

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2011

PHILADELPHIA, TUESDAY, MARCH 26, 2013

An **ALM** Publication

Estate of Worker Crushed Under Excavation Settles

Carbajal v. Grande Land \$5 Million Settlement

The estate of an undocumented worker who was crushed to death under a collapsing housing excavation has settled for \$5 million with the construction company that was excavating the land, one of the estate's attorneys has reported.

By Ben Present,
of the *Law Weekly*

Date of Verdict: February 27.

Court and Case No.: C.P. Berks
No. 10-15643.

Judge: Jeffrey L. Schmehl.

Type of Action: Negligence,
premises liability.

Injuries: Death.

Plaintiffs Counsel: Thomas R.
Kline, David K. Inscho and Kila
B. Baldwin, Kline & Specter,
Philadelphia.

Defense Counsel: Jeffrey B.
Rettig, Johnson, Duffie, Stewart
& Weidner, Lemoyne, Pa.

Plaintiffs Experts: Daniel M.
Honig, engineering, Swarthmore,
Pa.; Dr. Ian Hood, pathology,
Delanco, N.J.; David L. Hopkins,
economics, King of Prussia, Pa.;
Jonathan A. Grode and Ricky A.
Palladino, immigration law, Phil-
adelphia.

Defense Experts: Craig R.
Shagin, immigration law, Harris-
burg; Steven D. High, liability,
Lancaster.

Comment: The estate of an un-
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According to court records, the
estate of Fidel Arana sued West
Lawn, Pa.-based Grande Land,
claiming it was negligent in its
excavation of a large residential
housing foundation for failing to
slope or "bench" the walls of the
ditch in order to prevent cave-ins.
The lawsuit pointed to citations
Grande received for violating
three Occupational Safety and
Health Administration standards
related to excavating land. Those
included failing to slope the exca-
vation, failing to properly inspect
it, and allowing standing water to
accumulate within it.

Had the case been tried, court
records and interviews with plain-
tiffs counsel show, Arana's status
as an undocumented worker
would have likely been a central
issue in the proceedings, starting
with jury selection and extending
through the trial before the Berks
County Court of Common Pleas.

"A great challenge in this and
other similar construction acci-
dent cases involving undocu-
mented workers is getting a fair

jury panel, which would have ne-
cessitated a significant voir dire
of that panel," said Philadelphia
plaintiffs attorney Thomas R.
Kline of Kline & Specter, counsel
for the estate.

Calling the issue "the elephant
in the room," Kline said he would
have directly asked potential ju-
rors whether they could give a full
recovery to an undocumented
worker if the facts otherwise
showed one was warranted. "Both
parties had submitted expert re-
ports from immigration lawyers
opining on Arana's chances of
securing work and remaining in
the country had he not been killed
in June 2009. The week before
the settlement, the court granted
plaintiff Bernardo Carbajal, the
administrator to Arana's estate, on
a motion to amend his complaint
to add a claim for punitive dam-
ages.

According to the plaintiff's pre-
trial memorandum, the accident
occurred at Grande's "Rose-
mount" housing development pro-
ject in Spring Township, Pa., a
171-home project that was near-
ing halfway completion at the
time.

Arana was working for Snyder
Construction Co., a Grande sub-

contractor hired to pour concrete for housing foundations.

After Grande excavators dug the foundation, Snyder would come in and place large metal "forms" into which its workers would then pour the concrete foundation, court papers said. During the days leading up to the accident, there had been substantial rainfall in the area. On the morning of the accident, one of the excavation walls had already caved in and water had accumulated in the hole, the estate's pretrial memorandum said. At the time of the accident, according to the memo, Arana was removing one of the forms in an approximately eight-foot-deep ditch when the dirt wall of the excavation ditch collapsed around him, pinning him face-first against the foundation of the house. The plaintiff estimated about three tons of dirt caved in on Arana.

The estate cited the OSHA citations stemming from the accident, which Kline said were "clearly going to be admissible at trial," in advancing its theory of liability.

Namely, there was failing to prevent cave-ins (the appropriate slope for such a wall is 45 degrees, the memo said) and failing to have a competent person conduct daily inspections and inspections after rainstorms. The memo said Grande witnesses had testified they never conducted any inspections of the excavation.

Grande was also cited for allowing workers to enter an excavation with standing water in it.

The plaintiff pointed to testimony from Grande's owner, Fiorino Grande, in which he apparently admitted he did not know what OSHA was and did not know of its regulations for housing exca-

vations. The Grande manager in charge of excavations did not have any OSHA training, court papers alleged.

Grande's attorney, Jeffrey B. Rettig of Johnson, Duffie, Stewart & Weidner in Lemoyne, Pa., declined to comment for this story and the defendant's pretrial memorandum did not assert a theory on liability.

However, the defendant's liability expert, Steven D. High, noted in his expert report that OSHA cited and fined Snyder for the same provisions and dollar amounts as it did Grande. He said Arana should have recognized the potentially hazardous condition to which he was exposing himself by entering the ditch. High also opined that the only Grande employee at the site at the time did not enter the excavation and was therefore not exposed to the potential hazard of a collapse. However, he went on to opine that Grande had an obligation to assure Snyder was meeting OSHA standards, which he noted Grande did not do.

The estate contested that High's report ignored the fact that Grande was the only party involved in creating the excavation, which the plaintiff said Grande does regularly and Snyder never does.

As for the immigration, the defense submitted a report from Harrisburg immigration lawyer Craig R. Shagin. In the report, Shagin opined that, while Arana was a possible candidate for "cancellation of removal and adjustment of status" it was impossible to determine what would have happened to Arana's undocumented status had he not died. Shagin did, however, outline all of the

factors for cancellation of removal, which include length of time spent in the country, a character assessment and an establishment that removal would result in "exceptional and extremely unusual hardship" to the applicant or his or her family.

The plaintiff presented an expert report from attorneys Jonathan A. Grode of Green & Spiegel and Ricky A. Palladino of Solow, Isbell & Palladino. The attorneys said the defense expert had failed to mention the means through which Arana could have applied for cancellation of removal, albeit while Shagin identified him as a "prima facie" candidate for it.

Additionally, the plaintiff's experts said Arana's daughter, a U.S. citizen, is pushing 21 years old, an age at which she could petition for her father to obtain lawful resident status through an "immediate relative petition." The experts pointed to immigration reform they said was "gaining momentum" in the White House and Congress as further proof that it was "nearly impossible to envision a scenario where Mr. Arana could not have obtained employment authorization in the future."

Kline said the defendant has a \$7 million policy from Erie Insurance Group. He said the \$5 million settlement was within the range suggested by Berks County Court of Common Pleas President Judge Jeffrey L. Schmehl. David K. Inscho and Kila B. Baldwin, both of Kline & Specter, also represented the estate.