UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3535
Summary Calendar

RODGER D. CROWE,

Plaintiff-Appellant,

versus

STEWART MACHINE & ENGINEERING CO., INC., and JAMES G. BUCHART,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana
(CA 90 3933 L)

(August 30, 1993)

Before GARWOOD, JONES and EMILIO M. GARZA, Circuit Judges.*

GARWOOD, Circuit Judge:

The plaintiff in this personal injury suit appeals the district court's denial of his motion for a new trial grounded on his claim that the jury failed to award adequate damages. We

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

reverse.

Facts and Proceedings Below

On February 3, 1990, while driving his automobile on a U.S. highway in Pearl River County, Mississippi, plaintiff-appellant Roger D. Crowe (Crowe) was rear-ended by defendant-appellee James G. Buchert (Buchert),[1] who was driving a truck owned by his employer, defendant-appellee Stewart Machine & Engineering Co. (Stewart Machine). As a result of the accident, Crowe suffered a number of severe injuries which required hospitalization and surgery on his back and neck. Crowe's misfortunes were not finished, however, for on May 29, 1990, he was again involved in an automobile accident. This time, a car in which Crowe was a passenger was struck from behind by Terry D. King (King), an employee of the Saucier Construction Co. (Saucier Construction). Crowe underwent additional surgery and hospitalization following this accident.

Crowe, a Louisiana citizen, brought this diversity action against Buchert and Stewart Machine, a citizen and a corporation of Mississippi, respectively, in the Eastern District of Louisiana.[2] Buchert and Stewart Machine named as third-party defendants King, Saucier Construction, and Maryland Casualty Co. (Saucier Construction's liability insurance carrier). A jury trial ensued and at the close of Crowe's case-in-chief, he moved for judgment as

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[1] We use the spelling of Mr. Buchert's name that both parties use in their briefs, rather than that appearing in the caption.

[2] It is not contested that the substantive law of Mississippi applies in this case.

a matter of law as to the liability of Buchert and Stewart Machine for the February 3 accident. Buchert and Stewart Machine moved for the same against King and Saucier Construction for the May 29 accident. The district court granted both motions and the trial proceeded on the issue of damages.

At trial, Buchert and Stewart Machine tried to play down the severity of the injuries that Crowe sustained in the February 3 accident while playing up the extent of certain injuries which Crowe had sustained prior thereto. Meanwhile, third-party defendants attempted to attribute Crowe's injuries to the February 3 accident rather than the May 29 accident. With respect to Crowe's damages arising out of the February 3 accident (for which Buchert and Stewart Machine would be liable), the jury awarded Crowe $100,000 for past and future physical pain and suffering; $35,000 for past and future mental suffering; $50,000 for past medical expenses; and $12,000 for future medical expenses, for a total of $197,000. Crowe received nothing for loss of past wages or loss of future earning capacity. As to the May 29 accident, the jury found that Crowe had suffered no damages.

Dissatisfied by the jury's award of damages for the February 3 accident, Crowe filed a timely motion for a new trial. This motion was denied by the district court and Crowe timely appealed to this Court. The liability of King and Saucier Construction for the May 29 collision, and the jury's award of no damages for that accident, have not been appealed by any party.

Discussion

Crowe's sole contention on appeal is that the jury's award of damages is inadequate and entitles him to a new trial. A party's motion for a new trial is properly denied by the trial court unless the jury's verdict is against the great and overwhelming weight of the evidence. *Jones v. Wal-Mart Stores, Inc.*, 870 F.2d 982, 986 (5th Cir. 1989). We review the trial court's decision to deny such a motion only for abuse of discretion. *Pagan v. Shoney's, Inc.*, 931 F.2d 334, 337 (5th Cir. 1991) (per curiam). Although this is a diversity case, "the sufficiency or the insufficiency of the evidence in relation to the verdict is indisputably governed by a federal standard." *McCandless v. Beech Aircraft Corp.*, 779 F.2d 220, 223 (5th Cir. 1985), *vacated on other grounds*, 798 F.2d 163 (5th Cir. 1986) (quoting *Fairley v. American Hoist & Derrick Co.*, 640 F.2d 679, 681 (5th Cir. 1981) (per curiam)). The controlling federal standard of review is that, when all of the evidence is viewed in the light most favorable to the jury's verdict, we must "affirm the verdict unless the evidence points 'so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary [conclusion].'" *Whatley v. Armstrong World Indus. Inc.*, 861 F.2d 837, 839 (5th Cir. 1988) (quoting *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969)) (brackets added in *Whatley*).

