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Amicus Curious

Lawyer gets 2d chance at justice for family

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In the predawn hours of June 27, 1999, a Lisle, Ill., family of six was making its way westbound on Interstate 80 through Nebraska, en route to a family vacation at Yellowstone National Park.

They had left home just the day before, right after the eldest child's Little League playoff game. This was to be their long-planned family vacation.

The four children, Tom, Brigid, Meg and Patrick, lay sleeping in the back of the motor home, the family's Ford Escort in tow. Carroll Heatherly drove while his wife, Margaret, sat in the passenger seat.

Behind them, a stolen tractor-trailer approached at nearly 90 mph. Up ahead sat a parked truck, where hours earlier a driver from Minnesota had pulled off to the side of an exit ramp so he and his 8-year-old son who was traveling with him could rest.

At about 2:30 a.m., all of those things converged to create a fiery crash. Margaret Heatherly died instantly. Her husband's leg later would be amputated. The children managed to escape the vehicle unharmed.

This month, nearly seven years later, a jury in U.S. District Court for the District of Nebraska, the second to hear the case after the 8th U.S. Circuit Court of Appeals sent it back to the trial court, ended the matter with a \$6.6 million verdict in favor of the family.

Michael K. Demetrio of Corboy & Demetrio P.C., who represented the family, has practiced law for 27 years. This case was unique in his experience, he said.

From the tragedy came Demetrio's first-ever retrial and his associate's first federal court trial — and, Demetrio is convinced, an appellate opinion so well written that it will be referenced in decisions throughout the country and a reaffirmation of the effectiveness of the U.S. judicial system when it is functioning at its best.

"It gives you a chance to prove a case, and when you believe someone made an incorrect decision, there's someone you can take that to," Demetrio said, adding, "Ultimately, the system

allowed me, allowed my client, to have the decision as to whether he was entitled to compensation made by who I believe should make the decision — by 12 fellow citizens."

The case first went to trial in October 2003, before U.S. district Judge Lyle E. Strom, and centered on the question of proximate cause and whether the driver of the parked truck was liable for the accident.

Steven Alexander, who was driving the stolen semi, approached the Heatherlys' motor home from behind at a high rate of speed, Demetrio said. He struck the car that the family was towing and then hit the motor home, pushing it into the parked Midwest Specialized Transportation Inc. truck in which Gilbertson and his son were resting.

Alexander's truck went off the road into a field, and he fled to a nearby rest area where he managed to hitch a ride out of the area, Demetrio said. The motor home burst into flames after it hit Gilbertson's truck, resulting in instant death for Margaret Heatherly.

At trial, Demetrio, fellow partner Robert J. Bingle and associate William T. Gibbs argued that had Gilbertson not parked illegally, the family's vehicle would have continued to travel safely into the field.

Demetrio called the 81-year-old Strom an exceptional and hard-working judge, as well as "one of the most accomplished trial attorneys anywhere." Strom, he said, was a member of the International Academy of Trial Lawyers and the American College of Trial Lawyers, and even volunteers to help out with backlogs in courts across the country.

Gibbs praised Strom's management skills, noting that he moved the case along efficiently but would stop to ask jurors and attorneys questions, he said.

"Judge Strom was a very impressive judge to try a case in front of. Based on his extensive experience on the bench and also as a trial lawyer, he certainly has a wealth of knowledge that's pretty extensive.... He's in control, there's

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no doubt of it, it's his courtroom," Gibbs said. "But he lets the lawyers try their case."

But when the jury deadlocked after the trial, Strom delivered a verdict in favor of Midwest Specialized Transportation on the issue of proximate cause, finding that Gilbertson's actions were not a proximate cause of the Heatherly's injuries, but simply created a condition that made those injuries possible through Alexander's actions.

Demetrio appealed to the 8th Circuit, arguing that the decision should not be taken out of the jury's hands.

"If the act is a proximate cause of the damages, or could be, then that's a fact question for a jury.... One of my arguments was, 'Judge, it's not that clear-cut that you can take the jury away,' " he said.

In what Demetrio called the most thorough examination of proximate cause he had ever seen, the 8th Circuit reversed Strom's ruling. *Heatherly v. Midwest Specialized Transportation Inc. et al.*, 421 F.3d 638 (8th Cir. 2005).

Senior Judge C. Arlen Beam wrote that "though the District Court relied on relevant precedent, our analysis of Nebraska proximate cause law dictates a different outcome. As an initial matter, proximate cause appears to have been analyzed from the standpoint that X is a condition, therefore X is not a cause. Instead, we think the question should have been, 'Is X a proximate cause?' And if it is not, then X may be merely a condition."

Beam continued: "We believe that there was sufficient evidence to create a jury question regarding causation. Given the evidence in the

record, we cannot say that it would be unreasonable for a jury to determine that it was foreseeable that the parking of the [Midwest] truck on the shoulder of the exit ramp could result in a collision and injuries of the type suffered by the Heatherlys."

"I've got to tell you, that opinion ... is going to be cited throughout the United States on the issue of proximate cause," Demetrio said.

Demetrio's assessment of Strom grew still more favorable when the case was retried.

"Judge Strom could not have been more professional in the way that he handled the case when it came back," Demetrio said. "On several occasions, he commented in the course of the trial that he read the opinion ... he found it very enlightening on the concept of proximate cause."

On one occasions, for example, "The defense attorney said, 'Judge, you ruled different the first time' and he said, 'Well, I was wrong the first time,' " Demetrio recalled. "And you know what, only a seasoned, experienced jurist could say, 'I was wrong.' "

Strom seated another jury on April 3 and by April 5, Demetrio, Bingle and Gibbs had called 16 witnesses. The second jury deliberated for just more than 2 hours before returning a verdict of \$4.6 million for the death of Margaret Heatherly and \$2 million for Carroll Heatherly's injuries. *Carroll E. Heatherly, etc. v. Midwest Specialized Transportation and David Gilbertson*, No. 8:01CV332.

"Ultimately, my client got his 7th Amendment right to a jury trial," Demetrio said. "This case is a tremendous example of how the American jurisprudence system works in this country."