UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-7118

MICHAEL ALLEN GRAY,

Plaintiff-Appellant,

versus

AMERICAN CYANAMID COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Mississippi
(CA-J90-0167(B))

(May 17, 1994)

Before JOHNSON, GARWOOD and JONES, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Plaintiff-appellant Michael Allen Gray (Gray), who was rendered a paraplegic by his fall from defendant-appellee American Cyanamid Company's (Cyanamid) elevated work area, sued Cyanamid for negligence in failing to warn of a hidden danger, arguing that his injuries resulted when a section of the guardrail he was holding onto unexpectedly swung open and caused him to fall onto the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

concrete floor below. The jury, in response to special interrogatories, found that Cyanamid was negligent but that its negligence was not the proximate cause of Gray's injuries. Gray moved for judgment notwithstanding the verdict (JNOV) and a new trial on damages, or, in the alternative, a new trial. Both motions were denied by the district court. Finding no reversible error, we affirm.

Facts and Proceedings Below

At the time of the accident, Gray was a carpenter's assistant for Campbell Construction Company (CCC), a construction contractor not a party to this action. Cyanamid had hired CCC for a construction project at Cyanamid's plant in Pearl, Mississippi. Gray, with two more-experienced CCC employees, was cutting and affixing steel reinforcing rods on the top of a small storage vault. The roof of this vault was immediately adjacent to an open sided mezzanine which was ten feet above the concrete floor. A metal guardrail ran along the edge of the mezzanine, and Gray would reach the vault by walking across the mezzanine and climbing through the guardrail. A wire-mesh fence at the end of the mezzanine prevented Gray from stepping directly onto the vault's roof, so he would instead step through the bottom and top rungs of the mezzanine's guardrail, take about two steps along the four-inch ledge outside the guardrail, and then step down onto the vault.[1]

The section of the guardrail that Gray stepped through was

[1] This method of accessing the work area violated OSHA regulations and, at trial, the district court instructed the jury that CCC was negligent as a matter of law "in that it failed to follow OSHA regulations."

removable. This removable section had pins on each end which fit into sockets welded to the posts on either side. If a person stood at the center of the removable section and grasped the guardrail by the top section, he could remove the guardrail by simply lifting it straight up, thereby simultaneously raising the pins out of the sockets. The section could then be set aside so that a forklift could place materials on the mezzanine for storage. However, this method was not the only way used for accessing the mezzanine. For some time, Cyanamid employees had engaged in the practice of "springing" the pins from one end so that the movable section could be used as a swinging gate.

On April 22, 1987, as Gray attempted to step through the removable section and inch along the ledge, he fell. At some point Gray grasped the movable section, and it swung outward like a gate. The impact of the fall broke Gray's back, rendering him a paraplegic. At trial, Gray testified that as he was attempting to step through the movable section, he was carrying in his right hand steel reinforcing rods, leaving his left hand free to hold onto the guardrail as he stepped through the movable section. He completely stepped through the section, and stood up facing the mezzanine floor, with his feet sideways on the ledge. He testified that he then grasped the movable section for support, but it swung open, causing him to fall.[2] Although no one else saw the accident, Pat Hudson, the only eye-witness to observe Gray as he stepped through

[2] Gray also testified that although he knew the section was removable, he did not think it was possible for one end to be "sprung" so that the section could be used as a gate.

the guardrail, testified that Gray had both arms full, cradling a large power drill and a roll of extension cords. After the accident, Hudson testified that he noticed the removable section was swung outward and that a drill and extension cords had fallen around Gray.[3]

After the close of all the evidence, Gray requested a directed verdict on the issue of negligence. The district court denied Gray's motion, but it did adopt Gray's proposed instruction as to the negligence issue. Gray did not request a directed verdict on the issue of proximate cause. He had submitted a proposed proximate cause instruction which the judge also adopted and gave verbatim to the jury.[4] Subsequently, the jury returned its verdict

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[3] Another Cyanamid employee, Mickey Tillman (Tillman), testified that he arrived at the accident scene moments after Gray fell. He also noticed a drill near Gray, although he did not recall seeing any extension cords or steel reinforcing rods.

