**UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

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No. 93-7797
Summary Calendar

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NEAL WHITE,

Plaintiff-Appellant,

versus

ESMARK APPAREL, INC., ETC.,

Defendant-Appellee.

* * *

DONNA WHITE,

Plaintiff-Appellant,

versus

ESMARK APPAREL, INC., ETC.,

Defendant-Appellee.

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Appeal from the United States District Court
For the Northern District of Mississippi
(CA-WC90-57-S-D cons/w 90-122))

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(January 5, 1995)

Before POLITZ, Chief Judge, JONES and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Neal and Donna White appeal the rejection of their motion for

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

a new trial following an adverse jury verdict in their negligence action against Esmark Apparel, Inc., d/b/a Pennaco Hosiery.[1] They also appeal the court's refusal to review the bill for costs. Finding no reversible error, we affirm the ruling on the motion for new trial. We further affirm in part and vacate and remand in part the ruling on the assessment of court costs.

## Background

On December 6, 1989, Neal White, a construction worker for the City of Grenada, Mississippi, suffered a heart attack after working in a manhole located directly downstream from Pennaco, a stocking and pantyhose manufacturer. Pennaco discharged water used in its dye machines into the city's sanitary sewer system. The Whites alleged that Pennaco's effluent contained cyanide and other toxic chemicals which caused the heart attack.[2] The trial lasted nine days, interrupted by a recess for a week because of the judge's illness. After deliberating for an hour, the jury answered a special interrogatory that White's injury was neither caused nor contributed to by Pennaco's negligence. After entering the adverse judgment the court ordered the Whites to pay Pennaco's court costs. Motions for a new trial and for review of costs were denied and the Whites timely appealed.

## Analysis

The Whites maintain that the district court erred in refusing

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[1]Esmark Apparel is now Danskin, Inc.

[2]Evidence produced focused on cyanide, ammonia, and volatile organic compounds (VOCs).

a new trial because (1) the jury verdict was against the overwhelming weight of the evidence, (2) expert testimony was admitted erroneously, (3) the trial court erred in instructing the jury, and (4) the totality of circumstances militated against a fair trial. They also claim error in the trial court's refusal to revise the court costs as assessed by the clerk.

We review the denial of a motion for new trial under the abuse of discretion standard.[3] The Whites contend that the verdict was against the overwhelming weight of the evidence. We examine only to determine whether the record contains evidence in support of the verdict.[4]

The record contains ample evidence to support the verdict. A replication of Pennaco's operation on the date in question and an analysis of its liquid discharge by an independent laboratory revealed no cyanide and that quantities of ammonia and VOCs were within permissible limits. Experts, including an environmental engineer, testified that Pennaco's effluent contained no detectible levels of cyanide, the ammonia levels were within the range of domestic sewerage, and the VOC levels were within parameters of permissible exposure. Two medical experts testified that White's heart attack was not caused by exposure to cyanide, ammonia, or VOCs. A toxicologist and pharmacologist testified that the heart attack was not caused by cyanide or VOCs and that exposure to

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[3]**Mozeke v. Int'l Paper Co.**, 933 F.2d 1293 (5th Cir. 1991).

[4]There was no motion for judgment as a matter of law requiring the lessened standard of review.

ammonia does not cause heart attacks.

The Whites contend that the testimony of the toxicologist should not have been admitted. A ruling on admissibility of expert testimony will be sustained unless manifestly erroneous.[5] The trial court did not err in concluding that the toxicologist's testimony was admissible because of his expertise on the effect of chemicals on the human body.[6] The objection of the Whites to this testimony is not persuasive. Were we to exclude this testimony, however, the record contains sufficient evidence to support the jury's finding of a lack of proximate cause,[7] thus rendering harmless any error in the admission of the testimony.[8]

The Whites next challenge the court's instructions to the

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[5]**Christopherson v. Allied Signal Corp.**, 939 F.2d 1106 (5th Cir. 1991) (en banc), cert. denied, 112 S.Ct. 1280 (1992).

[6]See Fed.R.Evid. 702.

Webster's dictionary defines a toxicologist as "a specialist in toxicology." Toxicology is "a science that deals with poisons and their effect on living organisms, with substances otherwise harmless that prove toxic under particular conditions, and with the clinical, industrial, legal or other problems involved." Webster's Third New International Dictionary (1976). See also **Thompson v. Carter**, 518 So.2d 609, 614 (Miss. 1987) (finding that "a pharmacologist/toxicologist would be at least equally competent to testify concerning what effect a certain drug would have on the human body [as a medical doctor or licensed physician.]").

