ARTICLE

Ben Stevens

David Yarborough: Primed for Success

His Career, Lessons Learned, and the Amazon Verdict

By Ben Stevens

David Yarborough is the founding partner of the Charleston-based Yarborough Applegate law firm that specializes in complex catastrophic injury, wrongful death, and bad faith cases. A Charleston native, David attended the College of Charleston before matriculating into the University of South Carolina School of Law where he received his JD in 1998. David was the first person in his family to attend law school. After graduating, David clerked for the Honorable James R. Barber III before entering private practice with Young Clement. After several of his friends began the law firm of Pierce, Herns, Sloan & McLeod, David left Young Clement to become the firm's first associate. There, David found his passion for trial work.

After ten years at Pierce Herns, David pitched the idea of starting a firm to his long-time friend William Applegate while on a beach trip with their wives. What started as an idea became an obsession, leading both men to quit their respective firms to start Yarborough Applegate in 2010. Since opening its doors, Yarborough Applegate has grown to become one of the preeminent plaintiffs' firms in South Carolina. I had the pleasure of stopping by David's East Bay

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Nick Clekis, Clekis Law Firm; William Applegate, Alexandra Heaton, David Yarborough, and Sara Harrigan of Yarborough Applegate

Street office to speak with him about his early career in defense; strategy; trial work; and, of course, his most recent verdict against Amazon.

Thanks again for taking time to meet with me, David. I am interested to learn a little bit about your career in defense. How did it prepare you for Plaintiffs' work?

As far as being a trial lawyer, my experience at Pierce Herns was invaluable. We were national trial counsel for five or six different companies and tried asbestos cases all over the country. I got to work with (and against) some of the best product liability lawyers in the United States, and tried numerous multi-week and multi-month trials in foreign and often hostile jurisdictions. One of the more interesting aspects of the job was many of the products our clients manufactured were no longer in existence at the time of trial, so we had to go back and literally re-create the products and the environment they were allegedly used to disprove the plaintiff inhaled the fibers. Of course, we did this with the help of all sorts of epidemiologists, industrial hygienists, and other experts. Man, it was great. I took a couple thousand depositions, from plaintiffs, to experts, to co-workers, and

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other witnesses. The experience really helped me hone my trial skills and gave me an early understanding of what it meant to participate in a big, sophisticated trial where money wasn't an object—in terms of developing the defense.

Luckily, the guys over at Pierce Herns afforded me the opportunity to take on some plaintiffs' cases in my spare time which gave me more opportunities to get in the court room. I learned lots of great (often hard) lessons trying cases against some of the old lions of the defense bar. One of my favorites was a multi-week chemical spill case Mullins McLeod and I (we were about 26 at the time) were trying against 4 veteran defense lawyers in their 60s, when we ran into a couple of buzzsaws called the SCRCP and SCRE. Just about every question we asked and every document we tried to admit was objected to. Admittedly, we had not paid a lot of attention to the rules leading up to trial, we just knew we had really good facts! I mean, that is why I went to law school—not to sit behind a desk, wear a fancy suit, and call myself a lawyer—but to try cases and be in the courtroom. That was, in my mind, what being a lawyer was.

After those first few cases, I realized I was good with people and began taking on more and more plaintiffs' work being referred to me from some lawyer friends around town. After about ten years at Pierce Herns, I realized I did not have a platform to develop my own book of defense business. I knew, in our business, clients are the only thing that give you leverage in commanding your pay and your way. I was originating a ton of fees from my plaintiffs' work, so it seemed only natural to make the transition. There was no moral or philosophical reasoning behind the switch, it was strictly a business decision. Plus, I loved it and I was good at it.

It must have felt like a big risk when you left Pierce Herns and William left Motley Rice. How were those first few years out on your own? Do you remember a particular moment when you guys felt like you had something?

Well, we started out with our business plan that would have us in the red for the first 16 months. We both went from very healthy incomes to no incomes. Luckily, we had a couple of things break our way in that first year which allowed us to pay off our credit line and put us in the black. The first really big moment for us—when we felt we had arrived—happened in 2014 when we travelled up to Maryland to try an electrocution case involving a 24-year-old quadriplegic. This was a case we never thought we would try because defense counsel had told us all along they would settle as soon as discovery was over. Well, about four months before trial, the insurance companies for our client's former employer and the at-fault power company got sideways over a coverage dispute, resulting in the original defense counsel being fired. As a result, new defense counsel parachuted in and the new insurer, who took over the defense, refused to offer anywhere near fair value. So, we went to trial. It became clear at an early stage in the trial defense counsel had made a mistake and they attempted to re-open settlement discussions multiple times. We just kept saying no. We knew there was a certain number we had to have to give our client the quality of medical care he needed to be able to live a normal life expectancy. It was a really stressful situation considering the tremendous amount of pressure on us and the money already on the table. We had been told this was the most conservative county in all of Maryland and our client, who was an undocumented immigrant, spoke no English, had no

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family in the US, and had very pressing healthcare needs. Ultimately, we ended up getting a great recovery for that guy, enough to take care of him at home with his own private team of medical providers for the rest of his life. That was the first big highlight for our firm and it allowed us to come back to Charleston with some serious momentum. And, once the word got out about our verdict, more and more lawyers started bringing their cases to us.

