

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4041

HAROLD R. BRICE, ET AL.,
HAROLD R. BRICE,
Plaintiffs,
Plaintiff-Appellee,
versus
ROWAN COMPANIES, INC.,
Defendant-Third Party
Plaintiff-Appellant,
versus
POINT MARINE, INC.,
Third Party Defendant-
Appellee.

Appeals from the United States District Court
for the Eastern District of Texas
(1:90 CV 663)

(December 11, 1992)

Before REYNALDO G. GARZA, HIGGINBOTHAM, and EMILIO M. GARZA,
Circuit Judges.

PER CURIAM:*

I

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Harold Brice was working on the deck of the M/V Point Dover in rough seas. A large wave sent an untethered box across the deck injuring Brice's back, right leg, and knee.

Brice brought suit against his employer Rowan Companies, Inc. for his injuries in U.S District Court for the Eastern District of Texas and demanded trial by jury. Rowan in turn filed a third-party complaint for indemnity from Point Marine, Inc., the owner of the M/V Point Dover. During jury selection, Brice and Point Marine reached a "Mary Carter Agreement," by which Point Marine agreed to pay Brice \$200,000 in exchange for its release and the return of the first \$100,000 of Brice's recovery from Rowan. Noting that Brice and Point Marine now had a common interest at trial, Rowan asked the district court for permission to inquire of the venire regarding the Mary Carter Agreement. Rowan also contended that it should follow, not precede, Point Marine in presenting its defensive case to the jury. The district court denied both of these requests. The jury awarded Brice \$1,250,000 in damages, approximately \$350,000 more than his counsel had asked for. The court ordered a remittitur of \$350,000, which Brice accepted, but refused Rowan's later request for an additional reduction of \$100,000 as credit for Point Marine's net payment of \$100,000 to Brice. Rowan has appealed.

II.

Rowan first argues that it is entitled to a new trial on grounds that Brice's testimony regarding Rowan's payment and subsequent termination of gratuitous advances caused substantial

prejudice and led to a punitive jury verdict. Rowan presented itself as a very generous company in its opening statement. In an effort to counteract this impression, Brice testified that the advances he had been receiving from Rowan were cut off once he chose to seek a second medical opinion. By Rowan's own admission, Brice's mention of this incident was brief and not stressed by Brice's counsel. Moreover, the district court responded to Brice's reference to the amount of the advances he had received by instructing the jury that such information was immaterial and should not be considered. For this reason, Brice's statement was at worst "misleading and inappropriate," the phrase Rowan's counsel used in lodging his initial objection. As such, the district court's admission of the statements was harmless error, if error at all.

Rowan next claims that the district court improperly refused its request to conduct additional voir dire on the Mary Carter settlement reached by Brice and Point Marine. Rowan was advised of the settlement during voir dire and, according to Rowan, asked the court for permission to question the jurors concerning the agreement before the jury was empaneled. Brice and Point Marine, on the other hand, maintain that Rowan made this request after the jury had been selected. We need not resolve this question, for the principal danger identified by Rowan--juror confusion--was adequately handled by the district court's explicit reminders to the jury that Brice and Point Marine were on the same side. Thus, even if we assume that Rowan's request was timely, we cannot say

that the district court abused its discretion in refusing to allow additional voir dire.

Rowan contends that the district court should have altered the order of proof after Brice and Point Marine had reached their settlement. According to Rowan, Point Marine's presentation of its case after Rowan's caused considerable juror confusion: "Even though Point Marine shared a financial interest with Brice in this lawsuit, the Order of Proof caused the jury to perceive the case a contest between Brice versus Rowan versus Point Marine." This argument also fails, for the court's express instructions that Brice and Point Marine were aligned as a result of their settlement sufficiently reduced the risk of confusion.¹

Rowan's next argument has more purchase. Brice retained Glenn Hebert, a vocational rehabilitation counselor, as an expert on his future wage-earning ability. Brice did not call Hebert in his case-in-chief. Rowan also chose not to offer the testimony of its expert. Rowan did, however, introduce portions of Hebert's deposition in support of its contention that Brice was capable of earning wages equal to those he made as a roustabout. At the close of Rowan's case, Brice called Hebert as a rebuttal witness. Over

¹ The Texas Supreme Court recently declared Mary Carter agreements "void as violative of sound public policy" on grounds that such arrangements generally "skew the trial process [and] mislead the jury." Elbaor v. Smith, No. D-1163, slip op. at 19 (Tex. Dec. 2, 1992). We agree with the Elbaor court that Mary Carter agreements may have such deleterious effects in some circumstances. We do not, however, agree with Rowan that the absence of additional voir dire and a modified order of proof led to a distorted jury verdict in this case. For this reason, we cannot say that the district court committed reversible error in denying Rowan's requests for these measures.

