

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3215
Summary Calendar

BRIAN AMOND,

Plaintiff-Appellant,

versus

PROFESSIONAL DIVERS OF NEW ORLEANS
and CROSS MARINE, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana
(91-CV-1599-A-5)

(February 18, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

I

Brian Amond filed suit against Professional Divers of New Orleans, Inc. ("Professional Divers") and Cross Marine, Inc. ("Cross Marine"), inter alia, under the Jones Act and general maritime law for injuries he sustained during an alleged diving

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

accident. Amond contended that as a result of the negligence of the defendants and/or the unseaworthiness of the vessel he contracted decompression sickness (the bends) and Carpal Tunnel Syndrome.

On direct examination, Amond testified to prior cocaine and marijuana use and drug rehabilitation at two institutions. Further, Amond admitted to lying on his Professional Divers' employment application about illegal drug use and prior work injuries and to providing false answers to questions posed during the required pre-employment physical. During cross-examination, Almond admitted to lying on his employment application when he stated that he had never sued for a personal injury. On direct examination, however, he had earlier stated that this was one of the questions on the application he answered truthfully.

Amond testified that following a dive on January 31st he felt tired and had pains in his elbow indicating to him that he had decompression sickness or the bends. On cross-examination, however, Amond testified that he did not feel he had the bends until the afternoon of February 6th.

Amond testified that he told his diving supervisor that he was having problems with his elbows to which the supervisor replied it was just fatigue. He testified that he remembered telling everybody on the barge about his physical problems. Nevertheless, there was testimony casting doubt on the truth of much of this testimony.

Almond testified that following an argument with a Professional Divers' supervisor, he was discharged. Shortly thereafter, he reported that he was having pains and that urination was giving him problems. He was then put in the compression chamber. He was hospitalized for seven days.

A psychiatrist, Dr. Rennie Culver, examined Amond and testified at the trial. He testified that Amond fit the personality profile of a sociopath. Culver testified that sociopaths will lie to get whatever they want.

Amond moved for a directed verdict prior to the submission of the case to the jury.¹ That motion was denied. Following jury deliberations, the jury answered "No" to the following interrogatory:

Do you find by a preponderance of the evidence that on or about January 31, 1991, while conducting diving operations from the M/V Southern Cross I, Brian Amond was involved in an accident causing him injuries?

Amond moved for a new trial but did not renew his motion for judgment as a matter of law. The district court denied the motion. He appeals from the final judgment of the district court.

II

Amond argues that the district court erred in allowing the admission of Defendant's Exhibits 1, 2, and 3. Amond argues that

¹ Effective December 1, 1991, the term "judgment as a matter of law" replaced the terms "directed verdict" and "judgment notwithstanding the verdict." See FED. R. CIV. P. 50 advisory committee's note (1991 amendments).

the defendant failed to connect up the evidence as required by Fed. R. Evid. 608(b). Id. These exhibits consist of a discharge summary from Blue Waters Treatment Center (D-1), a portion of a medical record from that center (D-2), and a nurse's notes from Southeastern Louisiana Hospital (D-3). Amond argues that "[a]fter admission of D1, D2 and D3 counsel for the plaintiff then proceeded to ask plaintiff about prior drug use in order to ameliorate what was sure to be the forthcoming impact of the documentary D1, D2 and D3."

Prior to the direct examination of Amond, Amond's counsel objected to the admission of Defendant's exhibits 1, 2, and 3 on the grounds that they needed to be "connected up." The court responded that, "I know what they [your objections] are. I don't think you have a leg to stand on . . . But unless you can tell me about something I don't know about, your objections are going to be overruled. You can make your case accordingly." A strict reading of the record is that the court had not yet ruled on the admissibility of the exhibits when counsel for Amond broached the subject of Amond's prior drug use on direct. The court clearly had not ruled on the admission of the exhibits prior to Amond's opening statement in which he mentioned Amond's drug use.

Following the direct examination of Amond, the district court ruled that the exhibits were cumulative in light of Amond's admissions on direct. The court ruled that it would allow the

evidence to be admitted only if there was a discrepancy between the exhibits and Amond's testimony.

The scope of cross-examination is limited to "the subject matter of the direct examination and matters affecting the credibility of the witness." Fed. R. Evid. 611(b). "Implicit in the rule is that all evidence relevant to the subject matter of direct examination is within the scope of cross-examination." U.S. v. Beechum, 582 F.2d 898, 907 (5th Cir. 1978) (en banc) (criminal case), cert. denied, 440 U.S. 920 (1979). The challenged exhibits concern matters within the scope of direct.

