IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-3460

(Summary Calendar)

PAUL FLEMING,

Plaintiff-Appellant

and

FIRST HORIZON INSURANCE CO.,

Intervenor-Cross-Claimant-Appellant

versus

BRUCE MARINE TRANSPORTATION, INC.,

Defendant-Cross-Defendant-Appellee,

Appeal from the District Court
for the Eastern District of Louisiana
(CA 88 4316 "I")

(September 3, 1993)

Before JONES, DUHÉ, and WIENER, Circuit Judges:

Per Curiam*:

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined

This appeal follows the jury trial in federal district court of a suit brought by Plaintiff-Appellant Paul Fleming against Defendant-Appellee Bruce Marine Transportation, Inc. (Bruce Marine). Fleming, an employee of Offshore Painting Contractors (OPC), sought damages against Bruce Marine under § 905(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA)[1] for knee injuries he sustained while on board Bruce Marine's vessel, the M/V CHRIS "B" (CHRIS B). Applying maritime law as required when an injury occurs on a vessel in navigable waters, the jury exonerated Bruce Marine of negligence. On appeal, Fleming contends that the district court committed reversible error when it:

> 1. Admitted evidence that Fleming brought and settled an earlier claim against his employer, OPC;
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> 2. Limited Fleming's cross-examination of Bruce Marine's medical and marine safety experts on the issue of their fees;
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> 3. Informed the jury that Bruce Marine's medical expert was "credible";
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> 4. Permitted Bruce Marine's marine safety expert to give opinion testimony and to testify as to the ultimate question of negligence;
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> 5. Permitted Bruce Marine to lead its expert witnesses on direct examination in its case-in-chief;
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> 6. Refused to permit Fleming to examine adversely one of the individuals who captained the CHRIS B on the day of the accident; and
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> 7. Allowed Bruce Marine to cross-examine the OPC employee who hired Fleming on whether he had the authority to do so.

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that this opinion should not be published.

[1]33 U.S.C. § 905(b).

Finding that the admission for impeachment purposes of evidence that Fleming had brought and settled an earlier Jones Act suit against OPC violated Federal Rules of Evidence 401 and 408 and resulted in substantial prejudice to Fleming, we vacate the judgment in favor of Bruce Marine, and remand for further proceedings consistent with this opinion.

I

FACTS AND PROCEDURAL HISTORY

Fleming was hired as a painter's helper by OPC foreman Charles Netto to work on OPC's sandblasting and painting operations on drilling platforms in the Gulf of Mexico. Pursuant to a charter agreement between the OPC and Bruce Marine, OPC's employees and equipment were transported to these work sites by Bruce Marine's vessel, the CHRIS B. The Captains employed on the CHRIS B were Hanson Dardar and Dean Plaisance.

On October 1, 1985, Captain Dardar docked the CHRIS B at Fourchon, Louisiana. Sometime around 9:30 or 10:00 that evening, Fleming and Netto arrived to board the vessel for transportation to an offshore platform. Fleming followed Netto onto the vessel, "took two or three steps," stepped on a rope, and fell down. According to Netto, Fleming was "hurting plenty bad" by the next morning and could hardly walk. Subsequently, Fleming underwent two operations, the last being a total knee replacement.

Fleming first brought an action against OPC in a Mississippi federal court claiming seaman status. If Fleming succeeded on the

seaman status issue, OPC had potential tort liability under the Jones Act. Without seaman status, however, Fleming was left with a compensation remedy against OPC under the LHWCA. Faced with the uncertainties of litigation, OPC and Fleming agreed to settle the Jones Act claim for $40,000, and to settle the LHWCA claim in part for $15,000, leaving open only future medical benefits.

Fleming then brought this action against Bruce Marine for damages under LHWCA § 905(b). First Horizon Insurance Co. intervened and made a claim against Bruce Marine for recovery of compensation payments it had made to Fleming under the LHWCA. In the Pretrial Order, Fleming contested the admissibility of evidence of his suit against OPC, his settlement of that suit, and the amount of settlement. In the section of the Pretrial Order that lists exhibits, Bruce Marine indicated its intent to introduce "[t]he receipt and release . . . by Fleming in favor of [OPC]." Fleming objected to admission of this evidence on the basis of Federal Rules of Evidence 401, 403, 408, and 801. Fleming's complaint against OPC was not listed as an exhibit in the Pretrial Order.

