



2017 CLM & Business Insurance Construction Conference
October 9 – 11, 2017
San Diego, CA

The \$227 Million Dollar Settlement and How to Avoid It

I. Case Details

At 10:43 a.m. on June 5, 2013 at the corner of 22nd and Market Street in Philadelphia, Pennsylvania, a seemingly innocuous building demolition went horribly wrong as a 4-story brick wall toppled over onto the one-story Salvation Army thrift store next door. 2138 Market Street, an unoccupied four-story building, had been under demolition by Griffin Campbell Construction for several weeks prior to the collapse. This property, owned by Richard Basciano, the Time Square Pornography Magnate, was the second of two structures owned and demolished on the block via Basciano's development corporation, STB Investments. 2138 Market, the address of the Salvation Army store, opened only hours before the collapse and was open to shoppers and staff on the ground and basement levels.

The catastrophic collapse was caught on camera as a SEPTA bus passed the location of the collapse. This footage, released in July 2013, painted an unforgettable picture as wood, bricks, and dust are seen piling onto the Salvation Army store. Philadelphians rushed to the scene, attempting to dig out those trapped beneath the rubble of what was previously the Salvation Army thrift shop. Approximately 15 minutes later first responders arrived on the scene, began initiating search and rescue tactics, and, unfortunately, digging bodies out of the rubble. As a result of this incident, 6 people, ages 24 to 75, were killed and another 14 injured. Patrons were trapped under the rubble for as long as 13 hours while emergency crews worked tirelessly to identify their location. Media outlets responded to the scene instantaneously and national coverage, including speculation as to what such an incident, commenced immediately.

A. Pre-Collapse Demolition

Investigation of the demolition revealed a series of missteps and underhanded demolition tactics leading up to the collapse. On May 31, 2013, the property manager for STB, Thom Simmonds, emailed Plato Marinakos, an architect for STB, stating that Basciano visited that day and noticed no one was working. He indicated that Basciano would visit the site again that weekend and asked Marinakos to advise. The emails indicated that Basciano returned to the site on June 2 and was pleased to see progress. An 18-ton motorized excavator, to be operated by Sean Benschop, had been moved on to the site. At 6 p.m. on June 4, Marinakos testified that he went to the demolition site and was alarmed to see an unsupported brick wall looming next to the Salvation Army building. Marinakos then testified that he told Campbell to take the wall down immediately, "I was like, 'Griffin, you can't leave this wall here. This is just crazy. I mean, you can't do that.

Photographs of the building, secured from various social media outlets, in the days leading up to the collapse illustrate a failing structure. Moreover, the structure was not being demolished according to OSHA standards, nor was a strict demolition plan enforced. On November 16, exactly six months after OSHA inspectors visited the demolition site and noted infractions, the U.S. Department of Labor's Occupational Safety and Health Administration cited Griffin Campbell, doing business as Campbell Construction, and Sean Benschop, doing business as S&R Contracting, for safety violations, including three willful per-instance violations, following the June 5, 2013, building collapse that killed six people and injured 14. David Michaels, assistant U.S. secretary of labor for occupational safety and health publicly stated that this incident " could and should have been prevented" via implementation and enforcement of the OSHA standards. OSHA levied the maximum fine possible against the Campbell firm, totaling \$313,000, for each of what regulators determined were three "willful violations" of basic safety requirements: 1) failing to prepare an engineering study for the demolition project; 2) disobeying a rule requiring higher stories to be removed before demolition begins on lower floors; and 3) removing lateral bracing, provided by the floors, to support walls more than one story high. S&R Contracting was fined \$84,000 for "willful" violation of lateral bracing requirements, and two "serious" violations related to training and failure to protect employees from falls." Griffin Campbell's defense attorney combatted the fines imposed by OSHA stating that "Inspectors from both OSHA and the city's Department of Licenses and Inspections had visited the Market Street site repeatedly while the demolition was underway...and neither OSHA nor L&I ever shut down what was a safely-conceived demolition of the buildings."

B. Media Coverage: Plaintiffs versus Defendants

National news coverage commenced within an hour of the tragic building collapse, shaping the minds of the nation and, more importantly, the Philadelphians who would comprise the jury pool responsible for issuing a verdict in this matter. Outlets quoted sources who recounted both the tragic incident and the days leading up to same. Crucially, plaintiffs' counsel inserted themselves into the public eye immediately, making statements, shaping the mind of the public, and presenting disparaging remarks against potential defendants. For example, within weeks of the collapse, Robert Mongeluzzi, counsel for 6 survivors and the family of one deceased woman, accused the Salvation Army of playing "a game of chicken" with the safety of patrons as the store remained open during demolition.

http://www.pennlive.com/midstate/index.ssf/2013/08/philadelphia_building_collapse_8.html

Quotes such as the following were acquired and distributed both in print and online.