Crowe challenges the jury's award in each of the damages categories. To begin with, Crowe argues that the jury's award of $50,000 for past medical expenses is substantially less than what the undisputed evidence shows were the actual, recoverable medical

costs that he incurred as a result of the February 3 accident. Although the jury's award of damages in the other categories passes muster, we agree with Crowe that the award for past medical expenses is inadequate.

At trial, Crowe introduced uncontroverted and unimpeached evidence to establish that the February 3 accident injured his lower back, neck, shoulder, knee, and caused him to sustain a hernia. He was hospitalized from March 16, 1990, through March 29, 1990, due to severe low back and leg pain, and again from May 13, 1990, through May 17, 1990, during which time he underwent an anterior cervical fusion. Following the May 29, 1990, accident, a cervical bone graft performed in the wake of the February 3, 1990, accident was dislodged and required additional surgery on Crowe's neck. On February 6, 1992, Crowe had surgery to repair his hernia and was then hospitalized from February 11, 1992, through February 15, 1992, due to complications resulting from the surgery. The treatment of Crowe's injuries has required him to receive numerous morphine epidural injections.

Crowe submitted medical bills which demonstrated that the cost of the surgeries, hospitalization, and other medical treatment was $92,414.99.[3] There is of course no question that Crowe is entitled to recover the actual medical expenses he incurred as a result of

[3] During closing argument, Crowe's counsel told the jury that Crowe's total medical expenses were $96,000. However, Crowe's brief on appeal cites a figure of only $92,414.99 and so we use that figure in our discussion. We note also that the record contains a table summary of Crowe's bills totalling $92,414.99 whereas there is no such table in the record computing Crowe's expenses at $96,000 or thereabouts.

the February 3 accident; the liability of Buchert and Stewart Machine was established by the directed verdict and the jury did award Crowe $50,000 in past medical expenses, thus foreclosing the possibility that the jury had found that Crowe had incurred no damages arising out of the February 3 accident. The only question, then, is whether, in light of the evidence, $50,000 was a permissible estimation of Crowe's past medical expenses to date of trial caused by the February 3 accident.

The defense did not suggest that Crowe's medical bills totaled something other than $92,414.99; the cost of his care was undisputed. Thus, after carefully reviewing the evidence presented and the arguments made at trial, we can conceive of only three possible theories to explain why the jury might have awarded Crowe only slightly more than half of the total of his medical bills. The first possibility, one that we can quickly dismiss, is that the jury might have thought that some of Crowe's expenses stemmed not from injuries sustained in the February 3 accident (for which the $50,000 was specifically awarded) but from injuries sustained in the May 29 accident. Yet this theory is fatally undermined by the jury's explicit findings that Crowe sustained no damages whatsoever, including no medical expenses, from the May 29 accident.

The second theory is that the jury might have thought that some of Crowe's medical expenses were due to the aggravation of injuries that he had sustained prior to the February 3 accident.[4]

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[4] Crowe testified as to a series of back and neck injuries predating the February 3, 1990, accident. In the early 1960's,

Indeed, this is the theory upon which appellees rely in their brief:

> "This jury had credible evidence to suggest that Roger Crowe's neck surgery was really only the result of an aggravation of his pre-existing cervical injury for which he had already undergone surgery before this accident. Similarly, his low back injury was an exacerbation of his earlier, pre-accident, injury."

