UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3590
Summary Calendar

JOHN MICHAEL DUREL, SR., and
FAITH DUREL,

Plaintiffs-Appellants,

MARYLAND CASUALTY & SURETY
COMPANY,

Intervenor-Plaintiff-Appellant,

versus

AMERICAN PECCO CORPORATION, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

(CA 90 863 K)
(April 5, 1993)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Appellant John Durel suffered a serious neck injury when, upon climbing into the tower crane he operated during construction of the New Orleans Centre high above Poydras Street, the cabin hatch door slammed on top of his head. Durel could not sue his

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

employer W.S. Bellows Corp., but instead he proceeded against Peiner Maschinen GMBH, successor corporation to the manufacturer of the crane, and American Pecco Corp., which had bought and leased the crane to W.S. Bellows. The jury absolved both of these defendants of Louisiana law products liability, strict liability and negligence claims, causing Durel and his co-plaintiff wife to appeal. Finding evidence to support the verdict for appellees, we must affirm.

On appeal, the Durels purport to rely on the Boeing standard and contend that the evidence pointed so strongly and overwhelmingly in favor of recovery on their theories of liability and damages that a jury could not have found otherwise. Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969). The problem with this reliance, as appellees point out, is that the Durels did not move for a directed verdict pursuant to Fed. R. Civ. P. 50. As a result, the legal sufficiency of the evidence is not reviewable on appeal. 9 C. Wright & A. Miller, Fed. P. & Proc. § 2536 (1971). Appellate review is confined under these circumstances to the question whether any evidence supported the jury's verdict. Coughlin v. Capitol Cement Co., 571 F.2d 290, 297 (5th Cir. 1978); Smith v. State Farm Fire & Casualty Co., 695 F.2d 202 (5th Cir. 1983). Judged by this demanding standard, none of the Durels' theories of liability was so overwhelmingly established by the evidence, nor were the appellees' defenses so bereft of evidentiary support, that the verdict must be reversed. The Durels' own strategy confirms that they cannot win this appeal, because in the

trial court they did not even seek relief from the judgment as a matter of law. They moved only, and unsuccessfully, for a new trial. Fed. R. Civ. P. 59(a).

It is unnecessary to recount the evidence exhaustively. A few examples demonstrate that because there was evidence for and against appellants' theories of recovery, these were properly submitted to the jury and cannot be overturned. The Durels first contend that Piener breached the Louisiana Products Liability Act, La. R. S. 9:2800, et seq, by failing to warn tower crane purchasers that the hatch door to the cabin could fail under certain weather conditions or that failure to perform maintenance on the hatch door could contribute to an accident. According to appellants' reading of the evidence, there was testimony that no such warnings were provided. There was also testimony by appellants' expert witness that the accident occurred because the closing device was overpowered by the wind. Peiner's brief, however, points to evidence from its experts that the wind could not have caused Durel's accident and that even John Durel himself admitted that the wind was not unusually high that day. Further, the Durels' expert did not testify about the dangerousness of the absence of warnings as such. In short, while there was enough evidence to require a jury to decide whether the crane as manufactured was unreasonably dangerous because of a lack of warning, there was certainly some evidence to support the jury's verdict either because they disagreed that the crane was unreasonably dangerous or they disagreed that its condition caused the accident.

Against American Pecco, the Durels contend that the evidence overwhelmingly established Louisiana strict product liability and negligence causes of action. Appellants appear to contend on appeal that, pursuant to La. C. Civ. P. Art. 2317, American Pecco retained garde or custody of the crane, and that the crane was dangerously defective because its closing device was not strong enough to withstand the wind that day. Both of these elements of the cause of action were contested by American Pecco. In this regard, testimony suggested that American Pecco had fully turned the crane over to W.S. Bellows for two years before the accident, except in very rare cases of unusual repair requirements. American Pecco also offered evidence to support its theory that the accident was caused not by insufficient piston strength on the hatch cover but by a rotted, rusted area around the hinge, which might have been caused by Durel's "flopping" the cover open and shut every day for 14 months. Again, the jury had to choose between conflicting evidence on the elements of the Durels' cause of action, and there was some evidence to support their verdict.

Finally, the Durels asserted that American Pecco negligently failed to maintain the cabin hatch and hinge and to instruct W.S. Bellows employees in proper maintenance of the cabin hatch including the hinge. This negligence, they assert, led to Durel's injury. While that was a plausible theory, American Pecco contradicted it by evidence of its contractual relationship, which delegated to W.S. Bellows all responsibility for operation, maintenance and repair under the lease. W.S. Bellows never

requested America Pecco to repair or perform maintenance or inspection upon the hatch and its hinges. W.S. Bellows in turn expected the crane operator, Durel himself, to inspect the crane daily and to call for maintenance or repairs. From this and other evidence, the jury could have concluded either that American Pecco had no duty to perform routine maintenance and inspection on the crane it leased to W.S. Bellows or that it did not breach any such duty, because W.S. Bellows' skilled employees were aware of general maintenance needs and never called for repairs or maintenance on this crane's cabin hatch and hinge. Again, "some evidence" supports the jury's determination that American Pecco was not liable for negligence.

Because the verdict may not be overturned on any of the Durels' causes of action, we need not discuss their challenges to the finding of comparative negligence and rejecting loss of consortium. Further, we decline to comment on the Durels' citation of Gauthier v. O'Brien, a recent Louisiana intermediate appellate court decision, cited in a post-submission Rule 28(j) letter to this court. Appellants have waived that contention relating to Gauthier, inasmuch as no issue was raised in their appellate briefs concerning the propriety of submitting an interrogatory on W.S. Bellows' negligence under Louisiana C. Civ. P. Art. 2324.

The judgment of the district court is AFFIRMED.