

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 94-30568
Summary Calendar

ACY W. NEWSOM and TAMMY NEWSOM,
Individually and as tutors of
Jesse Layne Newsom,

Plaintiffs-Appellants,

versus

WAL-MART STORES, INC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana
(CA-93-1325-E)

(June 1, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

FORTUNATO P. BENAVIDES*:

Plaintiffs-Appellants Acy W. Newsom and Tammy Newsom ("the Newsoms") appeal the final judgment of the district court awarding them damages in the amount of \$3,309.97 and the court's order denying their motion for new trial. The jury verdict found Defendant-Appellee Wal-Mart Stores, Inc. ("Wal-Mart") 25% negligent and Mrs. Newsom 75% negligent, and the court awarded the Newsoms 25% of the total damages determined by the jury to adequately

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Pursuant to that Rule, the Court has determined that this opinion should not be published.

compensate the Newsoms for the injuries sustained by their daughter Jess Layne Newsom, including pain and suffering and medical expenses. We affirm.

FACTS AND PROCEDURAL HISTORY

On May 23, 1992, Mrs. Newsom departed the Wal-Mart store in Hammond, Louisiana. She was pushing a shopping cart containing several items she had just purchased. Her three year-old daughter, Jesse Layne Newsom, was riding in the child seat in the cart, near Mrs. Newsom. As she headed towards the parking lot, Mrs. Newsom proceeded down a concrete ramp outside the store. In the course of descending the ramp, the shopping cart she was pushing reared up from the front end and fell backwards on the rear end, trapping her daughter's leg underneath the handle bar.

Jesse Newsom was taken to the hospital, where she was treated for a fracture of the femur bone in her left leg. Her leg was put in traction for approximately five days. Then she was placed in a body cast for approximately eight weeks. Once the cast was removed, Jesse Newsom participated in a rehabilitation program. By the time of trial she had fully recovered from her injuries.

On March 29, 1993, the Newsoms filed suit in Louisiana state court against Wal-Mart and three individual employees. Wal-Mart removed the case to federal court, alleging fraudulent joinder of the individual employee-defendants. The Newsoms never responded to the removal action, but dismissed the action as to all the non-diverse defendants by stipulation during the jury trial.

After the trial was complete, the jury returned a verdict in

favor of the Newsoms. Responding to interrogatories provided by the court, the jury found Wal-Mart 25% negligent and Mrs. Newsom 75% negligent. The jury also awarded total damages in the amount of \$13,239.90, representing \$5,239.90 in medical expenses and \$8,000 in general damages for pain and suffering. Judgment was entered by the district court in favor of the Newsoms on July 29, 1994, ordering that the Newsoms be awarded 25% of the total damages calculated by the jury (\$3,309.97).

On August 4, 1994, the Newsoms filed a motion for new trial, arguing that the verdict was contrary to the law and the evidence. The district court denied the motion on September 15, 1994. On appeal, the Newsoms challenge the jury's allocation of fault and the amount awarded in damages.

STANDARD OF REVIEW

We review the district court's denial of the Newsom's motion for new trial for an abuse of discretion, that is, for clear error. *Eyre v. McDonough Power Equipment, Inc.*, 755 F.2d 416, 420 (5th Cir. 1985). "Under these circumstances, there is no abuse of discretion denying a motion for new trial unless there is a complete absence of evidence to support the verdict." *Esposito v. Davis*, 47 F.3d 164, 167 (5th cir. 1995).

COMPARATIVE NEGLIGENCE

The Newsoms contend that the jury ignored the instructions of the district judge when they found Mrs. Newsom 75% at fault for the injuries sustained by her daughter. They argue that the evidence presented at trial proves that the shopping cart popped up and fell

backwards only because of the lip or ridge at the end of the ramp. That evidence, they argue, is uncontested except for what defense counsel alleges Mrs. Newsom said in her deposition.

Under the facts presented at trial, we find that a reasonable juror could have found that Mrs. Newsom was 75% comparatively at fault in causing her daughter's injuries. *See Bergeron v. Wal-Mart Stores, Inc.*, 617 So.2d 179, 181 (La. App. 3 Cir. 1993, writ denied). Wal-Mart's expert in the field of mechanical engineering, Andrew McPhate, testified that the accident was precipitated only by the fact that Mrs. Newsom was leaning with her weight against the rear of the cart; although the cart may have struck some otherwise innocuous bump, causing a momentary instability, Mrs. Newsom's weight leaning on the rear portion of the cart caused it to tilt up and fall backwards on her daughter. In addition, Mrs. Newsom's own deposition testimony, wherein she admitted to resting her weight on the back of the cart, supports a reasonable jury's finding of comparative negligence. Therefore, we find that a jury could reasonably conclude that Mrs. Newsom was 75% negligent in causing her daughter's injuries, and that the district court did not abuse its discretion in denying the Newsoms's motion for new trial.

DAMAGES

The Newsoms contend that the jury's damage award of \$8,000 in general damages is too small in light of the injuries sustained by their daughter. Comparing this case with previous cases, the Newsoms argue that even the low end of the range of amounts awarded

in other cases is much greater than in this case.

When a district court denies a motion for new trial, appellate review is especially deferential because in that instance deference to the district court operates in harmony with deference to the jury's determination of the weight of the evidence and the constitutional allocation to the jury questions of fact.

Brun-Jacobo v. Pan American World Airways, Inc., 847 F.2d 242, 244 (5th Cir. 1988). Based on the evidence presented at trial, we find that the jury's assessment of general damages in the amount of \$8,000 should be left undisturbed. Dr. Allen Johnston, Jesse Newsom's orthopedic surgeon, testified that her broken femur was returned to pre-injury status with no permanent physical impairment referable to the injury, and that she suffered very little pain. We find that the district court did not abuse its discretion in deferring to the jury's finding and denying the Newsoms's motion for new trial that claimed an insufficient jury award of \$8,000 in general damages for pain and suffering.

CONCLUSION

For the reasons articulated above, the judgment of the district court is AFFIRMED.