II

ANALYSIS

A. Complaint as Impeachment Evidence

In his Jones Act suit against OPC, Fleming alleged that he had been "rendered permanently and totally disabled as a result of his injury all of which was caused by the negligence of the Defendant

and the unseaworthiness of the subject vessel" (emphasis added). At trial on the instant matter, Bruce Marine indicated that it intended to introduce evidence of Fleming's prior suit and settlement to impeach Fleming's current assertion that Bruce Marine's negligence caused his injuries. Specifically, Bruce Marine ~~also~~ indicated that it intended to introduce into evidence a copy of Fleming's complaint against OPC as an exhibit. At that point, Fleming once again objected to the introduction of such evidence. When asked by the district court to state the purpose of this evidence, Bruce Marine urged that the part of the complaint in which Fleming stated that he had been "disabled as a result of his injury all of which was caused by the negligence of the Defendant and unseaworthiness of the subject vessel," was inconsistent with Fleming's current assertion that Bruce Marine's negligence caused his injuries. Therefore, Bruce Marine insisted, the complaint and evidence of settlement were admissible for impeachment purposes.[2]

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[2]Specifically, Bruce Marine argued:

> [W]here a party makes a previous claim against another party . . . and says they are at fault, as a matter of fact, in his lawsuit that he filed against them in the Southern District of Mississippi, he said that they were, and I will quote from it exactly. "Plaintiff charges that he had been rendered permanently and totally disabled as a result of his injury, all of which was caused by the negligence of the defendant and the unseaworthiness of the subject vessel." That's his complaint. We think we have a right from a credibility standpoint and from the standpoint of this plaintiff's choice of forum, choice of states, choice of law, to point out to the jury that he has simply made a claim and that he's settled that claim. I don't want to go into the amount or anything like that, but I think I am entitled to that. He can't go to Mississippi and say, I

Fleming first responded that the complaint had not been listed as an exhibit in the Pretrial Order; neither had the Pretrial Order been amended by consent of the parties or by order of the court. Bruce Marine countered that because the complaint was being offered for purposes of impeachment, its introduction did not contravene the Pretrial Order. The district court appears to have agreed with Bruce Marine on this point.

Fleming next reminded the court that even if his complaint against OPC were inconsistent with allegations in his present suit against Bruce Marine--and thus relevant and admissible for the non-substantive purpose of impeachment--this evidence should nevertheless be exclude under Rule 403 because its probative value is substantially outweighed by the danger of unfair prejudice. But most importantly, Fleming contended, his assertions about causation in the two complaints were not in fact inconsistent. He stated:

> [F]airly reading this [the complaint against OPC], it says caused by the defendant's negligence. We were claiming that as a Jones Act seaman. A Jones Act seaman is owed a duty to be provided a reasonably safe place to work whether or not the employer owns the vessel. He can . . . it can be totally somebody else's vessel.

The district court then ruled that Bruce Marine could use the complaint against OPC to impeach Fleming, reasoning:

> [I]n the past I have admitted this kind of thing as impeachment evidence without mentioning the amount, and I will just go ahead and follow my normal practice the way I normally have handled it. I think it is relevant from a standpoint of

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> am a seaman and it is all their fault, and come here and say, No, I am not a seaman, I am a longshoreman and it is Bruce's fault, and not be expected to answer questions about that.

not only the man's credibility, but the way the pleadings are framed. If it recites in there that all of the negligence was on the part of the employer, that's part of it. But anyhow, I will go ahead and admit it up to the point where we won't mention the amount.

Bruce Marine then asked Fleming whether it was true that he sued OPC in 1987, settled his claim against OPC, and alleged in that case that he had been "rendered permanently and totally disabled as a result of this injury, all of which was caused by the negligence of Offshore Painting Contractors."[3] At the close of

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[3]Bruce Marine's cross-examination of Fleming went as follows:

> Q. And is it correct in April of '87 you filed suit against Offshore Painting Contractors?
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> A. Somewhere in that area, yes, sir.
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> Q. And you didn't file suit against Bruce Marine Transportation and Tony Bruce until September of 1988, correct?
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> A. Somewhere in that time zone.
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> Q. Almost three years, actually two years, 364 days after your accident, correct?
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> A. Yes, sir, that is correct?
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> Q. And that in July of 1989 you settled the claim that you filed in 1987 against Offshore Painting Contractors?
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> A. Yes, sir.
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> Q. And in that suit against Offshore Painting Contractors which you settled, in that case you said that you had been rendered permanently and totally disabled as a result of this injury, all of which was caused by the negligence of Offshore Painting Contractors?
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> A. No, sir, I didn't say that.
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> . . .
>
> Q. I will hand you a document marked for

Bruce Marine's cross-examination the district court instructed the jury that the complaint was "impeachment evidence that may or may not affect the credibility of the witness."