"You felt it shake," Jordan McLaughlin told CNN affiliate KYW. "There was people that actually fell over. People started screaming, they ran across the street. There was people inside the building, you heard them scream."

"I knew that was going to collapse sometime soon, and it did today. For weeks, they've been standing on the edge, knocking bricks off, pieces of, you could just see it was ready to go at any time. I knew it was going to happen. I seen it. I said it 10 times. Ask these guys. Every day, I said, 'It's gonna collapse, it's gonna collapse.'" Patrick Glynn

<http://www.cnn.com/2013/06/05/us/pennsylvania-philadelphia-building-collapse/index.html>

"There was a big boom, dust everywhere, and the ground started to shake." Jordan McLaughlin

<http://www.nytimes.com/2013/06/06/us/philadelphia-building-collapse.html?mcubz=1>

Unfortunately, as claims were not assigned swiftly and crucial litigation strategies delayed, defendants counsel were not as swift to respond to the disparaging comments, thereby allowing the public perception to metastasize within the minds of the jury pool.

C. Litigation

One of the key issues counsel must address before diving into litigation is creation of a sound, but flexible, defense strategy. The roles of each party, defendants and plaintiffs alike, must be assessed to the extent possible and a strategy implemented with that in mind. However, as is the case in all litigation, as same commences and details are uncovered, defense counsel must be mindful that those roles will change, alliances will break and new ones formed, and levels of exposure will fluctuate. Additionally, defense counsel must remain mindful that sometimes the best approach to litigation is the hands-off approach. To take a back seat and observe the case progression from a birds-eye view frequently enables counsel to recognize trends, flaws, and weaknesses that those in the weeds of litigation are unable to see. It remains crucial to consider that the objective is to secure the best result for the client rather, not illustrate the full extent of legal acumen or ensure defense counsel is noticed as a proficient legal mind.

1. Case Management

Due to the scope and extent of exposure, throughout litigation this matter was subject to monthly case management conferences before the trial judge. During these conferences, despite the presence of approximately 30 attorneys between plaintiff and defense counsel, only 4 of the “heavy hitters” contributed to case development, thereby molding the pending litigation and trial into the forum they deemed fit. It is crucial that during these stages, defense counsel is advocating for the client while working cooperatively so as to mitigate exposure for the client. Taking the back seat is frequently necessary in order to mitigate damages and exposure but, on issues crucial to your client, it is important to remain vocal. In this matter, for example, Sean Benschop was subject to two consecutive actions as the personal injury litigation proceeded: 1) a criminal law suit including charges for involuntary manslaughter and 2) a declaratory judgment action (dec action) initiated by his insurance carrier. These actions significantly impacted his defense in the civil litigation and necessitated other defense strategy considerations prior to resolution of those actions. Moreover, the criminal litigation resulted in various hurdles to counsel in the civil litigation as depositions and evidence could not be secured until the criminal trials were resolved.

2. Depositions

Deposition testimony proved crucial in this matter as same served as ammunition to impeach the witnesses at trial. Moreover, it was crucial that during the deposition process defense counsel recognized that although plaintiffs would aggressively examine the defendants, it was not necessary for co-defendants counsel to combat against the line of questioning as, on occasion, it was more advantageous for key defendants to take the brunt of allegations, thereby reducing exposure to other defendants. This thought process is not typical of all litigation as defense counsel generally prefer to present a unified front and combat the plaintiffs’ allegations. However, to zealously advocate for your client does not necessitate you defeat the plaintiff so much as you identify the key trial strategy which places your client in the most positive light. On the other hand, should your client fall into the category as a target defendant, it is crucial to ensure same was prepared to provide carefully thought out and contemplative testimony so as to avoid same from being twisted and converted into some nefarious representation.

3. Trial Testimony

Trial testimony is crucial in mitigating liability and damages exposure. If the jury finds your client disingenuous the plaintiff does not need to work as hard to establish the egregious nature of the case. For example, in this instance, a key example of the defendant offending the sensibilities of the jury arose when Defendant Basciano testified he prayed for the victims and their families on a daily basis. In response, Robert Mongeluzzi, plaintiffs' counsel, stated "Mr. Basciano, it's so thoughtful that you pray for the families on a daily basis. What are their names?" Unable to respond, Basciano put yet another nail in the coffin of his defense.

