UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7261

FEDERAL INSURANCE COMPANY and
CHUBB LLOYD'S INSURANCE CO.
OF TEXAS,

Plaintiffs,

CHUBB LLOYD'S INSURANCE CO.
OF TEXAS,

Plaintiff-Appellant,

versus

NORTHERN TELECOM, INC., ET AL.,

Defendants,

NORTHERN TELECOM, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
(J90-CV-370)

(March 17, 1994)

Before POLITZ, Chief Judge, JONES, Circuit Judge, and FULLAM*, District Judge.

PER CURIAM:**

Chubb Lloyd's Insurance Company of Texas appeals a judgment on

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*Hon. John P. Fullam, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

verdict rejecting its claim against Northern Telecom, Inc. Sitting as an **Erie** court in this diversity jurisdiction action we are to apply the law of Mississippi. Doing so we find an error in jury instructions requiring that we vacate and remand for a new trial.

Background

In November of 1987 a fire severely damaged the Jones County Chancery Building in Mississippi. Subrogated to the county's claim,[1] Chubb filed the instant products liability suit alleging that Northern had marketed a defective telephone transformer which caused the fire. In the ensuing settlement negotiations both parties neglected to respond to discovery requests in a timely fashion. When Northern did not respond timely to its Requests for Admissions, Chubb filed a motion for summary judgment claiming that the requests were deemed admitted, thus conclusively establishing the essential facts of Chubb's case. Northern filed a Rule 36(b) motion to allow its belated response to the requests for admission and thus controvert Chubb's allegations. A magistrate judge and the district court found that the requested responses would not cause any prejudice and would serve the interests of justice. Northern's motion was granted; the case proceeded to trial.

At trial, Northern's primary defense was that the transformer was so openly and obviously dangerous that Chubb was barred from recovery. Over Chubb's objection the court gave the following

[1]The Federal Insurance Company paid the county's insurance claim and was subrogated to its rights. Federal then assigned its rights to its affiliate, Chubb.

instruction regarding the open and obvious defense:

> Chubb may not recover anything in this action if you also find that though there was a hazard or defect in the transformer it was a hazard or defect which was open and obvious to those who dealt with it.

The jury found no liability on the part of Northern and Chubb's motion for new trial was denied. The instant appeal followed.

Analysis

Chubb first claims that the district court erred in allowing Northern to amend the "deemed" admissions by the subsequent filing of answers. This contention lacks merit. Rule 36 provides that unanswered requests for admission are deemed admitted and conclusively established "unless the court on motion permits withdrawal or amendment of the admission."[2] This rule applies to admissions by failure to respond.[3] Provided the merits of the action will be served thereby and no prejudice is shown, the district court has considerable discretion to allow amendments to or withdrawals of admissions.[4] Reviewing this decision for abuse of discretion only,[5] we find none.

Turning next to Chubb's challenge to the jury instruction, we conclude that we must reverse and remand for a new trial. Taking

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[2]Fed.R.Civ.P. 36.

[3]**Laughlin v. Prudential Ins. Co.**, 882 F.2d 187 (5th Cir. 1989).

[4]**American Automobile Ass'n (Inc.) v. AAA Legal Clinic of Jefferson Crooke, P.C.**, 930 F.2d 1117 (5th Cir. 1991).

[5]**Id.**

pains to underscore that it was following the holdings of prior cases,[6] in **Sperry-New Holland v. Prestage**[7] the Mississippi Supreme Court made abundantly clear that the openness and obviousness of a defect is but one factor to be considered in determining whether a product is unreasonably dangerous.[8] The court *a` quo* inadvertently instructed the jury that the openness and obviousness of a defect operated as a complete bar to recovery.[9] Because this instruction inaccurately depicted Mississippi products liability law at the time of trial, we VACATE and REMAND for a new trial.[10]

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[6]See **Whittley v. City of Meridian**, 530 So.2d 1341 (Miss. 1988), and **Hall v. Mississippi Chemical Exp., Inc.**, 528 So.2d 796 (Miss. 1988).

[7]617 So.2d 248 (Miss. 1993).

[8]This theory, which was adopted in 1988, see **Sperry-New Holland**, reflects the risk-utility test for liability. Recovery is precluded only if "a reasonable person would conclude that the danger-in-fact, whether foreseeable or not, outweighs the utility of the product." **Whittley**, 530 So.2d at 1347; see also **Sperry-New Holland**, 617 So.2d at 254.

[9]Known also as the "patent danger" rule, this bar applies in conjunction with the consumer expectations theory of liability which was in effect prior to **Hall** and **Whittley**. **Sperry-New Holland**, 617 So.2d at 256, n.4.

[10]See also **Satcher v. Honda Motor Co.**, 993 F.2d 56 (5th Cir. 1993) (vacating original opinion and remanding case because "Mississippi [has applied] a risk-utility analysis in products liability cases . . . since 1987 [sic]"); **Batts v. Tow-Motor Forklift Co., Caterpillar Industrial, Inc.**, 1994 WL 58285 (N.D. Miss., Feb. 8, 1994) (granting Rule 60(b) motion, vacating prior ruling, and remanding case for application of risk-utility theory).