

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 93-3213 and 93-3515

Summary Calendar

KEVIN PREVOST, ET AL.,

Plaintiffs-Appellants,

versus

WITCO CORPORATION, formerly known as
Witco Chemical Company,

Defendant-Appellee,

LINDA BUSH and COLETTE POLAKIEWICZ,

Plaintiffs-Appellants,

versus

WITCO CORPORATION,

Defendant-Cross-Defendant-
Appellee,

versus

UNION CARBIDE CHEMICAL AND PLASTICS, CO., INC.,

Defendant-Cross-Claimant-
Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-91-3632 K5 c/w 91-4238 K)

(December 29, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Plaintiffs challenge several district court orders excluding some of plaintiffs' expert testimony and reports, assessing plaintiffs for costs and attorney's fees, and dismissing their claims against the Witco Corporation. We AFFIRM.

I

Plaintiffs assert that they suffered exposure to a toxic substance on September 2, 1990. As a result, they claim to have developed headaches, nausea, vomiting, dizziness, and loss of coordination. Some of these symptoms persist in some of the plaintiffs to the present day.

Plaintiffs attempt to trace their illness to an alleged release of toxic gas by a Witco Corporation chemical plant. Toward this end, plaintiffs offer an array of circumstantial evidence tending to incriminate Witco. Expert testimony suggests that a sulfur compound could have caused the plaintiffs' injuries. At least one of the chemicals that Witco produces is a sulfur compound. Moreover, on the day in question the Witco plant released steam into the air and the wind was blowing from Witco toward Union Carbide, where plaintiffs worked. The position of the Witco plant and the direction of the wind at the time may explain

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

why Witco employees failed to detect any suspicious odor from the gas that the plaintiffs claim reached them.

Plaintiffs argue that they offered proof of these circumstances. Such proof, they claim, could have led a reasonable jury to conclude that the Witco plant emitted toxic gas causing plaintiffs' injuries. The district court disagreed.

In resolving this difference of opinion, we must pay attention to the nature and admissibility of the evidence the plaintiffs adduced to support their contentions.

II

Plaintiffs' difficulties follow from their failure to abide by the terms of litigation in the district court. The district court required that plaintiffs submit expert witness reports by December 9, 1992. When the plaintiffs did not meet this deadline, Witco filed a motion to preclude all but one of plaintiffs' expert witnesses from participating in the trial. Plaintiffs did not respond to this motion in a timely fashion nor did they request an extension of time in which to produce expert reports. The district court therefore granted Witco's motion as unopposed and on the merits.

Subsequently, plaintiffs requested that the district court reconsider its order excluding plaintiffs' expert testimony and reports. Citing plaintiffs' failure to meet the deadline that the court set for the submission of expert reports and the deadline for responding to Witco's motion to strike plaintiffs' evidence, the district court found the plaintiffs to be "either inattentive or

contemptuous." The court therefore refused to reconsider its ruling.

The court also assessed plaintiffs for the costs incurred in connection with the motion for reconsideration, including attorney's fees. The motion would not have been necessary, the court reasoned, had the plaintiffs opposed Witco's motion in a timely fashion.

In light of the limited expert testimony plaintiffs were able to marshal in support of their case, the district court then granted summary judgment in favor of Witco.

We consolidated these matters on appeal.

A

Plaintiffs first argue that the district court's exclusion of much of their expert testimony and reports and the district court's award of costs and attorney's fees to Witco were error. Plaintiffs do not, however, appeal from the district court's orders addressing these matters. Instead, they appeal from the district court's grant of summary judgment in favor of Witco and from the magistrate judge's evaluation of the costs and fees the district court awarded.¹ Assuming, without deciding, that we may reach the merits of plaintiffs' appeal on these matters, we find their arguments without merit.

¹ The plaintiffs made the same error before the district court. They appealed the magistrate judge's evaluation of costs and fees rather than the district court's award of costs and fees.

Plaintiffs failed to submit to the district court reports of their prospective expert testimony. They then failed to respond in a timely fashion to Witco's motion to exclude their expert testimony. Indeed, they did not file a motion for reconsideration of the district court's order excluding their expert evidence until after the date on which Witco was required to respond with its own reports on its expert witnesses. Plaintiffs did not present either an excuse or an explanation to the district court for their lack of punctuality, nor do they offer one on appeal.

We review the district court's imposition of discovery sanctions for abuse of discretion. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642 (1976) (per curiam) (applying this standard to the imposition of sanctions pursuant to Federal Rule of Civil Procedure 37). We find that the district court did not abuse its discretion but rather imposed fitting and appropriate sanctions. Plaintiffs' unsuccessful motion for reconsideration was necessary only because plaintiffs missed two deadlines. The district court acted properly in taxing plaintiffs with Witco's costs and attorney's fees for responding to that motion.

Similarly, plaintiffs did not present their expert reports in a timely fashion and they did not request an extension of time to produce those reports. Neither did they respond to Witco's motion to strike evidence from their expert witnesses in a timely fashion, nor did they request an extension of time in which to respond. The

district court acted appropriately in excluding the plaintiffs' evidence and forcing plaintiffs to proceed with the trial.

Witco has moved for this court to dismiss plaintiffs' appeal on the issues of sanctions and the exclusion of the expert testimony, and to sanction plaintiffs yet again. While we affirm the district court's orders, we impose no further sanctions.

B

Having excluded most of plaintiffs' expert testimony and reports, the district court granted Witco's motion for summary judgment. The district court concluded that plaintiffs could not establish that the Witco plant released a toxic chemical causing plaintiffs' injuries. We undertake a de novo review of the district court's grant of summary judgment. Walker v. Sears, Roebuck & Co., 853 F.2d 355, 358 (5th Cir. 1988).

Plaintiffs were left after the district court's ruling with only one expert witness, Dr. Jay Gandy. Dr. Gandy concluded that plaintiffs' symptoms were consistent with exposure to reduced sulfur-containing compounds. Plaintiffs do not provide the testimony of an expert witness to establish that a particular chemical that Witco produced was capable of producing and did produce plaintiffs' illness. No other evidence submitted attributes the capacity to cause the harm the plaintiffs suffered to a specific chemical that the Witco plant might have emitted. Without such evidence, the trier of fact would have no basis to conclude that Witco caused the plaintiffs' injuries. The district

court was therefore correct to grant Witco's motion for summary judgment.