

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-11073

United States Court of Appeals
Fifth Circuit

FILED

October 21, 2005

Charles R. Fulbruge III
Clerk

WENDALEE VANNOY,

Plaintiff - Appellant,

versus

VERIO INC., doing business as NTT/Verio,

Defendant - Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:02-CV-570-K

Before JOLLY and BARKSDALE, Circuit Judges, and LITTLE, District
Judge.¹

PER CURIAM:²

After a review of the record, study of the briefs, and
consideration of oral argument, we are convinced that the law of
Delaware is the appropriate law to apply in the determination of
this case. In this respect the district court did not err.

We have noted that there was no pretrial order in this case
and that the question of choice of law was not presented to the
court until the first day of trial. Although the court considered

¹ District Judge of the Western District of Louisiana, sitting
by designation.

² Pursuant to 5TH CIR. R. 47.5, the court has determined that
this opinion should not be published and is not precedent except
under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

the issue presented, the case nevertheless was tried and decided by the jury on the basis of Texas law. Thereafter, in response to the defendant's motion for judgment as a matter of law or, alternatively, for a new trial under rules 50(c) and 59 of the Federal Rules of Civil Procedure, the district court set aside the verdict of the jury in favor of the plaintiff and entered a judgment for the defendant. In this respect, we think the district court abused its discretion. Under the circumstances of this case, the more appropriate response would have been to set aside the verdict and order a new trial on the basis of Delaware law. Therefore, we vacate the judgment and remand this case.

The district court should allow amendments to the pleadings, appropriate discovery, motions and briefing (and argument if the court chooses) regarding the proper application of Delaware law to these facts, and a new trial if required. Consequently, the judgment is VACATED, and the case is REMANDED for further proceedings not inconsistent with this opinion.

VACATED and REMANDED.