IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-60096
Summary Calendar

BETSY HAGEN,

Plaintiff-Appellant,

versus

JOHN HATCHER, DAVID HATCHER,
D/B/A HATCHER LOGGING and
MARK D. STEVENSON,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
(CA-4:92-47(L)(N))

(September 2, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

Per curiam[1]:

Betsy Hagen was awarded a $100,000 judgment based on a jury verdict in her favor against defendants John Hatcher, David Hatcher, d/b/a Hatcher Logging and Mark D. Stevenson. She appeals, arguing that the jury's verdict was so inadequate and against the great weight of the evidence presented at trial as to indicate bias and prejudice on the jury's part. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

FACTS

On November 26, 1991, Appellant Betsy Hagen was injured when an automobile in which she was a passenger collided head-on with a fully loaded logging truck on U.S. Highway 45 south of Macon, Mississippi. She suffered a brain contusion (bruise), a severe sprain of her right ankle, multiple complex fractures to her pelvis and sacrum and a fractured left arm. She was confined to the hospital for a month and a half, immobilized in traction, primarily because of her pelvic injuries. When she was released from the hospital she remained in traction at home for thirty more days. During the time she was in traction, she was totally dependant on medical personnel, family and friends.

By February of 1992, Hagen had begun to walk unassisted and was on her way to recovery. She was released by her doctors in August 1992. At trial, she testified that she has some residual problems resulting from the injury, including headaches, short term forgetfulness, fear of driving or riding in a car, discomfort during sexual intercourse because of a bony encroachment in her birth canal, dysfunction of nerves causing decreased sensation in the pelvic region, urinary tract infections, and tenderness in her ankle.

The testimony of her doctors called the seriousness and causation of some of these complaints into question. The orthopedic surgeon testified that her fractures had all healed, but that her injuries placed her at greater than normal risk for developing problems with back pain in the future. The gynecologist

who told Hagen about the bony encroachment into the birth canal testified that he could not say whether it would be a problem in delivering a baby by natural childbirth, or give her discomfort during intercourse. The doctor who treated her for a urinary tract infection was not able to say that it was related to the pelvic injury.

At the time of the accident, Hagen was attending college on an academic scholarship. Of the six courses she was enrolled in, she was able to complete four, by taking final examinations after the accident, earning three A's and one B. On May 30, 1992 she married, and decided to work and not return to school, although there was no medical reason that would have prevented her from continuing her studies in the Fall of 1992.

Defendants admitted liability for Hagen's injuries prior to trial and stipulated that the expense of her hospitalization and medical care amounted to $43,024.68.

After the court entered the judgment, Hagen moved for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure, alleging that the jury's $100,000 verdict was contrary to the great weight of the evidence presented at trial and so contrary to the evidence as to evince bias, passion and prejudice on the part of the jury. The trial court denied the motion and Hagen appealed.

STANDARD OF REVIEW

A district court's ruling on a motion for new trial is reviewed for abuse of discretion. *Dawson v. Wal-Mart Stores, Inc.*, 978 F.2d 205, 208 (5th Cir. 1992). Such a standard recognizes the deference

that is due the trial court's first-hand experience of the witnesses, their demeanor, and the context of the trial. This deference is especially appropriate where a new trial is denied and the jury's determinations are left undisturbed. *Conway v. Chemical Leaman Tank Lines, Inc.*, 610 F.2d 360, 362 (5th Cir. 1980).

IS PLAINTIFF ENTITLED TO A NEW TRIAL?

Appellant submits that the $100,000 verdict is inadequate in light of the testimony at trial regarding the extent of Hagen's injuries, the length of her convalescence, her resulting pain and suffering, and the impact of the injuries on Hagen's present and future well-being. There was no dispute, either at trial or on appeal that Hagen's medical bills totaled $43,024.63. The thrust of her argument is that the approximately $57,000.00 award for pain and suffering, time lost to rehabilitation, permanent injuries, and other damages was not enough.

Appellant attributes what she considers the unreasonableness of the verdict to consideration by the jury of several inappropriate factors.

First, Hagen alleges that the jury considered possible insurance coverage in reaching its verdict. Shortly after the jury retired to deliberate, they sent out a note which read:

> Has any compensation been given to Betsy Hagen by <u>any source</u> (ins. or otherwise) to this date
>
> Clell Hall
> (signed)

(emphasis in original). The trial court responded with the following instruction which was approved by Plaintiff's attorney:

> That issue is not relevant or appropriate to your consideration of this case and you are instructed to decide this case without regard to that issue.
>
> Tom S. Lee
> (signed).

Hagen argues that the $100,000 verdict is evidence that the jury disregarded the court's instruction and considered insurance coverage in reaching their decision.

The "crucial assumption" underlying our system of trial by jury "is that juries will follow the instructions given them by the trial judge. Were this not so, it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse...because the jury was improperly instructed." *Parker v. Randolph,* 442 U.S. 62, 73, 99 S.Ct. 2132, 2139, 60 L.Ed.2d 713 (1979). From a review of the record we are not convinced that the jury failed to follow the court's instructions.

