94-20756

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ROGER K. PARSONS, Individually and as Administrator of the Estate of Esther Ann Parsons, deceased,

Plaintiff-Appellant/Cross-Appellee

v.

E.I. DU PONT DE NEMOURS AND COMPANY,

Defendant-Appellee/Cross-Appellant

On Appeal from the United States District Court for the Southern District of Texas, Houston Division

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PETITION FOR PANEL REHEARING

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PETITION FOR PANEL REHEARING

Roger Parsons petitions this Court for panel rehearing on the issue of whether the district

court erred in overruling the jury's verdict that E.I. du Pont de Nemours and Company ("DuPont") was grossly negligent in causing the death of Parsons' wife, Ann Kartsotis Parsons.[1]

Adopting the approach urged by DuPont, this Court's opinion dissects the evidence, and looking at each piece in isolation, finds it insufficient to establish gross negligence--especially as to the second prong of *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994) which requires evidence of DuPont's knowledge of the extreme risk to the safety of those on the plane and of DuPont's conscious indifference to it. The Court's opinion, however, overlooks several important facts that support the jury's verdict. Moreover, the law requires this Court to view the evidence in the light most favorable to the verdict and to indulge all inferences in support of the jury's verdict. A jury award of punitive damages is proper if the evidence, viewed in its most favorable light, supports the inference that the defendant had subjective awareness of the extreme degree of risk created by its conduct and that it proceeded with conscious indifference to that risk. *Moriel*, 879 S.W.2d at 21-22. The difference between negligence and gross negligence is merely one of degree. *RTC v. Acton*, 49 F.3d 1086, 1091 (5th Cir. 1995).

Most importantly, gross negligence may arise from a combination of factors. "The existence of gross negligence need not rest upon a single act or omission, but may result from a combination of negligent acts or omissions, and many circumstances and elements may be considered in determining whether an act constitutes gross negligence." *Apache Corp. v. Moore*, 891 S.W.2d 671, 682 (Tex. Ct. App. 1994); *see also Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 922 (Tex. 1981) (gross negligence may result from a combination of negligent acts and omissions). Absent an unlikely, outright admission by DuPont that it knew of the risks but willfully ignored them, gross negligence must be proved, as it was here, by circumstantial evidence. The evidence in this case established a series of negligent acts and omissions which combined to show DuPont's conscious indifference to known risks and require reinstatement of the gross negligence verdict. As Petersen[2] admitted, this crash was caused by "a series of events, a chain of events, that started . . . far from the crash site." (R. XXI, 1382-83).

I. THE OPINION OVERLOOKS EVIDENCE OF DUPONT'S VIOLATIONS OF

FEDERAL AVIATION REGULATIONS THAT SUPPORTED THE JURY'S FINDING OF GROSS NEGLIGENCE.

The decision overlooks DuPont's subjective awareness of federal regulations which DuPont violated and which were factors evidencing its gross negligence in this crash. This Court has long held that Federal Aviation Regulations ["FAR's"] have the force and effect of law. *United States v. Schultetus*, 277 F.2d 322, 327 (5th Cir.), *cert. denied*, 364 U.S. 828, 81 S. Ct. 67, 5 L. Ed. 2d 56 (1960); *see Associated Aviation Underwriters v. United States*, 462 F. Supp. 674, 680 (N.D. Tex. 1978). These regulations establish the minimum safety standards, and all pilots and operators are charged with full knowledge of them. *See Thibodeaux v. United States*, 14 Av. Cas. (CCH) ¶ 17,653 (E.D. Tex. 1976) (prudent airmen strive to exceed these minimum standards); *First of America Bank-Central v. United States*, 639 F. Supp. 446, 453 (W.D. Mich. 1986). Indeed, FAR's constitute notice to the public--regardless of actual notice. *Associated Aviation Underwriters*, 462 F. Supp. at 680. Thus, the regulations alone put Petersen and DuPont on actual notice of certain minimum safety requirements, which the evidence also establishes, DuPont chose to ignore.

Federal Aviation Regulation 91.503(d) put DuPont on actual notice of the safety imperative for providing all pertinent aeronautical charts to the pilots (R. XXIV, 806-07); 14 C.F.R. §91.503(d) ("The equipment, charts, and data prescribed in this section shall be used by the pilot in command and other members of the flight crew, when pertinent."). The logical reason for this regulation is to protect persons in aircraft in unfamiliar territory from unexpected terrain hazards. Plaintiffs' expert explained that a visual chart revealing the mountainous terrain around the Kota Kinabalu airport was necessary for a safe flight and was a pertinent aeronautical chart required by Section 91.503 (R. XXIV, 806-07). This evidence was sufficient to create an issue for the jury on DuPont's failure to provide the pilots the minimum requisite charts for safe flight over foreign terrain. Indeed, McNown did not even review with Fox before the flight the basic terrain charts the parties used at trial (R. XXIII, 1611-12). From this regulation and DuPont's decision to ignore it, the jury had evidence of DuPont's actual knowledge of the risk

that the regulation was enacted to avoid, and the jury could reasonably infer DuPont's conscious indifference to that risk.

