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The Gavel

Volume 52



DEFENSE VERDICT FOR GIBSON & BEHMAN: LANDFILL NOT LIABLE IN TRACTOR TRAILER ROLLOVER

Attorney Dan Shanahan of Gibson & Behman's Burlington office recently obtained a defense verdict in a premise liability case against a landfill. The plaintiff's tractor trailer rolled over while backing on the landfill's perimeter road, causing personal injury.

On August 30, 2005, the landfill owner contracted with an environmental company to service the leachate lines in the landfill. The environmental company dispatched a pick-up truck with a jet-spray trailer and a truck with a 45 foot tank trailer. The tractor trailer was operated by the plaintiff, a 58-year-old commercial truck driver with 30 years of trucking experience. After vacuuming excess ground water from a manhole into the tanker, the plaintiff attempted to back the truck along a dirt perimeter road to off-load at a facility located behind him on the landfill. While backing around a bend, the trailer's tires traveled over the edge of the roadway, resulting in the truck rolling over and down a 30 foot drop off. The plaintiff alleged the landfill was negligent because it closed down a section of the perimeter road located in front of the plaintiff, thereby forcing the plaintiff to back his truck on a narrow and curvy dirt road to off-load.

As a result of the accident, the plaintiff was transported by ambulance to a local hospital and treated for a neck injury and a large laceration on the back of his head requiring 20 staples. The plaintiff alleged that he also sustained a knee injury and torn rotator cuff later requiring surgery. The medical bills totaled approximately \$67,000. The Plaintiff also claimed that as a result of his injuries, he was unable to return to work as a truck driver, seeking lost wages of \$250,000 and a future loss of earning capacity.

The defense argued that there was no evidence the landfill's property was unreasonably dangerous or that any of its acts or omissions contributed to the plaintiff's accident. The landfill denied that any portion of the perimeter road was closed, and offered evidence that its employee provided the plaintiff's foreman with two options for the truck to travel to off-load at a facility on the landfill. The defense also argued that the plaintiff, as a CDL driver, was ultimately responsible for the operation of his truck, that the plaintiff made the decision to back up and failed to ask either of his two co-workers to assist him while backing.

The defense also disputed the extent and severity of the plaintiff's injuries. The defense presented evidence that the plaintiff returned to light duty work approximately two weeks after the accident, then returned to full duty approximately two weeks later, until he suffered another work-related injury to his foot. The plaintiff was later cleared to return to work full time but was laid off. It was at this point in time when the plaintiff began to treat with various medical specialists for his injuries.

After four days of trial in Suffolk Superior Court, and one hour of deliberation, a jury found the defendant not negligent. The plaintiff's demand was \$450,000 (including wife's loss of consortium claim). No offer was ever made.

June 2010

Dedication to serving the needs of its clients has been the backbone of Gibson & Behman, P.C. since its founding in 1987. G&B prides itself on providing progressive and economical solutions to the needs of clients in all areas of the firm's practice. We take a macro view of our clients' needs to address root causes of issues and to formulate plans to avoid future problems.

Our proven litigation track record and our ability to analyze trends in the legal community provide confidence to our clients and has allowed us to develop a reputation as zealous advocates. We strive to excel in all areas of our practice with client satisfaction, as always, our paramount goal.

**Daniel P. Gibson and
Scott R. Behman**

INSIDE THIS ISSUE:

New York	2
Rhode Island	3
Massachusetts	4
Connecticut	5-6
Florida	6
Virgin Islands	7

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GIBSON & BEHMAN PREVAILS ON APPEAL IN PREMISES LIABILITY MATTER

Gibson & Behman's New York Office recently prevailed on an appeal and secured a decision of the Appellate Division affirming the Hudson County Superior Court's granting of summary judgment to our client. Attorney Bella Pevzner argued before the Appellate Division of the Superior Court of New Jersey on March 24, 2010.

