

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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No. 19-60581  
Summary Calendar

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United States Court of Appeals  
Fifth Circuit

**FILED**

March 24, 2020

Lyle W. Cayce  
Clerk

ROSE MARY SMITH; RODNEY G. SMITH,

Plaintiffs - Appellants

v.

STARR INDEMNITY & LIABILITY COMPANY,

Defendant - Appellee

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Appeal from the United States District Court  
for the Southern District of Mississippi  
USDC No. 2:17-CV-164

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Before HIGGINBOTHAM, HO, and ENGELHARDT, Circuit Judges.

PER CURIAM:\*

Plaintiffs Rose Mary Smith and Rodney Smith appeal a jury's verdict on their insurance claim against Defendant Starr Indemnity & Liability Co. After Mrs. Smith was struck by an uninsured driver, she filed a claim with her insurer, Starr. Starr did not dispute liability under the policy but instead disputed the extent of Mrs. Smith's injuries caused by the accident.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

## No. 19-60581

Plaintiffs sued Starr in Mississippi state court, and Starr timely removed. The case proceeded to a three-day jury trial. Plaintiffs sought \$5,000,000 in damages for Mrs. Smith’s physical injuries and medical bills, economic losses from her business, and Mr. Smith’s loss of consortium. The jury awarded \$37,000 in damages—\$12,000 for Mrs. Smith’s past medical bills and \$25,000 for her noneconomic damages. Plaintiffs appealed to this court, arguing that the district court (1) committed plain error in instructing the jury, (2) abused its discretion by failing to exclude the testimony of Starr’s medical expert, and (3) abused its discretion by failing to grant Plaintiff’s motion for a new trial because the jury verdict was against the great weight of the evidence. We address each claim in turn.

We begin with Plaintiffs’ challenge to the district court’s jury instructions. Because Plaintiffs did not object in the district court to the jury instructions now challenged on appeal, this Court reviews only for plain error. *Guerra v. N.E. Indep. Sch. Dist.*, 496 F.3d 415, 417 (5th Cir. 2007). To establish plain error, the complaining party must show that: (1) the district court erred, (2) the error was clear or obvious, (3) the error affected the party’s substantial rights, and (4) the error, if left uncorrected, would seriously affect the fairness integrity, or public reputation of judicial proceedings. *In re Deepwater Horizon*, 824 F.3d 571, 583 (5th Cir. 2016). When reviewing a jury instruction, this court must “consider the jury charge as a whole” and reverse only if the entire charge leaves this court “with the substantial and ineradicable doubt whether the jury has been properly guided in its deliberations.” *Septimus v. University of Houston*, 399 F.3d 601, 607 (5th Cir. 2005) (internal quotations omitted).

Plaintiffs argue that the district court committed three errors when instructing the jury. First, Plaintiffs challenge two instances where the district court, following the Mississippi Model Jury Instructions, charged the jury to confine its “verdict to reasonable compensation for injuries actually

No. 19-60581

sustained, if any.” *See* Miss. Prac. Model Jury Instr. Civil §§ 10:4 & 10:5 (2d ed. 2019). Plaintiffs argue that the phrase “if any” misled the jury, allowing them to find that Mrs. Smith did not suffer any injuries despite the parties’ stipulations that she sustained “personal injuries” from the accident. *See McCary v. Caperton*, 601 So.2d 866, 870 (Miss. 1992) (holding that the trial court erred by using “if any” language in the jury instructions when the jury’s task was to “determine the *extent* of the injuries and loss, not whether any existed.”), *overruled on other grounds by Robinson Prop. Grp., L.P. v. Mitchell*, 7 So.3d 240 (Miss. 2009). But even if including “if any” in the instruction was erroneous, Plaintiffs fail to demonstrate that the error substantially affected their rights. *In re Deepwater Horizon*, 824 F.3d at 583. After all, the jury awarded \$37,000 in damages, concluding that Plaintiff suffered at least some injuries from the accident. Therefore, the district court did not plainly err by using “if any” language in the jury instructions.

