

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30295
Summary Calendar

NICHOLAS EAGAN,

Plaintiff,

TIMOTHY J. FALCON,

Movant-Appellant,

versus

LaPLACE TOWING, INC.,

Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana
(CA-91-4623-N)

(December 20, 1994)

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

PER CURIAM:*

Timothy J. Falcon, counsel for Nicholas Eagan in a Jones Act claim against LaPlace Towing, Inc., appeals an order of sanctions against him personally under 28 U.S.C. § 1927. Finding no 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 Pursuant to that Rule, the court has determined that this opinion should not be published.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

Eagan, an employee of LaPlace Towing, Inc., was injured in the course of his employment as a deckhand on the M/V ST. TAMMANY.¹ Although LaPlace initially made arrangements to pay for Eagan's medical treatment, when Eagan's physician recommended further diagnostic tests the company refused to pay, offering instead to settle the entire claim for \$250. Eagan refused the offer, retained Falcon as his counsel, and filed a Jones Act claim.

At trial, Falcon asked Eagan whether LaPlace ever made a settlement offer. Despite defense counsel's immediate objection, Eagan did not wait for the court's ruling and answered the question affirmatively. At the ensuing bench conference Falcon defended the question as relating to a statement made at the time of injury before attorneys had been retained. The court sustained the objection under Fed.R.Evid. 408² and granted defendant's motion for a mistrial because the jury had been incurably tainted. Defendant moved for excessive costs and attorneys' fees. Plaintiff moved for an *in limine* determination of the admissibility of the evidence in the second trial. The court denied plaintiff's motion but granted the defense motion and assessed costs against the plaintiff, ordering Falcon to pay defendant's attorneys' fees totaling \$1050. Eagan settled his claim against LaPlace. Falcon timely appealed.

¹At the time of injury Eagan was actually employed by Eckstein Marine Service, LaPlace's predecessor in interest.

²The court did not refer to Rule 408 in its contemporaneous ruling but did so in its order on later motions.

Analysis

Falcon first contends that the district court erred in granting the mistrial, claiming that testimony regarding LaPlace's settlement offer was admissible. We review the grant of a mistrial for abuse of discretion.³ The admission of evidence is also reviewed for abuse of discretion; we may reverse only if the challenged ruling is erroneous and affects a substantial right of the party.⁴

Rule 408 bars evidence of settlement offers as proof of liability.⁵ The trial judge, however, retains discretion to admit such evidence for other purposes.⁶ Falcon contends that the evidence was admissible as an exception to Rule 408 because he sought to introduce it to prove the bad faith element of Eagan's maintenance and cure claim rather than to prove liability.

³**United States v. Willis**, 6 F.3d 257 (5th Cir. 1993).

⁴**Brunet v. United Gas Pipeline Co.**, 15 F.3d 500 (5th Cir. 1994).

⁵Fed.R.Evid. 408 provides:

Compromise and Offers to Compromise. Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. . . . This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

⁶**Id.**; **Branch v. Fidelity & Casualty Co. of N.Y.**, 783 F.2d 1289 (5th Cir. 1986).

To obtain punitive damages and attorneys' fees on a maintenance and cure claim, an injured seaman must demonstrate the shipowner's maintenance and cure liability, as well as an unreasonable refusal to pay and callous indifference to the seaman's plight.⁷ The district court rejected Falcon's attempt to offer settlement evidence for proof of bad faith, finding proof of bad faith for a maintenance and cure claim to be completely intertwined with proof of liability such that the two issues could not be addressed separately. The court concluded that the sole rationale for using the evidence to prove bad faith would be that it showed LaPlace's awareness of its liability.

We agree with the district court that the bad faith and liability elements of a maintenance and cure claim may not be artificially separated simply to render the settlement testimony admissible. We therefore conclude that the court did not abuse its discretion. The court's exercise of discretion is buttressed by its determination that even if the settlement offer were being introduced for a purpose other than to prove liability, it was excludable under Fed.R.Civ.P. 403 because the danger of unfair prejudice outweighed its probative value.⁸

We also conclude that the court did not err in determining that the testimony about the settlement offer tainted the jury,⁹

⁷**Morales v. Garijak, Inc.**, 829 F.2d 1355 (5th Cir. 1987).

⁸**Williams v. Chevron U.S.A., Inc.**, 875 F.2d 501 (5th Cir. 1989).

⁹See **Kennon v. Slipstreamer, Inc.**, 794 F.2d 1067 (5th Cir. 1986) (disclosure of nominal amount of settlement prejudiced

and that a curative instruction likely would not have removed the taint.¹⁰ We are here deferential to the judgment of the district judge who necessarily occupied a superior vantage point to evaluate the effect of the inadmissible evidence.¹¹ We accordingly conclude that the decision to grant a mistrial was not an abuse of the court's discretion.

Falcon next argues that the district court erroneously imposed on him 28 U.S.C. § 1927 sanctions.¹² The imposition of sanctions under section 1927 is reviewed for abuse of discretion.¹³ To support section 1927 sanctions, the district court must find that counsel multiplied proceedings unreasonably and vexatiously, and in

non-settling defendant).

¹⁰See, e.g., **United States v. Whippy**, 531 F.2d 768 (5th Cir. 1976) (reversing conviction where circumstances of case rendered limiting instruction "inescapably insufficient" thus making mistrial only proper remedy).

¹¹See **United States v. Bauman**, 887 F.2d 546 (5th Cir. 1989) (upholding trial court's *sua sponte* declaration of mistrial because trial judge was most familiar with events of trial); **In Re Air Crash Disaster Near New Orleans, La.**, 764 F.2d 1084 (5th Cir. 1985) (explaining that judge was in better position than appellate court to evaluate effect of improper answer on jury); **Abdi v. State of Ga.**, 744 F.2d 1500 (11th Cir. 1984) (explaining that trial judge's grant of a mistrial deserves great deference when the grounds for a mistrial relate to jury prejudice because of trial judge's position in observing the jurors, witnesses and attorneys to evaluate extent of prejudice).

¹²28 U.S.C. § 1927 provides in pertinent part:

Any attorney who . . . so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

¹³**FDIC v. Conner**, 20 F.3d 1376 (5th Cir. 1994).

so doing acted with recklessness, bad faith, or improper motive.¹⁴ In the instant case, Falcon's attempt to introduce inadmissible evidence necessitated a mistrial and thus unreasonably multiplied the proceedings. Moreover, the district court specifically found that Falcon's attempt to introduce the settlement evidence at trial constituted reckless conduct, noting that Falcon neither identified the evidentiary problem in the pretrial order, thus alerting court and counsel, nor briefed the court about his contentions regarding admissibility. The court explained that Falcon should have sought, before the first trial, a ruling *in limine* on the admissibility of the evidence to avoid the risk of a tainted jury. We thus find that the district court did not abuse its discretion in concluding that Falcon's decision to inquire without forewarning about the settlement issue in the presence of the jury constituted reckless conduct.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

¹⁴**Manax v. McNamara**, 842 F.2d 808 (5th Cir. 1988).