

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-9578
Summary Calendar

MARIE KEENAN,

Plaintiff-Appellant,

VERSUS

A.R.A. LIVING CENTER-EAST, INC.,
wrongfully designated as ARA Living Center-East-Inc.,
d/b/a Jefferson Healthcare Center, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA 913104L)

(December 27, 1993)

Before DAVIS, JONES and DUHÉ, Circuit Judges.

PER CURIAM:¹

Background

Marie Keenan was visiting her mother at Jefferson Healthcare Center, a home for the elderly operated by ARA Living Centers-East, Inc. ("ARA"). Keenan claims that, while walking through the facility, she was hit from behind by a wheelchair operated by Bozider Gazetic, a resident in the home. Allegedly the blow coupled with a freshly waxed floor caused her to fall and sustain

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

serious injuries. Keenan sued ARA. ARA defended that Keenan failed to timely notice the wheelchair being pushed toward her and that she fell while attempting to sidestep it. A jury found that ARA was not negligent in providing a reasonably safe floor. The jury also found that ARA was negligent in providing Gazetic with the wheelchair, but that this negligence was not the proximate or legal cause of Keenan's injuries. Accordingly, judgment was entered in favor of ARA. Keenan appeals arguing that (1) the judge erred by communicating with the jury without consulting counsel and (2) the evidence does not support the jury's finding of no proximate cause.

Discussion

I. Judge's Communications with the Jury.

Keenan's first complaint is that the trial judge erred by communicating with the jury during jury deliberations without consulting counsel. Keenan argues that the judge improperly supplemented the record and prejudiced the jury with her responses to the jury's questions. Although the record indicates that the judge communicated with the jury, the record does not indicate that counsel was not consulted. We can only consider matters which appear in the record. Roberts v. Wal-Mart Stores, Inc., 93-4392, 1993 WL 465829, at * 2 (5th Cir. 1993).

Even assuming that we could consider this issue, there was no reversible error. According to Keenan, the judge communicated with the jury without consulting counsel on two occasions. In response to the jury's written request for a conference with the judge, the

judge wrote the jury that she could not have a conference with them and that they were to submit their questions in writing. Later, the jury wrote:

If the only Yes answer was to #3 - Do we continue with question #5.

The judge responded:

If your answer to Question No. 1 is No - and If your answer to Question No. 3 is Yes - but your answer to Question No. 4 is No - do not answer Question No. 5 or 6 or 7 or 8 - but date and sign the form & return to the Court room.

The judge's communications were nothing more than administrative directions consistent with the jury instructions and interrogatories.

Keenan argues that the judge's response in the second communication presumed that the jury answered question number four. She further posits that the judge suggested a negative answer to question number four by presuming that the jury answered it in the negative and by underscoring the word "but." We disagree. The court's response to the jury's second inquiry must be read in connection with the court's earlier note to the jury. The jury initially asked the judge:

If any of the questions 1-4 is yes, do we answer no. 5.

After consultation with the counsel and without objection, the judge responded:

You answer question no. 5 only if your answer to question no. 2 or your answer to question no. 4 is yes.

When both responses are read together, they show that the court instructed the jury as to how to proceed if question number four was answered affirmatively or negatively. Therefore, the court's instructions did not suggest a negative answer. Furthermore, Keenan's argument regarding underscoring is without merit; the judge consistently underscored conjunctions in her responses to the jury.

II. Jury Finding

Keenan's next contention is that there was no evidence to support the jury's finding that her injuries were not proximately caused by ARA's negligence. She asserts that the jury reached this finding because it was confused by the charges and interrogatories on proximate cause. The record reveals that Keenan did not request judgment as a matter of law at the conclusion of the defendants' evidence or prior to jury deliberations. Nor did she object to the jury charges or interrogatories regarding proximate cause. Accordingly, our review is limited to whether there was any evidence to support the jury's verdict or whether plain error was committed. See Coughlin v. Capital Cement Co., 571 F.2d 290, 297 (5th Cir. 1978). After reviewing the record, we find that there was no plain error.

CONCLUSION

For the foregoing reasons, the district court's judgment is AFFIRMED.