[7]See **Carter v. Massey-Ferguson, Inc.**, 716 F.2d 344 (5th Cir. 1983).

[8]See Fed.R.Civ.P. 61. Because we find evidence other than the toxicologist's testimony sufficient to support the jury's verdict, we need not consider the argument that this testimony was legally insufficient to defeat their *prima facie* case, and thus failed as a matter of law under **Brock v. Merrell Dow Pharmaceuticals, Inc.**, 874 F.2d 307 (5th Cir.), modified, 884 F.2d 166 (5th Cir. 1989), cert. denied, 494 U.S. 1096 (1990). This argument erroneously assigns to Pennaco the burden of proving noncausation.

jury, contending that the special interrogatories propounded omitted plaintiffs' strict liability and negligence *per se* theories of recovery and contained a "stop" instruction if the jury answered the first question in the negative.[9] The special interrogatory form was submitted by complainants; the court inserted the "stop" instruction. After an overnight review of the proposed instructions, neither party interposed objections. Under Fed.R.Civ.P. 49(a) we will not now entertain same.

Nor do we find any error in the court's instruction to the jury to proceed no further if it answered the first interrogatory in the negative. Absent an affirmative response to this interrogatory the remaining interrogatories became moot.

The Whites also object to the court's instruction on comparative negligence. We find neither error nor abuse of discretion. The instruction is adequately supported by the factual record[10] and there is no possibility that it could have confused the jury on strict liability for that issue was not submitted to the jury.

Nor do we find persuasive the contention that the combination of factors tainted the jury's product. The interruption of the

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[9]That special interrogatory provided in pertinent part:

> Question No. 1: Do you find from a preponderance of the evidence that Neal White has suffered injuries proximately caused or proximately contributed to by the negligence of the Defendant?
>
> Answer: YES_____ NO_____

[10]See **Walther v. Lone Star Gas Co.**, 952 F.2d 119 (5th Cir.), opinion on rehearing, 977 F.2d 168 (5th Cir. 1992).

trial, the complained of "cloud of experts," and the other issues raised by the Whites did not result in a cumulative adverse effect on the verdict or in the intrusion of an "undesirable or pernicious element . . . into the trial."[11]

Finally, the Whites appeal the court's refusal to review the bill of costs. The trial court has the discretion to award costs to the prevailing party[12] and to include various items therein.[13] The Whites asked the district court to order each party to pay its own costs in view of factors such as their inability to pay; the relative financial situations of the parties; the close and difficult nature of the case; and the reasonableness of the litigation. The district court refused to apportion costs, explaining that the reasons asserted by the Whites "are equally applicable to nearly all cases tried in this district." We do not find that this refusal constituted an abuse of the district court's discretion.

We do find potential error, however, in the taxing of costs for persons subpoenaed by Pennaco who were not called to the witness stand. The clerk found that "the defendant may recover its costs and subpoena fees for witnesses whom defendant subpoenaed in good faith even though those witnesses were not called to testify,"

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[11]**O'Neil v. W.R. Grace & Co.**, 410 F.2d 908 (5th Cir. 1969) (quoting **Lind v. Schenley Indus., Inc.**, 278 F.2d 79, 90 (3d Cir.), cert. denied, 364 U.S. 835 (1960)).

[12]**Nissho-Iwai Co., Ltd. v. Occidental Crude Sales**, 729 F.2d 1530 (5th Cir. 1984).

[13]**Brumley Estate v. Iowa Beef Processors, Inc.**, 704 F.2d 1362 (5th Cir. 1983).

citing **Christian v. Tackett**.[14] The test we have required for a non-testifying witness is stricter, mandating that the "witness was ready to testify but extrinsic circumstances rendered his testimony unnecessary."[15] We therefore vacate in part the court's decision to accept the clerk's taxing of costs insofar as it relates to persons subpoenaed but who did not testify, so that the court may consider such in light of the foregoing test.

The ruling on the motion for a new trial is AFFIRMED. The court's ruling on the motion to review the assessment of court costs is VACATED and REMANDED as relates to the assessing of costs for persons subpoenaed but not testifying; otherwise that ruling also is AFFIRMED.

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[14]86 F.R.D. 220 (N.D.Miss. 1979).

[15]**Nissho-Iwai**, 729 F.2d at 1553.