However, the general rule in tort is that a tort-feasor is liable for the aggravation of a victim's pre-existing condition. *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 43, at 292 (5th ed. 1984) (tort defendant is liable "for the extent to which the defendant's conduct has resulted in an aggravation of the [plaintiff's] pre-existing condition"); RESTATEMENT (SECOND) OF TORTS § 461 comment a (1965) ("A negligent actor must bear the risk that his liability will be increased by reason of the actual physical condition of the other toward whom his act is negligent."). This is also the law in Mississippi. *See Brake v. Speed*, 605 So.2d 28, 33 (Miss. 1992) (en banc) ("[O]ne who injures another suffering from a pre-existing condition is liable for the entire damage when no apportionment can be made between the pre-existing condition and the damage caused by the defendantsQthus the defendant must take his victim as he finds her."); *Munn v. Algee*, 730 F.Supp. 21, 29 (N.D.Miss. 1990), *aff'd*, 924 F.2d 568

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an automobile accident resulted in minor back strain. In the early 1970's, Crowe suffered from a hernia. In 1983, an automobile accident necessitated lower back surgery. In 1987, while performing heavy lifting, Crowe ruptured a disk in his neck and had to have surgery the following year. Since the automobile accident in 1983, Crowe had been drawing disability benefits from the Social Security Administration, which classified him as totally disabled.

(5th Cir.), *cert. denied*, 112 S.Ct. 277 (1991) ("[A]lthough the defendant is not liable for any physical problem that the plaintiff had prior to the defendant's act of negligence, he is liable for the exaggeration of that physical problem which is caused by his negligence, even if the exaggerated consequence was not foreseeable.") (applying Mississippi law). Too, the trial court's jury instructions accurately described this law.[5] Now, it is true that Crowe was not entitled to be reimbursed for any medical treatment that he would have had even absent the February 3 accident, but that is not appellee's contention. Nor is there any evendential basis for such a contention. Therefore, the notion that the jury withheld damages for the aggravation of Crowe's pre-existing injuries is a legally insufficient explanation for the amount of the verdict.

The third way potentially to explain the jury's award is that the jury might have concluded that not all of Crowe's medical treatment was necessary and therefore awarded him less than his total costs. The only testimony to this effect was offered by Dr. Mimeles, an orthopedic surgeon. The gist of Dr. Mimeles' testimony was that he would have performed additional or different tests upon

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[5] The trial court's instructions to the jury included the following:

> "One responsible for an accident takes his victim as he finds him. Therefore, where an accident aggravates a preexisting condition or induces the progress or development of a dormant condition, the party responsible is liable in damages to the injured person not only for the current injuries resulting from the accident in question, but also for the activation or the aggravation of any preexisting condition which directly results from the accident in question."

Crowe prior to deciding upon surgery. However, Dr. Mimeles' testimony was far from unequivocal and he pointedly stopped short of saying that Crowe's surgery was unnecessary. The following excerpt from the trial is illustrative:

> "Q. But you're not saying that the surgery wasn't necessary in his neck, are you?
>
> A. Well, what I'm telling you is based on what I've seen so far, if we want to pursue this, I don'tSQI would have done more of a workup on this gentleman's neck." [6]

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[6] There was also this more lengthy exchange:

> "Q. Are you also testifying that you're not sure that the surgery on May 15th was necessary?
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> A. This is the first surgery?
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> Q. First surgery.
>
> A. Well, you know, you asked meSQ
>
> Q. The myelogramSQ
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> A. SQall I'mSQwhat I'm testifying to is to the workup that I would have done with this gentleman. We've already, you know, [kicked] diskograms back and forth, so all I have to go on on the things that I would have done is a negative CAT scan as far as the CAT scan didn't show any obvious ruptured disks or pinched nerves on the first CAT scan.
> So are you asking me would I have then gone to a diskogram and operated on his neck, I would have done more of a workup, which I think I've already stated.
>
> Q. Would you have any opinion as far as the February 3rd, '90 accident and neck surgery three months later based upon the diskogram?
>
> A. We're talking about the first surgery?
>
> Q. First surgery.
>
> A. Would I have any opinion as to as far asSQ
>
> Q. If the surgery was necessary.
>
> A. Well, I can't tell you whether it was necessary