Second, despite not asking for such an instruction, Plaintiffs insist the district court plainly erred by not instructing the jury on aggravation of a pre-existing medical condition. But neither party presented evidence nor argued to the jury that Mrs. Smith’s injuries were the result of a purported aggravation. Thus, failing to include this instruction was not erroneous, much less plainly erroneous.

Third, Plaintiffs challenge the district court’s jury charge on proximate cause, which instructed the jury that the “accident must be a substantial factor in producing plaintiff’s injury,” arguing that Mississippi only uses the “substantial factor” test for causes of action involving multiple tortfeasors. But Plaintiffs fail to point to any Mississippi case holding that instructing the jury to use the “substantial factor” test to determine proximate cause is erroneous when there is only one tortfeasor. The district court did not err by using this

## No. 19-60581

test in its instruction. And when considering the jury instructions as a whole, Plaintiffs fail to show that the district court plainly erred.

Next, Plaintiffs argue that the district court erred by not excluding the testimony of Starr's medical expert, Dr. David Gandy, who testified that Mrs. Smith's continuing medical issues were caused by unrelated progressive degeneration, not the accident. Plaintiffs argue Dr. Gandy did not reliably apply his medical expertise to the facts of the case as required by Federal Rule of Evidence 702(d). Questions relating to the bases and sources of an expert's opinions affecting the weight to be assigned that opinion rather than its admissibility should be left for the jury's consideration. *See Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987). However, this general rule "yields when 'the source upon which an expert's opinion relies is of such little weight . . . that [the] testimony would not actually assist the jury in arriving at an intelligent and sound verdict.'" *Slaughter v. S. Tale Co.*, 919 F.2d 304, 306 (5th Cir. 1990) (quoting *Viterbo*, 826 F.2d at 422).

Here, Dr. Gandy's testimony was not based on such little weight that it would fail to assist the jury. Instead, he based his causation testimony regarding Mrs. Smith's injuries on medical treatises and medical studies, a review of Mrs. Smith's pre- and post-accident medical records, a medical history obtained from Mrs. Smith, and a physical examination of Mrs. Smith. After hearing Dr. Gandy's opinion, the jury was free to consider Dr. Gandy's sources and make its own credibility determination. *See Viterbo*, 826 F.2d at 422. The district court did not abuse its discretion by including Dr. Gandy's testimony.

Finally, Plaintiffs argue that they are entitled to a new trial because the jury's verdict was against the overwhelming weight of the evidence. "The decision to grant a new trial is within the sound discretion of the trial judge." *Cobb v. Rowan Cos., Inc.*, 919 F.2d 1089, 1090 (5th Cir. 1991). In evaluating

No. 19-60581

whether the district court abused that discretion, this court views the evidence in the light most favorable to the verdict. *Id.* This court may only overturn the verdict if it “is against the great weight of the evidence.” *Seibert v. Jackson County, Miss.*, 851 F.3d 430, 439 (5th Cir. 2017). “In other words, the movant must show ‘an absolute absence of evidence to support the jury’s verdict.’” *Id.* (quoting *Whitehead v. Food Max of Miss., Inc.*, 163 F.3d 265, 269 (5th Cir. 1998)).

Plaintiffs fail to meet this burden. Starr provided causation evidence in the form of testimony from Dr. Gandy. And, although Plaintiffs provided witnesses to testify regarding the extent of the damages Mrs. Smith incurred from the accident, their credibility is ultimately left up to the jury. *See Dotson v. Clark Equip. Co.*, 783 F.2d 586, 588 (5th Cir. 1986). Plaintiffs failed to show an absence of evidence supporting the jury’s verdict and thus have failed to demonstrate that the district court abused its discretion.

We conclude that the district court did not commit reversible error. The district court’s judgment is affirmed.