IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7381
Summary Calendar

DEBRA SMITH HARRIS,

Plaintiff-Appellant,

v.

UNITED INSURANCE COMPANY OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
(W91-CV-86-BR)

(March 30, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.*

PER CURIAM:

Plaintiff Debra Smith Harris filed suit against United Insurance Company of America ("United") in Mississippi state court for the nonpayment of the proceeds of a $5,000 life insurance policy on her sister's life. Harris additionally sought $3,000,000 in punitive damages for the allegedly willful actions of the defendant in refusing to pay the benefits due her as 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

beneficiary under the policy. The suit was subsequently removed to federal court where it was tried before a jury.

United conceded liability under the policy in the amount of $5,000, thereby leaving the jury only to address the issue of punitive damages. The jury found for the defendant on this issue and awarded no punitives. Harris appeals from the final judgment alleging that certain evidence was improperly excluded. Finding no error in the judgment of the district court, we AFFIRM.

As an initial matter, Harris maintains that the district court improperly excluded the testimony of Catherine Jefferson regarding an insurance claim she had against United. Harris specifically claims that this exclusion was accomplished by a motion in limine granted by the district court. However, while the record reflects that United filed a motion in limine to prohibit any mention of Jefferson's insurance claim, the district court *never* ruled on the motion. Thus, the district court *never* barred Jefferson's testimony and appellant *never* attempted to offer her testimony. In short, appellant's contention is meritless.

Similarly without merit is appellant's argument that the district court improperly excluded -- again by granting defendant's motion in limine -- an excerpt from an article maintaining that United had a notorious complaint record in California and a letter from that state's insurance commissioner to the same effect. The record reflects no motion in limine filed to exclude the alleged article and/or letter from the insurance commissioner, nor does the record reflect any ruling by the district court on this alleged

motion in limine. In short, the record is devoid of any ruling by the district court barring this evidence and, furthermore, of any attempt by the appellant to introduce this evidence.

Appellant's final contention is that the district court improperly sustained United's objections to the testimony of James Warren, a former United employee.[1] Harris urges that Warren would have testified that he was the agent who handled Jefferson's claim and that her claim was lost at the same time as the plaintiff's claim. Further, Warren would have testified that he was upset over trouble he experienced in getting United to honor claims. Harris claims that these two improperly sustained objections deprived her of the ability to establish United's liability for punitive damages.

Unfortunately, the trial judge did not have the benefit of knowing what Warren's testimony would have been; as the trial

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[1] On direct examination, Mr. Warren testified as follows:

Q. Okay. Did you quit working for the company?
A. Shortly thereafter -- well, about that time I just said, "I think it's best --" I said this to myself: I think it's best that you look for another job or employment. And of course, I stayed in the insurance business because that's my career. But I said I just can't see working for somebody that shows me they don't want to pay their claims --

MR. SUTTLE: If the court please, this is not testimony. It's speculative opinion or it's irrelevant to this matter. We object to it.

THE COURT: Sustained.

...

MR. VERHINE:
Q. How was United about paying their claims when you was with them?

MR. SUTTLE: If the court please, we object. Calls for a conclusion.

THE COURT: Sustained.

MR. VERHINE: I have no further questions.

transcript reflects, counsel for Harris did not make an offer of proof as required by Fed. R. Evid. 103(a)(2).[2] Notwithstanding this failure to make an offer of proof, Fed. R. Evid. 103(d) provides for appellate review of plain error. The plain error remedy is to be used only in those extreme cases "where a miscarriage of justice would otherwise occur." Wilson v. Waggener, 837 F.2d 220, 222 (5th Cir. 1988).

This is not the extreme case for which the plain error remedy is reserved. Plaintiff maintains that Warren's testimony would provide evidence of similar nonpayment of claims by United and therefore support a finding of intentionality or gross negligence critical to her punitive damage claim. However, as noted supra, plaintiff could have called Catherine Jefferson at trial or attempted to introduce the magazine article and/or letter. These two evidentiary avenues were available yet unexercised by plaintiff, and they would tend to establish the same proposition as Warren's testimony. No miscarriage of justice occurs under these circumstances. In short, appellant's last contention is also without merit.[3]

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[2] See supra note 1.

[3] We are similarly unconvinced by appellant's argument that a Mississippi common law rule of evidence "is so bound up with state substantive law that federal courts sitting in [Mississippi] should accord it the same treatment as state courts." Conway v. Chemical Leaman Tank Lines, Inc., 540 F.2d 837, 838 (5th Cir. 1976). Unlike the unambiguous Texas statute as issue in Conway, appellants rely primarily on Dawkins v. Redd Pest Control Co., Inc., 607 So.2d 1232 (Miss. 1992), which at most can be read to express the view of the Mississippi Supreme Court on a *discovery* matter. In brief, Dawkins does not establish a rule of evidence for the state, much less one fitting

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

within the narrow confines of Conway.