Second, Title 14 C.F.R. §91.103 put DuPont on actual notice of the safety requirement that: "Each pilot in command shall, before beginning a flight, become familiar with all available information concerning that flight." DuPont ignored this regulation. DuPont Chief Pilot McNown's failure to brief Fox on the dangers McNown experienced at Kota Kinabalu violated this regulation, as did McNown's overall failure to brief Fox on the conditions to be expected in third-world countries or the differences between foreign and domestic flights. Most importantly, the pilots were not even briefed on the fact that the ILS at Kota Kinabalu was inoperable--a situation Petersen expressly admitted that the law required DuPont to know (R. XXI, 1408; XXIII, 1614, 1617-18, 1624; XXIV, 751, 793).[3] This evidence was an admission by Petersen of his subjective awareness of a minimum safety requirement, and from DuPont's cavalier attitude toward preparing its pilots for this trip, the jury could reasonably infer DuPont's conscious indifference to the risk.

Third, because DuPont failed to adequately train the pilots, the pilots violated Federal Aviation Regulation 91.503(b) by failing to conduct a descent checklist (R. XVII, 261-62; XVIII, 269-78; XIX, 497); 14 C.F.R. §91.503(b) (checklist "shall be used by the flight crew members when operating the airplane" . . . "(4) before landing."). Fourth, the deficiently trained pilots committed further violations by flying past the VOR navigational beacon, exceeding their last clearance limit, by flying the aircraft below a minimum safe altitude, and by flying at an excessive speed (R. XVII, 247; XVIII, 333, 368-71; XX, 652).

These Federal Aviation regulations establish as a matter of law the minimum care necessary to avoid the extreme degree of risk inherent in aviation. DuPont was not only charged with full knowledge of these regulations, but Petersen admitted knowing certain requirements (R. XXI, 1408, 1414). Thus, DuPont had the requisite subjective awareness of the risk. The FAA regulations establishing minimum safety requirements put DuPont on actual notice of the extreme risk, and from DuPont's lackadaisical attitude toward these regulations and its disregard

of several of them, the jury could reasonably infer DuPont's conscious indifference to the risk. At the least, DuPont's failure to comply with the regulations was a factor, which when combined with the many others before the jury, supported its finding of gross negligence.

II. PLAINTIFFS ARE NOT REQUIRED TO PRODUCE EXPERT TESTIMONY OF DEFENDANTS' SUBJECTIVE AWARENESS.

This Court should reconsider its opinion that Parsons did not introduce expert testimony of DuPont's *subjective* awareness. *Parsons v. DuPont*, No. 94-20756, Slip Op. at 7 (5th Cir. 1996) ("Frederick [Parsons' expert] opined that Du Pont negligently managed and negligently communicated with its pilots, but did not express an opinion on gross negligence, either expressly or by stating that Du Pont had subjective awareness of any extreme risk."). The opinion's suggestion that to prove gross negligence a plaintiff must produce expert testimony as to the defendant's *subjective state of mind* is wrong. Experts can only be certified on issues of "scientific, technical, or other specialized knowledge[.]" FED. R. EVID. 702. Had Parsons attempted to certify a witness as an expert on the subject of DuPont's knowledge or thoughts, or had Parsons attempted to illicit such testimony from witnesses *not* certifiable as experts on this topic, DuPont would have and should have objected.

Moreover, *Moriel*, 879 S.W.2d at 23, the controlling authority here, emphasized that gross negligence may be proven circumstantially: "We hereby reaffirm our holding that the defendant's subjective mental state can be proven by direct or circumstantial evidence." Expert testimony of an opposing party's thought process is not required to prove gross negligence. *See id*. Given the Texas Supreme Court's express reaffirmation that circumstantial evidence is sufficient to prove subjective awareness, Aviation Director Petersen's admissions of his pre-crash knowledge of "needed" changes created a jury issue. Indeed, given that Petersen is a Director of DuPont, his admissions of pre-crash knowledge of needed changes constituted dramatic, direct evidence of subjective awareness (R. XXI, 1261-63, 1364-65, 1392-94). The full extent of Petersen's awareness was an inference properly drawn by the jury in light of all of the circumstances.

