

Wilken climbing upon and into the helicopter, the latter replete with Army aviation helmet. He also interpreted the damaged parts of the helicopter involved in this crash, which were also at the playground.

He also brought with him to the witness stand a door of a similar helicopter which belonged to the Massachusetts Army National Guard, which supported his claim that he was a member thereof.

In his trial testimony he expressed certain opinions toward establishing third-party fault of the U. S. Army in its alleged deficient maintenance of the particular helicopter in this case. Additionally, Mr. Wilken expressed opinions critical to the issues in this case, e.g., that because of the lack of proper maintenance by U. S. Army personnel the right pilot door opened and separated in flight which caused pilot panic and an immediate perilously steep climb to an altitude of about 2000 feet above ground level, which ultimately led to the fatal crash. He stated that when reaching its apex in the moments before the crash, the helicopter's main rotor struck the tail boom disabling the tail rotor, causing the helicopter to lose forward air speed to a point where the aircraft was physically incapable of autorotation, a maneuver that would allow the aircraft to make a relatively safe landing. These opinions were contrary to those expressed by plaintiffs' experts. The ability to autorotate was critical to plaintiffs' case, that the aircraft did autorotate to a point approximately 150 to 200 feet above the ground when the ears on the yolk broke due to a metal defect which caused the trunion to separate from its seating which disabled the main rotor resulting in the crash that killed the two Army pilots.

Mr. Wilken, quick to render opinions, based his reconstruction on his interpretation of a portion of the testimony of the witnesses in another helicopter at the scene. He was the "denouement" witness for the defense, the witness whose testimony essentially summarized the defense position.

Mr. Wilken's credentials and testimony on trial were false in that he was not then, ever before or since a member of the Massachusetts Army National Guard; he was not a test pilot for that organization; he was not an Army maintenance officer for the past 27 to 33 years; that he was not current in the OH58 helicopter. On all these points he testified falsely, and knowingly so.

Mr. Wilken on numerous occasions in previous litigation and matters was employed on behalf of Bell Helicopter Textron, and he was in its employ on another matter at the time of the evidentiary hearing in this matter. In this case, apparently Bell's insurer, employed Bell's trial counsel who employed Mr. Wilken. As such, actions taken by defense counsel or Bell's insurer are taken in behalf of and for the benefit of Bell.

Bell claims Mr. Wilken's deficiencies were discoverable and could have been ascertained before trial; that impeachment testimony presented after the trial should have been discovered by plaintiffs' attorneys before the trial. Defendant posits that plaintiffs failure to discover that Mr. Wilken was not what he professed now precludes them from bringing this motion for new trial, relying on *Southern Pacific Transportation*

Company v. Lueck, 112 Ariz. 277, 540 P.2d. 1258 (1975). The trial court in the *Lueck* case, affirmed by the Arizona Supreme Court, found that the newly discovered evidence could have been discovered by due diligence in time to move for a new trial and that it was not of such a character as to give reasonable assurance that it would warrant a different result upon a retrial. The case is inapposite to this case on both points in that the discovery was within time to move for a new trial, and the witness in this case testified to matters critical to the jury's inquiry.

It seems to this court that verdicts should be based on a truth derived from a fair presentation of evidence, on credible testimony from witnesses who are who they purport to be; that false testimony presented as to a witness's credentials presents false circumstances to a jury; that a party who employs a witness as an expert vouches for the credibility of that witness; that it should be the responsibility of the party proffering an expert witness to make reasonable inquiry of that expert's credentials; that a party who has utilized an expert in previous litigation and investigations and which expert is currently so employed by that party, regardless of how that expert is reimbursed, should be accountable for said witness and his opinions, the harm generated thereby, and the costs of reversing the injustice that may have been the product of his testimony.

That does not, however, appear to be the rule currently.

This court finds, concludes and orders as follows:

A. FINDINGS OF FACT:

1. Frederic Wilken was retained to testify as an expert witness on behalf of Bell Helicopter Textron, the defendant in this case. He was employed by trial counsel for the defense, who was employed by Defendant Bell's insurer.
2. Bell's representative, Mr. Sheatsley, assisted defense counsel throughout the trial and occupied a seat at the defense table.
3. Mr. Wilken willfully and knowingly gave false testimony to the jury regarding his current military status, his experience and length of service in a particular military specialty, and that he was currently familiar with the type of aircraft involved in this case.
4. His opinion testimony went to critical and decisive issues in this case.
5. Mr. Wilken was employed to testify on behalf of Bell or to conduct investigations and render opinions for Bell on previous occasions, and was so engaged as late as the post-trial evidentiary hearing on the motion for new trial.

Bell should have known of Mr. Wilken's false credentials prior to trial. This court cannot find, however, that Bell, its trial counsel or its insurer in fact knew of the false credentials of this expert witness before the trial of this matter.

Defendant Bell Helicopter Textron did not disclose to plaintiffs Mr. Wilken's false credentials.

Plaintiffs were prejudiced by the failure of defendant to disclose that Mr. Wilken's credentials were false.

Plaintiffs' counsel have expended throughout the trial and in post-trial proceedings time reasonably valued at \$583,578.67, pursuant to affidavits filed with plaintiffs' opening memoranda on this motion.

CONCLUSIONS OF LAW:

1. This was not a fair trial. Considerable time, effort and expense was lost on the part of counsel for plaintiffs.
2. Mr. Wilken knowingly testified falsely in the trial. Had he not testified as he did, or had it been shown to the jury that his credentials were false, the verdict might well have been for plaintiffs.
3. Defendant Bell Helicopter Textron, through its litigation representatives, trial counsel, or insurer knew or should have known prior to the trial that its position was being advanced by a witness with false credentials. This information should have been disclosed to plaintiffs prior to trial.
4. Sanctions pursuant to Rule 37(d), Rules of Civil Procedure, would be warranted in the circumstances if Bell or its attorneys knew of the falsity of the witness's credentials. This court, concluding that Bell, its agents or representatives or trial counsel, knew or should have known of the false credentials of Mr. Wilken, however, cannot conclude that Bell, its representatives or attorneys in fact knew of the falsity of said testimony before trial.
5. The questions remain:
 - i. Does a party vouch for the truth and accuracy of its expert's credentials?
 - ii. Should a party have known of the falsity of the credentials of its own expert witness under the circumstances of this case where the party and expert have had a lengthy working relationship over many years? If so,
 - iii. Is this a knowing failure to timely disclose, pursuant to Rule 37(d), Rules of Civil Procedure?
6. Plaintiffs presented their motion for new trial in timely fashion. There was no lack of due diligence in the subsequent discovery of the false credentials and testimony of Mr. Wilken.
7. The motion for new trial should be granted.

C. ORDERS:

It is **ORDERED** as follows:

1. Plaintiffs' motion for new trial is **GRANTED**.
2. Sanctions are not imposed.

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