Even given the leeway of closing argument, defense counsel was unable to characterize Dr. Mimeles' testimony in forceful terms: "You've heard testimony from Dr. Mimeles who said possibly the surgery wasn't necessary. He did not have much faith in the diskogram." In sum, we think it highly unlikely that jury could have concluded, based upon Dr. Mimeles' testimony, that Crowe was entitled only to slightly more than one-half of his medical expenses. Indeed, appellees make no such argument on appeal.

In short, none of these three theories can explain the jury's award in a legally sufficient manner. On the other hand, and importantly here, the record does affirmatively suggest that the jury's award was the result of a misapprehension of the law. During its deliberations, the jury had a note delivered to the trial court which read:

> "Of the . $96,000 medical bill was any of this reimbursed to the plaintiff by Medicare, or is this $96,000 his outstanding balance.
>
> /s/ Susan Fertitta"

The court's response, written on the note, was as follows:

> "The jury must decide the facts from the evidence.
>
> /s/ Judge V. Wicker
> April 3, 1992
> 2:20 P.M."

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until I saw some diagnostic studies.

Q. The only diagnostic study was the diskogram?

A. Yeah. That's not enough for me.

Q. So you would have done other tests before?

A. I would have done other testing."

The court's answer, while not an erroneous statement, was not responsive to the jury's inquiry. The jury's question was not one of fact, but law, and the court should have told the jury that, under the law, whether or not Medicare paid some of Crowe's bills is irrelevant. This is so because the collateral source rule obtains in Mississippi:[7]

> "Mississippi has adopted and follows the 'collateral source rule.' Under this rule, a defendant tortfeasor is not entitled to have damages for which he is liable reduced by reason of the fact that the plaintiff has received compensation for his injury by and through a totally independent source, separate and apart from the defendant tortfeasor." *Central Bank of Mississippi v. Butler*, 517 So.2d 507, 511-12 (Miss. 1987).

The court's answer, which was tantamount to saying you must decide what to do, may well have mislead the jury. During its deliberations, the jury had available to examine a compilation of all of Crowe's medical bills relating to the treatment of the injuries he sustained in the automobile accidents. Many of these bills indicate that payments by Medicare had been made. The court's vague answer to the jury's question may very well have lead the jury to believe that Crowe's out of pocket expenses were less than the total of his medical bills and compensated him accordingly.

In sum, none of the theories offered by the defense are legally sufficient to support the jury's award and the record affirmatively suggests the distinct possibility that the award was

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[7] We have noted that "[i]t is well established that in diversity cases in the Fifth Circuit state law governs the measure of damages." *Smith v. Industrial Constructors, Inc.*, 783 F.2d 1249, 1250 (5th Cir. 1986) (internal quotation marks omitted).

the result of the trial court's failure to explain the collateral source rule. We must therefore conclude that no reasonable jury could have awarded Crowe only $50,000 for his past medical expenses. We emphasize that it is not our opinion that an award of less than $92,414.99 cannot be legally supported. We merely hold that, in light of the evidence presented at this trial, an award of only $50,000 is insufficient. Accordingly, it was error for the district court to deny plaintiff's request for a new trial.

Conclusion

We reverse the judgment of the district court and remand for a new trial confined to the issue of Crowe's damages.[8]

REVERSED and REMANDED

[8] Crowe invites us to award him, instead of a new trial, an additur for the difference between his actual medical expenses and the jury's award. Because of the possible infirmities of that procedure, see *Dimick v. Schiedt*, 55 S.Ct. 296 (1935), we decline his invitation. We note too that Crowe's motion for a new trial before the district court did not include a request for an additur.