[4] Gray submitted a requested instruction "P-2" stating "The Court instructs the jury that Defendant American Cyanamid Company was guilty of negligence as a matter of law." At the charge conference, Gray objected to the failure to grant his instruction P-2, stating as follows:

> "The court, if your Honor please, we have now reached the point where we are going to address the instructions requested by the Plaintiff but which were refused by the Court. The Plaintiff objects to the Court's refusal to grant instruction P-2 on the grounds that the uncontradicted proof in this case by way of admissions of Defendant's corporate representative, insofar as this record is concerned, was fully authorized to bind them by his admissions, establishes that the Defendant, American Cyanamid Company, was guilty of negligence as a matter of law and also establishes that that negligence was a proximate contributing cause of the accident."

Counsel then immediately went on to object to the failure to give another requested instruction. Gray argues that the above-quoted "also establishes" language amounts to an objection to charging

finding that Cyanamid was negligent but that such negligence was not the proximate cause of Gray's injuries.[5] Gray moved for judgment notwithstanding the verdict (JNOV) or, alternatively, for a new trial. The district court denied these motions, and Gray now appeals seeking a new trial either on all of the issues or on damages and contributory negligence.

Discussion

Gray asserts that there is insufficient evidence to support the verdict that Cyanamid's negligence was not the proximate cause of Gray's injuries, therefore requiring the district court to grant a new trial. Generally, a district court's ruling on a motion for a new trial is reviewed for abuse of discretion. *Conway v.*

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the jury on proximate cause. We disagree. Gray never requested that the jury be instructed that proximate cause was established as a matter of law (nor ever made any motion for directed verdict in that respect), and the language in question was merely part of the objection to the failure to give instruction P-2, made in the context of stating objections to the refusal to give requested instructions; no objection whatever was made to instructing the jury on proximate cause or to the submission to the jury of the special interrogatory dealing with proximate cause.

[5] The two interrogatories answered by the jury stated:

"1. Do you find from a preponderance of the evidence that Defendant American Cyanamid Company was negligent?

__X__ Yes

_____ No

2. If your answer to Interrogatory 1 is 'Yes,' do you find such negligence of the Defendant was a proximate cause of Plaintiff's injuries?

_____ Yes

__X__ No"

Chemical Leaman Tank Lines, Inc., 610 F.2d 360, 362 (5th Cir. 1980). The abuse of discretion standard recognizes the deference that is due the trial court's first-hand experience with the witnesses, their demeanor, and the over-all context of the trial. Furthermore, the reviewing court gives somewhat greater deference when the district court has denied the new trial motion and left the jury's determinations undisturbed. *Id.*

In diversity cases such as this, even though state law determines the type of evidence that must be produced to support a verdict, the sufficiency or insufficiency of the evidence in relation to the verdict is governed by a federal standard. *Jones v. Wal-Mart Stores, Inc.*, 870 F.2d 982, 986 (5th Cir. 1989). In this case, Gray did not ask the court for a directed verdict on the issue of proximate cause.[6]

> "It is well-settled in this Circuit that in the absence of a motion for a directed verdict at the close of all the evidence, the sufficiency of the evidence to support a jury verdict is not reviewable on appeal. *Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 297 (5th Cir. 1978). Appellate inquiry is limited to whether there was any evidence to support the jury's verdict, irrespective of its sufficiency, or whether plain error was committed which, if not noticed, would result in a 'manifest miscarriage of justice.' *Id.*" *Simeon v. T. Smith & Son, Inc.*, 852 F.2d 1421, 1432 (5th Cir. 1988) (citation omitted).

Certainly, by this standard of review, there exists sufficient evidence to support the jury's finding that Cyanamid's negligence

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[6] Gray did seek a JNOV after the verdict but the denial of this motion cannot be reviewed by this Court since Gray failed to make a motion for a directed verdict. *See Perricone v. Kansas City Southern Ry. Co.*, 704 F.2d 1376, 1380 (5th Cir. 1983) ("Perricone did not move for a directed verdict. He cannot therefore be granted a judgment n.o.v. Perricone's motion for a directed verdict is a prerequisite, virtually jurisdictional.").

was not the proximate cause of Gray's injuries.

