

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE

NORFOLK SOUTHERN RAILWAY COMPANY,

Appellant-Respondent,

v.

CROWN POWER & EQUIPMENT CO., L.L.C.,

Respondent-Appellant.

DOCKET NUMBER WD73586
(Consolidated with WD73616)

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: June 26, 2012

APPEAL FROM

The Circuit Court of Sullivan County, Missouri
The Honorable Gary E. Ravens, Judge

JUDGES

Division One: Martin, P.J., and Newton and Mitchell, JJ.

CONCURRING.

ATTORNEYS

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MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

NORFOLK SOUTHERN RAILWAY)
COMPANY,)
)
Appellant-Respondent,)
v.)
CROWN POWER & EQUIPMENT CO.,)
L.L.C.,)
)
Respondent-Appellant.)

OPINION FILED:
June 26, 2012

WD73586
(Consolidated with WD73616)

Sullivan County

Before Division One Judges: Cynthia L. Martin, Presiding Judge, and
Thomas H. Newton and Karen King Mitchell, Judges

This case involves an alleged error by the jury in recording its verdict. The primary issue is whether the trial court erred in denying the plaintiff's motion for additur or, in the alternative, for a new trial as to damages only, when the damage award contained in the verdict was contrary to the uncontested facts in the record but when there was no clear alternative to the jury's damage award.

Another issue is whether the court erred in disregarding jurors' affidavits and other evidence purporting to establish that, contrary to the court's instructions, the jury reduced the plaintiff's damages by the applicable percentage of fault, when the uncontested evidence showed that the jury could not have rendered a verdict for the plaintiff in the amount stated on the verdict form.

There are also issues regarding the trial court's exclusion of expert testimony and refusal to give jury instructions.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Division One holds:

Upon good cause shown, the trial court may grant a new trial as to any issue. Rule 78.01. A new trial is appropriate as to damages when the verdict is so grossly or shockingly inadequate as to indicate that (1) the jury exercised its discretion in an arbitrary manner; or (2) the verdict was the product of passion and prejudice. *Porter v. Smoot*, 375 S.W.2d 209, 213 (Mo. App. 1964).

A statement by counsel made during trial is a binding judicial admission if, and only if, the statement constitutes a clear, unequivocal admission of fact. *McCarthy v. Wulff*, 452 S.W.2d 164, 167 (Mo. 1970); *DeArmon v. City of St. Louis*, 525 S.W.2d 795, 799 (Mo. App. 1975).

Here, the verdict was so grossly inadequate as to indicate an arbitrary exercise of the jury's discretion. Such is the case because the jury's finding of total damages was millions of dollars less than the amount that Crown Power and Equipment, L.L.C., judicially admitted that Norfolk Southern Railway Company incurred.

Accordingly, the trial court erred in denying Norfolk's motion for a new trial as to damages only.

Generally, juror affidavits may not be used to impeach the verdict, but they may be used to support or explain it. *Walton Constr. Co. v. MGM Masonry, Inc.*, 199 S.W.3d 799, 805 (Mo. App. W.D. 2006). If the verdict is unambiguous on its face and in light of the whole record, then juror affidavits are unnecessary and cannot be used to contradict the verdict. *Lyon v. J.E. Dunn Constr. Co.*, 693 S.W.2d 169, 173 (Mo. App. W.D. 1985). An ambiguity exists when the language to be interpreted is reasonably open to different constructions. *Dahmer v. Hutchison*, 315 S.W.3d 375, 377 (Mo. App. S.D. 2010).

On its face, the verdict in this case is unambiguous. It states that "We, the undersigned jurors, find the total amount of plaintiff Norfolk Southern's damages *disregarding any fault on the part of the plaintiff* to be \$1,709,114.55." (Emphasis added.) That language is not reasonably open to different interpretations: it means that the total amount of Norfolk's damages is \$1,709,114.55. *See Lyon*, 693 S.W.2d at 173.

Accordingly, the trial court did not err in denying Norfolk's motion for additur, and it did not err in denying Norfolk's motion to amend the judgment.

"[F]actors pertaining to how that evidence relates to the trial as a whole, such as whether the testimony is legally relevant or cumulative, are considerations applicable to lay and expert testimony alike and remain subject to review under an abuse of discretion standard." *Adkins v. Hontz*, 337 S.W.3d 711, 719 n.6 (Mo. App. W.D. 2011). It does not shock the sense of justice or clearly go against the logic of the circumstances for the court to prevent an expert from testifying to a matter that is common knowledge.

Accordingly, the trial court did not err in excluding the testimony of Norfolk's expert witness that Crown's driver should have called 911 when he became stuck on the railroad tracks.

The trial court did not err in excluding evidence of 4 CSR 265-8.130. Subsection (1)(B) was potentially confusing to the jury, and Crown's reliance on subsection (2)(A) had not been disclosed in discovery. Accordingly, the trial court did not abuse its discretion in refusing to admit the regulation itself, nor did it err in refusing to allow Crown's expert to testify regarding it.

"A jury instruction must be supported by substantial evidence which, if true, is probative and from which the jury can reasonably decide the case." *Holder v. Schenherr*, 55 S.W.3d 505, 507 (Mo. App. W.D. 2001). A jury instruction must be based on the proper duty of care. *Syn, Inc. v. Beebe*, 200 S.W.3d 122, 133 (Mo. App. W.D. 2006).

Here, underpinning each of Crown's jury instructions is their argument that Norfolk had a duty to maintain the crossing in compliance with 4 CSR 265-8.130. But Crown did not cite the trial court to any law or facts that would establish what compliance with that duty would entail, and, as such, the trial court did not err in refusing the instruction.

Accordingly, the trial court did not err in denying Crown's post-trial motion based on the refusal to admit testimony or instruct the jury regarding 4 CSR 265-8.130.

Opinion by: Karen King Mitchell, Judge

June 26, 2012

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THIS SUMMARY IS UNOFFICIAL AND SHOULD NOT BE QUOTED OR CITED.