

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ROBERT ROUVELLAT and
MELANIE ROUVELLAT,
Plaintiffs

v.

MICHAEL GUARCO and STATEWOOD, INC.,
d/b/a STATE LINE OIL,
Defendants

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) Civil Action No. 97-30026-KPN
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DOCKETED

MEMORANDUM AND ORDER WITH RESPECT TO PLAINTIFFS'
MOTION FOR NEW TRIAL (Docket No. 71)

October 15, 1998

NEIMAN, U.S.M.J.

The facts of the case are familiar to the parties and will not be repeated here. Suffice it to say, Plaintiff Robert Rouvellat ("Rouvellat") claimed that Defendant Michael Guarco ("Guarco") was negligent in the operation of his vehicle on May 30, 1996, when it rear-ended Rouvellat's vehicle. As a result of the accident, Rouvellat claims to have suffered not only property damage to his vehicle, but significant medical costs and personal damage as a result of an injury to his back and neck. Plaintiff Melanie Rouvellat made an independent claim for loss of consortium. Presented with a special verdict form which set forth nine questions, the jury found, in answer to the first question, that Plaintiffs had not proven by a preponderance of the evidence that Guarco, and in turn Defendant Statewood, Inc., d/b/a State Line Oil ("Statewood"), was negligent. The court, thereafter entered judgment for Defendants.

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Now, pursuant to Fed. R. Civ. P. 59, Plaintiffs move for a new trial. A court may grant a new trial "to all or any of the parties and on all or part of the issues . . . in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59. The Supreme Court has described the scope of the rule and a court's powers thereunder as follows:

The motion for a new trial may invoke the discretion of the court insofar as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the parties moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instruction to the jury.

Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251 (1940).

Plaintiffs claim that a new trial is warranted because a statement by defense counsel in his closing argument intentionally imparted false and prejudicial information to the jury. Plaintiffs also claim that the jury's verdict was against the weight of the evidence. Finally, Plaintiffs claim that, in arriving at its verdict, the jury failed to follow the instructions of the court. For the reasons which follow, Plaintiffs' motion will be denied.

DISCUSSION

A. Defendants' Counsel's Closing Argument

Plaintiffs claim that Defendants' counsel improperly implied in closing argument that Guarco was uninsured against liability. That representation, Plaintiffs argue, was not only untrue, but prejudicial and improperly influenced the

jurors in favor of Defendants, resulting in the defense verdict.

Defendants' counsel focused his closing argument on the circumstances surrounding the accident. After describing the accident and making specific reference to Guarco's testimony, Defendants' counsel stated the following to the jury:

Some accidents happen that aren't anybody's fault. You may decide that is this type of accident.

What I'm suggesting to you is that it really hasn't been put before you that [Guarco] was inattentive, that he was distracted, listening to the radio or something. He was paying attention. There was no reason that this accident happened. He said he wasn't able to stop in time. Those things happen. I think he feels badly about the fact that he damaged this gentleman's car, and certainly, by your decision, he will pay for whatever damages are judged against him, but that will be for you to decide. I think we've covered the accident pretty well, and I'll move on to something else.

(Pl. Motion for New Trial, Exh. B at 6.) Counsel then proceeded to his remaining arguments concerning Plaintiffs' claims for personal damages as a result of the injury, claims which consumed the better part of the trial.

At the close of Defendants' counsel's argument, the following conference was held at sidebar:

MR. C. RYAN [Plaintiffs' counsel]: Your Honor, I'm troubled by the serious prejudicial effect of Mr. Stewart's remark at the beginning of his argument that Mr. Guarco would have to pay the damages. This isn't a judgment. He made a distinct representation that if they found damages, that would mean that Mr. Guarco would have to pay the damages. He knows Mr. Guarco is not paying the damages. He's a spectator. And I can't tell this jury

about the insurance company, but I tell you, this is a very serious thing to leave hanging out there. I don't know how the Court is going to deal with that, but I would be seriously prejudiced by an experienced defense attorney who knows exactly what he is saying and doing.

