

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3158

Summary Calendar

QUENTIN HADLEY,

Plaintiff-Appellant,

versus

NOLTY J. THERIOT, INC.,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA 90 2549 B)

(January 11, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Quentin Hadley brought this lawsuit against his employer, Nolty J. Theriot, Inc. ("Theriot"), pursuant to the Jones Act, 46 U.S.C. § 688, and general maritime law for injuries he allegedly suffered while working as a deck hand on the M/V NOLTY THERIOT, II ("THERIOT"). In accordance with a jury verdict, the district court entered a judgment in favor of Hadley in the net amount of \$437.20. Hadley now appeals from that judgment, challenging the

* 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 Pursuant to that rule, we have determined that this opinion should not be published.

district court's findings that: (i) although Theriot was negligent and this negligence proximately caused Hadley's injuries, Hadley was ninety percent contributorily negligent for those injuries; (ii) Hadley is only entitled to cure for a period of four months--a period which does not include a neck surgery performed on Hadley; (iii) the THERIOT was in no way unseaworthy at the time of Hadley's alleged accident, and (iv) there is no basis upon which to award Hadley punitive damages and attorney's fees. Finding no error, we affirm the judgment of the district court.

I. BACKGROUND

In November 1989, Hadley was employed by Theriot to serve as a deck hand aboard the THERIOT. At the time of his employment, Hadley denied having previously incurred any back and neck problems.

The mission of the THERIOT's crew was to assist in moving a rig situated off the coast of Texas. Upon reaching the rig, the THERIOT's crew attached a short tow line so as to maintain maximum control over the rig while moving it out of the oil field in which it had been operating. Once the vessel had cleared the oil field, the crew began its procedure for changing to a longer tow line. As part of this procedure, crew members must remove and then reinsert metal pins into rollers. The purpose of these rollers is to provide safety for crew members by securing and controlling one tow cable while another is being attached.

Hadley alleges that he smashed his finger while reinserting one of these roller pins. However, (i) Hadley did not report any injury until two days after the time he was injured, (ii) the injury he did report at that time was solely to his finger, (iii) according to fellow deck hand Chris Grant¹ and mate Bert Hargis, Hadley was never out of their sight while the pins were being removed and then reinserted, and neither of them saw anything happen to Hadley, (iv) the crew members who examined Hadley's finger at the time he reported his injury saw nothing wrong with it;² (v) after reporting his alleged finger injury, Hadley remained on board the vessel for four days, performing normal deck hand duties--for example, cleaning, sweeping, and mopping--with no apparent difficulty; and (vi) Hadley reported no back or neck injury while aboard the THERIOT, and, in the accident report he completed before departing the vessel, Hadley stated only that he had smashed the middle finger of his left hand when the chain attached to a roller pin got wrapped around it.³

After leaving the THERIOT, Hadley was seen by three different doctors, and he never mentioned a neck or back injury.

¹ Grant, who shared quarters with Hadley aboard the THERIOT the night before Hadley's alleged accident, also testified at trial that Hadley said that he would "like to sue somebody; he didn't say who, he just said sue."

² The only exception is that deck hand Grant testified that, when he looked at Hadley's finger he saw "[a]bout a two-year-old cut on the finger, or something."

³ In response to a request for a description of the nature of the injuries he sustained, Hadley simply wrote "bruised and swelling of finger on left hand."

He first reported having a pain sensation in his neck, when, almost one month after his alleged accident, he saw a fourth doctor, Dr. Engerson. However, Dr. Engerson testified at trial that Hadley reported this pain in such a minimal manner that he only treated Hadley for his hand. Dr. Engerson also commented that Hadley appeared to be consciously controlling the alleged limited use of his fingers. See infra note 8.

About one and one-half months after his accident, Hadley's attorney referred him to a new set of doctors. At this time, Hadley began complaining primarily of neck and back injuries and, under the auspices of these doctors, Hadley was rushed into surgery. Theriot was not notified about these claims of neck and back problems, and it discontinued maintenance when Hadley's finger reached the maximum state of cure.

