# United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

**FILED**
June 17, 2022

Lyle W. Cayce
Clerk

No. 21-10831

SUSAN HANAN,

*Plaintiff—Appellant*,

*versus*

CRETE CARRIER CORPORATION; DORN KNAPP,

*Defendants—Appellees*.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:19-CV-149

Before JONES, STEWART, and DUNCAN, *Circuit Judges*.

PER CURIAM:*

This case arises out of an accident that occurred on Interstate 45 near Corsicana, Texas. Susan Hanan was driving a SUV in the left lane and Dorn Knapp was driving a Crete Carrier Corporation ("Crete") truck in the middle lane. As the left lane ended and Hanan attempted to merge, the vehicles collided.

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

Hanan filed suit in Texas state court against Knapp and Crete (collectively, "Defendants"), asserting a variety of negligence claims and seeking more than $1,000,000 in damages. Defendants removed the suit to federal court. After a three-day trial, a jury rendered a verdict for Defendants, having determined that only Hanan's negligence caused the accident.

On appeal, Hanan argues that the district court abused its discretion in denying Hanan's motions for a new trial and to reopen evidence, and that the district court's combined errors constitute reversible cumulative error. We disagree and AFFIRM.

## I. FACTUAL BACKGROUND & PROCEDURAL HISTORY

On June 18, 2018, Hanan was driving her Chevrolet Tahoe to Houston, where one of her daughters lived. Knapp was driving a commercial truck for Crete, his employer. Hanan was in the left lane and Knapp was in the middle lane of a three-lane portion of I-45 when barriers began closing off the left lane and the instant accident took place. The parties have different accounts of the cause of this accident. According to Hanan, Knapp suddenly turned into her lane and made contact with her car. According to Knapp, Hanan came into his lane and made contact with his truck.

On November 20, 2018, Hanan filed a petition in Navarro County, Texas, against Knapp and Crete, raising claims of (1) negligence and gross negligence against Defendants; (2) negligence per se against Defendants; (3) negligent hiring against Crete; (4) negligent training against Crete; (5) negligent supervision, retention, and monitoring against Crete; (6) negligent entrustment against Crete; and (7) ratification against Crete.[1] Hanan alleged that she "was caused to suffer severe personal injuries, bodily

[1] The district court granted Defendants' motion for summary judgment on the negligence per se and ratification claims, and Hanan does not raise these claims on appeal.

injury, physical impairment, loss of household services, pain, suffering, and mental anguish," and she sought recovery "in an amount in excess of $1,000,000.00[.]" On January 18, 2019, Defendants invoked diversity jurisdiction and removed to the Northern District of Texas. A jury trial was provisionally set for March 8, 2021.

On February 22, 2021, the parties filed several motions in limine that the district court ruled on before trial. Relevant to this appeal, Defendants successfully moved to exclude a document Crete created related to Knapp's involvement in the accident (hereinafter, "the Warning Notice"), as well as evidence of a traffic citation that Knapp received at the time of the accident and to which he pled no contest. Although Hanan sought to reopen evidence related to this citation after Defendants allegedly mentioned it during closing arguments, the district court denied her request.

Meanwhile, before trial, Hanan successfully requested to admit into evidence over Defendants' hearsay objections a transcript of 911 calls (hereinafter, "the 911 transcript") made the day of the accident by herself, Knapp, and a third-party witness, Gregory Brown. The district court reconsidered the admission of Brown's portion of the 911 transcript at trial once he did not appear as a witness, refusing to allow Hanan to use it to question Knapp, but the district court and the parties later acknowledged that the entire transcript had been admitted into evidence.

After a trial held between March 8 and March 10, 2021, a six-member jury rendered a verdict in favor of Defendants. The jury determined that the accident was caused by Hanan's negligence, with no negligence attributable to Knapp. On March 11, 2021, the district court entered a final judgment for Defendants, granting Hanan no damages. On April 8, 2021, Hanan moved

for a new trial under Federal Rule of Civil Procedure 59(a).[2] She alleged that evidentiary errors involving the Warning Notice and the 911 transcript independently and collectively "prevented [her] from fully presenting her case." The district court denied Hanan's motion for a new trial, concluding that it had not erred in its application of the Federal Rules of Evidence and that any potential error was harmless. Hanan timely appealed.