III. PETERSEN'S DESTRUCTION OF EVIDENCE, ADMISSIONS OF SAFETY DEFICIENCIES, AND LACK OF CREDIBILITY SUPPORT THE JURY'S FINDINGS OF DUPONT'S SUBJECTIVE AWARENESS AND CONSCIOUS INDIFFERENCE.

A. Evaluating Petersen's Credibility, a Reasonable Jury Could Infer DuPont's Knowledge Far Exceeded What Petersen Could Admit.

It was within the province of the jury to weigh the evidence and make the credibility choices, and its verdict reflects that it did so, especially as to Petersen. The cold record cannot reveal the witnesses' intonation, attitudes, gestures and demeanor which are critical to assessing credibility and the reason the law affords great deference to the jury's evaluation of the weight of the evidence and the credibility of the witnesses. The jurors, who saw Petersen testify and were the only ones entitled to judge his credibility, could reasonably have inferred from his demeanor, manner of speaking, and attitude, that he knew far more about the extreme degree of risk than he could admit publicly and still carry out his duty to protect DuPont's reputation, assets and corporate interests.

Petersen himself was a highly skilled aviator. He had personal knowledge of the FAA regulations and had identified and begun implementing needed changes in the aviation department. The opinion finds that Petersen never testified that the changes he identified were necessary to avoid a safety risk. (Slip Op. at 6). However, Petersen's subjective awareness of "needed" changes in pilot training and standards is evidenced *directly* by Petersen's own testimony. *See* (R. XXI, 1395-1400 (Petersen's admission to "needed" changes identified by him before the accident)). The logical conclusion that Petersen knew of a serious safety risk was within the jury's province. The opinion also overlooks the critical fact that Petersen's written evaluation of the crash documents his opinion that the pilots "lack[ed] situational awareness . . . in a non-radar environment" and that this was a cause of the crash (P Ex. 41-C). Thus, before the crash, Petersen knew the pilots needed situational awareness training (R. XXI, 1397), and after the crash, Petersen admitted that the pilots' lack of situational awareness was a cause (P Ex. 41-C). Based on this direct evidence of what Petersen knew before and after the crash, a reasonable

jury could infer that Petersen had the requisite subjective awareness, before the crash, that the training deficiency posed a serious safety risk.

Indeed, Petersen made several admissions that any reasonable jury could logically infer represented only the tip of the proverbial iceberg of his knowledge of the extreme risk faced by this inadequately trained crew and ill-equipped plane when they flew to third-world countries. First, as discussed, he identified the need for training in situational awareness as a problem before the crash, and he admitted that the lack of situational awareness was a cause of the crash in the lawyer-approved report of his "investigation" which he had prepared for DuPont (R. XXI, 1401-3, 1407). Second, he knew before the crash that Johnston was a problem co-pilot, and the cockpit voice recording makes plain that Johnston was confused and unhelpful for at least 30 minutes before the crash (R. XVII, 262-63; XVIII, 265-78; XXIV, 752, 756-57, 764-65; XIX, 497; XXI, 1398; RE 11). Third, he also admitted specific knowledge of some of the FAA regulations which DuPont violated (R. XXI, 1408-09, 1414). That Petersen, the corporate representative, would admit even this much could compel a reasonable jury to find gross negligence.

B. A Reasonable Jury Could Infer from Petersen's Destruction of Evidence that DuPont had the Requisite Subjective Awareness and Demonstrated Conscious Indifference.

The depth and breadth of Petersen's subjective awareness and admissions of deficiencies were revealed and magnified by DuPont's attitude toward the crash and the investigation. "Under Texas law, the 'mental attitude of the defendant' differentiates gross negligence from ordinary negligence and 'justifies the penal nature of the imposition of exemplary damages.'" *Clements v. Steele*, 786 F.2d 673, 676 (5th Cir.), *clarified, reh'g denied*, 792 F.2d 515 (1986), quoting *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 922 (Tex. 1981). Only the jury could evaluate DuPont's attitude and weigh the fact that Petersen, DuPont's corporate representative responsible for dispatching this plane and for investigating its loss, destroyed evidence of the crash. Petersen was not only a skilled aviator; he was the chief accident investigator for DuPont (R. XXI, 1364, 1375-1379). DuPont immediately dispatched him to investigate this crash, and,

as an experienced accident investigator, Petersen undoubtedly knew the importance of preserving evidence.

