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DAILY REPORT

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Truck wreck case settles for \$5.6M

PLAINTIFF'S ATTORNEY credits change of venue to DeKalb for parties' agreement

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THE ATTORNEY FOR a man hit by a tractor-trailer carrying an oversized load through north Georgia credits a change of venue for the \$5.6 million settlement from the trucking company and the company's president.

The wreck between the Peterbilt tractor and the plaintiff, Timothy Van Kirk, occurred on the afternoon of April 19, 2006, on Georgia Highway 53 near Marble Hill.

Van Kirk's suit never made it to trial, as the parties resolved it after an extended game of venue ping-pong.

Van Kirk originally filed his action in Fulton County State Court in April 2008, but the defense had it transferred to Cherokee County State Court because that's where Van Kirk was living at the time.

Van Kirk later moved to DeKalb County, and his attorney, Ben C. Brodhead III, dismissed the Cherokee case in July 2010 and refiled in DeKalb County State Court

in September 2010. In November 2010, attorneys for the defendants moved to have the case removed to federal court in Atlanta.

Brodhead said he immediately filed a motion to remand to DeKalb State Court, arguing that a case may be removed to federal court only for one year after the filing of the original action, which was April 3, 2008.

Lawyers for the defendants, who declined to comment on this story, argued that since the case had been dismissed and renewed, the deadline started with the September 2010 filing in DeKalb.

U.S. District Judge Charles A. Pannell Jr. ultimately agreed with the plaintiff and remanded the case to DeKalb County State Court.

Changing the trial location from Cherokee County to DeKalb County likely put pressure on the defense to settle rather than risk a trial, Brodhead said.

"The defense puts a lot of weight on the jury pool, and Cherokee County is known to be a conservative jury pool. Verdicts are historically higher in DeKalb County



Plaintiff's lawyer Ben Brodhead: "Verdicts are historically higher in DeKalb County than in Cherokee County."

than in Cherokee County," he said. "So, from a predictive standpoint, they can advise their insurance company it's going to likely be a lower verdict in Cherokee."

Brodhead also said he believes DeKalb's reputation as less conservative prompted the defense to challenge the change and try to have the case moved to federal court. "They knew in federal court the jurors would be selected from all over the Atlanta area, and they might generally award a lower amount," he said.

Among the alleged violations in Van Kirk's complaint were that the tractor-trailer driver, Robert Becker, failed to follow a route permitted by Georgia Department of Transportation, failed to follow the posted speed limit for bridges and failed to be the only vehicle on the bridges while crossing. Becker's truck also was accompanied by one escort vehicle, rather than two as required by state law, and thus was unable to halt oncoming traffic at the bridges so the oversized load could cross without endangering oncoming drivers, the plaintiff claimed.

Van Kirk was driving in the westbound lane of traffic over a hill and around a curve. He was unable to see that the eastbound oversized truck ahead was taking up both lanes, and he could not prevent being struck, Brodhead said.

As a result of the collision, Van Kirk fractured his hip and a lower leg. Van Kirk incurred \$364,000 in medical expenses and at least \$20,000 in lost wages, according to the complaint.

Van Kirk's lawsuit against Becker and his company, Custom Truck and Equipment Inc., which is based in Michigan, claimed recklessness and negligence.

The suit also named their insurance carrier, Cherokee Insurance Co., and the escort vehicle driver, Nikita Gideon, as defendants. It sought punitive damages as well as unspecified compensation for past and future medical costs, lost wages and pain and suffering.

"Defendants knew or should have known that operating a vehicle, specifically an oversized tractor-trailer, on an improper roadway while improperly loaded and improperly equipped and while its driver was not properly suited to drive it and while improperly escorted would result in harm to the individuals who would be affected by the operation of said vehicle," the complaint stated.

Bruce A. Taylor, Jr. and Abdi Ammari, a partner and senior associate, respectively, for Drew Eckl & Farnham, represented Becker and his company. Taylor would not comment on the case when reached Monday, but in the answer to the complaint, Taylor and Ammari denied most of the plaintiff's claims. They also alleged that "damages may have been caused by the acts or failure to act by the plaintiff."

Brodhead said the defense was poised to tell a jury that Van Kirk was speeding, talking to a passenger (who allegedly ran into the woods before police arrived on the scene) and ignoring warnings provided by the escort car. The defense also was prepared to tell a jury about Van Kirk's 16 previous criminal convictions, including one for felony methamphetamine distribution, as a way of damaging his credibility, he said.

Van Kirk, who was 25 at the time of the wreck, also was on supervised probation throughout the case, said Brodhead.

In June 2010, Van Kirk settled with the escort car driver for \$1 million, which was her insurance policy limit, and she was subsequently dropped from the suit, Brodhead said. Custom Truck and Equipment and Becker then argued they were entitled to offset the amount paid by the escort car driver, meaning any verdict against them would be reduced by \$1 million.

"[The] plaintiff argued that the liability would be apportioned and that the flag car driver would have far less liability than the trucking company, and, accordingly, any offset would be much lower than the settlement paid by the flag car driver," Brodhead said.

The two sides then went to mediation on June 24, which lasted a couple of weeks, Brodhead said. They failed to reach an agreement then but hatched one on Sept. 28.

The defendants agreed to an initial payment of \$1.6 million plus \$4,000 a month for the next 10 years, \$5,000 a month for the second 10 years and \$6,025 a month for the rest of Van Kirk's life to be paid into an irrevocable trust.

The case, before Judge Dax E. Lopez in DeKalb County State Court, was *Van Kirk v. Custom Truck and Equipment*, No. 10A32198-6. ☞