

MISSOURI LAWYERS WEEKLY

Helicopter Crash Case Gets \$21M Verdict On Second Try

Award In First St. Louis City Trial Was \$5.25 M



Morry S. Cole



Grant Davis

BY GERI L. DREILING

A St. Louis City jury awarded \$21 million on June 5 to the families of two U.S. Army reservists who were killed when their helicopter hit unmarked power lines in the Ozarks.

The families claimed that Three Rivers Electric Cooperative was responsible for the deaths because the electrical lines and their supporting structures were almost invisible and Three Rivers knew low-level aircraft flew in the area.

The verdict was actually the second one in the case. The first time it was tried in 1998, a jury returned a \$5.25 million verdict. The Missouri Supreme Court reversed, finding that the jury instructions improperly stated that the electric company owed the highest degree of care, rather than ordinary care.

"We're happy this utility corporation has once again been held accountable for its negligent actions," said Grant Davis, the attorney for the Lopez family.

Training Mission

Kenny Jones and George Lopez served in the U.S. Army Reserves. Jones was a helicopter pilot and Lopez was a flight engineer. On July 31, 1994, the two men were on a training mission in a Chinook helicopter with two other crew members. The helicopter was flying about 100 feet above the Osage River when it struck power lines owned by Three Rivers Electric Cooperative. The helicopter crashed and all four on board were killed. Although the lines were energized and carried 7,200 volts of electricity, it was undis-

puted that the electrical voltage did not cause the crash or the deaths.

The power lines were suspended at an angle across a 939-foot span in the river. They were supported by two "H" structures, but trees and vegetation concealed the supports. The lines did not have marker balls on them.

At the time of the accident, Jones was a 36-year-old fireman at Richards Gebauer Airport and a farmer. He was survived by his wife Penny, and two daughters Mandy, 12, and Katie, 8. He was also survived by his parents, Ola and Stanley Jones.

Lopez was a 30-year-old helicopter mechanic at the time of the accident. He was survived by his wife Elizabeth, his son Mikey, who was 5 at the time of the crash, and his parents, Betty and George Lopez.

The Lopez and Jones families originally hired Kansas City attorney Grant Davis to represent them in their case against Three Rivers Electric, which is headquartered in Linn, Mo. However, Davis said that he was worried that if the defense claimed the accident was due to pilot error, there would be a conflict of interest between the Lopez and Jones families, so he referred the case to the St. Louis firm of Gray & Ritter. During the first trial, Joan Tanner represented the Jones family. In the second trial, St. Louis attorney Morry Cole represented the Jones family.

The lawsuit initially named both Three Rivers Electric and the Boeing Company as defendants. Davis said he sued Boeing, the helicopter manufacturer, because it did not have a wire-strike protection kit.

"Boeing produced information to prove they had presented the option of a wire-strike protection kit to the military, but they declined to have it put on," Davis said, so he dismissed them from the suit.

When the case was first tried in May 1998, the jury returned a \$6 million verdict. However, it assessed 10 percent of the fault to Lopez and 20 percent to Jones, which brought the net recovery to \$5.25 million.

Three Rivers appealed the verdict. On Aug. 29, 2000, the Supreme Court reversed the verdict, finding that the accident "did not involve the inherently dangerous properties of electricity" and therefore the jury instruction holding the electric company to the highest degree of care was erroneous. Instead, the majority ruled, the jury instruction should have only required "ordinary care."

The second trial, starting on May 21, lasted 11 days.

Davis and Cole said it was critical in both trials to prove to the jury that Three Rivers violated the industry standard of care when it failed to put marker balls on the wires.

"The industry standards state that if you have lines that are hard to see and low-level aircraft activity in the area, then they should be marked," Cole said.

On the question of visibility, Davis and Cole pointed out that the lines were only 3/8 inch in diameter.

"As a comparison, there are some lines that run across the Mississippi that are 4 inches in diameter," Cole said.

Another factor affecting visibility was the way the lines were arranged in a horizontal manner on the same plane. And they had oxidized to a greenish-brown color, which blended in with the green trees and the water.