The case arose out of personal injuries sustained by a patron who fell on a step while exiting a local restaurant. The Plaintiff brought an action against both the restaurant and our client, an out-of-possession landlord of the premises. Although Plaintiff obtained a settlement with the restaurant, she continued pursuing the action against the landlord. In that regard, following the completion of discovery, Gibson & Behman filed a summary judgment motion on behalf of the landlord. In the motion, Gibson & Behman argued that the Lease Agreement between the restaurant and landlord delegated any and all responsibilities for maintenance and repairs of the leased premises to the restaurant. During oral arguments in favor of our

summary judgment motion in the Superior Court Hudson County, Judge Iglesias found that the landlord did not maintain, control or supervise the restaurant and, based on the Lease Agreement, the duty to maintain the restaurant belonged solely to the restaurant. As such, Judge Iglesias granted our summary judgment motion.

Thereafter, Plaintiff appealed Judge Iglesias' decision, arguing that landlord failed to properly delegate his duty to maintain the premises to the restaurant. However, in our Brief in Opposition, which was drafted by attorney Nana Japaridze, Gibson & Behman argued that landlord retained no control over the premises other than monthly collection of rent. As such, we argued that landlord was an out-of-possession landlord, whose duty to maintain the premises was properly and completely delegated to the tenant. In that regard, we pointed out that, pursuant to the Lease Agreement, the restaurant did not require permission to perform any repairs on the subject premises nor did landlord reserve the right to

approve or supervise the same. Therefore, it was argued that landlord owed no duty to the Plaintiff.

In our Brief in Opposition, as well as in our oral argument before the Appellate Division, we relied on *McBride v. Port Authority of N.Y. & N.J.*, 295 N.J. Super. 521 (App. Div. 1996), wherein the Court stated that the landlord is not responsible to maintain the leased premises unless (1) the landlord remains in control of the premises, (2) the landlord's duty to protect a tenant arises from a covenant, (3) the landlord breaches a written covenant to maintain the premises, or (4) the landlord knows of a concealed dangerous condition and fails to disclose same. In that regard, Gibson & Behman successfully argued that none of the above factors existed and, as such, landlord could not be held liable for Plaintiff's injuries.

As a result, the Appellate Division concurred with Judge Iglesias' decision and affirmed the Order granting summary judgment in our client's favor.

FEDERAL JUDGE INTERFERING IN 9/11 SETTLEMENT?

A federal judge has rejected a \$657 million settlement offered by the City of New York to nearly 10,000 first responders who were sickened by conditions at Ground Zero following the 9/11 attacks. Judge Alvin Hellerstein of the United States District Court, Southern District New York, was quoted as saying: "In my judgment the settlement is not enough ... I will not preside over a settlement that is based on fear or ignorance ... the people who responded on 9/11 were our heroes ... They cushioned the blow ... They brought us back from that blow." Hellerstein demanded changes in the settlement, including an increase in the settlement amount by millions of dollars.

Hellerstein further contended that the plaintiffs would have to agree to the deal without knowing the particulars of the settlement, including how much they would each be entitled to. For instance, some plaintiffs might receive \$1 million, while an estimated half of the plaintiffs would only receive between \$3,000 and \$10,000. Hellerstein also voiced concerns about the legal fees involved, a standard 1/3 contingency of the total settlement. Hellerstein stated: "Every plaintiff here is burdened by a lawyer's fee that is hard to gauge and will take a large bite out of every [settlement]." He suggested that WTC Captive Insurance Company, a non-profit entity that is distributing the money, to pay the legal fees.

While some have applauded Hellerstein's compassion for the 9/11 responders, others have questioned his authority to reject the deal (which took two years to negotiate). Included in the latter group are lawyers for the City of New York and its contractors, who have requested that Hellerstein stop talking about his objections to the deal, citing judicial interference. In papers filed with the U.S. Circuit Court of Appeals for the Second Circuit, the City of New York and its contractors have challenged several of Hellerstein's Orders that have the effect of blocking implementation of the deal. Specifically, they are appealing from a March 23, 2010 Order extending a deadline for the submission of an "eligible plaintiff list," as well as from an April 9, 2010 Order setting an April 27, 2010 fairness hearing in the case. A stay of the litigation is being sought pending resolution of the appeal.

CONSTANT CHANGES OCCURRING IN THE VIRGIN ISLANDS

Under the Revised Organic Act of 1954, Congress granted the U.S. Virgin Islands self-governing powers typical of non-state territories as well as significant constitutional rights to residents of the Virgin Islands. The Organic Act is the equivalent to a state constitution for the U.S. Virgin Islands. Though citizens of the United States, residents of the Virgin Islands cannot vote for President and have only a non-voting delegate in the United States Congress.