Next, relying on alleged facts outside the record, Hagen argues that she was injured in an area of Mississippi which relies to a great extent on the logging business and that the defendants operate a type of business which provides substantial income to the area. There is no evidence in the record that supports this argument. Hagen also complains that defendants' counsel told the venire panel during *voir dire* that only one of the defendants was present in court because "[t]hey have got a small operation in which...one of them needed to stay there or they just had to shut down completely." Although she raised no objection to this statement below, she now argues that size of the defendants' business was inappropriately considered by the jury in reaching a

verdict. This is merely speculation, and Hagen points to nothing in the record that indicates that the size of the defendants' company had an effect on the size of the verdict.

Third, Hagen asks this court to find reversible error in defense counsel's closing argument. Defense counsel quoted the following passage from the deposition testimony of one of Hagen's treating physicians, "[On February 14, s]he was walking. She had minimal pain, X-rays were done to be sure there had been no change in the sacral factor. She still appeared to have healed well. No change of position. I felt she was doing well." Hagen points out that defense counsel did not include the remainder of the doctor's statement, which continued after the quoted portion and read, "I felt she was doing well, considering her injuries."

Further into his closing argument, defense counsel discussed the testimony of Hagen's gynecologist.

> Dr. Madonia said, "This could cause some problems with your sexual intercourse." I don't know at that time, the history taken, not sexually active before marriage, not married, there's nothing to compare it with. He says, "It's something we'll have to see after you're married. And if you are having problems, come back."

Hagen points out that this was not a direct quote from Dr. Madonia's deposition, and argues that it misrepresents the doctor's position. The doctor did testify that the irregularity in the pelvis could possibly cause pain with sexual intercourse, but that he could not determine by examining her whether or not she would have problems. The doctor did not testify that he told Hagen to come back if she was having problems. Rather he testified that she had not been back to see him since March 19, 1992, which was prior

to her marriage.

Hagen did not raise objections to defense counsel's closing argument at trial or in her Motion for New Trial. Issues not raised in the district court will not be heard on appeal. *Capps v. Humble Oil and Refining Co.*, 536 F.2d 80, 82 (5th Cir. 1976).

Finally, Hagen argues that, based on the totality of the circumstances, the trial court's refusal to grant a new trial was an abuse of discretion because the verdict is inadequate. The standard for determining whether a verdict is so inadequate as to require a new trial is whether it indicates passion, bias and prejudice on the part of the jury. *Auster Oil & Gas, Inc. v. Stream*, 835 F.2d 597, 603 (5th Cir. 1988). This standard provides no mathematical rule by which a trial court can assess a jury verdict in order to determine its adequacy or inadequacy. Each case must be decided on its own facts, but it can be useful to examine verdicts rendered in other cases involving similar injuries. *Simeon v. T. Smith & Son, Inc.*,
852 F.2d 1421, 1427 n. 7 (5th Cir. 1988).

The cases cited by Hagen for comparison with her case are helpful, but do not convince us that her judgment is so far out of line as to require reversal. For example, in *MFC Services v. Lott*, 323 So.2d 81 (Miss. 1975), a Mississippi appellate court affirmed a verdict for the plaintiff conditioned on the plaintiff's acceptance of a remittitur from $175,000.00 to $100,000 for damages resulting from a rear end collision. *Id.* at 84. The plaintiff incurred a total of $1,691.17 in medical expenses and $875.00 for

property damage to his vehicle. His ongoing medical complaints included headaches, back and neck pain, and pressure on the nerves affecting his lower extremities. Although Lott's $100,000 judgment is identical to Hagen's, the proof at the two trials differed considerably. Hagen had higher medical bills and a longer hospital stay. Lott's claims included significant property damage and lost wages, neither of which were elements of Hagen's damages. A comparison between Lott and Hagen on the issue of permanent impairment is, at best, imprecise. Lott presented medical evidence that he was not able to engage in most of the main activities by which he earned his living at the time of the accident, and that his condition was permanent. The court noted however, that he could perform other types of work, and so would be able to earn a living in some other way. Hagen's doctors testified that she would have been able to resume her education, and did not put any limit on the type of employment for which she was suited. Both plaintiffs presented evidence of changes in personality and lifestyle allegedly resulting from their injuries. These two cases both resulted in $100,000 verdicts.

While it is possible to find appellate court opinions affirming personal injury awards that are higher and lower, we cannot say as a matter of law that Hagen's verdict is so inadequate as to require reversal. See, *Kern v. Gulf Coast Nursing Home, Inc.*, 502 So.2d 1198 (Miss. 1987) (Court affirmed a $20,000 verdict for an elderly woman who fell from a wheelchair and required surgery for the replacement of her broken hip bone, and who died within two months

of the accident.) But see, *Louisville & N. R. Co. v. Hasty*, 360 So.2d 925 (Miss. 1978) (Court affirmed jury verdict of $125,000.00 to a plaintiff involved in a collision between a van in which she was a passenger and a railroad train. Plaintiff had incurred $10,701.71 in medical expenses, and she had permanent disabilities to her spine and lower extremities. She had also experienced considerable pain and required psychiatric help for a personality change.)

CONCLUSION

For the foregoing reasons the trial court's denial of Appellant's Motion for New Trial is AFFIRMED.