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### News Story

## **\$21M Verdict Upheld Despite Juror 'Sympathy' For Plaintiffs Woman Said She Would 'Fairly' Assess Case**

By Paul D. Boynton

Even though a jury forewoman in a wrongful death case said during voir dire that she had sympathy for the plaintiffs and would find it difficult to set aside her emotions, this was not grounds for reversal of a \$21 million verdict, the Missouri Court of Appeals' Eastern District has ruled.

This was because the woman also said "I think I would be fair" in deciding the case.

"The critical question in reviewing the exercise of discretion is whether the challenged venire persons indicated unequivocally their ability to evaluate the evidence fairly and impartially," wrote Judge Paul J. Simon for the court.

In addition, Simon ruled, the verdict was not excessive.

The case is *Lopez, et al. v. Three Rivers Electric Cooperative, Inc.*, MLW No. 40232, issued on Oct. 22.

### **Fairly Clear**

"The trial judge was there and heard the inflection in her voice," said Grant L. Davis of Kansas City, counsel for the Lopez family.

"The appeals court deferred to the trial judge under the abuse of discretion standard. She was as nice and straightforward as you're going to get, totally believable."

Morry S. Cole of St. Louis, the attorney for the Jones family, said the decision "points out that lay people don't necessarily speak in absolutes. They speak like regular people. The record in this case reflects that the venire person could be fair, and there was no indication otherwise of any bias."

In addition, Cole said, "There's not as much gray area in this area of law as some might think. When a juror states repeatedly in the face of persistent questioning that he or she thinks they can be fair, we have to understand the juror is under oath and we have to trust and believe them."

As to the defense request that the verdict be reduced, Davis said, "This court has reaffirmed the belief that human life has a great value. Missouri courts have always held that juries have a wide discretion in deciding on wrongful death verdicts."

He noted that in addition to the verdict, prejudgment interest in the case currently totals \$9 million.

James J. Virtel of St. Louis, lead defense counsel, was unavailable for comment prior to deadline, as was the lead defense appellate attorney, Thomas C. Walsh of St. Louis.

### **Deadly Accident**

The helicopter crashed on July 31, 1994, when Army reservist pilot Kenny Jones and reservist flight engineer George Lopez during a training mission struck power lines owned by the defendant, Three Rivers Electric Cooperative, Inc. The two men died in the crash

The wires — suspended about 100 feet above and horizontally across a 939-foot span of the Osage River in the Ozarks — did not have orange ball markers to warn pilots. Trees and other vegetation obstructed the view of the wire supports. The wires, 3/8 inch in diameter, had oxidized and turned a greenish-brown, making them blend with the surrounding landscape.

The Federal Aviation Administration did not consider the lines an obstruction to air navigation because they were less than 500 feet above ground level and were not close to a public airport.

But the defendant knew military and civilian aircraft flew at low altitudes over the Osage River, and it was also aware of a 1975 accident where a plane struck the power lines in the same location.

The families of Jones and Lopez sued the defendant in St. Louis City Circuit Court for wrongful death.

At the time of their deaths, Jones, 36, was survived by his wife and two minor daughters, and Lopez, 30, was survived by his wife and minor son. Jones was a fireman and farmer, and Lopez was a helicopter mechanic.

At trial, the defendant argued that the power lines did not require any warning markings, and Jones and Lopez negligently operated the aircraft below the minimum altitude under military regulations.

A St. Louis City jury rendered a \$5.25 million verdict that was reversed on the defendant's appeal by the Missouri Supreme Court, which held that the jury instructions improperly stated that the electric company owed the highest degree of care, rather than ordinary care.

After the second trial, another jury on June 5, 2001 awarded \$11 million to the family of Jones and \$10 million to the Lopez family. Three Rivers appealed, arguing first that the forewoman was biased.

During voir dire, the eventual forewoman indicated that she had been exposed to the loss of a child and was sensitive "to the emotional side" of the case because of "the impact on the family, the tragedy that surrounds that family, how it alters their lives is real close to me."

She also said she could see "how devastating [it] would be" for the "head of the family [to be] taken away."

Judge Simon said that the standard of review on appeal is that a trial judge's ruling on a challenge to a juror will not be overturned unless it is a "clear abuse of discretion" and there is "a real probability of injury to the [appellant]."

Simon said, "The critical question in reviewing the exercise of discretion is whether the challenged venire persons indicated un-equivocally their ability to evaluate the evidence fairly and impartially."

When a venire individual states unequivocally that he or she will be impartial, the possibility of bias is not enough to disqualify that person from the jury, he said.

The statement "I think I would be fair" made by the forewoman was not a hedge or expression of doubt, according to Simon.

### **No Opinion Allowed**

Simon also upheld the plaintiff's objection to introducing into evidence an opinion in an accident report as to how the helicopter was being operated when it collided with the power lines.

The Army prepared an accident report containing factual findings as well as conclusions on causation, specifically, that the aircrew operated the helicopter in a careless and reckless manner endangering life and property.

Simon noted that the report was designed to obtain and preserve evidence, and a federal statute, 10 U.S.C. Sect. 2254, bars from evidence in a civil suit any opinion of the accident investigators as to the cause of, or factors contributing to, the accident.

The statute requires fact investigations involving a military accident for use in litigation, claims, disciplinary action, or adverse administrative actions.

The report in question was not a safety report, and, accordingly, the statute applied, Simon held.

The trial judge allowed into evidence all portions of the report except the opinions expressed in it.

Simon agreed with the plaintiffs that the defendant was not prejudiced by the exclusion of the opinion portion of the report.

The defendant countered that the report was not an accident report covered by the federal statute, and that it was admissible under of the Missouri rules of evidence as an exception to hearsay for official records of the government.

But Simon held that the federal statute preempted admission of the opinion evidence.

### **No New Trial**

The court also rejected the defendant's argument for a new trial.

The defendant claimed no probative facts supported the jury's finding that it was 100 percent at fault for the accident, since undisputed evidence showed the decedents acted carelessly and recklessly in flying the helicopter at an altitude of less than 100 feet down an unfamiliar river in violation of army regulations.

Simon noted that the evidence demonstrated that the defendant maintained power lines across the Osage River without orange marker balls to warn pilots, and that it knew of this unsafe condition. The evidence also showed that the defendant's failure to adequately warn of the wires caused the two deaths at issue.

The judge found that evidence on the comparative fault of the decedents went both ways, including that they were not at the controls when the helicopter crashed.

Furthermore, evidence was introduced that the crew's mission brief authorized it to fly low and fast along the river.

Accordingly, sufficient evidence existed for the jury to conclude the decedents were not comparatively negligent, Simon found.

The court also denied the defendant's effort to reduce the amount of the verdict.

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