UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-4176
Summary Calendar

EDWARD F. HARRIS, o/b/o Timmy Harris, o/b/o Kimberly Harris, and MARY HELEN HARRIS,

Plaintiffs-Appellants,

versus

WESTCHESTER FIRE INSURANCE and UTICA MUTUAL INSURANCE COMPANY,

Defendants-Appellees.

Appeal from the United States District Court
For the Western District of Louisiana
(CV86-3672)

(December 28, 1992)

Before POLITZ, Chief Judge, DUHÉ and DeMOSS, Circuit Judges.

POLITZ, Chief Judge:[*]

Edward F. and Mary Ellen Harris, individually and on behalf of their children, Timothy and Kimberly, appeal an adverse judgment and the denial of their motion for new trial. Utica Mutual

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Insurance Company seeks the partial dismissal of the appeal because the Harrises did not challenge any part of the judgment which applied to it.

Background

The Harrises sued Westchester Fire Insurance Company, the insurer of Gilchrist Machinery Company, Inc., seeking to recover for injuries suffered by Edward Harris in a crane accident. Gilchrist, the crane owner, leased the crane to Edward Harris's employer, Chemipulp. Utica, Chemipulp's insurer, intervened to recover worker's compensation benefits paid. The plaintiffs also sued Utica alleging that it provided insurance on the crane and agreed to indemnify Gilchrist. Westchester cross-claimed against Utica.

During the jury trial of this matter, the court directed a verdict in favor of the defendants on Timothy and Kimberly Harris' loss of consortium claims. The jury then returned a verdict finding that (1) Gilchrist/Westchester was not negligent, (2) the crane did not have a defect which created an unreasonable risk of harm, (3) the injuries were not caused by the defect, (4) Chemipulp/Utica had not agreed to insure or indemnify Gilchrist, and (5) Edward Harris was 75% negligent (the remaining 25% was not assessed against any party). Contending that the verdict was inconsistent, plaintiffs moved for a new trial. The district court denied the motion and entered judgment in favor of the defendants. Plaintiffs timely appealed.

Analysis

I. The Inconsistent Verdict

The district court is given broad discretion to determine whether the jury's answers to interrogatories are clear.[1] "The Seventh Amendment requires that if there is a view of the case which makes the jury's answers consistent, the court must adopt that view and enter judgment accordingly."[2] If the answers are in conflict, we must try to reconcile them to validate the jury verdict.[3] "[I]f the district court has correctly found that the jury's answer to a question that was supposed to terminate further inquiry is clear and disposes of the legal issues, on review we must ignore the jury's necessarily conflicting answers to any other questions. The subsequent questions are by definition irrelevant in those circumstances, and cannot be used to impeach the jury's clear verdict."[4]

We agree with the district court that the jury's findings that Gilchrist was not negligent, the crane did not have a defect which created an unreasonable risk of harm, and the injuries were not caused by the defect, clearly disposed of the relevant legal

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[1] **Richard v. Firestone Tire & Rubber Co.**, 853 F.2d 1258 (5th Cir. 1988), cert. denied, 488 U.S.1042 (1989). In discussing the district court's decision to resubmit interrogatories to the jury, in **Richard** we commented: "The district judge, who has observed the jury during trial, prepared the questions and explained them to the jury, is in the best position to determine whether the answers reflect confusion or uncertainty." **Id.** at 1260.

[2] **Griffin v. Matherne**, 471 F.2d 911, 915 (5th Cir. 1973).

[3] **White v. Grinfas**, 809 F.2d 1157 (5th Cir. 1987).

[4] **Id.** at 1161.

issues. The jury's confusing answer to the question regarding comparative fault is irrelevant.[5] Judgment was properly granted in favor of Westchester.

II. Rebuttal Evidence

The plaintiffs also complain that the district court erred by refusing to allow Edward Harris to testify as a rebuttal witness on seven specific issues. The plaintiffs made a proffer; the court found the testimony to be cumulative.

"The district court's refusal to allow testimony by rebuttal witnesses will be upheld unless such refusal was an abuse of

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[5]**See White; Rideau v. Parkem Industrial Services, Inc.**, 917 F.2d 892 (5th Cir. 1990).

The jury interrogatories in this case read as follows:

Question 1A. "Was Gilchrist Machinery negligent?"
Answer: "NO"

Question 2A. "Was the crane in the care, custody and control of Gilchrist?"
Answer: "YES"

Question 2B. "Did the crane have a vice or defect that created an unreasonable risk of harm?"
Answer: "NO"

Question 2C. "Were the plaintiff's injuries caused by the defect?"
Answer: "NO"

. . [The intervening questions involve unrelated issues]. .

Question 5A. "Was Edward Harris negligent?"
Answer: "YES"

Question 5B. "What percentage of negligence is chargeable to Edward Harris?"
Answer: "75%"

discretion."[6] Evidence is new for the purposes of warranting rebuttal if, "under all the facts and circumstances the court concludes that the evidence was not fairly and adequately presented to the trier of fact before the defendant's case in chief."[7] During the plaintiffs' case in chief, Ed Harris testified extensively regarding the facts and circumstances of the accident. The proposed rebuttal evidence would have served primarily to reiterate his former testimony; such is not a proper function of rebuttal evidence. After reviewing the record and the plaintiffs' proffer, we find that the district court did not abuse its discretion in declining to permit the proposed rebuttal testimony.

III. Loss of Consortium Claims

At the close of the plaintiffs' case the trial court directed a verdict in favor of the defendants on the children's loss of consortium claims. Neither Timothy nor Kimberly Harris, ages eighteen and sixteen respectively, testified at trial in support of their claims. In addition, their mother testified that since the accident her husband had spent substantially more time at home and his relationship with his children had improved. The plaintiffs assert that Edward Harris's testimony that since the accident he has not been able to engage in certain activities with his children and that his pain causes him to be frequently angry, is sufficient to defeat a directed verdict.

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[6]**Orduna S.A. v. Zen-Noh Grain Corp.**, 913 F.2d 1149 (5th Cir. 1990).

[7]**Rodriguez v. Olin Corp.**, 780 F.2d 491, 496 (5th Cir. 1986).

We agree with the district court that Timothy and Kimberly Harris failed to prove their claim for loss of consortium. Even if they had, we must note that in light of the jury's conclusion that the defendants were not at fault in causing Edward Harris's injuries, any error in granting the directed verdict necessarily would be harmless.

IV. The Motion to Dismiss the Appeal

Utica moved for a partial dismissal of the appeal. The appellants' brief raises no issues which challenge the portions of the judgment exonerating Chemipulp from liability. Accordingly, we grant Utica's motion for partial dismissal of the appeal.

In all other respects we AFFIRM.