Davis said, "One of our witnesses testified that if you were trying to camouflage the wires, you couldn't do a better job."

The industry guidelines ask a series of 13 questions concerning visibility, including: "Does the diameter of the wires facilitate recognition? Have the wires...oxidized or corroded to where they blend in with the background? Can supporting structures be detected from both directions at a distance of one mile?"

And the plaintiffs were able to find evidence of a previous crash and other near misses.

Davis said that as part of the initial investigation, he went down to the area around the crash site and talked to several people who owned cabins and looked through old newspaper stories from the area.

"We had a couple of eyewitnesses who not only saw the helicopter crash, but also saw a fixed-wing plane strike the power lines in the same location," Davis said, noting that three people were killed in the accident.

And the witnesses told him they had seen several near misses.

Cole and Davis also called Melvin Kitchen as a fact witness to testify about the low-level aircraft traffic in the area.

"Kitchen was one of the most impressive witnesses at trial," said Cole. "He is the former chief pilot for the state of Missouri and routinely flies the governor around the state."

In addition to flying for the state, Kitchen also operates a sea plane business on the Osage River. He offers flying lessons and routinely takes passengers on tours of the area. He also testified that he advertised his services on the radio and on fliers at supermarkets in the area where the helicopter crashed.

Low-Level Flying

Davis said he was able to establish at trial that the Osage River is a low-level military training area known as the Osage Route.

On the issue of low-level aircraft activity, the industry guidelines ask: "Has the structure or span been previously impacted by an aircraft other than an aircraft in distress? Does the transmission line span a route or area designated for military low-level flight training? Do airplanes or helicopters frequent the area for unique reasons? Have pilots previously complained of 'near misses' or 'close encounters' with the wires and/or supporting structures?"

The answers to the guideline

questions then allow electric companies to weigh the risk of a wire strike. If the risk level is high, the action required it to "mark line and/or structure."

Davis and Cole argued to the jury that the risk was extremely high, and therefore they should have marked the lines. They noted that a line further down the River had been marked in the late 1970s or early 1980s and that Three Rivers Electric marked the line 22 days after the accident in 1994.

"Three Rivers not only marked this line 22 days after the accident, but they used marker balls that cost \$204 apiece and had been stored in their warehouse for three years," Cole said.

Davis also noted that the defense waived the subsequent remedial measure rule in the trial. The reason why they might have waived it, he said, was that "in the first trial, the jury never learned of the subsequent remedial measure. One thing the jury said after the verdict was that they felt like they had to give a big award" as a way to make sure that Three Rivers marked the lines.

According to Davis and Cole, the defense argued that Jones and Lopez were 100 percent at fault for the accident because they were not authorized by the military to be flying that low on the mission because the military's standard operating procedure does not authorize flights below 500 feet.

However, Davis said they were able to show it was a rule "that was eaten up by the exception."

In fact, Davis said they introduced evidence showing that during the last 11 authorized military flights of the air crew from their base, eight were below 500 feet.

He said defense testimony on the issue was not believable. For example, he said Jim Sineath, who verbally briefed the reservists about the mission, testified for the defense and told the jury that Lopez and Jones were not authorized to go below 500 feet.

"His deposition testimony, testimony at the first trial and testimony at the second trial had so many striking inconsistencies, it was not credible," Davis said.

After deliberating for 4 1/2 hours, the jury returned a verdict awarding the Jones family \$10 million and the Lopez family \$11 million. They also found Three Rivers completely at fault for the accident.

When asked about the million dollar difference between the verdict, Davis said it is "probably due to the fact that Jones was six years older than Lopez."

David Madden, one of the Kansas City attorneys who represented Three Rivers Electric, said, "We are evaluating all the remedies available to us."

He also noted that there were cases brought by the families of the other two crew members who died in the crash *Nanninga v. Three Rivers Electric Cooperative* resulted in a defense verdict and *Blannon v. Three Rivers Electric Cooperative* was dismissed.