IADC COMMITTEE NEWSLETTER

TRANSPORTATION

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This article will address the defense of a client in a recent jury trial involving a motor vehicle accident.

Lessons Learned from the Trenches to Defeat the Reptile Strategy

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This IADC Committee was formed to combine practices of aviation, rail, maritime with trucking together to serve all members who are involved in the defense of transportation including aviation companies (including air carriers and aviation manufacturers), maritime companies (including offshore energy exploration and production), railroad litigation (including accidents and employee claims) and motor carriers and trucking insurance companies for personal injury claims, property damage claims and cargo claims. Learn more about the Committee at www.iadclaw.org.

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In May of 2022, I tried my second jury trial since the COVID 19 pandemic. A year earlier I tried a fairly routine case in front of masked jurors – with the lesson learned then that there is no substitute for eye contact with the jury during trial, especially during closing arguments. But in this particular trial, no one wore masks at the trial, and we'd all heard recently that jurors were more sensitive to personal injury claims in an almost post-COVID world. This jury trial had a little bit of everything: transportation engineering, construction, motorcycles, personal injury, a battle of the experts, faded memories, and of course a partial use of the reptile strategy by a Plaintiff attorney who asked the jury for $2.5M in jury selection.

I thought my client, who is a large, local paving company hired by the state Department of Transportation to resurface a section of a state highway, was going to do well in front of the jury despite a few bad facts. On the Saturday of one Labor Day weekend, our Plaintiff lost control of her motorcycle in my client's active construction work zone and suffered personal injuries that included a broken thumb that required a fusion, a broken ankle, and other typical motorcycle injuries such as road rash and sprains and strains. Plaintiff said the wreck was our fault because we left the road in a condition that it caused her to wreck, and that there were no posted advance warning zone constructions signs, and that her life was ruined since she could no longer ride motorcycles anymore. But since the Plaintiff's accident occurred on the Saturday of a holiday weekend, we had no one on site that day and thus no eyewitnesses, except for plaintiff and her husband. No one reported the accident to my client until months later. The investigating officer took no pictures on the day of Plaintiff's wreck. Unfortunately, a few days after the plaintiff's wreck, two other motorcyclists lost control of their motorcycles on that same stretch of road too, all of whom suffered more severe injuries than Plaintiff, including one death. By the time the investigation began in earnest, all the road conditions had changed. At trial, we tried to recreate the then-existing road conditions via DOT records, our own records some of which had been lost, and google earth photos to show we had an abundance of appropriate signage installed, and that we were compliance with MUTCD and DOT specifications. We also had to walk a fine line of using the records and scene photographs from the in-depth highway patrol investigative file from the two subsequent accidents, but also keep from the jury gruesome nature of their injuries – which we did.

In this venue, attorney-led *voir dire* is exhaustive. During jury selection, a full third of the jurors conveyed that they not only knew my corporate client, but they all held a favorable opinion of my client. My client had a great reputation in the community for decades, and some prospective jurors were even former employees. There are only so many things defense counsel can control at trial – and the client's longstanding reputation in the community is not one of

them. My client's general manager sat at counsel table with me for the duration of the 2-week jury trial. Per the reptile playbook – Plaintiff did not sit in the courtroom except for her own testimony. By doing so, Plaintiff was clueless as to what her own experts had testified to previously, and thus her testimony was at times inconsistent with her own experts' testimony.

During jury selection, one juror, swiftly stricken by the plaintiff attorney, said that just from listening to the questions in *voir dire*, that he had already knew it was the DOT's fault since it was their road and they should not have opened the road to the public in the first place, even though the DOT was not a defendant in the case. Many of the jurors also stated that they loved motorcycles but gave up riding years ago, because in this day and age with such prevalent cell phone use by motorists, riding motorcycles is even more dangerous. Keep in mind that in this jurisdiction, contributory negligence is a complete bar to recovery.

There was some evidence provided by way of DOT representatives who testified live at trial that my client complied with DOT plans and specifications, which my expert also confirmed. After all, my client is just a general contractor – and the DOT testified that my client does not exercise engineering judgment. Thus, at my request the judge agreed to provide a jury instruction on the *Spearin Doctrine*, although I could not find any case law in support of its application in a personal injury case. I also used Plaintiff's own expert engineer to bolster our contributory negligence defense – he testified consistent with generally accepted standards in the industry, such as the average human needs about 1-2 seconds to perceive and react to danger; and with 60 MPH equaling 88 feet per second, our Plaintiff had 5-8 seconds to see and react to the allegedly dangerous conditions in the roadway she complained of. With the reptile theory all about safety, a Plaintiff can find themselves on thin ice when their own conduct is put into focus. And remember, Plaintiff was not present for her expert's testimony, and thus she was later impeached by her own expert.

Plaintiff claimed her life was ruined because the injuries she sustained prevented her from riding motorcycles ever again. But the amount of her medical expenses were not particularly impressive, as they were less than $15,000. Per the reptile strategy playbook, Plaintiff successfully argued medical expenses were irrelevant and should not be admitted as Plaintiff withdrew her claim for recovery of medical expenses before the trial began. I moved the court for an order to admit just one specific request for admission as follows: "Plaintiff admits that her medical expenses for reasonable and necessary treatment as a result of the subject accident are less than $15,000." I argued to the judge that our sister states of Virginia, South Carolina, and several others ruled that it was proper to admit evidence of past medical expenses in a personal injury case even if a claim for expenses was not actually being made. The judge disagreed and granted Plaintiff's motion in limine to prevent introduction of evidence of the

amount of the Plaintiff's past medical expenses and this one request for admission.

While I could not disobey the court's order, I could not leave the medical expenses alone. Do not forget that you can argue the law in your closing – at least in my home state of North Carolina. In my closing, I argued that the law allows a person like the plaintiff to include a claim for past medical expenses, but that Plaintiff chose not to do so in this case – and the jurors should ask themselves "why wouldn't they - why not ask for the meds?" I then argued to them as follows:

- Plaintiff chose not to ask for past medical expenses probably because they were so minimal the Plaintiff attorney could not logically connect them to their $2.5M ask.

- The amount of medical expenses tells you the severity and extent of a plaintiff's injuries – they chose not to show you the amount of medical expenses because that number did not connect to the $2.5M ask.

- This ridiculous number of $2.5M is just a classic trick – they do not really want $2.5M. They do not believe you will actually give them $2.5M -- it's just a tactic to ask for a big number to make it easier for you to award a lower number, like a few hundred thousand dollars, which is still absurd.

In Plaintiff's counsel's closing, he double downed and said "No, no we really do want that $2.5M," but he offered no explanation for the $2.5M number or why they waived their claim for medical expenses. Jurors scoffed.

The jury came back with a complete defense verdict after about 35 minutes. I was later informed that the jury waited "so long" because they did not want to hurt the other side's feelings by deliberating for less than 5 minutes.

If Plaintiff chooses to not put on evidence of past medical expenses, use it against them and argue the law. It also helps to have a great client, and it is even better when they get sued on their home turf.

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