Petersen made a video of the crash site as he first flew over it in a helicopter--before the area of the initial impact was destroyed by explosions Petersen himself recommended to clear a landing site for helicopters (R. XXI, 1262, 1364-65, 1369-70, 1372-73). Petersen admitted in front of the jury that he showed this video to others at DuPont that he felt should see it before he accidentally destroyed it (R. XXI, 1392-94). This fact alone is sufficient evidence for the jury to infer that Petersen and DuPont knew far more than they would ever admit. Certainly, they would never acknowledge their full subjective awareness of the extreme degree of risk or accept their responsibility for it. From Petersen's demeanor, attitude, admitted actions and the available facts, a reasonable jury could infer that Petersen and DuPont were actually hiding the full extent of their knowledge of problems before and after the crash to limit their own liability. Indeed, there would be no need for a trial if Petersen or DuPont would admit the requisite subjective awareness and conscious indifference for the second prong of *Moriel*. Rather, these elements could only be inferred, but it was solely within the jury's province to draw the inferences, and there is substantial evidence which supports its findings.

IV. CHOOSING KOTA KINABALU AIRPORT WAS JUST ONE OF THE FACTORS COMBINING TO ESTABLISH GROSS NEGLIGENCE.

Contrary to the panel opinion, there was also evidence supporting the inference that the selection of the Kota Kinabalu airport was a factor showing conscious disregard of the known risk required by *Moriel*, and the danger was based on substantially more than the lack of radar at the facility. The choice of the Kota Kinabalu airport was just one of the many factors giving rise to the gross negligence finding, and it should not be viewed in isolation. First, DuPont's chief pilot McNown had actual knowledge of dangers inherent at Kota Kinabalu and testified that he himself had experienced a problem there. He did not even brief Fox on his experience, nor did they review the topography around that airport (R. XXIII, 1611-12, 1618-1619, 1623-1624). Second, there is a big difference between flying into familiar airports in the United States that are

not equipped with radar and flying into Kota Kinabalu. As this Court noted, flying into non-radar United States airports was common for these pilots. They had extensive experience in flying lesser aircraft in the United States.[4] They were familiar with certain non-radar United States airports and the terrain around them because they did fly into them frequently. However, the jury knew that the same could not be said with respect to Kota Kinabalu, where Fox had flown only once as a copilot and Johnston had never flown (R. XVIII, 389). These pilots did not have the requisite knowledge of the airport or the surrounding terrain, and DuPont knew that they did not. Indeed, even Petersen admitted "they didn't know the terrain." (R. XXI, 1382). McNown did not fully brief them on the hazards, the terrain, or the peculiarities of this international trip before they left Houston. The tragedy of this failure was compounded by DuPont's violations of FAA regulations by failing to supply them with all of the terrain charts needed for flight under these circumstances and by failing to brief them that Instrument Landing System at Kota Kinabalu was not operational (R. XXIV, 751; XXV, 967; XXIII, 1602; XXVI, 1197). These failures by DuPont, viewed in the totality of the circumstances, were sufficient for the jury to infer that DuPont had actual knowledge of the extreme risk posed by sending these pilots in this aircraft to this unfamiliar, foreign airport without the minimum charts and other information required by the FAA. Moreover, it was within the jury's sole province to pierce DuPont's willful blindness with its true verdict of gross negligence.

V. THE CHOICE OF EQUIPMENT WAS JUST ONE OF THE FACTORS COMBINING TO ESTABLISH GROSS NEGLIGENCE.

In part 3, the opinion reflects this Court's misunderstanding that "[t]he undisputed evidence was that Du Pont believed the system [GPWS] for this model was unreliable." (Slip Op. at 8). To the contrary, this issue was disputed, and there is evidence to support the jury's inference of gross negligence from all of DuPont's acts or omissions, including as factors either DuPont's failure to put GPWS on this plane or its poor choice to send this plane, rather than one of its several planes with GPWS, to Kota Kinabalu. Parsons' evidence established that GPWS was available, reliable and affordable, and that the reason DuPont did not equip the ill-fated G-II

with it was that it chose not to spend the money to do so (R. XVI, 18-19; XVIII, 400, 404, 406; XX, 681, 692-93; XXI, 1431-32; XXIV, 750; XXV, 1082, 1088; XVIII, 408; XX, 670-71).