Before this court, Fleming argues that admission of evidence of his earlier suit against OPC and his settlement of that suit for impeachment purposes constitutes reversible error. We agree. Although it is well established that a prior inconsistent pleading may be used for impeachment purposes in some circumstances,[4] we find no inconsistency between the subject portion of Fleming's complaint in the Jones Act suit against OPC and the allegations in his subsequent negligence suit against Bruce Marine. Without inconsistency there is no valid impeachment purpose, and without a valid impeachment purpose the evidence is both irrelevant and unfairly prejudicial.

When one reads Fleming's complaint against OPC in its entirety, as we must do when deciding whether a prior pleading contradicts a subsequent pleading,[5] it is clear that Fleming alleges only that OPC's negligence was a cause of his injuries, not

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identification purposes as Defendant's Exhibit No. 1.

[4]See, e.g., Dugan v. EMS Helicopters, Inc., 915 F.2d 1428, 1432, 1434 (10th Cir. 1990) (prior pleadings may be introduced on cross-examination for use as an impeachment tool under Fed.R.Evid 613).

[5]See id. at 1432-33 (review of evidence, pleadings, and statements of counsel show that the "[t]otality of position taken in the immediate case is inconsistent with the allegations contained in the ancillary complaint").

the sole proximate cause. In addition to the language in Fleming's complaint that Bruce Marine points to as contradictory--the conjunctive allegation that the cause of the injury was the negligence of defendant (OPC) and the unseaworthiness of the vessel (owned by Bruce Marine)--Fleming's complaint against OPC also states that "[t]he negligence of the Defendant [OPC] coupled with the unseaworthiness of the vessel was a direct and proximate result" of Fleming's injuries, and elsewhere, that Fleming's injuries were "caused by the negligence of Defendant and/or the unseaworthiness of the subject vessel."

Significantly, Fleming never claims that OPC's negligence was the sole proximate cause of his injuries.[6] Moreover, Fleming's allegations in Mississippi regarding the unseaworthiness of Bruce Marine's vessel is quite consistent with the negligence allegations in the instant case. This case thus stands in sharp contrast to those in which a plaintiff originally asserts that one person was the sole cause of an injury and then subsequently sues another person for the very same injury. (It is well settled, of course,

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[6]Compare, e.g., Dugan, 915 F.2d at 1432 (statements made in prior trial that parties were not responsible for injuries were admissible as admissions against interest under Fed.R.Evid. 801(d)(2) and for impeachment purposes under Fed.R.Evid. 613 in subsequent suit against those same parties alleging that they were in fact responsible), with Estate of Spinosa, 621 F.2d 1154, 1157 (1st Cir. 1980) (pleading in first suit against car owner not admissible as inconsistent in second suit against manufacturer because first pleading claimed that owner's actions "were a cause, not the sole cause of the accident"). See cases on prior inconsistent pleadings summarized in Vincent v. Louis Marx & Co., 874 F.2d 36, 39-40 (1st Cir. 1989).

that there can be more than one proximate cause of an injury.[7])

Additionally, Fleming's complaint against OPC must be evaluated in light of his Jones Act theory of recovery. Had Fleming been able to prove seaman status under the Jones Act at trial, OPC would have had a broad duty to provide Fleming with a reasonably safe place to work;[8] in other words, OPC might have been found liable for unreasonably dangerous conditions on the CHRIS B, even though Bruce Marine owned the vessel.[9]

Finally, we find significant that Bruce Marine's counsel never used at trial the one possible point of inconsistency between Fleming's two complaints--that Fleming claimed to be a Jones Act seaman in the first complaint while he claimed to be a longshoreman in the second. Although counsel alluded to this inconsistency during the bench conference on whether the earlier complaint was admissible, a review of the record reveals that counsel never mentioned this inconsistency to the jury. In short, as to the jury this inconsistency did not exist. What was used at trial--the purported contradiction over the cause of the injuries--was not in

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[7]See, e.g., In re Aircrash at Dallas/Fort Worth Airport, 919 F.2d 1079, 1086-87 (5th Cir. 1991).

