

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4007
Summary Calendar

MARY D. RICHARD and
RODNEY W. RICHARD,

Plaintiffs-Appellants,

versus

OWENSBY & SONS TRUCKING, INC.,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Western District of Louisiana
(90-CV-0731)

(July 21, 1993)

Before POLITZ, Chief Judge, DAVIS and JONES, Circuit Judges.

POLITZ, Chief Judge:*

Mary D. and Rodney W. Richard appeal an adverse judgment on jury verdict and several related trial rulings. Finding no reversible error, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

Mary Richard has a history of back and neck injuries beginning with an automobile accident in 1980 which required a four-level cervical fusion. In 1987 she suffered a crushed vertebrae in a fall down a flight of stairs and in the summer of 1988 she had two more automobile accidents. The accident which is the subject of this appeal occurred May 11, 1989 when an 18-wheeler had a blowout and its tire fragments struck the Richards' vehicle. When the car and tire collided, the car became airborne and Mary Richard claims she hit her head on the roof of the car and jammed her shoulder in the safety belt's shoulder strap. She contends that as a result of this accident she suffered a herniated disc at the C2-3 level, aggravation of her temporomandibular joint problems, and severe depression.

The Richards brought suit against Owensby & Sons Trucking, the owner of the 18-wheeler, and its insurer, Clarendon National Insurance Company. At the first trial, the jury returned a verdict in favor of the Richards for past and future medical expenses and loss of earnings, but awarded no damages for pain and suffering. Because under Louisiana law it is error for a jury to award special damages but no general damages, the defendants conceded liability but moved for a new trial on causation and damages. The Richards filed a cross-motion for a new trial limited to the amount of general damages for pain, suffering, and mental anguish. The district court granted the defendants' motion and ordered a new trial on both causation and damages. At the second trial the jury

found that none of Mary Richard's injuries were caused by the May 1989 accident and judgment was entered in favor of the defendants. The Richards timely appeal.

Analysis

The New Trial Issues

The Richards contend that the district court erred in granting a new trial on both causation and damages rather than on only the amount of general damages. They suggest that the court's decision was based upon a misperception of Louisiana law.

District courts have wide discretion to grant a new trial and such an order will only be reversed for abuse of that discretion.¹ Rule 59 of the Federal Rules of Civil Procedure provides that "[a] new trial may be granted on all or part of the issues."² The decision whether the new trial should embrace all as opposed to part of the issues is similarly reviewed only for clear abuse of discretion.³ "Courts must order a complete retrial of issues 'unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice.'"⁴ A new trial on all issues may be required "when the issues subject to retrial are so interwoven with

¹ **Eximco, Inc. v. Trane Co.**, 748 F.2d 287 (5th Cir. 1984).

² Fed.R.Civ.P. 59(a).

³ **Taherzadeh v. Clements**, 781 F.2d 1093 (5th Cir. 1986).

⁴ **Nissho-Iwai Co. v. Occidental Crude Sales, Inc.**, 729 F.2d 1530, 1538 (5th Cir. 1984) (quoting **Gasoline Products v. Champlin Refining**, 283 U.S. 494, 500 (1931)).

other issues in the case that they 'cannot be submitted to the jury independently . . . without confusion and uncertainty, which would amount to a denial of a fair trial.'"⁵

The district court's decision to grant a new trial relied, at least in part, upon our interpretation of Louisiana law in **Pagan v. Shoney's, Inc.**⁶ wherein we held that "[t]o award special damages for medical expenses and lost wages, but not for general damages SO personal injury, pain and suffering, etc. SO is, as a matter of Louisiana law, to err."⁷ In **Pagan**, faced with such an error, we remanded for a new trial only on damages, but declined to limit that new trial to general damages. We specifically refused to "go so far as to affirm the jury's award of special damages and leave only general damages to be re-tried. To limit so narrowly the scope of the new trial would be to misunderstand the nature of an inconsistent verdict."⁸ Following **Pagan**, the court *a` quo* concluded that a new trial was warranted both on the issues of special and general damages, and the related issue of causation.

The Richards contend that **Pagan** misapplies Louisiana law. In most cases in which Louisiana courts have been faced with jury verdicts awarding special damages but no general damages, the error

⁵ **Colonial Leasing of New England, Inc. v. Logistics Control Int'l**, 770 F.2d 479, 481 (5th Cir. 1985) (quoting **Gasoline Products**, 283 U.S. at 500)).

⁶ 931 F.2d 334 (5th Cir. 1991).

⁷ 931 F.2d at 337 (citing **Marcel v. Allstate Ins. Co.**, 536 So.2d 632 (La.App. 1988), cert. denied, 539 So.2d 631 (1989)).

⁸ **Id.**

has been remedied either by the trial court's award of general damages by way of judgment notwithstanding the verdict⁹ or by the appellate court rendering an award of general damages.¹⁰ The Richards note that an underlying principle of **Erie**¹¹ is that, in diversity cases, the Federal Rules of Civil Procedure should be used to resolve a case "as nearly as possible as if it were in a state courtroom."¹² Thus, appellants argue that to replicate the result which would have obtained in a Louisiana state court, the district court should have granted a new trial only on the issue of the amount of Mary Richard's general damages.

In this case, the district court found that the issues of causation and damages were so interwoven that they should be retried together. Due to Mary Richard's extensive pre-existing injuries, this case involved difficult causation questions. Although a Louisiana trial or appellate court may be competent to render an appropriate general damage award in such a case, we can not say that the district court's decision herein to grant a new trial on the closely-related issues of causation and damages was an abuse of discretion.

