testing presented by the Plaintiff was invalid because none of the testing including tests for malingering.

After a day-and-a-half of deliberation, the Jury found the Plaintiff 51% negligent, barring his claim, and further finding that neither the Plaintiff's wife nor his daughter were entitled to loss-of-consortium damages.