[8]Ober v. Penrod Drilling Co., 726 F.2d 1035, 1037 (5th Cir. 1984).

[9]See Verrett v. McDonough Marine Service, 705 F.2d 1437, 1441 (5th Cir. 1983) (duty to provide a safe place to work extends to areas over which the employer has control).

fact inconsistent and thus was not relevant for impeachment purposes.

Given that the part of Fleming's claim against OPC used by Bruce Martin's counsel does not contradict Fleming's subsequent assertion against Bruce Marine, there was no legitimate purpose--impeachment or otherwise--for admitting the OPC complaint. The OPC complaint is therefore irrelevant, and inadmissible under Rule 401.[10] Consequently, there was no valid reason to permit Bruce Marine to mention repeatedly to the jury that Fleming had brought and settled an earlier claim against OPC. Rule 408 bars admission of evidence of settlement "unless it is admissible for a purpose other than 'to prove liability for or invalidity of the claim or its amount.'"[11] That the district court prohibited reference to the quantum of the prior settlement does nothing to cure the inadmissibility of evidence of the fact of settlement.

The district court does not explain why Bruce Marine was permitted to disclose the fact of prior suit and settlement. But even if we assume arguendo that it was to avoid the jury confusion

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[10]Rule 401 provides: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." Cf. Estate Spinosa v. International Harvester Co., 621 F.2d 1154, 1157 (1st Cir. 1980) (where there is no inconsistency, a court has discretion to exclude material as irrelevant).

[11]Kennon v. Slipstreamer, Inc., 794 F.2d 1067, 1069 (5th Cir. 1986), quoting Belton v. Fibreboard Corp., 724 F.2d 500, 505 (5th Cir. 1984).

that could result from admission of the complaint against OPC for impeachment purposes, rather than for the purpose of showing liability,[12] the evidence of settlement remains inadmissible. Although we have held under different circumstances that the fact of settlement may be revealed to avoid jury confusion,[13] such is not the case here. Absent the improper admission of the OPC complaint for impeachment purposes, there would have been no jury confusion, and hence no valid reason to disclose the fact of settlement.

Abundantly clear from the record is the unavoidable realization that Bruce Marine used evidence of the OPC suit and settlement for the very purpose prohibited by Rule 408: to prove that it was not liable for the claim. There can be no real question but that the true purpose of Bruce Marine's use of settlement evidence was to plant in the jury's mind the seed of the notion that Fleming had already sued and received money for the accident from OPC, so OPC must have been at fault and Fleming must already have been compensated. This is illustrated by Bruce Marine's closing argument to the jury:

> Mr. Fleming has repeatedly impeached with respect to his deposition testimony and with respect to something else, which I think is extremely important and that is the fact that, ladies, this isn't the first time that he sued somebody for this injury, this isn't the first time that he sued somebody on this accident. And when I asked him, I said, isn't it a fact, Mr. Fleming, that you sued your own employer and in that

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[12] See, e.g., Kennon, 794 at 1070.

[13] Id.

> suit you said and remember, I gave you the complaint, we read it together, you had a chance to read it, you said that you were rendered permanently and totally disabled as a result of this injury, all of which was caused by the negligence of the defendant. And the defendant in that case was Offshore Painting Contractors. And he filed in Mississippi. Well, it strikes me that he can't go over there, sue Offshore Painting Contractors and say it's all their fault and settle that case in Mississippi and then come over here to New Orleans and say its all your fault. Now, is that fair?

"[E]videntiary rulings of the district court will be left undisturbed unless an abuse of discretion results in substantial prejudice to the rights of a party."[14] We find, however, that admission of Fleming's complaint against OPC, and, most significantly, the fact of his earlier settlement, was extremely prejudicial and misleading.[15] The jury may well have concluded that Fleming had already been compensated for his injuries. Or, Bruce Marine's use of the OPC complaint to impeach Fleming on cross-

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[14]Williams v. Chevron USA, 875 F.2d 501, 504 (5th Cir. 1989), citing Petty v. Ideco, Division of Dresser Industries, Inc., 761 F.2d 1146, 1151 (5th Cir. 1985).

