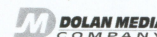


MASSACHUSETTS LAWYERS WEEKLY

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Trial Reports

Negligence

Wrongful Death - Fire - Service Of Oil Burner

Injuries alleged:

Death by fire and additional claims for burns and other personal injuries suffered by the survivors

Name of case:

Nickerson et al. v. Lombardi Oil Co. & Lombardi Heating Service Co. Inc.

Court/case #:

Essex Superior Court, No. 92-1490, 93-0596

Name of judge:

Isaac Borenstein

Demand:

\$1 million

Highest offer:

\$150,000

Amount of award or settlement: Defendants' verdict

Most helpful experts:

Richard J. Splaine & Edward Petrow

Attorney for defendants:

Michael A. Fitzhugh, Catherine Bardascino, paralegal,
Fitzhugh & Associates, Boston

Attorney for plaintiffs:

Withheld

Insurance carrier:

Royal Insurance Co.

Other useful information:

The above cases were actions for wrongful death and personal injuries, and consolidated for a jury trial that lasted two and one half weeks. The case arose out of a residential fire that the plaintiffs contended was caused by the defendants' failure to properly service and repair an oil burner. The minor plaintiffs sought recovery for their own injuries, as well as the emotional distress they suffered when they witnessed their mother perish in the fire of the single-family dwelling that they inhabited. Additional claims were brought by two additional adult plaintiffs who claimed personal injuries from the fire. Two months prior to trial, the owner of the dwelling (who had been a defendant) settled for the full insurance policy limits.

The plaintiffs' theory was that the oil burner had leaked and somehow ignited, leading to a basement fire that rapidly progressed through the dwelling. That theory of the fire's cause and origin was supported by expert testimony of an independent investigator, and

the investigator of a state police officer assigned to the Office of the Fire Marshall of the Commonwealth.

Conversely, the defendants contended that the fire had started on two upper floors of the house, and those two experts had conducted a faulty investigation, failing to interview eyewitnesses (including firefighters arriving on the scene in the early moments of the blaze) and failing to preserve crucial evidence. The house was razed shortly after the fire, and the defendants had only the subject oil burner as real evidence to work with, along with photographs of the scene. The defendants sought to demonstrate that a wood stove that was improperly vented into the chimney flue shared by the oil burner was the most likely cause of the fire, and thus the landlord who had previously settled was the only party legally responsible for the injuries and death.

At trial, the plaintiffs sought to undermine the ability of the defendants' experts to develop and prove a hypothesis of the fire's cause and origin by using merely photographic evidence. The defendants countered by calling as witnesses the firefighters who first arrived on the scene. The firefighters testified unequivocally that when they first arrived, there was no fire in the dwelling's basement, and the fire was confined to the upper floors. They were shown photographs of the fire's progress on the stand, and asked to sequence them; they sequenced them in an order that was consistent with their testimony.

In addition, the defendants' experts were utilized to establish two elements that vitiated the plaintiffs' case. First, Edward Petrow, an engineer with a specialty in combustion used an exemplar burner similar to the subject oil burner. His testimony focused upon how oil burners actually operate and the physical properties of number 2 home heating oil which make ignition and sustained combustion an event that can only occur under controlled circumstances. Mr. Petrow's testimony successfully challenged and undermined the scientific basis of the plaintiffs' contentions regarding combustion of the fuel and the capability of a fire to originate in an oil burner. Subsequently, Richard Splaine, a private investigator specializing in the cause and origin of fires was called to testify. Mr. Splaine is also a lieutenant inspector with the Boston Fire Department's Major Case Unit, and testified that the photographs of the scene demonstrated that the fire did not originate in the basement. Using the testimony of the firefighters called to the scene and photographs showing char patterns and beveling of the floor joists, he successfully demonstrated that the event was a classic "drop down" fire and therefore could not have originated at the oil burner.

After closing arguments to the jury, a written settlement demand of \$999,999 was presented by all plaintiffs in order to force the issue of settlement demand within the policy limits. The demand was summarily rejected.

