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Construction injury nets \$5M settlement in WNY

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By the time attorneys Michael Flynn and Scott Orndoff were hired for a nearly 6-year-old case in which a worker was injured in a local construction site accident, the case was close to dismissal.

They approached it late last year with some trepidation because the Massachusetts-based law firm of Flynn Wirkus Young would have to scramble to keep it alive, according to Orndoff, who works in the Buffalo office.

Not only did they prevent the dismissal, they helped the plaintiff win a \$5.3 million settlement for the worker, who was injured April 16, 2008 in Buffalo.

"We went from the case being almost on life support to quite the opposite and us having the upper hand," said Orndoff, whose boutique firm specializes in railroad defense and insurance coverage.

Flynn Wirkus Young's other offices are in Quincy, Mass., and Philadelphia.

When he and Flynn took over the case, both defendants – the general contractor and the property owner – had motions in place for summary judgment to dismiss the case. It had been pending for more than a year without being responded to by the plaintiff's attorney. Then the plaintiff went in another direction, according to Orndoff. The first goal of the newly hired attorneys was to keep the case afloat by responding to those motions, he said.

A fall on the job caused the construction worker, 46 at the time and a steward and foreman with Laborers Local 210, to suffer a torn rotator cuff, punctured lung and eight herniated discs, according to the firm. He had to have three corrective surgeries and is slated for another, the attorneys said.

They took an aggressive approach by cross-moving to file their own motion for summary judgment, arguing that the defendants were each liable due to violating New York's Labor Law. After months of litigation, liability was established in their favor.

To gain liability in their favor, Flynn said the



Partner, Michael B. Flynn



Senior Associate, Scott R. Orndoff

firm had to argue against the defendants pursuing a claim that the construction worker disregarded an alternative, safer means while at work.

In April came Judge Tracey Bannister's decision that the defendants were 100 percent liable to the construction worker for his injuries. That left only the issue of damages for trial, which was planned for September. Interest at the rate of 9 percent on the eventual verdict accrued from there, so Orndoff said the longer it was pending, the defendants were looking at a heftier verdict.

Settlement negotiations began shortly after the attorneys submitted the opinions of damage experts and filed the earning capacity motion. On Aug. 29, after several rounds of negotiations and shortly before trial was to begin, an agreement was reached to settle the case for an amount believed to be one of the largest settlements ever reached in Bannister's session.

"That was the biggest thing, right there, because when Judge Bannister granted our cross-motion, that means interest begins to accrue at 9 percent, which is what forced the defendants to the negotiating table," Orndoff said.

Flynn said a hurdle they faced in getting a settlement was that the injured worker looked fine from the outside – his body was "in one

piece" after the accident, Flynn said.

He said the defense also claimed the plaintiff's injury problems were pre-existing and not caused by the fall, but they pointed out that the individual had no medical records of previous back or shoulder problems.

"A big challenge on damages was convincing the other side, the mediator and people who held the money that this was a guy hurt very badly, which essentially changed his life for the worse, and the injuries that he had were related to the accident," Flynn said. "The defense was pursuing a theory on the injuries that was very strongly contradicted by the medical records."

Also, Flynn said Flynn Wirkus Young gained the upper-hand when the defendant's own vocational rehabilitation expert wrote a report in which he admitted that the injured worker was permanently disabled with no earning capacity.

Orndoff said it got to the point where the client felt that there was going to be enough recovery for him and his family to be comfortable going forward.

"To be frank, I was actually looking forward to putting some proof on and maybe trying the case, but it got to the point where enough money was on the table that the client wanted to take it," Orndoff said. "That's their prerogative and I certainly don't blame them."