IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-4091

Summary Calendar

JOYCE B. ARCENEAUX, ET AL., and
VALERIE FAYE ARCENEAUX, ET AL.,

Plaintiffs-Appellants,

v.

MIKE HOOKS, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(90-CV-634)

(January 31, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

Joyce B. Arceneaux and Valerie Arceneaux appeal the district court's denial of their motion for new trial on grounds that the jury issued a compromise verdict and that the verdict was inconsistent. Finding no abuse of discretion, we affirm the judgment of the district court.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

On June 18, 1989, while working for Mike Hooks, Inc. aboard the dredge MISSOURI H, 59-year-old Adie Arceneaux died of a heart attack approximately a half-hour after being involved in an altercation with Terry Prejean, a fellow employee. Joyce B. Arceneaux--Adie's widow--and Adie's eight children, including Valerie Arceneaux,[1] filed suit in the United States District Court for the Western District of Louisiana against Mike Hooks, Inc. The plaintiffs set forth claims of negligence under the Jones Act, 14 U.S.C. § 688 et seq., and unseaworthiness under the general maritime laws of the United States.[2]

After a three-day trial, the jury deliberated approximately three hours and determined that (1) the MISSOURI H was not unseaworthy; (2) Mike Hooks, Inc. was negligent; (3) the

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[1] Prior to trial, the district court dismissed the claims of all of the children except those of Valerie Arceneaux, an adult child. Although married at the time of trial, she was unmarried, unemployed, and living with her parents at the time of her father's death.

[2] We note that the record does not show that Joyce Arceneaux or any of the other plaintiffs who filed suit has been qualified as the executor/executrix or the administrator of the decedent's estate. The Jones Act requires that only the decedent seaman's "personal representative" may bring an action under the Act "for the benefit of the surviving widow or husband and children" of the decedent. 46 U.S.C. § 688(a); see Van Beeck v. Sabine Towing Co., 300 U.S. 342, 348-51 (1937).

However, Mike Hooks, Inc. has not pleaded absence of capacity and has thus waived the issue. See FED. R. CIV. P. 9(a); Lang v. Texas & Pac. Ry. Co., 624 F.2d 1275, 1277 (5th Cir. 1980) (although the plaintiff in a wrongful death action brought under the Federal Employers Liability Act was not the decedent's "personal representative," the defendant had failed to plead absence of capacity at trial and had thus waived the issue on appeal).

negligence of Mike Hooks, Inc. was a legal cause of Arceneaux's death; (4) Arceneaux himself was negligent, and his negligence was a legal cause of his death; (5) Arceneaux was 50 percent responsible for the negligence which contributed to his death; and (6) Arceneaux had experienced pain and suffering prior to his death. The jury also determined that $25,000 in damages should be awarded only to Joyce Arceneaux, and not to Valerie Arceneaux, for loss of support and services and that no damages should be awarded to compensate for Arceneaux's pain and suffering.

Joyce and Valerie Arceneaux then filed a motion for new trial, arguing that the jury's verdict that Arceneaux was 50 percent responsible for the negligence which contributed to his death was against the weight of the evidence, that the jury's failure to award any loss of support to Valerie Arceneaux, a child of the deceased, was not supported by the evidence, and that the damages awarded were inadequate. Joyce and Valerie Arceneaux also supplemented that motion, arguing that the issue of damages should be retried because the verdict was inconsistent with the damage award. The district court denied the motion for new trial on all grounds set forth, and this appeal ensued.

II.

Joyce and Valerie Arceneaux assert only two points of contention on appeal: that the district court erred in denying their motion for new trial because the verdict was a compromise verdict, resulting in the award of inadequate damages, and

because the verdict was inconsistent with the damages awarded. We address each of these contentions in turn.

A. *Standard of Review*

This court may overturn a denial of a motion for new trial only upon a finding of abuse of discretion. Yarbrough v. Sturm, Ruger & Co., 964 F.2d 376, 378 (5th Cir. 1992); Pagan v. Shoney's, Inc., 931 F.2d 334, 337 (5th Cir. 1991). Our standard of review is "'somewhat narrower when a new trial is denied, and somewhat broader when a new trial is granted.'" Pagan, 931 F.2d at 337 (quoting Jones v. Wal-Mart Stores, Inc., 870 F.2d 982, 986 (5th Cir. 1989)).

B. *Compromise Verdict*

Joyce and Valerie Arceneaux first contend that the verdict issued by the jury was a compromise verdict and that therefore the district court erred in denying their motion for new trial. We disagree.

"A compromise verdict occurs when a jury, which is unable to agree on liability, compromises that disagreement and awards inadequate damages." Pagan, 931 F.2d at 339. If such a verdict occurs, the complaining party is entitled to a new trial because "considerations of damages should not taint the initial question of the defendant's fault." Yarbrough, 964 F.2d at 379.