THE COURT: What is your proposal with respect to that?

MR. C. RYAN: Well, I would love an admonition for them to ignore that statement, that that was an improper comment, and it should not have been made.

MR. STEWART [Defendants' counsel]: Judge, first of all, there was nothing intentional.

MR. C. RYAN: It was said.

MR. STEWART: Okay, well, let's go beyond that. We know in the restatement of agency, where an employee engages in tortious conduct which creates exposure on the part of the employer, the employer has a right of indemnity against the employee. So, even if you collect against State Line Oil, they have a right of indemnity against Mr. Guarco. So, I think this is taken care of in the general charge anyway. We know that liability is imputed.

MR. C. RYAN: I'm not talking about that. I'm talking about the fact that neither Mr. Guarco or State Line Oil is going to pay this judgment.

THE COURT: Right, I understand what you're saying. I don't think that it is prejudicial in the way that you indicated, and I think it would be more problematic to try to correct that, if you will, than to leave it alone. I'm going to leave that alone. Anything else?

MR. C. RYAN: Note my objection, Your Honor.

THE COURT: Your objection is noted, thank you.

MR. C. RYAN: Your Honor, as far as time --

THE COURT: I know, he took forty minutes.

MR. STEWART: I apologize for going over, Judge.

THE COURT: No, I know you both indicated problems with thirty minutes, but I'm giving you the time you need.

MR. C. RYAN: Thank you.

(Id. at 7-9.)

Plaintiff claims that defense counsel's reference to Guarco having to "pay for whatever damages are judged against him" was not only "intentionally false," if not "reprehensible," but "extremely prejudicial." (Pl. Motion at 2-3.) These strong accusations, in the court's opinion, are not borne out by either the facts or the case law presented.

As Plaintiffs argue, improper remarks in closing arguments may engender sufficient prejudice to mandate the granting of a new trial. *Bryant v. Consolidated Rail Corp.*, 672 F.2d 217, 219 (1st Cir. 1982) (citing *Draper v. Airco, Inc.*, 580 F.2d 91, 97 (3d Cir. 1978)). See also *Chang v. City of Albany*, 150 F.R.D. 456, 459 (N.D.N.Y. 1993); *Falkowski v. Johnson*, 148 F.R.D. 132, 136 (D. Del. 1993). In this regard, a party cannot affirmatively refer to or imply the existence or nonexistence of insurance without adverse consequences. As the Massachusetts Supreme Judicial Court has explained, "a defendant is not permitted to assert or imply that he is not protected by insurance; especially is this proscribed when there has been no improper suggestion of insurance by the opposing party. Such statements are considered tantamount to a plea of poverty, not only irrelevant but

prejudicial in that they might influence the jury towards giving defendants compassionate but strictly unmerited relief from personal liability." *Goldstein v. Gontarz*, 309 N.E.2d 196, 203 (Mass. 1974). More often than not, however, a combination of improper remarks is required to persuade a court of prejudicial injury. *Draper*, 580 F.2d at 97. An isolated improper remark will not support a new trial. *Id.* at 95. See *Adams Lab. v. Jacob Eng'g Co., Inc.*, 761 F.2d 1218, 1226-27 (7th Cir. 1985) (to warrant a new trial, reference to insurance coverage must be "due to some misconduct or improper remarks . . . of counsel, oftentimes repeated, and calculated to influence or prejudice the jury.") (citing *Fitsch v. Goode*, 362 N.E.2d 446, 451-52 (Ill. App. 1997); see also *Salas by Salas v. Wang*, 846 F.2d 897 (3d Cir. 1988); *Anastasio v. Schering Corp.*, 838 F.2d 701 (3d Cir. 1981).