## II. STANDARD OF REVIEW

"We review a district court's denial of a motion for a new trial for abuse of discretion." *United States v. Kieffer*, 991 F.3d 630, 636 (5th Cir.), *cert. denied*, 142 S. Ct. 297 (2021) (citing *United States v. Hoffman*, 901 F.3d 523, 552 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 2615 (2019)). One basis for a new trial is an erroneous evidentiary ruling, *Jordan v. Maxfield & Oberton Holdings, L.L.C.*, 977 F.3d 412, 417 (5th Cir. 2020) (citation omitted), and evidentiary rulings are likewise reviewed for abuse of discretion. *Koch v. United States*, 857 F.3d 267, 277 (5th Cir. 2017) (citing *Kelly v. Boeing Petroleum Servs., Inc.*, 61 F.3d 350, 356 (5th Cir. 1995)). We review a district court's denial of a motion to reopen evidence for abuse of discretion as well. *Garcia v. Woman's Hosp. of Tex.*, 97 F.3d 810, 814 (5th Cir. 1996).

"Deference is the 'hallmark of [the] abuse-of-discretion review' applicable to such decisions." *United States v. Tsarnaev*, 142 S. Ct. 1024, 1040 (2022) (quoting *General Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997)). "A 'reviewing court' applying that standard 'must not substitute its judgment for that of the district court.'" *Id.* (quoting *Horne v. Flores*, 557 U.S. 433, 493 (2009) (Breyer, J., dissenting)). "Rather, an appellate court must

[2] In the alternative, Hanan moved for relief from the judgment under Rule 60(b)(6). Her arguments hinged on Knapp's allegedly misleading the jury into believing that he was significantly injured when he was not. The district court rejected these arguments, and Hanan did not raise them on appeal.

defer to the lower court's sound judgment so long as its decision falls within its wide discretion and is not manifestly erroneous." *Id.* (internal citations and quotation marks omitted); *see also HTC Corp. v. Telefonaktiebolaget LM Ericcson*, 12 F.4th 476, 489 (5th Cir. 2021) ("A trial court abuses its discretion when its ruling is based on an erroneous view of the law or a clearly erroneous assessment of the evidence.").

Meanwhile, "[t]he harmless error doctrine applies to the review of evidentiary rulings." *Heinsohn v. Carabin & Shaw, P.C.*, 832 F.3d 224, 233 (5th Cir. 2016) (citing *Nunez v. Allstate Ins. Co.*, 604 F.3d 840, 844 (5th Cir. 2010); FED. R. CIV. P. 61.)). "The party asserting the error has the burden of proving that the error was prejudicial," *Williams v. Manitowoc Cranes, L.L.C.*, 898 F.3d 607, 615 (5th Cir. 2018) (citation omitted), and this court "will not reverse unless the error affected the substantial rights of the parties," *Spectrum Ass'n Mgmt. of Tex., L.L.C. v. Lifetime HOA Mgmt. L.L.C.*, 5 F.4th 560, 564 (5th Cir. 2021) (citation omitted).

## III. DISCUSSION

On appeal, Hanan argues that the district court abused its discretion in denying her motion for a new trial when it wrongly excluded the Warning Notice and the 911 transcript. Hanan also avers that the district court abused its discretion in denying her motion to reopen evidence after the defendants "opened the door" to the excluded citation, and that the district court's combined errors prevented her from presenting her case and constitute reversible cumulative error. We take up each argument in turn.

### *A. Motion for a New Trial*

According to Hanan, the district court abused its discretion in denying Hanan's motion for new trial based on two prejudicial evidentiary errors involving the Warning Notice and the 911 transcript, respectively.

*i. The Warning Notice*

Crete issued the Warning Notice to Knapp after the accident. It stated, inter alia, that Knapp "will attend a Defensive Driving Course provided by the company," "is to re-seat and train on DriveCam immediately," and "will be subject to monthly log audits." The Warning Notice also specified that "[a]ny further preventable accidents . . . may result in disciplinary action[.]" The district court excluded this document based on Federal Rule of Evidence 407, which provides that evidence of subsequent remedial measures is inadmissible to prove culpable conduct; and Federal Rule of Evidence 403, which allows for the exclusion of evidence if its probative value is substantially outweighed by the danger of unfair prejudice. On appeal, Hanan contends that the Warning Notice should have been admitted under both Rules. We disagree.