Because a court does not question jurors about their reasoning processes, it can only speculate on how the jury assessed the amount of damages awarded. Thus, to determine whether the jury issued a compromise verdict, this court examines

the totality of the circumstances and considers not only any indicia of compromise apparent from the record but also "other factors that may have caused a verdict for damages that would be inadequate if the jury actually found liability." Id. (citing Pagan, 931 F.2d at 339). "An award of only nominal damages coupled with either a disregard for uncontested and obvious damages or an award of only out-of-pocket expenses raises the suspicion of a compromise verdict," Pagan, 931 F.2d at 339, but is not dispositive of the issue. Other factors this court views in determining whether the jury reached a compromise verdict include whether the issue of liability was strongly contested, whether the damages awarded were grossly inadequate, whether the jury was confused concerning contributory negligence, and how long the jury deliberated. Yarbrough, 964 F.2d at 379 & n.2; Pagan, 931 F.2d at 339. However, no compromise exists when there is another basis for an alleged improper award. See Pagan, 931 F.2d at 339.

Although we acknowledge that the extent of the "physical" altercation between Arceneaux and Prejean was very much at issue throughout the trial and that thus the issue of liability might have been strongly contested, we find no other indicia of a compromise. First, although the jury awarded no general damages for pain and suffering, it did award $25,000 in special damages for loss of support and services, a figure reflecting more than merely nominal or out-of-pocket expenses. Evidence also supports

the jury's failure to award general damages. See Part II.C. infra.

Moreover, we cannot say that the damages awarded in the instant case were grossly inadequate. The damages awarded for support and services ($25,000) admittedly fell outside the range provided by the two economic experts who testified at trial (approximately between $70,000 and $130,000). Nonetheless, the law does not mandate that the jury return an award which falls within parameters established by such experts. See Bartholomew v. CNG Producing Co., 832 F.2d 326, 331 (5th Cir. 1987) (upholding damage award of $325,000 despite testimony that economic loss was between approximately $475,000 and $615,000); Haas v. Atlantic Richfield, 799 F.2d 1011, 1017 (5th Cir. 1986) (affirming award of $35,000 for lost past and future wages, even though expert estimated loss as $483,681). As we stated in Leefe v. Air Logistics, Inc., 876 F.2d 409 (5th Cir. 1989),

> [although] it is unusual for the jury to make an award below the amount approximated by expert witnesses . . . , we must also recognize that a jury's award is more sacred than an expert's testimony. Although we must give great deference to the jury, the jury need not defer to the experts. We do not require that a jury's award fall within the estimates given by expert testimony. The purpose of expert testimony is to guide the jury.

Leefe, 876 F.2d at 411-12 (internal citations omitted) (upholding award of $15,000 for lost future wages when experts estimated loss between $62,106 and $333,716).

Dr. Mike Mounir, a cardiologist, who reviewed Adie Arceneaux's medical records dating back to 1958, testified at trial that Arceneaux had been treated by a Dr. Kang mainly for

his persistent complaint about chest pain since at least 1982. Dr. Mounir also testified that these medical records indicated that Arceneaux, who visited Dr. Kang every three to four months, complained on fifteen or twenty visits of pain "across the chest going sometimes to the neck, sometimes to both arms," that Dr. Kang had started Arceneaux on cardiac medication in March 1982 and had noted that Arceneaux's electrocardiogram had abnormalities in it, and that Arceneaux's complaints of chest pains continued through some time in 1986 and then were made again when Arceneaux visited Dr. Kang in June 1989--two weeks before Arceneaux's death. From Dr. Mounir's testimony, then, the jury could have reasonably concluded that the experts' assessment of Arceneaux's work life expectancy as 5.48 years from the date of his death, a figure used to calculate loss of support and services to Arceneaux's dependents, was incorrect in light of Arceneaux's medical history and awarded specific damages accordingly. Thus, although the actual award of damages for loss of support and services was lower than what the experts had calculated it to be, record evidence provides an alternative explanation for the jury's award. See Pagan, 931 F.2d at 340 (explaining that one reason the verdict was not a compromise was that "another basis for the jury's improper award exists"); cf. Yarbrough, 964 F.2d at 379 (determining that the most important evidence that the jury's verdict was a compromise was that the evidence offered no alternative explanation for the verdict).

Further, the court explained in its instructions to the jury that the court would reduce the damages awarded by any percentage of negligence the jury might find on Arceneaux's part, and the record does not indicate that the jury was confused about contributory negligence. The jury also reached its verdict after approximately three hours of deliberation, a reasonable period after a three-day trial. Accordingly, the totality of the circumstances does not indicate that the verdict in this case was a compromise verdict. The district court therefore did not abuse its discretion in denying the motion for new trial on grounds that the verdict was compromised.

