

Inside Story of Lawsuit over Catastrophic Injuries at Construction Site - Did Attorney's Rejection of Settlement Offer Cost His Client \$7,000,000?

Posted on June 13, 2009 by [John Hochfelder](#)

A 35 year old healthy construction worker was helping to build a new Lowe's Home Depot in Orangeburg (Ulster County), New York on November 14, 2002 when he fell off the roof 22 feet striking his head on the ground below.



After 63 days in the hospital (57 of them in a coma), **11 surgeries** and 65 more days in a rehabilitation hospital, Robert Doviak was left **totally and permanently blind**, with a sense of touch that was seriously compromised, **partial loss of hearing** and **no sense of smell or taste**. Additionally, he had **substantial orthopedic injuries** including fractures of his left femur, several cervical vertebrae, both zygomatic arches and other bones in and about his face and eyes, his left hand and his right wrist.

Doviak's wife hired [Finkelstein & Partners](#), a well known personal injury law firm in Newburgh, New York and they began a lawsuit against Lowe's and others based on New York's Labor Law which provides that owners of commercial buildings under construction are liable for injuries suffered by workers when they involve falls from heights. A judge granted plaintiff's motion for summary judgment on liability grounds and the case then proceeded to a jury trial to determine the amount of damages.

In [Doviak v. Lowe's Home Centers, Inc.](#), an Ulster County jury found that plaintiff was entitled to \$1,000,000 for his pain and suffering (\$200,000 past; \$800,000 future - 32 years) plus additional amounts for his lost earnings and medical expenses and his wife's loss of consortium. The jury's total award for all elements of damages was thus \$3,700,000.

Since **each element of a future damages verdict that is more than \$250,000 must under New York law (CPLR 5014) be calculated to present value** (usually resulting in a significantly lower figure) before a judgment is given to a plaintiff, the \$3,700,000 jury total really represented only about \$3,000,000 for the plaintiff.

In a post-trial motion, the pain and suffering award was found by the trial judge to be unreasonably low and a new trial was directed to be held unless defendants agreed to increase the pain and suffering sum to \$4,100,000 (\$1,200,000 past and \$2,900,000 future). Plaintiff appealed and the appeals court this week (properly relying, in part, on [Villaseca v. City of New York](#), a

loss of vision case we discussed [here](#)) added another \$1,000,000 to plaintiff's future pain and suffering award which is now **\$5,100,000** (\$1,200,000 past; \$3,900,000 future). The new total (including the earnings, medical expenses and consortium claims) is \$9,300,000 - a present value of about **\$7,000,000**.

As always, and especially in catastrophic injury cases like this one, no amount of money ever makes the injured plaintiff feel like the whole thing was worth it. Neither \$7,000,000 nor \$100,000,000 would be enough for any sane person to undergo what Robert Doviak has undergone and will suffer with for the rest of his life.

Now for the **inside information**. During the trial, the defendants offered on the record to settle for a present value of \$9,250,000. Plaintiff's then attorney, without plaintiff present, rejected that offer on the spot. The next day, the defense increased the settlement offer to \$10,000,000. Again it was rejected. Finally, still before the verdict, the defense made a final **settlement offer - \$12,000,000**. Doviak says the offer was rejected by the Finkelstein firm without bothering to consult him.

Did Doviak's lawyers fail to inform him of the \$12,000,000 offer?

After the trial, the plaintiff fired Finkelstein and hired two new firms. Levy Phillips & Konigsberg (a New York City personal injury law firm best known for its extensive advertising about and its mass representation of plaintiffs in asbestos exposure lawsuits) was hired to handle the appeal decided this week. Another firm was hired to sue the Finkelstein firm for malpractice. In the malpractice suit, Finkelstein & Partners admits that the \$12,000,000 offer was made but denies it acted improperly.



Doviak and his new attorneys are claiming that errors were made by Doviak's trial counsel which cost Doviak \$7,000,000 (the difference between the settlement offer and the final appellate court figures). Here are some of the matters relevant to the ongoing malpractice dispute:

- **significant settlement offers must be conveyed to clients and if rejected then the rejection should either be on the record or in writing** (with a full explanation of the consequences also on the record or in writing)
- **attorneys (and their injured clients) should not let greed serve as the foundation of a personal injury lawsuit** - during summation, Doviak's attorney asked the jury to award Doviak \$60,000,000 for pain and suffering, an amount Doviak's new attorneys say is preposterous and evidence of awful advocacy and which defense counsel says revealed the greed that served as the foundation of plaintiff's case

As the attorney malpractice case progresses (and surely it will move quickly now that the appeals court has ruled on the propriety of the verdict figures), we will report on claims, defenses and developments.