As an unincorporated territory of the United States, the U.S. Virgin Islands is not fully a part of the United States. Thus, situations may arise where specific federal laws may not be applicable in the U.S. Virgin Islands. Therefore, it is very important to address any situation dealing with the government or federal law on a case by case basis.

A notable and significant aspect of law in the U.S. Virgin Islands is the unique use of the Restatements of the Law and other publications of the American Law Institute.

In the absence of an applicable Virgin Islands statute or case law, the Restatements of Law act as common law for the Virgin Islands.

Due to the relatively limited body of territorial statutory and case law, the Restatements are of paramount importance to legal practice in the U.S. Virgin Islands. Virgin Island attorneys quickly realize when researching an issue that there is very limited case law or statutes on point and he/she will need to look outside the territory for guidance on how the Court will likely rule. In addition to examining the Restatements of Law, the Court will look to other states in the 3rd Circuit which include New Jersey, Pennsylvania and Delaware for guidance. Moreover, the lack of case law invites spirited debate between counsel regarding which law should apply to a given issue.

In addition to the limited territorial case law and statutes, there are also three different sets of civil procedures that must be followed. The Superior Court recently enacted its own set of rules of civil procedure titled Superior Court Rules, however, they are limited in scope and are to be read in conjunction with the Federal Rules of Civil Procedure and the Local Rules of Civil Procedure. The Local Rules will apply to all civil cases and the Federal Rules are only to apply when the Superior Court Rules and Local Rules are silent on an issue.

Changes to the Court System are constantly ongoing in the Virgin Islands. Another recent development is that decisions of the Superior Court may now be appealed directly to the Supreme Court (instead of the District Court of Appeals).

As more and more case law is made through decisions of the Court and the legislature continues to enact and revise statutes, the laws of the Virgin Islands will continue to evolve.

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CT OFFICE GETS DEFENSE VERDICT IN TRAUMATIC BRAIN INJURY CASE

In a two-week trial, Dominic Secondo, an Associate of G&B's Connecticut office, obtained a defense verdict in a serious claim alleging traumatic brain injury, right-sided paralysis, post traumatic stress disorder, and depression. On September, 25 2004, the plaintiff fell and was injured while being escorted out of the establishment by the permittee.

Plaintiff alleged that while a patron of the establishment, he was escorted out of the establishment by the permittee and was pushed backwards off a landing, striking his head on the asphalt parking lot. The Plaintiff alleged negligence, recklessness and assault on the part of the insureds. At trial, Plaintiff's attorney claimed the defendants were negligent and willful in the manner in which they escorted the Plaintiff out of the establishment. We disputed liability and disputed that the defendant breached the standard of care. Attorney Secondo argued that the plaintiff himself was negligent and caused his own fall.

The plaintiff had a significant medical history consisting of numerous prior and subsequent injuries, inclusive of gun shot to the head, multiple motor vehicle accidents, as well as several assaults. Despite this he was claiming that several of his conditions were related solely to the September 245, 2010. Attorney Secondo was able to significantly discredit the Plaintiff through introduction of conflicting medical reports, which demonstrated that the Plaintiff experienced significant symptoms prior to the subject incident

The plaintiff had in excess of \$40,000 in medical bills and was making a lost wage claim and a lost future earning capacity claim. He was seeking damages in excess of \$350,000 from the jury for her injuries and claims. The insurer offered \$2,500.00 and filed an offer of compromise for that amount. After approximately one hour of deliberation, the jury returned a defense verdict.

One interesting note, the trial judge allowed jurors to submit questions following cross-examination of witnesses. Apparently the Judge has used this technique over several trials and found the process to aid in jurors' deliberations of the matter. After receiving the questions from the jurors, the Judge would consult with both parties and determine whether there were any objections. He would then proceed to personally pose the questions to the witnesses. Thereafter, counsel could follow-up with questions related to the specific responses. Overall, the process provided insight as to the mindset of the jurors following each witness. However, in hindsight, several concerns became apparent. The process allowed Plaintiff's counsel to possibly recover from cross-examination in that witnesses were allowed to further explain inconsistencies in their testimony. It also, appeared to distract jurors from the examination by counsel in that they were concentrating on posing their own questions or focusing on the questions posed by other jurors.