Having heard the matter, the court finds nothing calculating or indeed repetitive in defense counsel's remarks during closing argument. There is nothing in the record which indicates or even implies that counsel intentionally sought to interject insurance or, more appropriately, the specter of non-insurance, into his argument. First, there was no direct mention by counsel of Guarco's not being insured. What counsel said, and what the court understood, was that Guarco would pay for any physical damage to Rouvellat's car which the jury adjudged. Second, there appeared to have been nothing in counsel's statement which reflected an intention to get an insurance "issue" before the jury. If anything, defense counsel himself was unaware of any supposed reference on his part to

noninsurance, as demonstrated by his obvious misunderstanding of Plaintiffs' counsel's objection at sidebar. What defense counsel knew was that Statewood was in fact insured and would be responsible for paying any judgment against Guarco. All that the jury knew, as stipulated by the parties, was that Statewood would be vicariously liable for any judgment against Guarco. Defense counsel's argument was geared accordingly.

Goldstein, upon which Plaintiffs rely, is instructive. There, the plaintiff, either directly or through counsel, made repeated references in both opening argument and trial testimony to plaintiff's election not to receive worker's compensation benefits, references which created sufficient prejudice to require a new trial. Here, in contrast, there is nothing echoing the "plea of poverty" so obvious in *Goldstein*. First, there was no evidence presented during trial regarding insurance, or the lack thereof, as there was in *Goldstein*. The only statement which concerns Plaintiffs is one made in closing argument. As the jury was instructed, such arguments did not constitute evidence. Second, defense counsel's statement during closing argument, in the court's opinion, is not reasonably subject to the interpretation which Plaintiffs seek to give it. Defendants' counsel's statement, if anything, was a concession that Guarco *would* pay any damage to Plaintiffs' vehicle.

Counsel's statement stands in sharp contrast to the statement in *Priel v. R.E.D., Inc.*, 392 N.W.2d 65, 67 (N.D. 1986), upon which Plaintiffs also rely. There, defendant's counsel asserted in closing argument that "[w]e are talking

about money that my client will have to pay out of his own pocket." In the instant matter, in contrast, Defendants' counsel's reference was not explicit and emitted no tone of improper sympathy. The statement was more akin to the "inadvertent, unexpected and vague" reference in *Andersen v. Teamsters Local 116 Bldg. Club, Inc.*, 347 N.W.2d 309 (N.D. 1984), which the court in *Priel* distinguishes. *Priel*, 392 N.D.2d at 68. See also *Lambert v. Tripp*, 560 A.2d 1097 (Me. 1989) (denial of motion for new trial affirmed despite defense counsel's statement to the jury in closing arguments that "[t]he plaintiff comes into the courtroom asking you to have [the defendant] pay her for her damages."); *Mudd by Mudd v. Goldblatt Bros., Inc.* 454 N.E.2d 754, 762 (Ill. App. 1983) (affirmation of trial court's refusal to order a new trial when defendant's counsel stated in closing argument "that [the] complaint is served on [the defendant], he comes to court, he hires an attorney, he defends the case."); *Reeves v. Eckles*, 248 N.E.2d 125, 128 (Ill. App. 1969) (denial of motion for new trial affirmed because only by speculating could one reach the plaintiff's conclusion that defense counsel's statement in closing -- that the plaintiffs "are trying to reach into my client's pocket. They want money" -- could make the jury believe that defendants were uninsured); *Hardy v. Berisha*, 474 A.2d 93, 95 (Vt. 1984) (no new trial despite defense argument that "it wouldn't be fair for someone to be -- have money taken from him when his fault was no greater than that of the other party.").

Even were counsel's statement in the instant matter deemed to hint at possible non-insurance, the court does not believe that the statement improperly

influenced the verdict. Counsel's statement was only one in a constellation of statements made during closing argument, and the jury was specifically instructed that such arguments were not evidence. In addition, the court directed the jury to the parties' stipulation that Guarco was operating a vehicle owned by Statewood in the course of his employment and that Statewood would be vicariously liable for any adjudication against him were he found negligent. (See Instructions (Docket No. 67) ¶ 18.) In the court's estimation, these instructions -- rather than Plaintiff's counsel's suggestion at sidebar to admonish the jury regarding the impropriety of defense counsel's statement with respect to insurance -- addressed the problem, if any, raised by Plaintiffs.