Hadley brought this action against Theriot alleging that the THERIOT was unseaworthy at the time of his accident, and that Theriot committed Jones Act negligence. Hadley also requested punitive damages for Theriot's failure to pay maintenance and cure during the time he underwent neck surgery. The case was tried to a jury, which found that Theriot's negligence was the proximate cause of Hadley's injuries, but that Hadley was 90 percent contributorily negligent. The jury awarded Hadley maintenance and cure from the date of his accident to approximately one week prior to his neck surgery, indicating that it believed that Theriot did not cause Hadley's neck problems. Also, the jury found no unseaworthiness on the part of the

THERIOT, and that punitive damages are not applicable because Theriot was not "willful, callous and persistent" in its failure to pay maintenance and cure during the period of Hadley's neck surgery. The district court entered final judgment accordingly, awarding Hadley a net judgment of \$437.20 (\$4,372.00 subject to a credit of ninety percent for Hadley's contributory negligence), and Hadley appeals from that judgment.

II. DISCUSSION

On appeal, Hadley challenges the sufficiency of the evidence regarding the jury's findings that he (i) was 90% contributorily negligent, (ii) was not entitled to cure during the time of his neck surgery, and (iii) is only entitled to damages in the net amount of \$437.20. Hadley also contends that the district court erred by allowing the admission of evidence of his misdemeanor convictions for impeachment purposes.

A. Sufficiency of the Evidence

Because Hadley failed to move for a directed verdict ("d.v.") at the conclusion of trial and then for a judgment notwithstanding the verdict ("j.n.o.v."), "the sufficiency of the evidence supporting the jury's findings is not reviewable on appeal." Illinois Central Gulf Railroad Co. v. International Paper Co., 889 F.2d 536, 541 (5th Cir. 1989); see also Delchamps, Inc. v. Borkin, 429 F.2d 417, 418 (5th Cir. 1970) (where sufficiency challenge was not preserved by motions for d.v. and j.n.o.v., holding that this court cannot examine the evidence for sufficiency). "Thus, the scope of our inquiry [regarding

Hadley's challenges to the sufficiency of the evidence] is restricted to `whether there was any evidence to support the jury's verdict, irrespective of its sufficiency, or whether plain error was committed which, if not noticed, would result in a manifest miscarriage of justice.'" Id. at 541 (emphasis in original and internal quotation omitted), quoting Coughlin v. Capitol Cement Co., 571 F.2d 290, 297 (5th Cir. 1978); see also McConney v. City of Houston, 863 F.2d 1180, 1187 (5th Cir. 1989) (holding that, although evidence was insufficient, "there was not a total absence of any evidence") (emphasis in original); Shipman v. Central Gulf Lines, Inc., 709 F.2d 383, 385-86 (5th Cir. 1983). In short, "[w]hat is in issue is whether there was an `absolute absence of evidence to support the jury's verdict,'"⁴ and, under these circumstances, "appellate relief is limited to ordering a new trial." McConney, 863 F.2d at 1187.

1. Contributory Negligence

Hadley's first sufficiency challenge regards the district court's finding that he was ninety percent contributorily negligent. According to Hadley, "[t]he only mention of any contributory negligence of Mr. Hadley was in defendant's closing argument, not in any evidence presented during the trial." We disagree.

Having reviewed the record below, we do not find an "absolute absence of evidence to support the jury's verdict." See Coughlin, 571 F.2d at 298 (quotation omitted). First, it was

⁴ Coughlin, 571 F.2d at 298 (quotation omitted).

established at trial that Hadley was instructed by both Grant and Captain Jimmy Allemand regarding the task he was performing at the time of his alleged accident--pulling and then reinserting metal pins into rollers. Similarly, evidence was introduced to establish that: (i) pulling and reinserting these pins is the kind of simple task which, in the absence of extraneous circumstances and when performed with basic caution, should not result in injury; (ii) the seas, running just two to four feet, were calm at the time of Hadley's injury; and (iii) the deck was not slippery.⁵

Second, this court has held that, "[a]lthough a seaman's duty to protect himself is slight, still that duty does exist. The seaman has a duty to follow a safe course of conduct of which he knows or should have known and that is readily available to avoid an unsafe course." Fontenot v. Teledyne Movable Offshore, Inc., 714 F.2d 17, 20 (5th Cir. 1983) (citation omitted). But see Johnson v. Offshore Exp., Inc., 845 F.2d 1347, 1355 (5th Cir.), cert. denied, 488 U.S. 968, 109 S. Ct. 497 (1988) ("Although the seaman has a duty to use reasonable care, the seaman's duty to protect himself is slight since this duty is tempered by the realities of maritime employment."). Hadley's own testimony that (i) he was injured while attempting to replace the pin in the roller at the same time he was regaining his balance after falling, and, (ii) although he is right-handed, he

⁵ Hadley introduced evidence to the contrary regarding the condition of the seas and deck, but that evidence was extensively disproved by defendant's--and even Hadley's--witnesses.

attempted to insert the pin with his left hand suggests that Hadley did not fulfill his duty to follow a safe course of conduct. This testimony satisfies our "absolute absence of evidence"⁶ standard of review and, therefore, we find that Hadley's challenge to the district court's finding of contributory negligence is without merit.

