

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4362

Summary Calendar

DIXIE HAMILTON and DON HAMILTON,
Plaintiffs-Appellants,
versus
AMERICAN CYNAMID COMPANY and GARY PORTER,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
90 CV 0770

(August 27, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Dixie and Donald Hamilton allege that two herbicides purchased from American Cynamid Company damaged portions of their soybean crop. They sued American Cynamid and Gary Porter, its marketing representative, under a redhibition provision of the Louisiana Civil Code, seeking damages because the herbicides did not perform as expected. American Cynamid responded that the Hamiltons failed

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

to prove that the herbicides suffered from a "vice or defect," that any crop damage resulted from an uncharacteristically rainy growing season, and that the Hamiltons suffered no damage to their soybean crop. At a trial in the U.S. District Court for the Western District of Louisiana (Little, J.), the jury found for American Cynamid.

On appeal, the Hamiltons argue that the trial court misrepresented Louisiana law in its jury instructions and jury verdict form. In particular, they argue that the district court should not have asked the jury to find whether "deficiency in performance" of American Cynamid's products was caused by a "defect" or by an "intervening cause" over which American Cynamid had no control. As well, the Hamiltons argue that the district court should not have permitted the jury to take copies of the jury instructions into the deliberation room.

Section 2520 of the Louisiana Civil Code defines redhibition as "the avoidance of a sale on account of some vice or defect in the thing sold." La. Civ. Code Ann. § 2520 (West 1952). The Hamiltons cannot make a successful claim under this provision if they demonstrate only that the herbicides did not perform as expected. Instead, they must show some vice or defect in the products. Landiache v. Supreme Chevrolet, Inc., 602 So.2d 1127, 1130 (Lap. App. 1 Cir. 1992); Peters v. Pattison Pontiac Co., 259 So. 99, 101 (La. App. 4th Cir. 1972). The district court properly directed the jury to ascertain whether any unsatisfactory

performance by the herbicides resulted from a vice or defect in the products.

Not surprisingly, Louisiana products liability law requires the plaintiff to prove that the product had a defect, that the defect caused his injury, and that his use of the product at the time of the injury constituted a normal and foreseeable use of the product. Oatis v. Catalytic, Inc., 433 So.2d 328 (La. App. 3d Cir.), cert. denied, 441 S.2d 210 (La.), and cert. denied, 441 So.2d 215 (La. 1983); Baronet v. Mobil Chem. Corp., 422 So.2d 563, 564 (La. App. 3d Cir. 1982). The Hamiltons had to prove a defect in the herbicides to recover damages, not just that they were disappointed in the effectiveness of the products. This court will not disturb the jury's conclusion that the Hamiltons did not meet this requirement.

As for taking jury instructions into the deliberation room, Rule 51 of the Federal Rules of Civil Procedure states that "[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds for objection." Fed. R. Civ. P. 51. Counsel for the Hamiltons failed to object to the jurors examining their instructions in the deliberation room, and no evidence exists that the district court afforded counsel for the Hamiltons insufficient time to object to this practice.

This court has held that counsel must preserve the right to appeal matters concerning jury instructions by noting their

objections at trial. Otherwise, this court will not review a district court's jury instructions, except by the plain error standard. Branch-Hines v. Hebert, 939 F.2d 1311, 1317 (5th Cir. 1991); Williams v. Thomas, 692 F.2d 1032 (5th Cir.), cert. denied, 462 U.S. 1133 (1982). In no sense can the district court's decision to permit jurors to read their instructions in the deliberation room be considered plain error. Affirmed.