

The Peaceful Lawyer Goes To Trial



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Sometimes it takes the toughest fight to get to the most healing result.

A HUSH falls over the courtroom as the bailiff ushers the jury into the high-ceilinged, ornately decorated City Hall venue. The plaintiffs, defendants and their counsel all rise for the jury. Two of those lawyers begin whispering. Suddenly, it's all over! The defense finally blinked. The case has settled! It took the presence of the jury to finally bring the defense to the realization that this case wasn't just going away. The defendant would have to pay the price of its negligence. The final result: The case settled on January 25, 2012, for \$1,075,001. The lion's share (\$900,000) came from Mad River Bar and Grille, a tavern that had served alcohol to a visibly intoxicated customer.

This story begins on March 1, 2009, the day Matthew Maher, age 25, tore his anterior cruciate ligament while playing soccer for the Philadelphia Kixx professional indoor soccer team. Maher was despondent, picturing a future without soccer. On the evening of March 6, 2009, Maher decided to go out for dinner with his good friend, Michael Filachek. Maher was the designated driver for the evening, which began at a Center City Philadelphia pub, Nodding Head Brewery, around 7:30 p.m. Before the friends' evening was over, they would also patronize Urban Saloon (9:00 p.m. to 12:45 a.m.) in the Fairmount

neighborhood of Philadelphia and Mad River Bar and Grille (1:00 to 2:00 a.m.) in the Manayunk neighborhood. Finally, shortly after the 2:00 a.m. closing time, Maher and Filachek headed to the Borgata Hotel in Atlantic City. They never made it.

Tragically, at 2:51 a.m. Maher crashed his Cadillac Escalade into the rear of Hort Kap's Chrysler Town and Country minivan near milepost 18.6 on the Atlantic City Expressway, in Hamilton Township, New Jersey. The New Jersey State Police did a thorough investigation culminating in an extremely detailed crash reconstruction report. It showed that Maher was traveling at approximately 103 mph at .5 seconds before the impact, and he did not apply his brakes at any time prior to the crash. There were no curves in the road. Kap's lights were on and he was traveling at or around the speed limit. Had Maher fallen asleep at the wheel? He denied this under oath.

Kap's vehicle overturned after hitting the right guard rail and flipped onto the passenger side, trapping the driver beneath his car. The force of the impact caused Kap to come out of his seat belt so that only his foot was inside the shoulder harness. The Atlantic County Medical Examiner's autopsy report showed that Hort Kap, age 55, suffered abrasions to the chin and right cheek with shredding of tissue, extensive rib cage fractures on both sides, thoracic fracture, thoracic aorta laceration, lung lacerations, hairline fractures to the base of the skull, leading ultimately to his untimely and tragic death. Police found Kap face down near a pool of blood that had flowed from his head, mouth, and body. Hort Kap was pronounced dead at 5:32 a.m.

Kap left behind six adult children, all of whom were prepared to testify about how their father's death had devastated them. Kap had survived the killing fields of the Khmer Rouge in Cambodia, only to be cut down in the prime of life by a drunk driver. His children were an integral part of the case, attending every hearing and showing their commitment to the litigation. Hort Kap and

their mother, Sawann Ung, had done an excellent job of raising six high-achieving, law-abiding children. They would have made compelling witnesses at trial, and the defense knew it.

Back to milepost 18.6. Maher and Filachek stood near their vehicle while Kap lay dying or already dead. Passersby stopped to render assistance. Neither Maher nor Filachek walked over to help Kap. Within minutes, New Jersey State Police were on the scene. Maher had a strong odor of consumed alcohol on his breath. Trooper A. M. Abbate questioned Maher about this odor, and Maher admitted that he had been drinking alcohol. Accordingly, Trooper Abbate conducted field sobriety tests. Trooper Abbate reported that Maher had droopy lids, bloodshot and watery eyes, nystagmus (unintentional jittery movement of the eyes), flushed face, was swaying and staggering, was bending at the knees with both hands leaning on them and could barely maintain his balance during the instructional phase of the test. He had very slow hand movements, very slow, delayed speech, and slurred and stuttering speech. On the heel-to-toe test, Trooper Abbate reported that Maher failed to take any of the nine steps.

Maher was handcuffed and taken to the police station. Two Alcotest breathalyzers readings were taken between 3:00 and 3:30 a.m. Both readings were .21 whole blood alcohol level. The legal limit is .08. Maher's blood was drawn at 8:05 a.m. at Atlantic Care Regional Medical Center Hospital. His blood alcohol content then was .156. In other words, Maher was stone drunk. Maher was charged with first-degree aggravated manslaughter, driving while intoxicated, and other criminal offenses. The police did not test Filachek's level of intoxication. Filachek later admitted under oath that he was intoxicated early in the evening and grew more so as the evening went along.

When confronted with the field sobriety test results, Maher suggested that the New Jersey State Police were guilty of deception. Maher stated, “I have no idea if [Trooper Abbate’s] statement is accurate, but I do know that from the looks of this report, the state police — it’s a check box and they tend to embellish on certain things and it’s like if you check one, you check them all.” He denied the accuracy of virtually the entire report. Maher testified regarding his appearance at the scene, “I thought I presented myself fine.” Maher is the son of John Maher, a retired police chief and currently executive undersheriff of the Cape May County Sheriff’s Office.

OVERVIEW OF THE LITIGATION • On March 11, 2009, I received a phone call from Noun Ung, the eldest son of Hort Kap. Noun told me that his father had been killed a few days earlier by a drunk driver and that this driver was a professional soccer player. That certainly got my interest. After hearing a bit more about the case, I asked Noun if he could come to my office. He suggested instead that we go out to the scene of the crash. I immediately agreed, and within the hour, we were on our way eastbound on the Atlantic City Expressway. I was able to view and photograph the scene. I could see the dented side rail, broken glass and skid marks. Family members placed flowers at the scene, amid sobs and tears.