First, it was within the district court's discretion to exclude the Warning Notice under Rule 407. After reviewing Crete's motion in limine and Hanan's response, hearing arguments on this issue at a pretrial hearing, requesting supplemental briefing, and holding a second pretrial hearing based on the filings, the district court reasonably determined that the Warning Notice was a subsequent remedial measure. As Crete's own representative Matthew DiVito testified, this was a "written warning," not an investigative report for which Rule 407 does not apply. *See Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 430–31 (5th Cir. 2006). And exclusion under this Rule "rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety." FED. R. EVID. 407 advisory committee's notes. Here, Crete took a step in furtherance of added safety by issuing a written warning that required its driver to carry out additional training after an accident. We have long recognized that "by admitting such evidence defendants will be prompted to allow dangerous conditions to continue to exist rather than making

corrections or repairs." *Bailey v. Kawasaki-Kisen, K. K.*, 455 F.2d 392, 396 (5th Cir. 1972).

Second, the exclusion of the Warning Notice was within the district court's "broad discretion to weigh the relevance, probative value, and prejudice of the evidence in determining its admissibility under Rule 403." *United States v. Allard*, 464 F.3d 529, 534 (5th Cir. 2006). Its issuance was based on Crete's assessment that the accident was preventable as defined by the American Trucking Association ("ATA"), which differs from negligent as defined by Texas law. *See Villalba v. Consol. Freightways Corp. of Del.*, No. 98 C 5347, 2000 WL 1154073, at *6 (N.D. Ill. Aug. 14, 2000). As DiVito explained, the ATA standard asks whether a driver did everything possible to avoid an accident, not whether a driver used ordinary care. Here, the district court reasonably observed "the risk [was] high that the jury would substitute Crete's findings for its own judgment," which is particularly worrisome when the preventability and negligence standards differ, and when Hanan sought to admit the Warning Notice as evidence of Crete's "opinion" as to "fault." Accordingly, the district court did not err in its exclusion of the Warning Notice.[3]

*ii. The 911 Transcript*

Turning to the 911 transcript, this was a transcript of phone calls made to emergency services by Hanan, Knapp, and Brown. The district court rejected Hanan's allegation that it had erred in excluding the 911 transcript,

[3] Hanan also argues that the Warning Notice is admissible as impeachment evidence. However, the district court correctly ruled that this evidence did not in fact contradict DiVito's testimony. Specifically, it explained, "Crete Carrier's position at trial is that Knapp was not negligent, not that Knapp failed to prevent the accident according to the ATA Preventability Guidelines. As the Warning Notice states only that the accident was 'preventable,' this evidence would not show a prior inconsistent position on behalf of Crete Carrier."

observing that it did, in fact, admit the entirety into evidence. On appeal, Hanan reiterates that the 911 transcript was improperly excluded, emphasizing that this was a "functional exclusion" because the district court did not allow her to use Brown's portion in her presentation of evidence and it was thus never presented to the jury. *See* FED. R. EVID. 803(1)–(2).

The record reflects that the 911 transcript was ultimately admitted into evidence in its entirety and provided to the jury during deliberations.[4] Although the district court reconsidered its admission of the 911 transcript, refusing to allow Hanan to use Brown's portion to question Knapp, the record confirms that any associated error was harmless. Hanan contends that the jury was not able to hear that Brown identified Knapp as having caused the crash. But as the district court observed, Hanan presented the relevant information from Brown's portion of the 911 transcript to the jury through his video deposition after he failed to appear as a witness: namely, that he "used [his] cell phone to call 911" after witnessing the accident, that he concluded "the Crete Driver ma[d]e an improper lane change and then

[4] The transcript reads, in pertinent part:

MR. LEWIS: Plaintiff's 23 has been admitted into evidence, Your Honor.

THE COURT: You guys agree?