C. *Inconsistent Verdict*

Joyce and Valerie Arceneaux also contend that the jury's finding that Adie Arceneaux had experienced pain and suffering prior to his death was inconsistent with its failure to award any damages to compensate for that pain and suffering. They specifically rely on this court's decisions in Pagan and Davis v. Becker & Assocs., Inc., 608 F.2d 621 (5th Cir. 1979), as dispositive.

As the district court noted, however, Pagan is distinguishable from the instant case in that Pagan was an action involving Louisiana law with this court's jurisdiction based in diversity. See Pagan, 931 F.2d at 336-37. In Pagan, the plaintiff filed suit against Shoney's, Inc. for injury resulting from a slip-and-fall accident on Shoney's premises. Id. at 336. The jury found Shoney's negligent and the plaintiff 90 percent

negligent and awarded the plaintiff medical expenses and lost wages but nothing for general pain and suffering. Id. Although in Pagan we determined that the district court abused its discretion in denying the plaintiff's motion for new trial, we did so because "to award special damages for medical expenses and lost wages, but not for general damages," i.e., pain and suffering, was to err as a matter of Louisiana law. Id. at 337. Thus, the jury's answers to special verdicts in Pagan were fatally inconsistent under Louisiana law, and we remanded for a new trial on the issue of damages. Id. at 340.

Our decision in Davis is also distinguishable from the instant case. In Davis, the jury found that the plaintiff's back was injured in a December 1975 accident and that the defendant was liable for the consequences thereof. Davis, 608 F.2d at 623. The jury also awarded the plaintiff 100 percent of his lost wages from the date of the accident through April 1979, two years after the trial, but nothing for his pain and suffering. Id. at 622-23. The plaintiff had incurred a prior injury to his back in 1970, requiring removal of the torn portion of a disc, and the defendant contended that the jury could have attributed the pain and suffering the plaintiff experienced after December 1975 to only the 1970 injury. Id. at 622.

We determined, however, that the jury's verdict was inconsistent. Testimony at trial from both the plaintiff himself and the surgeon who had treated him since 1970 indicated that the increasing pain and disability which the plaintiff had

experienced after the 1975 accident came from either reinjury or reactivation of the 1970 injury. Id. at 622-23. The surgeon also testified that the plaintiff had undergone surgery in 1976, a process which necessarily entailed pain and suffering, because of the 1975 accident. Id. at 623. Although another doctor testified that the plaintiff's complaints were related only to his 1970 injury, we determined that because the jury found the defendant liable for all of the consequences of the plaintiff's 1975 accident, the jury had to have accepted the surgeon's testimony relating the plaintiff's injury at issue to the 1975 accident. Id. Finding no substantial evidence that related the plaintiff's pain and suffering to the 1970 injury and thus no view of the case which could make the jury's verdict consistent, we therefore determined that the jury had inconsistently awarded no damages for the plaintiff's pain and suffering and remanded for a new trial on damages. Id.

As we indicated in Davis, and as the district court in the instant case explained, because the Seventh Amendment requires this court to make a concerted effort to reconcile apparent inconsistencies in answers to special verdicts if at all possible, we must attempt "to reconcile the jury's findings by exegesis, if necessary, before we are free to disregard the jury's verdict and remand the case for a new trial." Alvarez v. J. Ray McDermott and Co., Inc., 674 F.2d 1037, 1040 (5th Cir. 1982); see Wommack v. Durham Pecan Co., Inc., 715 F.2d 962, 968 (5th Cir. 1983). Thus, only if we find that "no view of the case

makes the jury's answers consistent and that the inconsistency is such that the special verdict will support neither the judgment entered below nor any other judgment" will we decide that the district court erred in denying a motion for new trial. Alvarez, 674 F.2d at 1040 (emphasis added).

The jury's award of no general damages in the instant case, despite its finding that Arceneaux "experienced pain and suffering prior to his death," is supported by the evidence. As the district court noted, there was no direct testimony from any medical expert concerning the intensity or length of pain and suffering associated with Arceneaux's heart attack. Further, although a witness to the altercation, J. Allen Richey, testified that Prejean "landed quite a few blows" on Arceneaux, he was the only one to testify to numerous blows. Prejean himself testified that he had struck Arceneaux only once, and the coroner--who examined Arceneaux's body shortly after he died--stated in his report that he found only two small scrapes, one on the forehead and one on the cheek, and one small scratch on the right side of the neck. The jury could have therefore concluded, as the district court pointed out, that the pain and suffering Arceneaux experienced from being hit by Prejean was too minor and from his heart attack too brief to be compensable. Hence, the jury's determination that Arceneaux "experienced pain and suffering prior to his death" can be read consistently with its failure to award any general damages, and the district court did not abuse

its discretion in denying the motion for mistrial on inconsistency grounds.

III.

For the foregoing reasons, we AFFIRM the judgment of the district court.