Part of your success is due to your ability to read a jury, but have you ever been completely surprised by a verdict?

I have certainly taken my losses, especially earlier in my career, but I cannot say I was particularly surprised by any of those. That does not necessarily mean I am not still scarred from some of them. More recently, we took a big loss in a tire failure case a couple years ago in Dorchester County. We were not expecting that one because we thought we had a good case but, I guess, the guys on the other side had a better case. It was tough.

Of course, we have also had some we have been pleasantly surprised, the most recent example being the size of the Amazon verdict. Again, that was another case we did not necessarily think we would try, and probably one that should not have been tried.

Tell me more about the Amazon verdict. Are there lessons to be learned?

Absolutely. For years Amazon has developed a network of individually owned delivery service partners (DSPs) who Amazon characterizes as "independent contractors" through contractual provisions in order to shield itself from liability. The DSPs hire the delivery drivers and lease the vans from Amazon to deliver the packages. The vans are insured by the DSP for only $1 million. Of course, it would be one thing if Amazon had been taking a no-pay position on cases involving these delivery drivers based on the agency issue; however, that has not been the case. As we monitored other serious cases involving Amazon delivery drivers around the county, we heard about Amazon continuously settling on the eve of trial for what we understood was fair value, despite the agency issue. We thought there was no way they are going to let us try this case. I had the agency issue nailed, they had already admitted liability for the wreck, and I was black boarding $11 million in economic damages. On Friday evening before the trial, Amazon refused to offer anything near our valuation. They made an offer of judgment for $1.25 million and never offered any more. Like in Maryland, attorneys parachuted in at the last minute to try the case. Funny enough, it was the same defense firm, not from around here, who had similarly parachuted into our Maryland case. They stood firm on Amazon's valuation based on their position on the agency issue. They also took the position our client was faking his injuries. So, we went to trial. This Amazon case was the first time in my career I did not ask the jury to award a specific amount for non-economic damages or suggest a number for punitives. I did not give any examples or do any of the story telling I typically do to allow the jury to get comfortable with giving a big award. To be honest, I was scared of this jury. As I mentioned earlier, we had taken a defense verdict two years earlier in a products liability case involving a paraplegic with a $10 million life care plan in the very

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same courtroom. During the opening stages of the Amazon trial, all we heard from bailiffs, support staff, and everyone else was Dorchester County juries do not give any money. But we felt strongly about both the agency issue and the severity of our client's injuries. And, crucially, we saw the way the defense was acting. We knew they could not help themselves but to go up there and deny Amazon maintained any control over their drivers and call the whole thing a money grab. They had a bunch of Facebook posts by our client's girlfriend and video surveillance of our client—not doing anything he claimed he could not do—they intended to use to suggest the plaintiff was living a normal life and had not been injured to the extent he claimed. So, instead of asking for big numbers and doing the very things the defense told the jury we would do, we allowed the defense to lose credibility on their own by taking unreasonable positions not supported by the evidence. And, by the end, we were the ones with all the credibility.

What was the biggest revelation in the case?

I remember coming out of the Defendant driver's and DSP owner's depositions and saying to my team: we have a *real* problem. Both of the witnesses were likable and nice, and it really worried me. The case took a turn when Alex Heaton in my office came across "distracted driver data" maintained by Amazon for each of its drivers. Not surprisingly, as a tech giant, Amazon is a hyper-vigilant employer that keeps exhaustive records of data collected from its drivers through an app each driver has on their personal phones. The defendant driver had *ninety* distracted driving incidents in his five months of employment at Amazon, all of which were meticulously documented in his driver app. The defense countered this by highlighting the defendant driver had no incidents of distracted driving on the day of the accident; however, this fell flat because the defendant driver had already admitted to occasionally turning the app off when he drove. This prompted us to dig further into his cellular data usage records which revealed he was utilizing an enormous amount of data while on his route during the days leading up to the crash. About a month before trial, we got a court order allowing us to image his phone, which he had previously claimed he no longer had. We imaged the new phone and were able to extract data that had transferred from his previous phone which revealed he was watching YouTube videos and downloading pornographic material while driving, around the time of the crash. This revelation led to us transitioning from our original theme, "Amazon drivers are being assigned to deliver too many packages in too little time," to the distracted driver theme which really took on a life of its own.

