

Wrongful death ruling appealed

Attorney contends sympathy, not evidence, swayed verdict

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Claiming sympathy for the family not evidence presented at the trial swayed a Marion County Common Pleas Court jury to make the largest award ever granted here in a wrongful death suit, Mako Brothers & Sons Inc. is asking for a new trial.

A week ago, a jury awarded \$753,000 to the estate of Wayne Berkey, who died March 13, 1988, in an accident at the scrap-metal yard on Bartram Avenue at Silver Street, now owned by Marion Steel Co. A truck driver, Berkey, 36, Dalton, was standing in the bed of his trailer when 16 tons of scrap metal was dumped into it.

When Berkey died, he left a pregnant wife, a 2-year-old son and his parents as heirs. Marion lawyer Donald Taube, who represents Mako Brothers, believes sympathy for those survivors swayed the verdict.

Jurors found Berkey to be not at all responsible for the accident that took his life, and determined Mako

Brothers to be 100 percent responsible. It was that determination, which Taube found "shocking," that has the defense seeking a new trial.

"Obviously, I think the jury's verdict was erroneous," Taube said. "It's up to the judge whether he agrees with me."

Tim Scanlon, the Akron lawyer who represented Berkey's estate, said he is not surprised that a new trial is being sought but believes it unwarranted.

"That's a pretty typical thing for insurance companies to do," he said, adding, "They shouldn't be entitled to a new trial just because the insurance company is unhappy. There's naturally sympathy in a case like this. There was sympathy on both sides."

Scanlon said evidence at the trial indicated that Berkey's death resulted in a lost earning capacity of \$685,000 for his family, thus the award was not excessive.

"That's why you have juries," he said. "You give them all the evi-

dence. Tell them to follow instructions, which I think they did, and let them exercise their common sense. Unless we're going to do away with juries in cases like this, that's what you have."

Taube, in supporting briefs filed with his motion for a new trial, points out evidence at the trial indicated Berkey had arrived at the yard just minutes before it was to close, and as a favor to him, the crane operator agreed to stay late and load the truck.

Taube states witnesses told the jury Berkey promised the crane operator his rig would be ready to load by the time the operator got back from making a call home to say he would be late. When the crane operator returned, he did not see Berkey, who was in the trailer folding the canvas covering he had removed from it after pulling it into loading position.

Mako Brothers' argues there was no reason the crane operator should have expected Berkey to be inside

the trailer once it had been pulled into loading position, and thus Berkey was at least partially responsible for the accident.

If Judge Richard Rogers, who heard the case, does not grant a new trial, Taube is asking the judge to override the verdict. He states in his brief that, "... as a matter of law, the plaintiff was negligent in some degree and perhaps to a far greater degree than any negligence that may have been committed by the defendant."

Taube explained, "If the judge thinks the jury missed the point, he could assess some responsibility to the decedent (Berkey). As an example, and this is only an example, you understand, he could find the decedent 10 percent responsible, and that would reduce the verdict by 10 percent."

Failing granting a new trial or assigning part of the blame to Berkey, Taube asks the judge to reduce the amount of the award granted.