Moreover, considerable deference is afforded a trial judge's evidentiary rulings. Hardy v. Chemetron Corp., 870 F.2d 1007, 1009 (5th Cir. 1989). This court will reverse an evidentiary ruling only "when the district court has clearly abused this discretion and a substantial right of a party is affected." Rock v. Huffco Gas & Oil Co., Inc., 922 F.2d 272, 277 (5th Cir. 1991) (internal quotations and citations omitted).

Amond contends that the admission of the exhibits was not proper under Fed. R. Evid. 608(b) that provides:

[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness of untruthfulness,

As we have noted before in a criminal case, Fed. R. Evid. 608(b) allows cross-examination of conduct that may bear on a witness's credibility for impeachment purposes. U.S. v. Farias-Farias, 925 F.2d 805, 809 (5th Cir. 1991). We have indicated in another criminal case that Rule 608 does not apply in "`determining the admissibility of relevant evidence introduced to contradict a witness's testimony as to a material issue.'" U.S. v. Lopez, 979 F.2d 1024, 1033 (5th Cir. 1992), cert. denied, 113 S.Ct. 2349 (1993) (citing U.S. v. Opager, 589 F.2d 799, 801-02 (5th Cir. 1979)). Fed. R. Evid. 403 controls the admission of such contradiction evidence. Lopez, 979 F.2d at 1034. "Extrinsic evidence . . . is admissible under the general standards of Rules 402 and 403 to contradict specific testimony, as long as the evidence is relevant and its probative value is not substantially outweighed by the danger of unfair prejudice." Id.

Although Amond had made general admission concerning his treatment for drug and alcohol problems, the exhibits were introduced and used to contradict specific portions of Amond's testimony. See Ramos v. Liberty Mut. Ins. Co., 615 F.2d 334, 340 (5th Cir. 1980), cert. denied, 449 U.S. 1112 (1981). A portion of the original D-1 was introduced as evidence contradicting Amond's statement on direct that he had never abused alcohol. D-2 was introduced to contradict Amond's statement on direct that he started using cocaine at the age of 27 or 28. D-3 was introduced

as evidence contradicting the representation Amond made on cross that he never had "track marks in both arms."

The relevance of the evidence was not outweighed by the danger of unfair prejudice. The determination of the issue whether there was an accident on January 31st depended largely on the credibility of Amond's testimony. The admission of the exhibits undoubtedly weakened Amond's credibility with the jury. To constitute unfair prejudice under Rule 403, evidence must be more than merely adverse to the opposing party. See Ramos, 615 F.2d at 340.

III

Amond argues that the evidence established beyond question that he was involved in a diving accident. Although Amond moved for a judgment as a matter of law prior to the submission of the case to the jury, he failed to renew his motion after the entry of the judgment. See Fed. R. Civ. P. 50(b). Amond did, however, raise the sufficiency issue in his motion for new trial. We have found no authority indicating whether the sufficiency of the evidence supporting the jury's findings is reviewable on appeal in the absence of a renewed motion for judgment as a matter of law after the trial. See Fed. R. Civ. P. 50(b).

Nevertheless, if the issue has been properly preserved, the standard of review for sufficiency claims arising under general maritime law is "in light of all the evidence whether `reasonable men could not arrive at a contrary verdict' to that urged by movant." Fontenot v. Teledyne Movable Offshore, Inc., 714 F.2d 17,

19 (5th Cir. 1983). The standard of review for sufficiency claims arising under the Jones Act is "whether there is a `complete absence of probative facts' to support the non movant's position." Id.

Because the jury's verdict--that Amond was not involved in an accident on January 31, 1991--is supportable under all potentially applicable standards, we have no hesitation in affirming. Testimony from Amond's treating physician suggests that the bends are diagnosed largely through subjective complaints. Dr. Garner testified that a sociopath could mislead his physician. There was testimony suggesting that Carpal Tunnel Syndrome could have been caused by a combination of Amond's drug use and a congenital defect of Amond's.

The record is replete with instances of Amond's propensity for untruthfulness. It is well-settled that this court gives great deference to the credibility determinations of the trier of fact. Martin v. Thomas, 973 F.2d 449, 453 (5th Cir. 1992). The judgment of the district court is consequently

A F F I R M E D.