Under Mississippi law, in order to find that a defendant's negligence was the proximate cause of a plaintiff's injuries, the jury must necessarily find that the defendant's negligence actually caused the injuries. *Clayton v. Thompson*, 475 So.2d 439, 445 (Miss. 1985) ("This Court notes that proximate cause arises when the omission of a duty contributes to cause the injury."). Here there exists some evidence that Cyanamid's negligenceSQfailure to warn of the hidden defect that the removable section could swing openSQwas not the cause in fact of Gray's injuries. Hudson, the only eye-witness to the events leading up to the accident, testified that Gray was attempting to climb through the section with both arms full of equipment. Gray himself testified that he did not fall until after he had stepped through the section and stood up on the thin ledge, facing the mezzanine. No one, except Gray, actually saw how the fall occurred. Based on this evidence, a reasonable jury could make the inference that when Gray stood up on the thin ledge, his arms full of tools, he lost his balance and began to fall backwards.[7] Trying to regain his balance, he grasped

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[7] Gray argues that such an inference is impermissible because no one, except Gray, witnessed the accident. However, Mississippi courts do not allow the jury to engage in speculation as to causation where the *plaintiff* with the burden of proof fails to show the cause in fact for his injuries. *See Finkelberg v. Luckett*, 608 So.2d 1214, 1221 (Miss. 1992); *Hudson v. Farrish Gravel Co.*, 279 So.2d 630, 636 (Miss. 1973). Here the *defendant*, without the burden of proof, is asking the jury to consider a reasonable inference from circumstantial evidence and conclude that plaintiff has not satisfied it that his version of events is correct. Certainly, Gray's testimony that he did not lose his balance until after he grabbed hold of the movable section and it unexpectedly swung outward, was the only direct testimony concerning causation. However, this does not mean that in the

at the removable section and it swung outward. A jury could conclude that the section's movement did not cause Gray to fall because, due to the precarious position Gray was already in, he would have fallen whether the section opened or not.

Gray also seeks a new trial based on the contention that the jury's answers were inconsistent.[8] Gray contends that if a defendant is found negligent in failing to warn of a hidden danger known to the defendant, than any injury involving that hidden danger must have been foreseeable by the defendant. Therefore, the

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absence of other direct testimony, Gray's testimony must be accepted by the jury. A jury generally may disregard such testimony of an interested party as self serving. *See Laurence v. Chevron, U.S.A., Inc.*, 885 F.2d 280, 285 (5th Cir. 1989) (noting that "evaluating witness credibility is within the unique purview of the jury, and a jury is free to discredit a[] [party's] self-serving testimony"); *cf. Swaggart v. Haney*, 363 So.2d 251, 255-56 (Miss. 1978).

[8] Gray also argues that he was entitled as a matter of law to a directed verdict on proximate cause based on an admission by Thomas Scanlon (Scanlon) made during a lengthy cross-examination. Scanlon, Cyanamid's plant engineer and representative, during cross-examination stated in response to the question of whether the gate caused Gray to fall that, "It was one possibility." Later, when asked if the gate was part of the cause of Gray's fall, Scanlon answered, "Yes." Then, Scanlon agreed with Gray's statement that Scanlon had indicated in an accident report numerous causes, one of which was that Gray lost his balance and grabbed for the guardrail which came open. Taken out of context and viewed in isolation, Scanlon's affirmative answer to the question of whether the swinging gate partially caused the accident might be seen as an admission. However, based on conflicting statements made before and after the alleged admission, we believe that Scanlon's remark is at most ambiguous. Considering the witness's testimony as a whole, we will not interpret stray statements made during the heat of cross-examination as binding judicial admissions. *Cf., Collins v. Wayne Corp.*, 621 F.2d 777, 782 (5th Cir. 1980) (holding that a deposition and investigation accident report by Wayne's investigator, Greene, were admissions by Wayne but they were not binding judicial admissions and that Wayne at trial "had an opportunity to explain why some of Greene's conclusions were not consistent with Wayne's position at trial").

jury's finding that Cyanamid was negligent due to a failure to warn of a hidden danger necessarily included a finding of foreseeability so that Cyanamid's negligence, as a matter of law, was the proximate cause of Gray's injuries.[9] If all the premises of this argument were correct, then the jury's verdict as to no proximate cause would, if *necessarily* based on lack of foreseeability, be inconsistent with its verdict as to negligence. In such an instance, where the jury's answers to interrogatories are internally inconsistent, a new trial is required. *Guidry v. Kem Mfg. Co.*, 598 F.2d 402 (5th Cir. 1979).