2. Entitlement to Cure

Hadley also contends that "[t]here was no evidence presented to the trial court by defendants to support the termination of cure on March 15, 1990"--one week prior to Hadley's neck surgery. We disagree.

"[T]he cut-off point for maintenance and cure is not that at which the seaman recovers sufficiently to return to his old job but rather the time of maximum possible cure." Tullos v. Resource Drilling, Inc., 750 F.2d 380, 388 (5th Cir. 1985) (quotations and citations omitted). "[I]t is the medical, not the judicial, determination of permanency that terminates the right to maintenance and cure." Id. Therefore, combining our

⁶ Coughlin, 571 F.2d at 298 (quotation omitted). We also recognize that, at trial, Hadley did not object to Theriot's closing argument regarding contributory negligence. Moreover, Hadley also did not object to the submission of interrogatories to the jury which permitted a finding of contributing negligence, or to the district court's instructions to the jury regarding contributory negligence. Accordingly, our "absolute absence of evidence" standard of review is minimized--if not narrowed even further--for, although this court will consider errors to which no objections were made at trial, we "will exercise this power only in exceptional cases where the interest of substantial justice is at stake." Shipman, 709 F.2d at 388 (where plaintiff raised a challenge to closing argument on grounds of prejudice for first time on appeal, holding that alleged errors did not rise to the level of plain error).

Tullos holding with our standard of review for Hadley's belated sufficiency contention, our inquiry is whether there was any medical evidence to support the jury's verdict that Hadley was entitled to cure for the injury to his finger but not entitled to cure for his neck surgery.

The record is bursting with evidence to establish that Hadley's back and neck problems--the problems for which Hadley underwent surgery--were a pre-existing condition not attributable to the alleged finger injury Hadley sustained aboard the THERIOT. First, Dr. Michael Madden testified that he treated Hadley for lower back strain for a six-month period around April 22, 1987, thereby contradicting Hadley's contentions that he had not suffered back injury prior to his finger injury on the THERIOT.⁷ Second, Dr. Van Winkle testified that, based upon her examination of Hadley on December 1, 1989, his neck and back injuries cannot be attributed to Hadley's alleged injury on the THERIOT; in fact, Dr. Van Winkle testified that Hadley's fingers could have been taped, and that this would have allowed him to return to work immediately.⁸ Dr. Van Winkle also testified that, two weeks

⁷ Although Hadley explicitly stated during his deposition that he had no prior back or neck problems, it was established at trial that Hadley injured his back while working for Wal-Mart, and that he had sustained other work-related injuries while employed by a company called Pipeline Products. The Wal-Mart injury, which occurred while Hadley was lifting heavy pallets, caused Hadley to receive medical treatment from Dr. Madden.

⁸ According to Dr. Van Winkle, when Hadley reported his symptoms to her, he exhibited "extreme exaggerated illness behavior." This testimony was corroborated by that of Dr. Engerson, who testified that there is a strong possibility that Hadley was malingering during this time because of his "conscious

after her examination of Hadley, he was seen by her associate, Dr. Walker, who performed a complete physical examination on Hadley and found everything to be normal. Testimony was also offered to establish that Hadley should have reached maximum medical cure for his hand injury--the only injury Hadley complained of in his accident report and the only injury the jury found Theriot responsible for--by the end of December 1989.

In sum, we find that there is not "an absolute absence of evidence to support the jury's verdict" regarding the cure Hadley was entitled to. See Coughlin, 571 F.2d at 298 (quotation omitted); see also Thezan v. Maritime Overseas Corp., 708 F.2d 175, 182 (5th Cir. 1983) ("A maintenance award will be upheld so long as there is an evidentiary basis for the jury's verdict."), cert. denied, 464 U.S. 1050, 104 S. Ct. 729 (1984). Accordingly, we affirm the jury's determination that Hadley was not entitled to cure for the period during which he underwent neck surgery.

