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Ski Slope Liable For Worker's Construction Death

Bortz v. Tuthill \$1.2M Verdict

The Legal Intelligencer

January 30, 2016

Date of Verdict: Nov. 9, 2015.

Court and Case No.: C.P. Carbon No. 13-0304.

Judge: Steven R. Serfass.

Type of Action: Wrongful death, survival.

Injuries: Death.

Plaintiffs Counsel: Albert J. Evans, Fanelli, Evans & Patel, Pottsville.

Defense Counsel: Hugh M. Emory, Cipriani & Werner, Blue Bell.

Plaintiffs Expert: John Nawn, forensic engineering, Pottsville; Royal A. Bunin, economist, Pottsville.

Defense Expert: Robert Burch, construction expert, Bellefontaine, Ohio; Dr. Jonathan Briskin, forensic pathologist, Radnor.

Comment: A Carbon County jury awarded more than \$1.2 million to the family of an excavation truck driver who died after his vehicle backed down an embankment during a ski slope expansion project. The verdict is the highest reported out of Carbon County, based on a review of The Legal's archives.

The jury in Bortz v. Tuthill awarded Patricia Bortz, the administrator of the estate of Victor Bortz, \$341,250 on her wrongful-death claims and \$879,009 on her survival claims after finding that the company that owned the slope was negligent. The jury additionally found the company to be 71 percent liable, and Bortz to be 29 percent liable. According to a court official, the parties resolved the case after the verdict.

According to the plaintiff's pretrial memorandum, in September 2011, Victor Bortz, who was 49

at the time, was driving an articulating hauler up a steep embankment as part of a project to widen a ski slope at Blue Mountain Ski Resort, which is owned by The Tuthill Corp.

After ascending about 25 feet, the hauler, which was carrying a half load of soil, backed off the hill, down a steep, 30-foot embankment, and struck a ski lift tower, the memo said. At some point, Bortz was ejected from the cab through the right window, and, when the truck came to rest, its right tire was partially covering Bortz, the memo said.

The plaintiff's memo noted that a fellow excavator on the project had said the angle of the hill had scared him, and Bortz's boss, Timothy Livengood, also testified that he had been concerned about the hill. The memo said Bortz, his co-worker and Livengood met with a representative from Tuthill, who directed Bortz and his co-worker on the route.

The memo said Tuthill had already prepared the slope by using a bulldozer to grade it off, so the excavation truck would have an easier time maneuvering. Bortz had also been told to back the truck down the hill because there was a concern that the truck might tip over when trying to turn around on the steep slope, the memo said.

Bortz made an initial attempt to go up the hill, but his truck stopped and he slowly backed down the hill, the memo said. Bortz was then told to keep the hauler in first gear and "floor it and not leave off the accelerator pedal," the memo said. After Bortz made his first successful trip up the hill, the supervisors left the area.

According to the memo, Bortz and his co-worker continued to discuss how dangerous the project was over the radio; however, the incident immediately before Bortz's death was not witnessed.

The plaintiff's memo said Bortz was survived by his wife of 27 years and two grown children.

The memo argued the grade of the slope exceeded the reasonable standards for the industry, and lacked a safety berm to protect runaway vehicles.

"Mr. Bortz's truck was being forced to operate on a slope that was within the upper limits of the capabilities of the vehicle," the memo said. "The accident could have been prevented if Tuthill had not been negligent."

Tuthill's pretrial memo said Livengood had chosen which excavator to use, and had advised the company that he had the manpower and equipment to do the job. The memo also said Livengood, who had more than 30 years of experience in the excavation business, had no concerns about the excavator.

The memo also said the slope was 26.2 degrees, which is "well within the Volvo's capabilities," as the trucks were rated to go up slopes as steep as 40 percent.

"In sum, Blue Mountain asked the expert earth-moving company if it could do the job," the memo said. "It said that it could and Blue Mountain hired it to do the job."

Noting that the job was only expected to take two days, the memo also disputed as "totally unreasonable" the opinion of plaintiffs expert John Nawn, who said the company should have built a road with a maximum slope of 10 degrees.

Tuthill also retained construction expert Robert Burch, who said that Livengood controlled the

job.

The memo also disputed negligence, and said there was no evidence that Bortz attempted to take evasive action, such as breaking or applying more gas. The memo also said Bortz had not been wearing a seatbelt.

The memo also noted an email from an investigating police officer to the Occupational Safety and Health Administration, suggesting that Bortz may have suffered a heart attack during the incident.

Tuthill's forensic pathologist, Jonathan Briskin, also noted a lack of blood at the scene, and opined that the cause of death could not reasonably be determined.

"The key issue in the case was whether Blue Mountain exercised control over the work of Victor Bortz and we were able to establish that," said plaintiffs counsel Albert J. Evans of Fanelli, Evans & Patel.

Defense counsel Hugh M. Emory of Cipriani & Werner did not return a call for comment.

— Max Mitchell, of the Law Weekly •

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