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THE TOP VERDICTS AND SETTLEMENTS OF 1995

Several Notable Defense Verdicts In 1995

Plaintiffs' verdicts inevitably get more attention, but defendants also scored their share of victories in Massachusetts last year. Following are a sampling of some lawsuits where plaintiffs demanded a lot but came up empty.

• **Hayward v. Massachusetts Lottery Commission** (Norfolk Superior Court), in which a plaintiff claimed that he won a \$9.4 million Megabucks drawing by playing the lottery over the telephone. The defendant, however, showed that the plaintiff dialed the winning numbers just seconds after they were drawn on television. A jury found for the defendant. Counsel for the defendant: Pierce O. Cray, Boston.

• **Alvira, et al. v. Peterborough Housing Associates, et al.** (Suffolk Superior Court). This was a wrongful death action brought by the estate of a young woman who was murdered in her apartment against the owner of the building and others. The plaintiff, who claimed that negligent security provided by the defendants was the cause of the decedent's death, demanded damages of \$6.8 million. The defendants' highest offer was \$250,000. A jury found that any negligence by the defendants was not the cause of the decedent's death and judgment was entered for the defendants. Counsel for the defendants: Roderick MacLeish Jr., Robert G. Najarian Jr. and Frederick M. Doyle, Boston.

• **Francis v. City of Boston, et al.** (U.S. District Court), in which a plaintiff claimed he was punched by a police officer after being involved in a traffic accident with the officer. The plaintiff sought \$3 million in damages. A jury deliberated for little over an hour before finding for the officer and the city. Counsel for the defendants: Kimberly M. Saillant, Boston.

• **Sideri & ADTEC Electroplating Co. v. Bride, Grimes & Co., et al.** (Essex Superior Court). The case arose out of a fire that occurred at the plaintiff company in Lawrence. The plaintiff sued the company that had been hired

• **Nickerson, et al. v. Lombardi Oil Co., et al.** (Essex Superior Court), a wrongful death action arising out of a residential fire that the plaintiffs contended was caused by the defendants' negligent failure to service and repair an oil burner properly. The plaintiffs demanded \$1 million, but the defendants rejected the demand and a jury found for the defendants. Counsel for the defendants: Michael A. Fitzhugh, Boston.

to provide maintenance for the building, contending that the defendant had failed to test the sprinkler system properly. The plaintiff demanded \$1.6 million. A jury found that the maintenance company was not negligent. The codefendants, including the city of Lawrence, were found to be negligent but the jury said that their negligence

was not the cause of the fire. Counsel for the defendants: Marshall A. Karol and Edward F. Maloney, Boston, Robert J. O'Sullivan, Lawrence, and Patricia O'Connor, Worcester.

• **Creran v. O'Brien & Gere Engineers, Inc.** (Berkshire Superior Court), an engineering malpractice case arising out of a Chapter 21E site assessment. The plaintiff demanded \$1.4 million. The jury found that the defendant was not negligent. Counsel for the defendant: Stanley A. Martin, Boston.

• **Higgins v. Delata Elevator Service Corp.** (Suffolk Superior Court), a case in which the plaintiff fell while exiting an elevator. The plaintiff, who sought damages of \$1.2 million, claimed that the elevator was misleveled as a result of the defendant's negligence. A jury found for the defendant. Counsel for the defendant: Thomas F. Healy and Barry E. Morin, Boston.

• **Nicholopoulos v. Consolidated Rail Corp.** (U.S. District Court), a suit brought under the Federal Employer's Boiler Inspection Act. Demanding \$1 million, the plaintiff, who was injured when he fell from a "fireman's chair" inside a locomotive, alleged that the chair was defective and unsafe. The jury found for the defendant on both theories of negligence raised by the plaintiff. Counsel for the defendant: Michael B. Flynn, Boston.

Fitzhugh & Associates is pleased to announce that it has been recognized by Lawyer's Weekly as one of eight Massachusetts law firms to obtain a notable verdict in 1995. Through our extensive trial practice, exemplified by the *Nickerson v. Lombardi* verdict, Fitzhugh & Associates remains committed to providing our clients with the highest quality legal representation.