Rowan's objections, Hebert testified that Brice's capacity for future employment was hampered by several severe limitations.

Rowan attacks Hebert's testimony on procedural and substantive grounds. Rowan argues that Hebert's testimony touched on several matters that had not been previously raised. As such, the presentation of Hebert as a rebuttal witness was sandbagging, allowing the views of Brice's expert to reach the jury while blocking Rowan's. In addition, Rowan asserts that the bulk of Hebert's testimony consisted of the type of groundless speculation this court has previously criticized. See, e.g., In re Aircrash Disaster at New Orleans, 795 F.2d 1230 (5th Cir. 1986).

Brice contends that he informed Rowan that Hebert would be called as a rebuttal witness if Rowan chose to introduce parts of Hebert's deposition as part of its own case. Brice further argues that rebuttal was necessary because Rowan had distorted Hebert's views by reading only selected portions of the deposition. Citing Rodriguez v. Olin Corp., 780 F.2d 491 (5th Cir. 1986), Brice maintains that a district court does not abuse its discretion by permitting rebuttal where, as here, new facts are brought out during the defendant's case-in-chief.

Rowan also claims that "Hebert came to trial with credentials and a speculative opinion which can only be characterized as an abuse and misuse of his position as an expert witness." Brice maintains that Hebert's predictions relating to his employment prospects were well-grounded in fact. As to Hebert's credentials, Brice points out that since Rowan brought out these alleged

deficiencies on cross-examination, this issue went to the weight of his testimony. Since Hebert's views did not pertain to wholly new matters and had some basis in fact, we cannot say that the trial court abused its considerable discretion in admitting this testimony on rebuttal.

The jury specifically found Rowan 100% at fault for Brice's injuries. Rowan appeals the district court's denial of its motion for judgment notwithstanding the verdict, claiming that the "substantial evidence at trial established that both Point Marine and Brice were negligent and at fault in causing the accident." A jury verdict must be upheld unless the evidence points so strongly in one party's favor that reasonable men could not arrive at a contrary conclusion. Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) (en banc). Rowan's showing here does not approach this rigorous standard. Both Brice and Point Marine cite the testimony of several witnesses as support for the jury's verdict. The district court did not err in denying Rowan's motion for JNOV.

After the remittitur of \$350,000, Rowan filed a second motion to reduce the amount awarded to Brice by another \$100,000, the sum paid by Point Marine as part of the Mary Carter settlement. The district court denied the motion, stating: "[C]onsidering the large amount of the remittitur, the judgment should not be further reduced by \$100,000, the amount paid by the third-party defendant Point Marine." Rowan contends that Hernandez v. M/V RAJAAN, 841 F.2d 582 (5th Cir.), cert. denied, 488 U.S. 981 (1988), requires

reversal, for the district court's refusal to grant credit for the money received by settlement gives Brice an impermissible double recovery.

We agree that Hernandez, rather than Leger v. Drilling Well Control, Inc., 592 F.2d 1246 (5th Cir. 1979), controls our review of this question. An additional reduction of \$100,000 based on the settlement is unnecessary, however, because it is apparent to us that the district court took this into account in granting the remittitur of \$350,000.

Rowan finally claims that the excessiveness of the jury's verdict warrants a new trial on the issue of damages. "This court will not reverse a jury verdict for excessiveness except on the strongest of showings. In addition, where, as here, 'the trial court has invoked its discretion in granting a remittitur, our scope of review is even narrower than usual.'" Knight v. Texaco, 786 F.2d 1296, 1299 (5th Cir. 1986) (citations omitted). Rowan contends that Brice's claims of total and permanent disability and a causally-related back injury were not supported by any scientific evidence. This is untrue. The testimony of Brice's doctor and rehabilitation counselor provide a sufficient ground for the jury's verdict. In addition, the sum awarded to Brice, \$900,000, is not beyond the pale in light of the testimony of Brice's economic expert that Brice would suffer an economic loss of \$777,000 as a result of his total disability. Some of this testimony is indeed at the boundary, but we cannot conclude that it stepped over, and thus cannot conclude that the district court abused its discretion

in admitting it. The district court's denial of Rowan's motion for a new trial is affirmed.

AFFIRMED.