MS. ALTMAN: Yes, Your Honor.

cause[d] the accident," and that Knapp refused to stop. Thus, there was no "functional exclusion" of evidence that affected Hanan's substantial rights.[5]

In sum, we hold that the district court did not abuse its discretion in denying Hanan's motion for a new trial.

### *B. Motion to Reopen Evidence*

According to Hanan, the district court also abused its discretion in denying her motion to reopen evidence after Defendants "opened the door" to the excluded traffic citation. She argues she had adhered to a court order requiring her to exclude any mention of the fact that Knapp pled no contest to a citation for an improper lane change[6] but should have been allowed to introduce this evidence once Defendants stated that "[she] ha[s] not brought forth any statute or violation of a statute." Hanan asserts that the jury was thereby "left with the false impression that there was no evidence that Mr. Knapp had violated any provisions of the Texas Transportation Code" and that "the only way for [her] to remedy that misimpression was to reopen the evidence to introduce the citation."

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[5] Hanan further contends that she was deprived "of a critical avenue from which to impeach Mr. Knapp's credibility and to effectively cross-examine the [D]efendants' expert witness." However, "[t]he impeachment value of such hearsay evidence was slight because 'the statement could not be used to prove the truth of its substance, but only to destroy the credibility of the witness.'" *Reddin v. Robinson Prop. Grp. Ltd. P'ship*, 239 F.3d 756, 760–61 (5th Cir. 2001) (quoting *Whitehurst v. Wright*, 592 F.2d 834, 840 (5th Cir. 1979)). And Defendants' expert witness reviewed the 911 transcript in its entirety and could have relied on it as hearsay on cross had she sought to elicit testimony about it, but she did not. *See United States v. Williams*, 447 F.2d 1285, 1290 (5th Cir. 1971).

[6] The district court determined that neither the "receipt of the citation nor [Knapp's] payment thereof establishes negligence as a matter of law," and that the citation is inadmissible when there is no guilty plea. *See Robert v. Maurice*, No. CV 18-11632, 2020 WL 4043097, at *6 n.88 (E.D. La. July 17, 2020) (collecting cases demonstrating that mere issuance or payment of a traffic citation is not admissible in a civil trial).

We disagree. For starters, Hanan was not prohibited from presenting evidence related to provisions or violations of the Texas Transportation Code or other relevant statutes; in fact, as noted by Defendants, she received explicit permission from the district court to refer to applicable statutes on the first day of trial with the first witness.[7] Further, Defendants did not represent that Knapp had never pled no contest to a citation such that she needed to introduce it to correct the record. As the district court observed, "[a]ll [Defendants] said was that there's no law that showed that [Knapp] violated the statute that's at issue here," not that there was "no[] citation." In other words, "it's apples and oranges." We therefore hold that the district court did not abuse its discretion in denying Hanan's motion to reopen evidence.

### *C. Cumulative Error*

Lastly, according to Hanan, the combined prejudicial effect of the errors she alleged caused reversible cumulative error. She cites to our en banc court in *United States v. Delgado*, which explained, "[t]he cumulative error doctrine . . . provides that an aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless errors) can yield a denial of the constitutional right to a fair trial, which calls for reversal." 672 F.3d 320, 343–44 (5th Cir. 2012) (en banc) (quoting *United States v. Munoz*, 150 F.3d 401, 418 (5th Cir. 1998)). Hanan acknowledges that the doctrine justifies reversal "only in rare instances[.]" *Id.* at 344. However, she avers that this is

[7] When Hanan objected to Defendants' request to admit federal motor carrier safety regulations because "the [c]ourt here provides the law, not the attorneys here," the district court overruled her objection. She countered, "[i]t would be the same if I wanted to bring in traffic violation statutes with Mr. Knapp[,]" and the district court responded, "[y]ou can do it[.]"

one such instance and that collective errors prevented her from presenting a full and fair case.

Like the en banc court in *Delgado*, we conclude that "the cumulative error doctrine has no applicability to [this] trial." *Id.* We have identified no errors that "so fatally infect the trial that they violated the trial's fundamental fairness," as required. *Id.* Accordingly, we hold that the district court did not err in deciding that the cumulative error doctrine was inapplicable.

## IV. CONCLUSION

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