As the court determined then, and as it remains convinced now, it would have been more problematical to "correct" defense counsel's statement than to leave it alone. A "reference made in passing" is not so prejudicial as to require a new trial. *Williamson v. Raymond*, 495 S.2d 609, 612-13 (Ala. 1986). Here, too, defense counsel's statement is not an example of the "classic kind of argument calculated to prey on the emotions of the jury." *Id.* at 613. Moreover, as in *Williamson*, the requested "cure" would have been more prejudicial than the alleged impropriety. *Id.*

The instant matter is also similar to, if not less egregious than, the situation confronting the court in *Roy v. Star Chopper Co., Inc.*, 584 F.2d 1124 (1st Cir. 1978). There, the defendant raised as reversible error the trial court's refusal to grant a motion for a new trial after plaintiff's attorney adverted to the fact that

defendant had insurance. The reference was made during an extensive evidentiary colloquy in the midst of trial. There as here, however, the reference was deemed "inadvertent and nonprejudicial," counsel not having thereafter drawn the jury's attention to the fact of insurance. As the First Circuit explained, "[w]e do not view a single, unrepeated reference to defendant's insurance carrier, entered inadvertently, in a trial which lasted three weeks, so inherently prejudicial that failure to declare a mistrial constitutes error." *Id.* at 1135.

Granted, defendant's counsel in *Roy* made a tactical choice to forego a corrective instruction, in contrast to Plaintiffs' counsel's suggestion here. Nonetheless, the court deemed it best then, as it maintains now, to de-emphasize the matter and rely on its instructions. The jury was admonished that its decision was to be based solely upon the evidence, that the evidence consisted only of witness testimony, exhibits and stipulations, that arguments and personal opinions of counsel were not evidence, that the case was to be decided without regard to the relative worth of the parties and that the jury's decision could not be governed by sympathy or prejudice. (Instructions at ¶¶ 10, 9, 6 and 1, respectively.) Moreover, the jury was specifically instructed, at counsels' joint request, that Statewood would be vicariously liable for any negligence on Guarco's part. (*Id.* at ¶ 18.)

B. Weight of the Evidence

Plaintiffs also claim that the defense verdict is against the weight of the evidence. "One can read and reread [the trial and deposition testimonies of

Guarco] time and time again," Plaintiffs argue, " and utterly fail to find any support for the jury's decision." (Pl. Motion at 5.)

A party urging a court to set aside a jury verdict as against the clear weight of the evidence "has a heavy burden." *Urigo v. Parnell Oil Co.*, 552 F. Supp. 499, 500 (D. Mass. 1982). As the First Circuit has explained, the court may order a new trial "only if the verdict is so clearly against the weight of the evidence as to amount to a manifest miscarriage of justice." *Cigna Fire Underwriters Co. v. McDonald & Johnson, Inc.*, 86 F.3d 1260, 1263 (1st Cir. 1996). See also *Lama v. Borrás*, 16 F.3d 473, 477 (1st Cir. 1994). Thus, the court's discretion to grant a new trial is quite limited. *Velazquez v. Figueroa-Gomez*, 996 F.2d 425, 427-28 (1st Cir. 1993). As long as a reasonable basis exists for the jury's verdict, it should not be disturbed. *Newell P.R., Ltd. v. Rubbermaid, Inc.*, 20 F.3d 15, 22 (1st Cir. 1994). The court's "[m]ere disagreement with the verdict will not justify the granting of a new trial." *Id.* If the court finds at least a rational basis for the verdict, the verdict must stand. See *Havinga v. Crowley Towing & Transp. Co.*, 24 F.3d 1480, 1483 (1st Cir. 1994); *Phav v. Trueblood, Inc.*, 915 F.2d 764, 766 (1st Cir. 1990).

Plaintiffs' argument is not without some force. As Plaintiffs describe, Guarco himself testified that he had been over the bridge, the scene of the accident, hundreds of times, he knew that at that time of day traffic would be stop-and-go and that he had unlimited and unobstructed visibility. Guarco also testified that he did not see Rouvellat's car until he was about twenty feet from the point of impact.