THE FLORIDA STANDARD CIVIL JURY INSTRUCTIONS CHANGE

On March 4, 2010, the Florida Supreme Court authorized the publication of new standard jury instructions for civil cases. Unlike the standard jury instructions which were promulgated piece-meal over the past four decades, the new instructions completely replace existing standard civil jury instructions and constitute a new start.

One of the major changes is that the organization and new instructions follow the normal sequence of a trial. The Committee expanded several instructions such as Instruction 202.2 "Explanation of the Trial Process" and 700 "Closing Instructions" to explain more fully the trial process and the juror's role, and to provide important do's and don'ts that jurors must follow during the trial. Additionally, the Committee undertook a comprehensive plain English revision of the instructions to make them more understandable. For example, to help jurors understand the concept of negligence its definition has not been expanded to state: "Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances. Negligence is doing something that a reasonably careful person would not do under like circumstances or failing to do something that a reasonably careful person would do under like circumstances."

The professional negligence instructions now cover mostly all professional negligence claims. Many of those instructions relate to medical malpractice claims which are the most predominant professional negligence claims. However, Instruction 402.5 covers professional negligence in general and Instruction 402.12 is a new instruction on issues that may arise on attorney malpractice claims. The new section 402 includes a complete set of instructions for medical malpractice claims updated to current law. Thus, Instruction 402.9 Preliminary Issues-Vicarious Liability provides a logical framework for decision making on the preliminary vicarious liability issues such as agency, independent contractors, non-delegable duties and joint ventures. Likewise, Instruction 402.4 Medical Negligence now covers a variety of different types of negligence, including the presence of foreign bodies, *res ipsa loquitur*, and the failure of health care providers to maintain records.

The new instructions do not yet contain products liability instructions, so for the time being, the former set of civil instructions for the existing products liability instruction will control. The Committee has proposed amended products liability instructions and these are currently pending in a case in which oral argument was scheduled for May 5, 2010.

Florida

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**GIBSON & BEHMAN PREVAILS IN RHODE ISLAND
WORKERS' COMPENSATION COURT**

The Employee filed a claim in Rhode Island Workers' Compensation Court alleging he sustained an injury arising out of the scope of and in the course of his employment with a local landscaping company.

The Employer denied that the injury arose in the scope and course of his employment and retained Gibson & Behman Attorney Brian Dougan to represent it.

The Employee alleges that while working as a laborer for a landscaping company, he was stung by bees more than thirty (30) times. The Employee alleged that he reported the injury to his supervisor immediately after it happened and immediately phoned a relative to pick him up and bring him to the Hospital.

We presented testimony that the Employee was a recently hired employee (4 days on the job) who was not performing up to expectations, was constantly asking for breaks and did not enjoy the job. Further testimony showed that the

Employee failed to report the bee stings to his supervisor that afternoon or anytime thereafter and failed to appear for work again.

Furthermore, Gibson & Behman presented evidence that the Employee left the job site just before lunch but the medical records from the Hospital indicated he did not appear at the Hospital until after 3:00 p.m., almost 4 hours later. Moreover, Gibson & Behman argued that the Hospital records do not indicate anywhere that this was a work related accident.

Under Rhode Island law, the Employee bears the burden of proving by a preponderance of the evidence that his/her injury arises out of the course and in the scope of employment, regardless of fault. R.I.G.L. Section 28-33-1.

In this case, the Judge found that while there was no question the Employee had been stung by bees, there was not enough evidence to find that the Employee's injury arose

out of the scope of and in the course of his employment landscaping. The Judge pointed to the inconsistent testimony of the Employee and the time gap between when the Employee alleged that the injury occurred and the time indicated in the medical records. Furthermore, the Employee's medical records did not indicate a work injury occurred. Finally, the Judge found the testimony of the Employer credible.

Therefore, as a result of the testimony and evidence presented the Judge denied the Employee's claim and found for the Employer thereby rendering another victory for Gibson & Behman, P.C.

JOELLE HAYS RECEIVES 2009 PRO BONO CERTIFICATE OF APPRECIATION

Joelle Hays from Gibson & Behman's Providence office recently received a Certificate of Appreciation from the Rhode Island Bar Association for her dedication to the Rhode Island Bar Association's Public Service Programs.