However, no such inconsistency exists here. To begin with, we do not read the negligence instruction to expressly require a finding of foreseeability and under Mississippi law a finding of negligence based on the hidden-danger theory may not necessitate a finding of foreseeability. *See Biloxi Regional Medical Center v. David*, 555 So.2d 53, 56-57 (Miss. 1989) (approving jury instructions listing proximate cause as a requirement separate from the elements of the hidden-danger theory and reviewing separately

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[9] The court's negligence instruction stated that Cyanamid could be liable if the jury found:

> "[O]ne, Plaintiff Michael Allen Gray was on the mezzanine climbing through the railing in answer to an express or implied invitation of the Defendant to do business or for their mutual advantage; and two, the condition of the pins and sockets just before the Plaintiff fell constituted a dangerous condition not readily apparent to the senses of the ordinary person; and three, the Defendant failed to take measures reasonably calculated to remove this danger or to warn the Plaintiff of its existence."

the causation issue).[10] In any event, even if foreseeability were subsumed within the negligence instruction, this finding would not lead to the conclusion that proximate cause had been established. As explained *supra*, proximate cause requires, besides a finding of foreseeability, an additional finding that a defendant's negligence was a cause in fact of the plaintiff's injury. However, the evidence was not such as to require the jury to so find, particularly in light of the failure to move for directed verdict on this issue.

Gray also complains of the admission of the OSHA regulations, the instruction that CCC's violation of them in respect to the method of accessing the work was negligence *per se*, the submission to the jury of interrogatories 5 and 6 concerning CCC's negligence and whether it was the sole proximate cause of Gray's injury, and the assertedly confusing nature of the interrogatories. These contentions present no reversible error. The cases Gray relies on concerning OSHA regulations and negligence *per se* only stand for the proposition that violation thereof by one who is not the injured party's employer is not negligence *per se*, this being because such regulations are only applicable to employers for the benefit of their employees. *See Sprankle v. Bower Ammonia &*

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[10] We would also note that Gray's own instruction on proximate cause, which was adopted by the court and read to the jury, stated, "An element or test of proximate cause is that an ordinary prudent person should reasonably have *foreseen* that some injury might probably occur as a result of his negligence." Furthermore, Mississippi law may consider foreseeability to be an element of proximate cause, not negligence. *M & M Pipe and Pressure Vessel Fabricators, Inc. v. Roberts*, 531 So.2d 615, 618 (Miss. 1988); *Sprayberry v. Blount*, 336 So.2d 1289, 1295 (Miss. 1976).

Chemical Co., 824 F.2d 409, 416 n.10 (5th Cir. 1987). Violation of such regulations may, however, establish the negligence of the injured party's employer. *See Melerine v. Avondale Shipyards, Inc*., 659 F.2d 706, 709 (5th Cir. 1981). The undisputed evidence showed that CCC, Gray's employer, violated the regulations. As to the complaints of interrogatories 5 and 6 and of the interrogatories being confusing, Gray's objection was insufficiently specific,[11] and, in any event, we think the charge as a whole was adequate and not confusing. Finally, none of these matters (singly or together) amounts to reversible error, because the case was submitted solely on special interrogatories, there was no general verdict, and the jury never reached any issue concerning CCC's negligence or whether it was either a, or the sole, proximate cause of Gray's injuries (nor did the jury reach any issues concerning whether Gray was negligent and whether such negligence was a proximate cause of his injuries). Rather, in accordance with the instructions on the verdict form, the jury, having answered interrogatory 2 "No," answered none of the remaining interrogatories. *See, e.g., Rehler v. Beech Aircraft Corp*., 777

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[11] "MR. HAGWOOD: As to the special interrogatories, the Plaintiff objects on the grounds that the interrogatories, as framed, are confusing. Plaintiff believes that they are misleading and can result in inconsistent results being reached by the jury. In addition, the CourtSQthe special interrogatories should not have interjected into the form of the special interrogatory the issue of the negligence of Campbell Construction Company as framed in 5 and 6 of the special interrogatories. And we also believe it to be prejudicial in its effect."

F.2d 1072, 1088 (5th Cir. 1985).

Conclusion

At least some evidence supported the jury's finding that Cyanamid's negligence was not the proximate cause of Gray's injury. Also, the jury's answers to the two questions concerning negligence and proximate cause were not inconsistent. Gray's other complaints are without merit. Therefore, the district court did not err in refusing to grant Gray a new trial, and its judgment is

AFFIRMED.