3. Amount of the Damages Award

Hadley also raises a sufficiency-related challenge to the district court's award of damages, asserting that the district court ignored the evidence before it and "abused its discretion by awarding damages which were well below the lowest amount which could have been reasonably awarded." We disagree.

Although Hadley introduced evidence of medical expenses totalling \$21,816.41, this summation of expenses includes

refusal to flex his joints maximally while actively using his extensor muscles to withhold motion"

Hadley's neck surgery and follow-up treatment. The jury--and, ultimately, the district court--determined that Theriot is not responsible for those expenses and, accordingly, it chose not to include them in Hadley's damages award. In light of the evidence suggesting that Hadley's neck and back problems were a pre-existing condition (see supra Part II.A.2), we find that there is an evidentiary basis for the district court's assessment of damages. Therefore, we will not disturb it. See Thezan, 708 F.2d at 182 (under similar circumstances, holding that "[t]he size of the award is essentially a finding of fact, and we will interfere concerning damages only in extreme and exceptional cases where the award is `so gross . . . as to be contrary to right reason'") (internal quotation omitted); see also Gates v. Shell Offshore, Inc., 881 F.2d 215, 218 (5th Cir. 1989) ("Damage awards will only be overturned in exceptional cases where such awards are so gross as to be contrary to right reason."), cert. denied, 494 U.S. 1017, 110 S. Ct. 1320 (1990); Bartholomew v. CNG Producing Co., 832 F.2d 326, 331 (5th Cir. 1987) (in considering a contention that a jury award was inadequate, holding that "[t]his Court will overturn a jury verdict for inadequacy only upon the strongest of showings").

B. Hadley's Misdemeanor Convictions

Hadley's final contention is that the district court committed reversible error by allowing evidence regarding two misdemeanor convictions to be introduced for impeachment purposes. The evidence in question--a certified copy of a

shoplifting conviction, a certified copy of a conviction for damaging property, and related testimony--was offered by Theriot while impeaching Hadley for a series of concealments, fabrications, and inconsistent statements made during his deposition. Although Hadley testified that he was convicted of shoplifting without objection by his attorney, when Theriot moved to admit a certified copy of Hadley's shoplifting conviction into evidence, Hadley's counsel objected pursuant to Rule 403 of the Federal Rules of Evidence on the grounds that this evidence was "prejudicial" and "cumulative." However, when Theriot questioned Hadley about his conviction for damaging property and moved to admit a certified copy of that conviction into evidence, Hadley made no objection. Although the district court allowed Hadley to be questioned about both convictions during his cross-examination and then conditionally admitted the conviction exhibits, the court did not rule on the admissibility of those exhibits until the close of evidence. Ultimately, the court refused to admit either conviction exhibit, stating that "it's cumulative, and even though I find that the probative value of these exhibits may outweigh its prejudicial impact, these are misdemeanors and I wasn't aware of that at the time they were introduced."

In addressing Hadley's contention that the district court committed reversible error by admitting evidence regarding his misdemeanor convictions, we begin by stating that Hadley challenges the district court's admission of testimony regarding his previous convictions, as well as the district court's

decision to conditionally admit the conviction exhibits until the close of evidence.⁹ With the exception of his challenge to the district court's conditional admission of his shoplifting conviction as an exhibit, Hadley attempts to raise challenges on appeal not grounded in objections made below.¹⁰ First, Hadley challenges the admission of testimony regarding both of his convictions, even though he did not raise proper objections to this testimony at trial. Second, Hadley challenges the district court's conditional admission of his property damage conviction, despite the fact that Hadley's counsel explicitly stated at trial that he had no objection to the admission of this exhibit. Third, Hadley raises a Rule 609 argument for the first time on appeal, asserting that the convictions at issue--both misdemeanors under Louisiana law--should have been excluded because they do not meet the "punishable by death or imprisonment

⁹ Specifically, Hadley contends that:
[t]he trial judge allowed the questioning of Mr. Hadley and the introduction of his misdemeanor convictions. Later in the trial, the Judge disallowed the criminal records from the evidence, but by that time the damage had been done, and the jury was tainted by having this record initially presented into evidence. Even if this Court determines that this evidence is relevant, which we specifically deny, then this evidence should be precluded pursuant to Rule 403 of the Federal Rules of Evidence

¹⁰ In fact, Hadley's counsel only made the following two objections to this evidence: (i) a conditional objection made at the outset of this line of questioning ("Your Honor, we're going to object to any criminal convictions, unless we see certain proof of when they were."); and (ii) an objection to admitting the shoplifting conviction as an exhibit ("Your Honor, I think he's admitted to that, and to put this into evidence would be prejudicial and cumulative.").