Mrs. Hays, a Rhode Island native, has a background in advocating for children and families. Her work with the Volunteer Lawyer Program focuses on providing free legal representation to clients who otherwise could not obtain legal services. Recently, Hays was successful in obtaining a divorce for her client, along with a Court Order against her ex-husband to pay more than one thousand dollars in credit card bills he charged after they were separated.

In these tough economic times it is more important than ever for attorneys to give back to their communities. The Rhode Island Volunteer Lawyer program provides free legal assistance to low income and indigent clients throughout Rhode Island and relies on attorneys like Mrs. Hays who volunteer their time to help those in need.

Rhode Island

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SUMMARY JUDGMENT IN MASSACHUSETTS PERSONAL INJURY CASE

Attorney Daniel J. Gibson recently prevailed on a motion for summary judgment on a personal injury claim. The case arose out of a patron's slip and fall at a Massachusetts restaurant. The plaintiff alleged that she slipped and fell while descending the stairway of the restaurant upon exiting. The elderly Plaintiff sustained a fractured hip--necessitating hip replacement-and gashed her skull. It was raining on the date of the accident. The plaintiff claimed that the restaurant was responsible for her injuries in failing to remove accumulated water on the floor, that the stairs were a dangerous condition due to the tiling, and that the premises was negligently maintained. The Plaintiff was an elderly lady who would prove sympathetic to the jury. Complicating matters for the defense was the fact that the

Plaintiff suffered from dementia and was granted a protective order from engaging in discovery.

Attorney Gibson argued that the Defendant had no notice of any alleged accumulation of water, that the hazards associated with water on an entranceway stairs on a heavily rainy day are obvious, and the Plaintiff did not produce any evidence indicating that the stairs themselves represented a dangerous or defective condition. There was no evidence existing to show that the alleged accumulation of water on the floor was due to an act of any employee of the Defendant. Furthermore, the Plaintiff did not know how long the alleged accumulation of water was on the floor and did not notice any water upon arriving at the restaurant. The Defen-

dant was never made aware of any accumulating water in the stairway by the Plaintiff or any other patron.

The Motion was allowed by the Worcester Superior Court. Judge Curran opined that the Plaintiff was unable to present evidence that the water in the restaurant's entrance way was anything more than what normally exists from restaurant patron foot traffic on a rainy day. The judge found no negligence on behalf of the Defendant, and the case was dismissed with prejudice and costs.

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'OPEN AND OBVIOUS DANGER' DEFENSE MELTS IN MASSACHUSETTS

The Massachusetts Appeals Court, in the case Soderberg v. Concord Greene Condominium Association, Appeals Court No. 2009-P380, has ruled that the open and obvious danger defense, at least in the context of snow and ice cases, is not a complete defense as some have argued on the heels of the recent decisions.

The trial judge had included a threshold liability question on the verdict slip asking whether the accumulation of snow and ice the plaintiff fell on was open and obvious. The jury answered "yes" and also found that the plaintiff had an alternative to traversing the accumulation. Accordingly, the jury's verdict was for the defendant without the jury actually reaching the questions of the defendant's negligence or causation.

In reversing the judgment and remanding the case for new trial, the Appeals Court concluded that "the open and obvious danger rule does not operate to negate a landowner's duty to remedy hazardous conditions resulting from unnatural accumulation of ice and snow, at least where, as here, those hazards lie in a known path of travel. Therefore, the jury should not have been asked to determine, as a threshold liability question, whether the dangers were open and obvious."

The decision has potentially chilling ramifications for property owners and insurers. The ruling essentially abolishes the ability of open and obvious danger defense to negate a duty of care as a remedy in snow and ice cases. Under the holding, property owners and insurers will not be, as matter of law, entitled to summary judgment by way of the open and obvious danger defense, but will instead be forced to utilize the defense for the limited of purpose of calculating the plaintiff's level of comparative negligence. As the Appeals Court stated in the decision, "It remained for the jury to determine whether the defendant was negligent, whether the negligence was a proximate cause of plaintiff's injuries, whether any negligence of the plaintiff in crossing the snow and ice was a substantial contributing factor, and, if so, to determine the parties' relative percentages of fault."