[15]We conclude also that Fleming effectuated a valid objection to the improper use of the complaint and settlement evidence in closing argument. Fleming continually objected at trial to the admissibility of this evidence in any form, not merely to use for other than impeachment purposes. Fleming objected to this evidence in his trial brief, at a bench conference that occurred at the beginning of trial, and when Bruce Marine started to introduce this evidence during his cross examination of the plaintiff. At this point counsel for Bruce Marine conceded that he would agree to recognize a continuing objection to the admissibility of the complaint and settlement evidence. Finally, Fleming introduced the trial brief containing the objections to the admissibility of the complaint and settlement evidence into the record at the beginning of closing argument. Under these facts it is clear that all concerned had notice of Fleming's objection to the improper use of the complaint and settlement evidence in closing argument.

examination might well have confused or misled the jury on the critical issue of proximate causation. Furthermore, it is quite likely that the jury used evidence of prior suit and settlement for exactly the reasons precluded under Rule 408.

B. Instructing Jury as to Experts' Credibility

Our resolution of the Rule 401 and 408 issue makes it unnecessary to decide the other errors raised by Fleming. We do consider two somewhat related issues, however, because they are likely to recur at trial: the district court's limits on the scope of Fleming's cross-examination of Bruce Marine's medical and marine safety experts on the issue of their fees; and the district court's comment in open court that Bruce Marine's medical expert is "credible."

During cross-examination of Bruce Marine's medical expert, Dr. Habig, the district court sua sponte intervened to terminate Fleming's questioning on the subject of fees. The district court remarked that Federal Rule of Evidence 611(b) limited cross-examination to the subject matter of the direct examination and matters affecting the credibility of the witness. The court then commented: "I don't think this [fees] affects Dr. Habig's credibility because he comes up here all the time and testifies." Later, during cross-examination of Sheldon Held, Bruce Marine's marine safety expert, Fleming was again prohibited from inquiring into the expert's fee. Responding to Bruce Marine's objection ("Everybody here is paid. I resent the implication."), the

district court commented to the jury:

> Ladies of the jury, everybody that you see here in the courtroom is paid for their services and their time. Let's go on with that. It is a waste of the Court's time to try to prove that Mr. Clark [Fleming's attorney] is paid, Mr.Cobb [Bruce Marine's attorney] is paid, that this gentleman [Held] is paid and so forth. We are just wasting our time. Everybody is paid.

Fleming asserts that the district court erred in limiting cross examination of Bruce Marine's experts on the subject of their fees. We agree with Fleming that evidence concerning an expert's fees is indeed relevant under Rule 401, and within reasonable bounds, a permissible subject of cross examination under Rule 611(b). Exposure of a witness' motivation in testifying is an important function of the right of cross examination.[16] Our conclusion is supported by numerous cases---as well as common sense--holding that the fact that an expert is paid is relevant in appraising the credibility of his or her testimony.[17] For example, in Collins v. Wayne Corp.,[18] in deciding that "cross-examination of an expert about fees earned in prior cases is not improper," we stated:

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[15]Davis v. Alaska, 415 U.S. 308, 316 (1974).

[16]See, e.g., Mills v. Beech Aircraft Corp, Inc., 886 F.2d 758, 766 (5th Cir. 1989) (comments about fees "concerned--at least tangentially--the credibility of the plaintiffs' experts and their testimony").

[17]621 F.2d 777, 784 (5th Cir. 1980).

> No one questions that cross-examination to show the bias of a witness or his interest in a case is entirely proper. Impeachment of witnesses through a showing of bias or interest aids the jury in its difficult task of determining facts when it is faced with contradictory assertions by witnesses on both sides of a case. A pecuniary interest in the outcome of a case may, of course, bias a witness. A showing of a pattern of compensation in past cases raises an inference of the possibility that the witness has slanted his testimony in those cases so he would be hired to testify in the future.

We are similarly disturbed by the district court's comments that Bruce Marine's medical expert is known to the court and would not be biased by receiving a fee. Not only are such comments nonsequiturs, they amount to vouching for the expert's credibility. It is axiomatic that the jury has the sole prerogative of determining the credibility of witnesses and of weighing their testimony. Comments such as this on the part of the court might well preempt the jury's credibility call and thereby prejudice Fleming by placing the stamp of judicial approval on the opposing party's witness.

For the foregoing reasons, we VACATE the district court's judgement and REMAND for a new trial.