UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-3600
Summary Calendar

NORA JONES,

Plaintiff-Appellant,

versus

SUZETTE D. BRATTON, ET AL.,

Defendants-Appellees,

ROBERT G. HAIK,

Intervenor.

Appeal from the United States District Court for the
Eastern District of Louisiana
(CA-92-3031 "H" (1))

(October 25, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.*

PER CURIAM:

This Louisiana law diversity suit filed by plaintiff-appellant Nora Jones (Jones) against defendants-appellees Suzette Bratton, Kenneth Bratton, and Potomac Insurance Company of Illinois (Defendants) arises from an automobile collision that occurred on

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

January 23, 1992 in Mandeville, Louisiana. Defendants admitted liability, contesting only the amount of damages. The parties consented to a trial before Magistrate Judge Lemelle. After a three-day trial in June 1993, the jury returned a verdict awarding Jones $22,152.40.

Jones filed several post-trial motions, including a motion for a new trial under Federal Rule of Civil Procedure 59. After a hearing, the magistrate judge denied Jones' motions, stating: "While this writer would have given a higher award than the jury, there is ample evidence in the record to support the jury's verdict." Jones now appeals the denial of this post-trial motion and also raises several other issues.

Although it is undisputed that defendant Suzette Bratton rear-ended Jones' car, the parties' accounts of the ensuing events diverge. Jones alleges that, as a result of the accident, she suffered cervical neck strain, a brain injury, and speech disorder, all of which required extensive medical treatment and precluded her from returning to work as a registered nurse. By contrast, Defendants assert that the collision involved a minor, very low-speed impact and did not cause any brain injury allegedly suffered by Jones. Both parties proffered expert medical testimony on the extent of Jones' injuries.

We review a trial court's order denying a new trial for an abuse of discretion. *Conway v. Chemical Leaman Tank Lines, Inc.*, 610 F.2d 360 (5th Cir. 1980). Since the trial court has the opportunity to observe the witnesses, their demeanor, and the evidence in the context of a live trial, this deference is

especially appropriate where, as here, the court denies the motion and leaves the jury's determinations undisturbed. *Id.* at 362 (citation omitted). A new trial should not be granted unless the verdict is against the great weight of the evidence. *Id.*

A review of the record supports the magistrate judge's denial of Jones' motion for a new trial. For instance, Jones testified that, prior to the accident, she intended to work two jobs as a nurse and earn twice as much money as she had ever earned in her entire nursing career. However, Jones conceded that one month before the accident she had requested to work only part-time because of job-related stress. Jones also claimed that the police officer at the scene of the accident refused to call an ambulance for her. At trial, the officer testified that Jones never asked him to call an ambulance and that he had never refused to call an ambulance for an accident victim. In addition, Defendants' impeachment of Jones' expert Dr. Van Geffen may have properly damaged the credibility of Jones' claim in the eyes of the jury. On cross-examination, Dr. Van Geffen admitted writing a May 10, 1993 letter to another doctor stating that Jones was able to return to work as a nurse. In a second letter dated the same day, Dr. Van Geffen wrote the state disability examiner that Jones was disabled from her job and thus entitled to benefits. Defendants' expert Dr. Hayden testified that she found it very unlikely that Jones sustained a brain injury of any significance in the accident.

This testimony, along with other facts in the record,[1]

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[1] In December 1991, one month before the collision in this case, Jones was involved in a more serious accident in which she

supplies ample evidence for the jury to doubt the credibility of Jones' claim. We cannot say that the jury's verdict is against the great weight of the evidence. Therefore, we are unable to say that the denial of Jones' motion for a new trial was an abuse of discretion.

On appeal, Jones has requested additur. We are bound by authority that the Seventh Amendment prohibits a federal court from using additur to increase the damages awarded by the jury. *Dimick v. Schiedt*, 55 S.Ct. 296 (1935); *Silverman v. Travelers Ins. Co.*, 277 F.2d 257, 262 (5th Cir. 1960). Therefore, Jones' claim for additur is without merit.

Jones also contends that the jury verdict was the product of prejudice, arguing that Defendants used peremptory challenges to strike prospective jurors on the basis of race. The use of peremptory strikes to exclude prospective jurors on the basis of race violates the Equal Protection Clause. *Batson v. Kentucky*, 106 S.Ct. 1712 (1986). The Supreme Court has since extended the *Batson* rationale to civil cases. *Edmonson v. Leesville Concrete Co., Inc.*, 111 S.Ct. 2077 (1991). A constitutional objection to the composition of the jury raised for the first time in a post-trial motion is untimely and therefore barred. *Dawson v. Wal-Mart Stores, Inc.*, 978 F.2d 205, 210 (5th Cir. 1992). *See United States v. Erwin*, 793 F.2d 656, 667 (5th Cir.), *cert. denied*, 107 S.Ct. 589 (1986) (*Batson* objections should be made before unselected

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was at fault and totalled her car. The jury may have concluded that some of Jones' alleged injuries stemmed from this more serious accident.

veniremen are released). Because Jones raised this argument for the first time in a post-trial motion, we will not address it.

Jones next argues that Defendants' presentation of witnesses and evidence not contained in the pretrial order undermined Jones' trial strategy.[2] The proper remedy for surprise is generally to ask for a continuance. *F & S Offshore, Inc. v. K.O. Steel Castings, Inc.*, 662 F.2d 1104, 1108 (5th Cir. 1981). There has been no demonstration of clear abuse of discretion or prejudicial unfairness or surprise in the trial court's complained of rulings, certainly not such as would require a new trial. Moreover, Jones failed to ask for a continuance at trial, thus waiving any argument based on unfair surprise.

Finally, Jones contends that the jury either improperly based its verdict on an average or improperly awarded damages solely for medical expenses. It is well established that an appellate court should be very reluctant to disturb a jury's assessment of damages. *Munn v. Algee*, 924 F.2d 568 (5th Cir.), *cert. denied*, 112 S.Ct. 277 (1991). We will not join Jones in speculating on possible mathematical formulas employed by the jury to arrive at the verdict. We merely hold that there is sufficient evidence in the record to support the jury's verdict.

CONCLUSION

For the foregoing reasons, the judgment below is

AFFIRMED.

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[2] One of the surprise witnesses Jones claims affected her trial strategy is Officer Schwartz. In fact, Officer Schwartz was listed as one of Jones' own witnesses in the pretrial order.