



Trench Death Award Upsets Liability Law

Defense: \$15M verdict would make property owners contractors'

By THOMAS B. SCHEFFEY

In a stunning outcome, a Waterbury jury has awarded the estate of Trumbull plumbing contractor Bernard Milligan \$15 million. It concluded W&M Properties of Connecticut, which manages the imposing MerrittView office plaza in Norwalk, was reckless in not preventing a trench cave-in that killed Milligan on Dec. 13, 2000.

"I think the verdict surprised everybody—I mean everybody," said defense lawyer James Coyne, of Stratford's Coyne, von Kuhn, Brady & Fries. His client's response to the original complaint was a counterclaim for vexatious litigation that asserted Milligan's death was his own fault.

The jury partly agreed. It ascribed 29 percent of the negligence to Milligan, 40 percent to W&M and 31 percent to two excavation workers Milligan had hired, Joseph Gunduck and Jeffrey Blizzard.

"The theory of liability here is one most people, even most lawyers, are not all that familiar with," said plaintiff's attorney Neil W. Sutton, of Adelman, Hirsch & Newman in Bridgeport. "It's section 413 of the Restatement of Torts," sometimes known as "the doctrine of peculiar risk."

For Milligan's estate, deft application of that doctrine meant the difference between an award of \$15 million and nothing.

Bridgeport resident Hubert "Darnell" Burgess had been working a few feet from Milligan in the trench when it collapsed, but survived. Bridgeport Superior Court Judge Joseph W. Doherty dismissed Burgess's suit against W&M Properties on summary judgment Jan. 27, on grounds Burgess presented no evidence that W&M was in control of the trench digging.

But in a March 1 summary judgment rul-



Plaintiffs' lawyer Neil W. Sutton relied on an unconventional theory of liability.

Nick Lacy

ing in the Milligan case, Waterbury Complex Litigation Docket Judge Jon M. Alander ruled that W&M was in control. In a footnote, Alander explained: "The court in *Burgess* was apparently not presented with [Milligan's claim that] W&M properties is liable because the excavation of the trench was likely to create a peculiar risk of unreasonable harm to others unless special precautions were taken."

In an interview, Sutton said that Connecticut's case law on this point was established in the 2003 state Supreme Court ruling in *Pelletier v. Sardonis-Senska*, in which a mis-welded two ton girder struck the plaintiff. That case reversed an older line of decisions that held only third parties could sue the property owner or manager, and excluded suits by employees of contractors or subcontractors.

"I think *Pelletier* has gone too far," coun-

tered Coyne. He said he will be filing a post-verdict challenge, and will ultimately appeal on three main grounds. First, he said, "No Connecticut court has held that digging a trench is an inherently dangerous activity. If it's done properly, no one's going to get hurt."

Secondly, the Restatement Sec. 413 doctrine refers to a risk of harm to "others." Coyne contends that means people other than the contractors' employees.

Finally, said Coyne, property managers or owners should only be liable under Sec. 413 if they "knew or should have known" of the danger. He said the company deferred to the tacit views of city water officials and other experienced excavators who examined the site without raising objections.

The MerrittView building is a 250,000-square-foot corporate plaza. Milligan's

company, Quality Mechanical Plumbing Contractors LLC, was hired to locate a suspected leak that flooded a manhole.

Over a four-day period, diggers Gundeck and Blizzard dug a 25-foot long, 10-foot wide trench that was 14-feet deep at its deepest end. Although the pipe proved sound, it made sense to replace it as an

upgrade. The trench had no trench box or wooden shoring to prevent cave-ins.

Sutton said the facts of *Milligan* support an exception to the general rule. A property owner or manager is normally not liable if a contractor's employee is injured on the job. However, "if there is a situation which creates a peculiar situation of unreasonable

harm, unless special precautions are taken, you as the property manager have an obligation to take reasonable steps to make sure those precautions are put in place."

Coyne said the exception for inherently dangerous work is a problem for property owners: "Any work can be inherently dangerous when it's done in a slipshod fashion." ■