I asked Noun how he had gotten my name. I generally get my cases by word of mouth, so I wanted to know who to thank for the referral. Noun instead told me that he got my name through my website. That was quite a surprise. I do get some cases that way, but I don’t really expect to get cases like this one from my website. A website is really not the ideal way to find a lawyer, especially for major litigation. Fortunately for Noun and his family, his choice worked out well.

Because this was a wrongful death case, it was necessary to raise an estate. That meant having an estate representative appointed. Noun’s sister, Linda Ung, was selected, and it was in her name, as Administratrix for the Estate of Hort Kap that suit was instituted in October, 2009. In a case like this, there was no chance of working out a fair settlement until extreme pressure was exerted on the defendants. These days, cases involving serious injuries or death rarely settle early in the litigation. The insurance companies carefully investigate all such claims. Indeed, the case didn’t settle until we had gone beyond the courtroom steps, and so there was no reason to wait beyond the initial investigation, fact gathering, and review of the law. The 95-paragraph lawsuit set forth in detail the facts underlying the claim and the acts of negligence and recklessness alleged against each of the defendants. The initial fact gathering disclosed that alcoholic beverages were consumed only at one bar, and so suit was begun against that bar and Maher. That bar, Mad River Bar and Grille, joined two additional bars into the litigation. During the litigation we learned that alcohol was consumed at those bars as well.

Several of the defendants filed Preliminary Objections seeking dismissal of the claim for various reasons. After amending the complaint twice to moot most of these objections, the issue of punitive damages was ripe for the Court’s consideration. In denying the objections to the claim for punitive damages, the Court specifically ruled that Pennsylvania law applied as the state with the most significant relationship to the occurrence and the parties. All of the parties were from Pennsylvania. Every matter of importance to the litigation, except for the crash itself, occurred in Pennsylvania. This ruling was vitally important since the damages recoverable under Pennsylvania’s Wrongful Death and Survival statutes are much greater than New Jersey’s.

We then moved into the discovery phase of the litigation. The most important documents we

obtained were the bar receipts, which showed the food and drink ordered by Maher and Filachek that evening. We learned that Maher and Filachek ordered more than 53 alcoholic beverages that evening. After written discovery was completed, all of the principal players were deposed, including Maher, Filachek and employees at all three bars and customers who might have witnessed Maher's visible intoxication. All of the depositions but Maher's were videotaped so that the jury could see the demeanor of each deponent. This would help at trial in the event that it was necessary to impeach the witness's credibility. Maher's deposition could not be videotaped, per prison rules.

As will be explored in depth below, the key issue in the case was whether Matthew Maher had been served alcohol while visibly intoxicated. If so, under the Pennsylvania Dram Shop Act, the bar would be legally responsible for the damages caused by Maher. I had hoped that with the receipts showing the quantity of alcohol ordered, along with the field sobriety test results, the breathalyzers, and the rest of the evidence, a settlement could be worked out. Once the first rounds of depositions were concluded, I reached out to defense counsel. Unfortunately, there was absolutely no interest in settlement and no offers were made. Faced with seven defense lawyers, I felt that it was time to get help, and so I reached out to Kevin Marciano of the law firm of Marciano & MacAvoy. Mr. Marciano, in my opinion, is the top lawyer in the Philadelphia area when it comes to suing bars that serve visibly intoxicated patrons. His contributions toward our partnership and eventual success were beyond indispensable. Kevin's ability to achieve large jury awards in major injury cases brought the defense finally to the bargaining table.

Once Kevin was on board, my job got much easier. Kevin handled the remaining depositions, a day-long mediation and, most importantly, trial preparation. He prepared and argued 13 motions in limine and responded to 15 motions in limine

filed by the defense. He engaged in extensive negotiations with defense counsel. We anticipated that 15 lay witnesses would testify at trial, along with four expert witnesses. Kevin prepared for all of that, along with every other aspect of this jury trial.

Our experts were: G. John DiGregorio, M.D., Ph.D., Wayne K. Ross, M.D., Mark Lukas, Ed.D. and Andrew G. Verzilli, Ph.D. Dr. DiGregorio is a toxicologist. He reviewed the Alcotest breathalyzer readings, blood alcohol tests, the bar tabs, the deposition transcripts and the police investigation. He concluded that Maher would have shown signs of impairment at each bar, including "lack of motor coordination, impaired mental and motor skills, slurred speech, visible intoxication and delayed response to sensory stimuli." In other words, each bar had violated the Pennsylvania Dram Shop Act, leading directly to the crash.

Dr. Ross, a neuropathologist, was contacted in order to examine the issue of pain and suffering. The defense argued that Kap suffered instant death, and that, therefore, there was no compensable pain and suffering. Dr. Ross reviewed the autopsy report, photographs of the Escalade and minivan, and the police accident reconstruction report. He concluded that prior to being ejected from the minivan, Kap sustained a whiplash injury to his neck, multiple impacts to the interior of the vehicle eliciting conscious pain and suffering, following by ejection and semi-conscious pain and suffering.

Dr. Lukas performed a vocational assessment, and Dr. Verzilli performed an economic assessment. Hort Kap's work record was very spotty. Nevertheless, we were able to claim, via these experts, economic damages in the \$401,700 to \$503,800 range.

Strangely, the defense did not hire experts. This seemed to us like a tactical error, since this meant that our experts' opinions were unopposed, although obviously defense counsel could attack their opinions during cross-examination. But without their own experts, the jury would have no contrary expert opinions against which to balance