THE FACEBOOK PROFILE: A NEW STANDARD SOURCE OF DISCOVERY

A recent federal court case in the District Court of Connecticut held that a plaintiff's Facebook information is relevant to a personal injury claim brought by such a plaintiff. Bass v. Miss Porter's Sch., 2009 U.S. Dist. LEXIS 99916 (D. Conn. 2009). Not only did the Court hold that Facebook information is relevant, the Court went as far as to state that a plaintiff's own determination of the relevant portions is subjective enough that the Court could conduct an in camera review to determine what portions of a plaintiff's Facebook profile are relevant and discoverable. The Court stated, "Facebook usage depicts a snapshot of the user's relationships and state of mind at the time of the content's posting. Therefore, relevance of the content of Plaintiff's Facebook usage as to both liability and damages in this case is more in the eye of the beholder than subject to strict legal demarcations, and production should not be limited to Plaintiff's own determination of what maybe 'reasonably calculated to lead to the discovery of admissible evidence.'"

Attorney Elycia D. Solimene of

Gibson & Behman in Middletown, Connecticut, recently used photographs and text postings by the plaintiff on her Facebook profile to discredit and impeach the plaintiff's own testimony regarding the extent of her injuries, her past injuries, and her post-injury activities. Attorney Solimene submitted into evidence photographs of the plaintiff, which she posted on Facebook of herself involved in admittedly strenuous activities, which the plaintiff previously testified she could not participate in. Also submitted into evidence were numerous text postings by the plaintiff describing several other slip and fall incidents and other strenuous activities. In addition, there were discrepancies between the printed information the plaintiff submitted to the Court and the printed information obtained by defense counsel, indicating that the plaintiff had, in fact, deleted relevant portions of her profile before submitting the same to the court.

As courts become increasingly more willing to allow the discovery and admission of Facebook profile information, defendants

of civil lawsuits should include the discovery of Facebook information as part of their standard discovery protocol. This includes filing additional interrogatories and requests for production regarding which, if any, social networks the plaintiff may store or post information on and requesting the contents of the same. While there are nearly always objections from plaintiffs to the disclosure of personal Facebook information, courts are willing to conduct in-camera reviews for the purpose of sorting out potentially irrelevant personal information. An additional concern with Facebook discovery, as encountered in our recent case, is the destruction of information and evidence by the profile owner; in other words the deleting of posts and other information. This can be prevented by requesting directly to Facebook that specific profile information be preserved in order to be released pending a court order or subpoena. It is recommended that a request for preservation be submitted and confirmed before requesting the information from a plaintiff. .

Connecticut

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G&B'S CONNECTICUT OFFICE OBTAINS DEFENSE VERDICT IN SLIP AND FALL TRIAL

In a three-week trial, Elycia D. Solimene, Director of G&B's Connecticut office, obtained a defense verdict in a serious campground matter. On October 21, 2006, the plaintiff fell while exiting an RV, which the defendant campground had opened and displayed to the public.

Plaintiff alleged that while descending down a step from the RV, the step failed to properly and safely support her and caused her to fall to the ground, sustaining injuries. Plaintiff's attorney claimed the defendants were negligent in that they breached the standard of care in the display and set up of RVs by failing to: provide a brace under the steps from the RV or some other type of apparatus to stabilize the steps; provide additional steps leaving the RV which would have extended the existing steps lower and closer to the ground; provide a handrail alongside the steps from the RV; post any warning to the plaintiff of the dangerous unstable condition of the steps; and inspect the steps to determine if they were safe for the use by persons visiting the RV such as the plaintiff. We disputed liability and disputed that the defendant breached the standard of care. Attorney Solimene argued that the plaintiff herself was negligent and caused her own fall.

The plaintiff had in excess of \$120,000 in medical bills and was making a lost wage claim. She was seeking damages in excess of \$1,000,000 from the jury for her injuries and claims. The insurer offered \$500.00 and filed an offer of compromise for that amount.

The plaintiff had a significant medical history consisting of two neck fusions before this fall. Subsequent to the fall she had a third cervical fusion and was in need of a lumbar fusion. Gibson & Behman contested, in accordance with the opinion of our IME, that the third cervical fusion and lumbar fusion were related to this fall. After approximately three hours of deliberation, the jury returned a defense verdict.