⁹ **Sumrall v. Sumrall**, 612 So.2d 1010 (La.App. 1993); **Brantley v. General Motors Corp.**, 573 So.2d 1288 (La.App.), cert. denied, 577 So.2d 17 (1991); **Jones v. Northbrook Ins. Co.**, 544 So.2d 742 (La.App.), cert. denied, 548 So.2d 1234 (1989).

¹⁰ **Martin v. Francis**, 600 So.2d 1382 (La.App.), cert. denied, 606 So.2d 541 (1992); **Marcel**; **Harper v. Boudreaux**, 496 So.2d 439 (La.App. 1986).

¹¹ **Erie Ry. Co. v. Tompkins**, 304 U.S. 64 (1938).

¹² **Schulz v. Celotex Corp.**, 942 F.2d 204, 207 (3d Cir. 1991).

The Causation Verdict in the Second Trial

The Richards raise two related challenges to the jury's determination in the second trial that Mary Richard's injuries were not caused by the May 1989 accident. They first contend that the district court erred when, at the close of the evidence, it refused to grant them a judgment on causation as a matter of law. They then contend that the jury's verdict is unsupported by the evidence. Both of these challenges are the same.¹³

A party is entitled to judgment as a matter of law if "there is no legally sufficient evidentiary basis for a reasonable jury to have found for [the other] party."¹⁴ If substantial evidence supports the verdict, we must affirm the district court's denial of such a motion.¹⁵ "Substantial evidence is 'evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions.'"¹⁶

The essential question before us is whether there was substantial evidence from which the jury could have concluded that the May 1989 accident caused Mary Richard no compensable injuries. Although the question is very close, it must be answered in the affirmative.

¹³ **Smith v. Transworld Drilling Co.**, 773 F.2d 610, 615 (5th Cir. 1985). Under Fed.R.Civ.P. 50, as amended in 1991, sufficiency may only be attacked on a motion for judgment as a matter of law.

¹⁴ Fed.R.Civ.P. 50.

¹⁵ **Transoil (Jersey) Ltd. v. Belcher Oil Co.**, 950 F.2d 1115 (5th Cir.), cert. denied, 113 S.Ct. 90 (1992).

¹⁶ **Id.** at 1118 (quoting **Boeing Co. v. Shipman**, 411 F.2d 365, 374 (5th Cir. 1969) (en banc)).

The Richards contend that every medical opinion given at trial was that the accident caused Mary Richard some injury. As the defense counsel repeatedly brought out on cross-examination, these opinions were based in large part upon her representations to the doctors that she experienced additional pain and depression following the accident. For example, Dr. Jackson testified that the results of two neurological examinations, one shortly before the accident and the other shortly after the accident, were "essentially the same," and his conclusion that the May 11 accident aggravated her condition was based "on her history of her complaints of increasing pain." In addition, Mrs. Richard sought treatment for depression by Dr. Allen for the first time in March, 1992; she did not see Dr. Welch regarding the flare up of her temporomandibular joint problems until February, 1992 SO nearly three years after the accident. Both Allen and Welch could base their determinations that the accident caused injury only upon her representation that she began having symptoms immediately following the accident.¹⁷ The jury's finding necessarily was based largely upon its credibility assessment of Mrs. Richard.

It was within the province of the jury to infer that Mrs. Richard inaccurately represented the effect of the accident on her condition. That inference would be supported by the giving of inconsistent testimony. For example, she testified at trial that

¹⁷ The jury was also entitled to make the reasonable inference that problems for which Richard did not seek treatment until almost three years after the accident were more likely than not unrelated to that accident.

prior to the accident her pain problems had decreased and she was able to take care of both her daughter and her infirm mother-in-law. At a deposition in 1990, however, she testified that in the year before the accident she was only able to rest and watch television. In addition, contrary to her representation that her constant pain and depression began with the accident, Dr. Jackson testified that when he examined her one month before the accident she complained of constant pain and depression; he also suspected at that time that the C2-3 discs might have been the source of her problems. "[I]t is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses."¹⁸ According appropriate deference to the jury's responsibility to make credibility assessments and reasonable inferences from the evidence, we find that there is substantial evidence to support the jury's verdict on causation.

The Jury Charge

Finally, the Richards contend that in the second trial the jury was instructed improperly on the issue of damages. Again following our lead in **Pagan**, the district court instructed the jury that "if you award no general damages, then you may not award any special damages."¹⁹ The Richards maintain that although it is error under Louisiana law to award special damages and no general damages, the contra-positive of that statement, reflected in the

¹⁸ **Boeing**, 411 F.2d at 375.

¹⁹ See 931 F.2d at 338.

district court's instruction, is incorrect under Louisiana law.

If a timely objection has been made to a jury instruction, "[w]e will not reverse 'if we find, based upon the record, that the challenged instruction could not have affected the outcome of the case.'"²⁰ Because we affirm the jury's determination that none of Mary Richard's injuries were caused by the May 11, 1989 accident, we do not reach the issue about error in the instruction on damages. That instruction could not have affected the outcome of the second trial -- the jury obviously never reached that issue.

The judgment of the district court is AFFIRMED.

²⁰ **Middleton v. Harris Press and Shear, Inc.**, 796 F.2d 747, 749 (5th Cir. 1986) (quoting **Bass v. USDA**, 737 F.2d 1408, 1414 (5th Cir. 1984), further citations omitted).