You keep talking about credibility. How important is credibility when you are trying a case?

Credibility is so crucial. I have seen so many attorneys get so embedded in a position they think is a winner they end up losing credibility with the jury. I am a firm believer in having an adaptive trial strategy and being able to concede a point when the evidence is unfavorable to your position. Because in the end, your credibility in the eyes of the jury is everything. I have no doubt, had the lawyers for Amazon admitted agency and just focused on defending the damages, it would have been a much different verdict. We had the opportunity to speak with the jury after the

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trial and they told us they really liked the DSP owner and were furious Amazon attempted to shift the blame to him and the driver, when Amazon organized the entire scheme and was making all the money. These lawyers actually referred to the defendant driver as an "ant on the leg of an elephant!" I kid you not.

I am kind of switching gears here. What are some mediation strategies defense attorneys utilize you find to be especially effective?

From the defense perspective, one of the most effective things you guys can do, but seem reluctant to do, is setting an expiration for your last best offer. If you are able to take the position of "hey, our offer is set to expire at the end of the day and will not be re-introduced afterward" you might find a lot of the plaintiffs are willing to accept the offer. Defense attorneys have to remember, most of the time, the plaintiff's attorney (at least a good one) has a much higher appetite for risk than the individual plaintiff. When a position like that is taken, it prompts a serious conversation between counsel and client, which can put a lot of pressure on counsel. It is hard for us to promise a client we can beat a reasonable, best final offer at meditation, so when a threat like that can be credibly made, often times, the client will not want to take the risk. Additionally, it gives the plaintiff's counsel an opportunity to manage expectations and prompt an acceptance if, of course, it is the right offer. In a nutshell: **be bolder**.

What about ineffective strategies?

I cannot stand when defense counsel or their clients respond to an offer with "I (or they) do not know how to respond to that." It makes no sense. The only way to respond to a demand is by making a counter-offer. Of course, the counter-offer does not have to be in line with the demand, but saying "I (or they) do not know how to respond to that" is not a strategy. Respond to it by offering money or a valid reason not to.

Is there something you would like to discuss with the defense bar at large that frustrates you or others in the plaintiff's bar?

Yes, actually. Something we constantly talk about over here is this notion, often adhered to by the older generation of defense lawyers, wrongful death cases (without economic damages) are only worth a million dollars. For many years it was standard thought a wrongful death of a child or mother was worth a million dollars. That has been proven wrong time and time again. It really comes down to the different valuations defense lawyers and plaintiff place on non-economic damages. One of the things we have done a really good job of is telling a story in ways to get a jury to value non-economic damages, like their grief and sorrow, and not underestimate the great weight of the loss of a loved one. Of course, it is our job to explain the breakdown of the damages: how some money goes to cover medical bills, some money goes to lost wages that are meant to cover the light bill, the mortgage, groceries, the kid's college tuition, or whatever it is. But, after showing where the money goes, we always like to pose the question: what is left? How much is left to compensate the survivor for the pain they experienced losing a loved one? Our goal is to empower a jury to make a plaintiff as close to whole

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as possible. It is challenging to use emotional persuasion to convince an insurance company, which is making data driven decisions, to value a case a certain way. As my friend Jamie Hood says, "we need more data points, we need to reset values by trying more cases." I could not agree with him more.

You have had some great success to this point in your career and you are by no means close to being done, but have you ever thought about your legacy and how you would like to be remembered?

I love what I do and the people I do it with. I love coming to work every day. I love a bare-knuckled bloody fight with a defense lawyer only to become good friends with him or her by the end of the case. But I am also not someone who views their legal work as the most important thing in their life. I work to live, I do not live to work. I love mentoring young lawyers and being of service to others in my profession and community. I would never have gotten to where I am from a spiritual or professional perspective without a ton of help from others. And there were times early in my life when not a lot of people thought I was worth helping. Fortunately, through my own experience, I have been mentoring and counseling people (lawyers and non-lawyers) suffering from alcoholism and addiction who are seeking recovery for the past thirty years. My door is always open to help anyone who is struggling with substance abuse, grief, depression or mental wellness issues, and I get a lot of callers. So I suppose part of my legacy will be to have been of service to others in that regard. What is most important to me is my family. I have an awesome wife and four great kids. To me, success is measured by being able to take time to spend with them. I would love to one day practice law with one of my kids so I can spend time with them into their adulthood. I guess the embodiment of my legacy are my children and I think it would be pretty cool if they wanted to become a lawyer like their dad one day.

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