However, it was not merely DuPont's failure to place GPWS on the G-II that showed its knowledge of the extreme risk and its conscious indifference to it. Rather, this was one of the factors that the jury was empowered to consider along with many others. What posed the extreme risk and showed DuPont's conscious indifference to it was the combination of factors which caused this crash. If DuPont believed that the GPWS model available for this aircraft was too unreliable to install on this plane, the jury could have reasonably inferred that DuPont was grossly negligent in allowing this non-GPWS-equipped plane to travel internationally, to unfamiliar non-radar airports, in the hands of pilots who were not trained to fly there, had no experience flying there, and who had neither been fully briefed nor even supplied the full set of charts required by the FAA for flight under these circumstances. Thus, the pieces in their entirety combine to create a picture of conscious disregard of known risks.

The fundamental flaw in the panel opinion is that it isolates each fact adverse to DuPont, and viewing each fact in isolation, finds it is insufficient to support the jury's finding of gross negligence. The opinion must be vacated and the jury's verdict reinstated because the longstanding jurisprudence of this Court authorizes only the jury to weigh the evidence and make the credibility choices, and it empowers the jury to look to all of the surrounding facts and circumstances in combination. *Apache Corp.*, 891 S.W.2d at 682. It is the entire record of facts, of a series of negligent acts and omissions, and of the attitude and credibility of its witnesses, which combine to establish DuPont's knowledge of the extreme risk posed by its overall approach to this trip and its conscious indifference to that risk as a whole. The very nature of the numerous, successive failures by DuPont in this case reflect, as the jury was instructed, far "more than a momentary thoughtlessness, inadvertence or error of judgment." (R. XXIII, 1709). Rather, the evidence established a series of acts and omissions, arising from a corporate culture of conscious indifference to the safety of the persons DuPont required to make this particular trip in its choice of equipment, which logically lead to this needless tragedy. These acts and

omissions, combined with DuPont's failure to conduct a thorough investigation or even to preserve (except for its own use) what little evidence Petersen gathered, provided more than sufficient evidence from which the jury could reasonably infer the high degree of awareness and conscious indifference that rose to the level of gross negligence.

This Court has held: "'Even though we might have reached a different conclusion if we had been the trier of fact, we are not free to reweigh the evidence or to re-evaluate credibility of witnesses. We must not substitute for the jury's reasonable factual inferences other inferences that we may regard as more reasonable.'" *Hiltgen v. Sumrall*, 47 F.3d 695, 700 (5th Cir. 1995) (quoting *Rideau v. Parkem Indus. Services, Inc.*, 917 F.2d 892, 897 (5th Cir. 1990)). The panel opinion must be vacated. It was the jury's job to sift through the evidence, draw the inferences and make the credibility choices. It did so, and its verdict of gross negligence should be reinstated.

CONCLUSION

The jury was empowered to judge the credibility of the witnesses and weigh the evidence before it. Numerous factors in a series of acts and omissions by DuPont combined to rise to the level of gross negligence, evidencing DuPont's subjective awareness of and conscious indifference to extreme risks. The jury's verdict that DuPont was grossly negligent is supported by ample evidence and should be reinstated, and the case remanded for trial on the quantum of punitive damages.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of Parsons' Petition for Panel Rehearing were served on Martin E. Rose, Gardere & Wynne, L.L.P., 3000 Thanksgiving Tower, 1601 Elm Street, Dallas, Texas 75201-4761; Windle Turley, The Law Offices of Windle Turley, P.C., 1000 University Tower, 6440 North Central Expressway, Dallas, Texas 75206; and David R. Weiner, 3102 Oaklawn, Suite 600, Dallas, Texas 75219 by First Class United States Mail this 25th day of June, 1996.

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SIDNEY POWELL

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[1] This petition for panel rehearing does not challenge the judgment on behalf of Mr. and Mrs. Kartsotis, and mandate should issue in affirmance of their judgment. We ask, however, that the opinion clarify the disposition of the appeal as it affected them. The opinion notes: "Although the husband and parents appealed the judgment on gross negligence, the parents' appeal was dismissed." Trial counsel did file a notice of appeal on behalf of Roger Parsons and Mr. and Mrs. Kartsotis, but Texas law precluded parents from obtaining exemplary damages in these circumstances. TEX. CONST. ART. XVI §26 (1995). Accordingly, the Kartsotises could not appeal the judgment as a matter of law on gross negligence. Mr. and Mrs. Kartsotis were involved in this appeal only as appellees and solely because DuPont's cross-appeal challenged the jury's compensatory award to them for the loss of their daughter's companionship.

[2] The opinion should be revised to correct the spelling of Petersen's name.

[3] McNown admitted spending less than one hour with Fox for the briefing on the entire trip

which was to include 12 to 15 stops around the world (R. XXIII, 1607, 1614).

[4] Johnston had experience with a propeller-driven King Air (R. XXIII, 1603). Fox had only 107 hours in command of a G-II (R. XXIII, 1609).