Given this, Plaintiffs assert, it was inescapable that (a) Guarco's rate of speed was greater than it should have been at that time and place, or (b) that the distance between Guarco's car and the rear of Rouvellat's car was closer than it should have been, or (c) that Guarco did not anticipate and prepare for what was likely to happen, namely, Rouvellat stopping his car, or (d) a combination of the above. In essence, Plaintiffs assert, someone must be to blame. Since Rouvellat himself was blameless as a matter of law, Guarco himself must have been to blame, the jury's verdict notwithstanding.

Unfortunately for Plaintiffs, another reasonable basis exists for the jury's verdict. As Defendants argue, the jury could have found that Guarco was travelling in heavy, stop-and-go rush hour traffic, that he was following Rouvellat's vehicle at an appropriate distance of approximately twenty feet, that he heard squeaking brakes and saw brakelights, and that Guarco, without chargeable fault, was not able to stop in time. Thus, Defendants argue, the jury could rationally infer from Guarco's testimony that the squealing of tires came from the vehicles in front of him and, based on the reasonable person standard, that Guarco's distance of twenty feet was reasonable given his speed and the prevailing traffic conditions. The jury could also infer that Guarco's speed was low, that he had just started moving again after stopping, that the collision was insufficient to propel Guarco into his steering wheel or to have Rouvellat's airbag deploy. In sum, the jury could have concluded that Guarco was not negligent.

While Plaintiffs now offer alternative bases for Guarco's negligence,

conclusions which they claim are inescapable, there was relatively little direct evidence on these points. For example, there was no evidence that Guarco was daydreaming or distracted, from which the jury might otherwise have inferred that he was not alert to the situation.

In the court's view, the evidence supports, though admittedly does not compel, the jury verdict. Moreover, the mere fact that the court might disagree with the verdict does not justify the granting of a new trial. *Newell P.R. Ltd.*, 20 F.3d at 22. "The fact that a contrary verdict may have been equally -- or even more easily -- supportable furnishes no cognizable ground for granting a new trial. If the weight of the evidence is not grotesquely lopsided, it is irrelevant that the judge, were he sitting jury-waived, would likely have found the other way." *Freeman v. Package Mach. Co.*, 865 F.2d 1331, 1333-34 (1st Cir. 1988).¹

C. Instructions of the Court

Plaintiffs concede that the instructions at paragraphs 21, 22 and 24 with respect to duty and the breach of duty set forth the applicable law. However, Plaintiffs argue that the jury improperly ignored those instructions since it found

¹ In their motion for a new trial, Plaintiffs also mention the court's ruling with respect to the issue of comparative negligence. The court, denying Plaintiff's motion that the comparative negligence issue not be submitted to the jury (Docket No. 65), indicated that that issue was very close and invited Plaintiffs, if necessary, to renew the motion at the appropriate time. However, the court does not have to reconsider the issue of comparative negligence since the jury itself never reached the question. The jury simply found that Guarco was not negligent. Accordingly, Plaintiffs assertion that their "motion for judgment" with respect to the comparative negligence issue should have been allowed is of no moment.

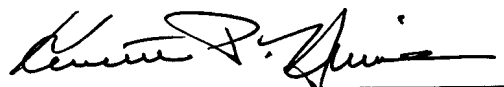
that Guarco had not violated one or more of the duties owed Plaintiff. The court disagrees. The court assumes that the jury "listen[ed] and follow[ed] the judge's entire charge." *Arthur D. Little, Inc. v. Dooyang Corporation*, 147 F.3d 47, 53 (1st Cir. 1998). Moreover, as explained, the jury had sufficient grounds upon which to reach its verdict.

CONCLUSION

For the reasons stated, Plaintiffs' motion for a new trial is DENIED.

IT IS SO ORDERED.

DATED: October 15, 1998



KENNETH P. NEIMAN
U.S. Magistrate Judge