II. Trial

Trial in this matter lasted before The Honorable M. Teresa Sarmina for 17 weeks prior to the parties settling for \$227,000,000. This trial is now known as the longest civil trial in Philadelphia court history and qualifies as the largest personal injury settlement in Pennsylvania state court history. The trial was run predominantly by Mr. Mongeluzzi for Plaintiffs and Jack Snyder for the Salvation Army, plaintiffs' primary target.

<http://www.nbcphiladelphia.com/news/local/Market-Street-Building-Collapse-Trial-Basciano-Defense-Opening-Statement-394165181.html>

The lawsuits filed by relatives and survivors were consolidated for trial and resulted in plaintiffs' counsel presenting 24 witnesses over 28 days. The Salvation Army presented 10 witnesses over 10 days' time prior to resting and based its defense on the grounds that the Salvation Army had no reason to believe a collapse was imminent and likewise pointed the finger at co-defendant, Benschop, asserting same was solely liable for the collapse.

http://www.philly.com/philly/news/20170121_Salvation_Army_ends_defense_in_collapse_trial.html

A. The benefits of bifurcation

Bifurcation can prove to be a useful tool in evaluating a trial, such as this one, which may be incredibly expensive and/or wherein the results are uncertain. In addressing a trial where liability is questionable as to the individual defendants, bifurcation will enable counsel to better assess and evaluate same and, importantly, permit counsel to focus on one aspect of trial development as opposed to addressing all elements of trial. Finally, bifurcating trial can result in reduced litigation costs.

Some argue against bifurcation, highlighting the importance of remembering that the decision to separate the trial of liability from damages is not merely a matter of trial management but involves a decision that could very well impact and influence the outcome of the trial. In essence, that bifurcating a case is akin to trying the case in a vacuum or a laboratory setting. In this matter, bifurcation proved useful in order to enable defendants to assess how the jury would apportion damages, liability, and culpability. Shockingly, the jury was convinced by plaintiffs' arguments, apportioning a majority percentage of liability to the Salvation Army as opposed to those defendants who actively participated in the demolition of the building. Of the 227-million-dollar settlement, survivor Mariya Plekan was awarded the highest settlement, \$95.6 million, by the arbitrator.

<http://philadelphia.cbslocal.com/2017/05/25/mariya-plekan-building-collapse-95-6m/>

1. Liability

In a bifurcated trial, the first trial is the liability phase where only the issue of fault is tried and the jury determines whether defendants are liable and to be held responsible for the underlying incident. Neither damages, nor injuries are addressed during phase 1. Upon determination of fault against defendants, the jury will continue to phase 2. When the jury is permitted to express its opinion as to liability without imposing a damages amount, defense counsel and adjusters are less pressured to settle the matter and able to place more accurate valuations on the case. Moreover, if unsuccessful, Defendants can slightly alter course in the damages portion of trial.

2. Damages

Phase two of trial, damages, commences when the jury finds fault. In this litigation, the damages portion of trial did not conclude as the parties reached settlement prior to issuance of any damages verdict by the jury. However, it is during the damages phase the injuries are presented to the jury, pain and suffering addressed, and the evidence weighed regarding how consequential plaintiff's injuries were.

B. Working with opposing counsel toward a mutual goal

During trial, it is crucial that defendants are not battling openly against one another in such a fashion as to create a weak and unorganized defense. However, should a defendant's goals be more attainable via presentation of a defense strategy in line with that of the Plaintiff, it is not unusual for defendants, such as was the case in this matter, to present a strategy which serves to undercut that of another defendant.

C. Reptile Theory

The Reptile Theory proved useful for plaintiffs in this matter as it served to manipulate jurors to fear for the safety of themselves, their families, and their communities. Here, the plaintiffs used fear of construction and enforcement of safety standards to insert into the minds of the jury that without harsh punishment, developers will undervalue human life and engage in practices which place them and their loved ones at risk of death.

As such, we will briefly evaluate ways in which to avoid falling victim to The Reptile Theory.

III. Settlement Negotiations

Settlement negotiations are laborious and difficult generally, much more so in litigation of this magnitude. As such, in engaging in settlement negotiations it is important to evaluate the risk of verdict at trial and the costs associated with proceeding to trial against the value of the case. As such, weighing public perception, verdict searches, and cohesiveness of arguments is key when evaluating cases.

As is well known throughout the field, runaway juries are a very real fear which must be considered. For this reason, both the client and the attorney must collaborate and agree on the best course of action, considering risk and reward, to facilitate acquisition of the primary goal. Counsel must recognize when liability can be contested, such as in this matter, and when same must be foregone. In complicated matters such as this, it is sometimes advantageous to risk a bifurcated trial in order to garner a better assessment of jury mentality prior to agreeing to settle a matter.