in excess of one year" requirement of Rule 609(a) of the Federal Rules of Evidence.¹¹

Rule 103(a)(1) of the Federal Rules of Evidence provides that:

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and[,] . . . [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specified ground was not apparent from the context

FED. R. EVID. 103(a)(1) (emphasis added). Because Hadley did not properly object to either the district court's admission of testimony regarding both of his convictions or the court's conditional admission of his property damage conviction as an exhibit,¹² and did not properly raise a Rule 609 objection below, our review of these contentions on appeal is limited to plain error. See FED. R. EVID. 103(d) ("Nothing in this rule precludes

¹¹ Rule 609(a) provides:

(a) General rule. For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

FED. R. EVID. 609 (emphasis added).

¹² We note that, during Hadley's re-direct-examination, Hadley's own counsel questioned him before the jury regarding his property damage conviction.

taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."). We have defined plain error as "error which, when examined in the context of the entire case, is so obvious and substantial that failure to notice and correct it would affect the fairness, integrity or public reputation of judicial proceedings." United States v. Lopez, 923 F.2d 47, 49-50 (5th Cir.), cert. denied, ___ U.S. ___, 111 S. Ct. 2032 (1991). Especially in light of the lengthy series of impeaching statements made by Hadley which damaged his credibility,¹³ we do not find that this case constitutes one in which plain error has been committed. See Lopez, 923 F.2d at 49-50.

As for Hadley's contention that the district court committed reversible error by conditionally admitting his shoplifting conviction as an exhibit despite his objection, Hadley relies upon Rule 403 of the Federal Rules of Evidence. Rule 403 provides that,

¹³ The following list, by no means complete, is a sampling of the impeachment evidence demonstrated to the jury during the course of Hadley's trial:

- (1) several instances of concealment and denial of prior work injuries;
- (2) the fact that Hadley's rendition of the condition of the seas at the time of his alleged injury was disproved by his own meteorologist;
- (3) inconsistencies in Hadley's renditions of how his alleged accident occurred;
- (4) the fact that Hadley's assertions regarding the extent of his injuries were disproved by numerous witnesses and doctors; and
- (5) statements by two of the doctors who treated Hadley's alleged finger injury that they believed Hadley was "exaggerating" his symptoms. See supra note 8.

[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

FED. R. EVID. 403. In considering a contention similar to Hadley's, this court held that:

the Rule 403 balance to be struck by the district court will not be overturned absent the abuse of the trial judge's broad discretion in this area. Rule 403 is an "extraordinary measure" because it permits exclusion of relevant evidence. Thus, when reviewing the district court's exercise of discretion we view the evidence in the light most favorable to the proponent, maximizing its probative value and minimizing its prejudicial effect.

United States v. Blake, 941 F.2d 334, 340 (5th Cir. 1991) (internal citations omitted), cert. denied, ___ S. Ct. ___, 1992 WL 203185 (1992). In light of the fact that (i) Hadley's questioning regarding his shoplifting conviction constitutes a small segment of a long line of questioning which resulted in numerous instances of impeachment,¹⁴ (ii) the conviction was introduced by Theriot only after Hadley flatly denied ever having been convicted,¹⁵ and (iii) Hadley was questioned about his

¹⁴ See supra note 13.

¹⁵ Specifically, during his cross-examination, Hadley testified as follows:

Q My question to you is, in your deposition when you were asked if you'd ever been convicted of anything, you said, no, isn't that correct?

A I wasn't convicted of anything.

Q You've never been convicted of anything?

A No.

* * *

Q And you have in fact pled guilty to some criminal acts in the past, isn't that correct?

A No.

shoplifting conviction without objection before the district court conditionally admitted a copy of the conviction as an exhibit, we find that the district court did not abuse its discretion by conditionally admitting the shoplifting conviction exhibit. See Blake, 941 F.2d at 340; see also Hardy v. Chemetron Corp., 870 F.2d 1007, 1009 (5th Cir. 1989) ("Acknowledging both our respect for the local judge's superior knowledge of the trial scene and the importance of enabling the trial judge to keep the trial on course, we accord considerable deference to the trial judge's evidentiary rulings.").

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgment in favor of Hadley in the net amount of \$437.20. We also order Hadley to bear the cost of this appeal.